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THE EUROPEAN UNION AS AN EMERGING INTERNATIONAL MILITARY ACTOR AND ITS LEGAL RELATIONSHIP WITH UN SECURITY COUNCIL RESOLUTIONS

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Abstract

The thesis results from a research project, combining elements of European law and public international law. The project focuses on the different forms of the use of force by the European Union in the sphere of the Common Security and Defence Policy as an integral part of the EU's common foreign and security policy. It examines the conditions under which the European Union can engage in military crisis management missions from the perspective of European Union law as well as from the perspective of public international law. The main emphasis of the thesis is put on the former, analysing the EU's ambitions to become an international security actor from an inside-out perspective. When addressing the vertical dimension of the EU and the use of force in more detail, the thesis analyses the extent to which the Member States are constrained in the conduct of their national foreign and security policy through decisions by the European Union in the sphere of the Common Foreign and Security Policy. With regards to the EU's legal relationship with the United Nations, the thesis examines whether and if so to what extent the European Union, although not a member of the United Nations, is bound by UN Security Council resolutions in respect of the use of force. Based on the assumption that the EU is bound by UN Security Council resolutions imposing economic sanctions, the thesis uses a comparative method in order to show that the EU as an international organisation is bound by decisions of the UN Security Council in the sense that the EU is obliged to respect the wording and limits of a UN Security Council mandate to use force once it decides to contribute with an EU mission. If the EU decides not to accept a UN Security Council mandate, the thesis argues that the EU is under the obligation not to undermine the success of a UN authorised military intervention, in the spirit of a loyalty obligation. Apart from analyzing the interaction of the EU and the international legal framework, the thesis also uses a speculative approach in order to examine the implications of silence in the context of the use of force.

Declaration

Pursuant to Regulation 2 of the Postgraduate Assessment Regulation for Research Degrees of September 2011, I hereby declare that the research has been completed by myself alone and that the work has not been submitted for any other degree of professional qualification.

Julia Ruth Schmidt

Contents

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Last, but by no means least, are my father Bruno Schmidt and my sister Stefanie Schmidt, whose constant love and support have been invaluable throughout. This thesis is dedicated to the memory of my mother Anneliese Schmidt.

Abbreviations

AG	Advocate General
AU	African Union
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
DTSEC	Draft Treaty embodying the Statute of the European Community
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECrtHR	European Court on Human Rights
ECSC	European Coal and Steal Community
EDC	European Defence Community
EEAS	European External Action Service
EEC	European Economic Community
ECJ	European Court of Justice
EPC	European Political Cooperation
ESDI	European Defense Identity
ESDP	European Security and Defense Policy
ESS	European Security Strategy
EU	European Union
EUMC	Military Committee of the European Union
EUMS	Military Staff of the European Union
FRY	Federal Republic of Yugoslavia
GAERC	General Affairs and External Relations Council
ICJ	International Court of Justice
ICCPR	International Covenant on Civil or Political Rights
ICESCR	International Covenant on Economic, Social and

	Cultural Rights
LTEU	Consolidated version of the Treaty on European Union as it results from the amendments introduced by the Treaty of Lisbon
LTFEU	Consolidated version of the Treaty on the Functioning of the European Union as it results from the amendments introduced by the Treaty of Lisbon
NATO	North Atlantic Treaty Organisation
OSCE	Organisation for Security and Cooperation in Europe
PSC	Political and Security Committee
QMV	Qualified Majority Voting
SEA	Single European Act
SOFA	Status of Force Agreement
SOMA	Status of Mission Agreement
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFG	Transitional Federal Government of Somalia
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Seas
UNSCOM	UN Special Commission for Iraq for Monitoring the Destruction and Surrender of Mass Destruction Weapons
WEU	Western European Union
VCLT	1969 Vienna Convention on the Law of Treaties

Chapter 1: Introduction

'We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention.'[1]

The European Union is keen on establishing itself as an international security actor whose influence mirrors its economic power. Driven forward by the *European Security Strategy* of 2003[2], which represents the first strategic European concept addressing foreign policy as a whole, the European Union has engaged in a variety of military crisis management missions in many parts of the world as part of its comprehensive concept of crisis management. In the fight against piracy off the Somali coast, the European Union is contributing military Operation Atalanta to implement UN Security Council Resolutions 1814 (2008), 1816 (2008) and 1851 (2008). To protect merchant vessels as well as vessels of the World Food Programme that are delivering food aid to displaced persons in Somalia, Operation Atalanta shall

> take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present.[3]

Operation Atalanta is not being conducted in a post conflict situation but in a hostile environment. The participating military personnel are coming face to face with heavily armed pirates. Atalanta, an EU-led military crisis management operation, highlights some of the questions that will be raised in this study about the European Union as an emerging international military actor and its legal relationship with UN Security Council resolutions.

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[1] European Council, '*A Secure Europe in a Better World: European Security Strategy*' Brussels, 12 December 2003 <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> 11[hereinafter *European Security Strategy*]; All electronic sources were last accessed on 17/07/2012.
[2] *European Security Strategy* (n 1).
[3] Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L 301/33 Article 2.

Crisis management missions under the auspices of the EU's common security and defence policy may be used in general for peace-keeping, conflict prevention and strengthening of international security outside the territory of the European Union.[4] The fulfilment of these tasks can entail a variety of missions, including the non-exhaustive list of the so called Petersberg Plus tasks. This list has been amended by the Treaty of Lisbon and now refers to joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.[5]

All military crisis management missions[6] undertaken so far have had the consent of host states and have often been accompanied by UN Security Council resolutions authorising the use of force.[7] In a strict sense, however, a UN mandate is not required

[4] Article 42 LTEU.
[5] Article 43 LTEU.
[6] The European Union has also been engaged in a wide range of civilian crisis management missions. In practice these include police missions, rule of law missions, border assistance missions, missions in support of security sector reform and monitoring missions.
[7] Operation Concordia has been carried out at the request of the FYROM government; and Operation AMIS has been carried out at the request of the African Union, see Council Joint Action 2003/92/CFSP on the European Union military operation in the Former Yugoslav Republic of Macedonia [2003] OJ L 34/26 Article 1 and Council Joint Action 2005/557/CFSP on the European Union civilian – military supporting action to the African Union mission in the Darfur region of Sudan [2005] OJ L 188/46 preamble para 12. Operation EUFOR Tchad/RCA has been welcomed by the authorities of Chad and the Central African Republic, see Council Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic [2007] OJ L 279/21 preamble para 8. Operation EUFOR RD Congo has been welcomed by the authorities of the Democratic Republic of the Congo, see Council Joint Action 2006/319/CFSP on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process [2006] OJ L 116/98 preamble para 8. The Somali Transitional Federal Government expressed its appreciation for the EU's support in the context of Operation EUTM Somalia, see Council Decision 2011/843/CFSP amending and extending Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia) [2011] OJ L 198/37 preamble para 6 and Council Decision 2010/197/CFSP on the launch of a European Union military mission to contribute to the training of Somali security forces [2010] OJ L 87/33. Its predecessor, Operation EU NAVCO, was conducted in cooperation with the Transitional Federal Government of Somalia, see Council Joint Action 200/749/CFSP on the European Union military coordination action in support of UN Security Council resolutions 1816 (2008) [2008] OJ L 252/39 preamble para 1. In the context of Operation Atalanta the EU is cooperating with the Transitional Federal Government in the fight against piracy, see Council Joint Action 2008/851/CFSP on a European military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L 301/33 preamble para 6. Operation EUFOR Althea is implementing the General Framework Agreement for Peace in Bosnia and Herzegovina, see Council Joint Action 2004/570/CFSP on the European Union military operation in Bosnia and Herzegovina [2004] OJ L 252/10 Article 1. Operation ARTEMIS was carried out in order to implement UN Security Council Resolution 1484

once an invitation to act by the host state exists. The European Union has predominantly undertaken peace-keeping or humanitarian missions during which the use of force has been used primarily to protect the civilian population of the host state or in self-defence.[8]

However, the European Union has gone through a profound development as a military actor already which can be illustrated by its counter-piracy operation Atalanta in the Gulf of Aden and Somali Basin. The mandate of operation Atalanta includes the protection of vessels chartered by the World Food Programme as well as the protection of merchant vessels.[9] Atalanta is not only therefore the European Union's first naval operation but it is also carried out to protect the interest of EU member states and not merely the interest and rights of third states.[10] The *European Security Strategy* (ESS) indicates that the EU could even go further in future by undertaking robust military interventions which are carried out without the consent of the host state, turning it into a target.[11] Thus the European Union could leave the path of 'merely' conducting peace-keeping and humanitarian missions and could engage in robust peace-enforcement.

(2003) that authorised a multinational force in Bunia, see Council Joint Action 2003/423/CFSP on the European Union military operation in the Democratic Republic of Congo [2003] OJ L 143/50 Article 1. The deployment of a multinational force had been requested by the Secretary-General and the President of the Democratic Republic of the Congo and the Ituri parties had supported this request, see UN Security Council Resolution 1484 (2003).

Apart from Operation Concordia, Operation AMIS and Operation EUTM Somalia, all military crisis management operations have been accompanied by Chapter VII UN Security Council resolutions authorising the use of force. Some UN Security Council Resolutions recognised EU-led military crisis management operations. Operation EUFOR RD Congo has been authorised by UN Security Council Resolution 1671 (2006) and UN Security Council Resolution 1778 (2007) authorised the EU to deploy an operation in Chad. UN Security Council Resolution 1851 (2008) welcomed the launch of EU Operation Atalanta.

[8] See, for example, Operation ARTEMIS, Council Joint Action 2003/423/CFSP on the European Union military operation in the Democratic Republic of Congo [2003] OJ L 143/50; Operation EUFOR Tchad/RCA, Council Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic [2007] OJ L 279/21.

[9] Council Joint Action 2008/851/CFSP (n 3) Article 1.

[10] J Larik points out that operation Atalanta would also serve as an example for the external protection of EU citizens, although the mandate lacks a specific reference. See J Larik, 'Operation Atalanta and the Protection of EU Citizens: *Civis Europaeus* Unheeded?' (2011) 3 Perspectives on Federalism 40-66.

[11] It has also been suggested by P Gordon that the broad scope of the common foreign and security policy would cover military interventions. P Gordon, 'Europe's Uncommon Foreign Policy' (Winter 1997/1998) 22 (3) International Security 82.

The EU has the legal capacity and the political will to engage in peace-enforcement operations. The provisions on the common security and defence policy under which the EU's crisis management missions are launched and conducted in general refer to peace-making missions.[12] Within the system of the United Nations, peace-making traditionally refers only to peaceful means of settling disputes under Chapter VI of the UN Charter whereas peace-enforcement is covered by Chapter VII of the UN Charter.[13] Within the context of the European Union, however, peace-making has to be understood to include peace-enforcement measures as well.[14] Peace-enforcement operations use military personnel to enforce a solution.[15] In the absence of a European army, the European Union depends on its member states to make their troops available for European crisis management missions.

The political will of the European Union to engage in the use of force as a last resort is expressed in the *European Security Strategy*.[16] The ESS is a political document without legally binding force. In the aftermath of the Iraq war in 2003, during which the European Union could not speak with one voice, the ESS was supposed to provide the EU with a strategic concept.[17] This strategic concept was needed to enable the EU to develop its own role as an international crisis management actor. In general, '[a] security strategy is a policy-making tool which, on the basis of given values and interests, outlines long-term overall objectives to be achieved and the basic categories to be applied to that end'.[18] It provides a 'reference framework for day-to-day policy-making'.[19]

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[12] Article 43 LTEU.
[13] UN Secretary General Boutros Boutros-Ghali, *An Agenda for Peace, Preventive diplomacy, peacemaking and peace-keeping*, 17 June 1992, A/47/277 - S/24111, para 20 [Hereinafter *Agenda For Peace*].
[14] S Blockmans, 'An Introduction to the Role of the EU in Crisis Management' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 9.
[15] Blockmans (n 14) 9.
[16] *European Security Strategy* (n 1).
[17] S Biscop, 'The European Security Strategy: Implementing a Distinctive Approach to Security' (March 2004) 'Sécurité & Sratégie', Paper No. 82, the Royal Defence College (IRSD-KHID), Brussels <http://www.politologischinstituut.be/PE2004/documents/6Biscop.pdf> 6-8.
[18] S Biscop and R Coolseat, 'The World is the Stage – A Global Security Strategy for the European Union' (December 2003) Notre Europe Policy Papers No. 8 <http://www.egmontinstitute.be/papers/notre-eur.Policypaper8.pdf> 1.
[19] Biscop and Coolseat (n 18) 1.

The *European Security Strategy* indicates a unique European approach to security which is characterised by a comprehensive concept of crisis management that approaches different dimensions of security in an integrated way and in a multilateral setting. It aspires to prevent conflicts and aims to be reactive only if necessary.[20] The *European Security Strategy* responds to a changed global security environment and identifies global challenges and key threats. To address these, the ESS develops strategic objectives and promotes an international order based on effective multilateralism. In the absence of an internationally agreed definition of multilateralism,[21] the practice and statements of the EU reveal a distinctive approach with the United Nations at the centre.[22]

The EU's approach to international security is also influenced by its internal values, particularly regarding human rights, the rule of law, and democracy. [23] These values are supposed to be reflected in the EU's international action and are important if the EU is to establish itself as a legitimate security actor. By putting its internal values and principles into concrete forms, the EU will gradually shape its profile and portfolio in the international community and will contribute to the international system. In addition, the EU will create its own legitimacy as an international actor.

The value the EU can add to the international system will be influenced by the role the EU creates for itself. In its call for effective multilateralism, the EU highlights its commitment to international law and the values of the UN Charter. It recognises the primary responsibility of the United Nations for the maintenance and restoration of

[20] Biscop and Coolsaet (n 18) 27, 29.
[21] J Peterson and others, 'The Consequences of Europe: Multilateralism and the New Security Agenda' (2008) Mitchell Working Paper Series 3/2008, University of Edinburgh Europa Institute <http://www.law.ed.ac.uk/file_download/series/41_theconsequencesofeuropemultilateralismandthenewsecurityagenda.pdf> 2.
[22] K Graham, 'Towards Effective Multilateralism: The EU and the UN: Partners in Crisis Management'*EU and Global Governance* (November 2004) EPC (European Policy Centre) Working Paper No. 13 <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=10822&lng=en> 7; J Krause, 'Multilateralism: Behind European Views' (2004) 27 Washington Quarterly 48.
[23] A De Vasconcelos (ed), 'The European Security Strategy 2003-2008: Building on Common Interests' (February 2009) ISS Report No. 5, EU Institute for Security Studies <http://www.iss.europa.eu/uploads/media/ISS_Report_05.pdf> 33; Biscop and Coolsaet refer to 'rule-based multilateralism'in Biscop and Coolsaet (n 18) 30.

international peace and security.[24] In practice, the European Union is capable of providing the United Nations with much needed rapid reaction mechanisms.

Nevertheless, the legal relationship between the European Union and UN Security Council resolutions on the use of force is unclear. Unlike all its member states that make their military personnel available for EU-led crisis management missions, the European Union is not a member of the United Nations. Within the system of collective security of the United Nations that is based on the general prohibition of the use of force, the UN Security Council has the competence to authorise the use of force under Chapter VII of the UN Charter through military sanction resolutions. So far, the European Union has only conducted military operations with the consent of the host state. However, if it would consider imposing military sanctions against the will of the target, the question that needs to be addressed is whether the European Union needs first to obtain a UN Security Council mandate to engage in the use of force lawfully. In addition, the issue needs to be raised about whether, and if so to what extent, the European Union is bound by existing UN Security Council resolutions regarding the use of force. Is the European Union legally bound by a UN Security Council resolution if it decides to accept a UN mandate? How do UN Security Council resolutions affect the EU even if the EU decides not to actively take part in a conflict?

1. Research framework

The purpose of this thesis is to examine the European as well as the international legal framework for the use of military force in EU-led crisis management missions. The use of force comes in many different varieties. Military force can be used to maintain international peace and security or to enforce its restoration. The first category of peace-maintenance does not include a coercive purpose or intent although military personnel is employed and might eventually become involved in fighting activities.[25] The prominent features of peace-maintenance operations include

[24] 'Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority' *European Security Strategy* (n 1) 9.
[25] D W Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (Stevens & Sons, The David Davies Memorial Institute, London 1964) 267, 268.

some sort of consent by the host state, the observance of impartiality and the limited use of force for either the purpose of defence or as a tool of protection with regards to an immediate threat.[26] Peace-keeping, humanitarian relief and assistance tasks as well as preventive diplomacy represent examples of non-coercive use of military force.[27]

Peace-enforcement on the other hand enjoys a strong coercive element and lacks consent and impartiality. Peace-enforcement operations are carried out against a particular target and 'involve the use of armed force in a coercive capacity at varying levels of intensity'.[28]

The thesis will focus on the use of military force by the European Union in general but will emphasise peace-enforcement operations. The term peace-enforcement will be used interchangeably with military interventions and military sanctions. Although the term sanction is sometimes used in the scholarly debate solely to refer to economic coercive measures that fall within the ambit of Article 41 UN Charter and in contrast to military interventions, the present study will use the phrases economic and military sanctions to underline their shared coercive elements and their nature as enforcement measures.[29] In addition, the term sanction has been chosen to underline the comparative method used in chapter six, which argues that the analysis of the EU's relationship with UN Security Council resolutions with regards to economic sanctions can be transferred to the relationship between the EU and the latter with regards to military sanctions, due to the similarities they share.

2. Research questions

The use of force by the European Union generates a number of questions about the EU's relationship with its member states on the one hand and for its place within the

[26] T D Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers Under Chapter VII Of The Charter'(1995) 26 Netherlands Yearbook of International Law 52.
[27] Gill (n 26) 52.
[28] Gill (n 26) 52.
[29] The term military sanction has also been used by H Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations' (1948) The American Journal Of International Law 787 and M Noortmann, Math, *Enforcing International Law: From Self-help to Self-contained Regimes* (Ashgate Publishing Limited, Aldershot 2005) 33.

international legal order and in particular for its relationship with the United Nations on the other. The European Union does not have a European army and therefore depends on capable and willing member states to make their military personnel available to it. Member states are not legally obliged to contribute troops to an EU-led operation but they are under other obligations of support and assistance. One of the research questions is to analyse therefore whether and if so to what extent EU member states are constrained in the conduct of their national foreign policies through military European crisis management operations. Security and defence matters are at the very heart of state sovereignty and member states have always been cautious of giving away their competences in this policy field which is one of the reasons why a role for the European Union in security matters is a rather new development that gained in speed during the late 1990s.

The second research question concerns the EU's relationship with the United Nations in the context of the use of military sanctions. Of particular interest is the EU's legal relationship with UN Security Council resolutions. In the international legal system, the United Nations has been granted the monopoly to use force if keeping the right to individual or collective self-defence or the highly disputed concept of the responsibility to protect aside for a moment. The EU is an emerging international military actor that is willing to undertake robust military interventions in the future. Therefore the need arises to examine the EU's relationship with the United Nations and in particular with UN Security Council resolutions. The aim of this thesis is to find out whether and if so to what extent the European Union is bound by UN Security Council resolutions with regards to the use of force despite not being a member of the United Nations unlike all its member states. The European Union makes strong references to the values and principles of the UN Charter that have inspired its own creation in its treaties[30] and reinforces its call for effective multilateralism in its political documents.[31] Nonetheless, the European Union avoids a clear statement as to whether it regards itself to be bound by the UN Charter and UN Security Council resolutions. The European member states also appear to be

[30] Article 21(2)(b),(c) LTEU.
[31] See for example the *European Security Strategy* (n 1).

divided about whether the EU has the right to deploy military personnel without obtaining formal UN Security Council mandates.[32]

3. Research methods

To assess the above outlined research questions, the main emphasis of the thesis will be put on the perspective of European law itself and on the question of how the EU views itself as an international security provider within the international community from an inside-out perspective. By addressing the relationship between the European Union and UN Security Council resolutions in particular, the general relationship between the European legal order and the international legal order will be addressed, as will be the question whether the EU perceives its own legal order to be in a hierarchical relationship with international law or whether it views itself as a completely autonomous legal system.

Therefore, the examination of the question of whether the European Union is bound by UN Security Council resolutions will use a predominantly doctrinal approach and will focus on the EU legal order. The European courts have no jurisdiction within the common security and defence policy. Therefore no precedents are available for the EU's relationship with UN Security Council resolutions regarding the use of force. The European Court of Justice has nevertheless provided some guidelines on the relationship between the European Union and economic UN Security Council decisions although most aspects are far from being resolved.[33]

Based on the assumption that the European Union is bound by UN Security Council resolutions with regards to economic sanctions in light of the *International Fruit*

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[32] T Hadden (ed), *A Responsibility to Assist: EU Policy and Practice in Crisis-management Operations under European Security and Defence Policy: A COST Report* (Hart Publishing, Oxford 2009) 68; W Wagner, 'The Democratic Legitimacy of European Security and Defence Policy' (2005) Occasional Paper 57, The European Union Institute for Security Studies <http://www.iss.europa.eu/uploads/media/occ57.pdf>27, 28.

[33] See for example Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, Ireland* [1996] ECR I-3953 [hereinafter *Bosphorus*]; Case C-177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others, Italy* [1997] ECR I-1111 [hereinafter *Ebony Maritime*]; Case C-124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-81[hereinafter *Centro-Com*]; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

Company case of the European Court of Justice, [34] a comparative method will be used to find out whether this relationship can be helpful for the understanding of the relationship between the EU and UN Security Council resolutions with regards to the use of force.

To allow for a comparison between economic and military sanctions, the thesis will outline the similarities and differences between both types of instruments from an international as well as from a European legal perspective. In addition, the EU's own comprehensive approach to crisis management will be used to support a comparative method between both types of foreign policy instruments. After arguing in favour of a comparative method, the criteria established by the European Court of Justice in the *International Fruit Company* case for the functional substitution of the member states will be tested against UN Security Council resolutions regarding the use of force.

4. Chapter overview

The examination of the legal framework for the use of military force in EU crisis management operations will apply different legal perspectives. As an international organisation that created its own legal order, the following two chapters of the thesis will analyse the conditions set up by European law itself that have to be met if the EU aims to engage in the use of military enforcement measures. Chapter four and chapter six that builds on the findings of the previous chapters, will examine whether the European Union has to respect additional conditions originating from international law when it launches and conducts military crisis management operations.

But before, chapter two will set out the European legal framework under the common security and defence policy for the use of force by the European Union in military crisis management mission. The chapter will start with a historic overview of the development of a European role in foreign, security and defence matters in

[34] Joined Cases 21 to 24-72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit, Netherlands* [1972] ECR 1219[hereinafter *International Fruit Company* case].

order to visualise the resistance of EU member states to lose some of their sovereign powers in this highly sensitive political sphere. The final part of chapter two will set out the status quo of the common security and defence policy under the Treaty of Lisbon and will describe how a European crisis management operation of a military nature is launched and conducted in practice.

Following this historic and descriptive approach, chapter three will examine the already achieved level of European integration in the common security and defence policy by analysing the binding nature of primary and secondary law of the EU's common foreign and security policy in order to discover whether the member states are already legally constrained in the conduct of their national foreign policies through Council decisions adopted within the framework of the EU's common security and defence policy. The assessment of the legally binding nature of Council decisions adopted within the common security and defence policy is needed to help prepare the comparative method used in chapter six.

The analysis of the European legal framework for the use of force will be followed by the examination of public international law and its requirements for the lawful use of military sanctions. The conditions set up by the Charter of the United Nations under Chapter VII for the use of force are predominantly aimed at states. Therefore it will be crucial to find out whether the findings that UN member states need to obtain an explicit and a priori mandate by the UN security Council if they plan to impose military sanctions, and that once the UN Security Council has adopted a military sanction resolution UN member states are bound by its decisions, can be transferred to the European Union. In other words, it will be assessed whether the European Union needs to comply with additional legal requirements originating from general international law and the UN Charter in particular if it wants to resort to the use of military force. For this purpose, chapter four will examine the general international legal framework for the use of force that has been developed primarily with regards to states and regional arrangements in mind.[35] Particular emphasis will

[35] The European Union is not a regional arrangement within the meaning of chapter VIII of the UN Charter. See for example, J Cloos, 'EU-UN Cooperation in Crisis Management – Putting Effective

be put on Chapter VII of the UN Charter, the legal effects produced by military sanctions and the question of when UN Security Council resolutions stop being binding on UN member states.

Chapter six will examine whether these findings can be transferred to the European Union as an emerging international military actor. In order to analyse whether the European Union is bound by UN Security Council resolutions, chapter six will use a unique comparative method. The comparison is unique in the sense that the effects of economic sanctions and the effects of military sanctions within the international legal order as well as within the European legal order will be assessed and compared with each other. It will be argued that both types of measures create rights as well as obligations for UN member states from the perspective of international law. Turning to the European Union as an emerging international actor that is adopting and implementing economic sanctions and that is adopting Council decisions with which military crisis management missions are being launched and conducted, it will be held that both types of instruments are binding on the European member states. Both types of instruments constrain them in the conduct of their national foreign policies. Based on the finding that the European Union is bound by UN Security Council resolutions with regards to economic sanctions according to the criteria established by the ECJ in the *International Fruit Company* Case, it will be argued that there are sufficient similarities between economic and military sanctions within the European legal order to test whether these criteria are also applicable to the EU's relationship with UN Security Council resolutions regarding the use of force.

In order to prepare the comparative method used in chapter six, chapter five will take a closer look at economic sanctions within the European legal order. The EU, which uses the term restrictive measures when it refers to sanctions, recognizes several types of measures. They include diplomatic sanctions like the expulsion of diplomats, severing of diplomatic ties or the suspension of official visits; the suspension of cooperation with a third country; boycotts of sports or cultural events; trade sanctions like general or specific trade sanctions and arms embargoes; financial

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Multilateralsim into Practice' in J Wouters, F Hoffmeister and T Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser Press, The Hague 2006) 265.

sanctions like the freezing of funds or economic resources, the prohibition of financial transactions or restrictions on export credits or investment; flight bans and restrictions on admission.[36]

Within the European context, only economic and financial sanctions are going to be assessed that are adopted by decisions made in the framework of the common foreign and security policy and a related legislative measure based on the Treaty on the Functioning of the European Union. National implementing measures eg arms embargoes and other national measures in response to Council decisions adopted within the common foreign and security policy are not included. Although the European legal order distinguishes the terms economic and financial sanctions, they will both be referred to as economic sanctions in a broad sense. Since the entry into force of the Lisbon Treaty, both instruments find their legal basis in the same provision in the Treaty on the Functioning of the European Union.[37] The international legal order does not recognise such a distinction either in the sense that both types of measures are covered by Article 41 UN Charter.

The first part of chapter five will outline the European framework for the adoption of economic sanctions, including the changes introduced by the Treaty of Lisbon. This will be followed by a detailed historical overview of the development of a European competence for economic sanctions that combine trade measures with foreign policy considerations. Comparable to matters of security and defence, economic sanctions are therefore close to the member states' guarded sphere of state power that they are reluctant to lose to the European Union. Nevertheless, the process of European integration in the foreign policy arena of economic sanctions can be regarded as almost settled today and the European member states are largely constrained in their domestic foreign policies in this regard.

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[36] See European Commission, *Restrictive Measures* (2008) <http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf#2> and J Kreutz, 'Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981 - 2004' (2005) Bonn International Center for Conversion (BICC) paper 45 <http://www.bicc.de/uploads/pdf/publications/papers/paper45/paper45.pdf> 5, 6.

[37] Article 215 LTFEU.

The core of chapter six focuses on the analysis of the EU's legal relationship with UN Security Council resolutions regarding the use of force. Building on the findings of the previous chapters, chapter six will examine whether the EU's legal relationship with economic UN Security Council resolutions can be helpful for the understanding of the EU's relationship with UN Security Council resolutions regarding military sanctions by using the above mentioned comparative method.

So far, chapter two to chapter six have examined the EU and the use of force whenever there has been a positive decision to resort to military measures and how these decisions affect the European member states on the one hand and the European Union itself on the other hand. Chapter seven will test the findings of the previous chapters and will examine the legal implications of a silence in the context of the use of force, on the background of the war against Iraq in 2003 during which the European member states have been deeply divided. They prevented the European Union from speaking with one voice and thus from exercising its political weight in the world. The EU remained silent in accordance with the absence of a UN Security Council resolution authorising the war against Iraq. Some EU member states, including the UK, actively contributed to the military operation.[38]

In the context of silence and the use of force, two problems will be addressed. From an international law point of view, it will be questioned whether the silence of the UN Security Council can be interpreted as an authorisation for the European Union to use military sanctions. Turning to the European legal order itself, it will be examined how a silence within the common security and defence policy could influence the member states. Thus, it will be questioned whether the European member states could be constrained in the conduct of their domestic foreign policies through the Union's common security and defence policy, even when no Council decisions in the framework of the common security and defence policy have yet been adopted.

[38] D McGoldrick, *From '9-11' to the Iraq War 2003: International Law in an Age of Complexity* (Hart Publishing, Oxford 2004) 11, 12.

Thus chapter seven will adopt a more speculative approach and will discuss the gradual development of an *acquis securitaire* through a bottom-up approach. It will be argued that the more experience the European Union gains as an international crisis management actor, the more patterns of behaviour will develop which will make it more difficult for European member states to act unilaterally when faced with a specific crisis situation. Patterns will develop that show that the European Union addresses specific types of crisis or specific phases of a crisis in particular ways. In doing so, the European Union will start to create legitimate expectations to act in certain ways when faced with particular situations. Transferring this reasoning to the member states, they will find it more difficult in the future to justify unilateral domestic measures that do not correspond to these practices. In extreme cases, this could indicate that EU member states would have to refrain from acting externally even when the European Union has not decided on a common position yet.

5. Main research contribution

The main research contribution of this thesis is twofold. The legal relationship between the European Union and UN Security Council resolutions in the context of the use of force has not been examined, to my knowledge, as such. This is probably due to the rather new development of the European Union as an international military actor. EU-led military crisis management operations conducted in rather hostile environments, such as Operation Atalanta, create even more awareness for the need to examine the EU's relation with UN Security Council resolutions. It will be particularly questioned whether the EU needs to obtain a UN Security Council mandate before it can lawfully engage in the use of force and whether and to what extent the EU is bound by UN Security Council resolutions authorising the use of force. In the context of economic sanctions, the EU's relationship with UN Security Council resolutions has so far been controversially discussed.[39] Based on an analogy

[39] Supporting the view that the EU could be bound by economic Security Council resolutions: P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, Oxford 2004) 438, 439. Rejecting this view is S Bohr, 'Sanctions by the United Nations Security Council and the European Community' (1993) 4 European Journal of International Law 265; also rather negative is C Eckes, 'Judicial Review of European Anti-Terrorism Measures – The *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 European Law Journal, 85

with the *International Fruit Company* case[40] it has been held that the EU, although not a member of the United Nations, is bound by economic UN Security Council decisions.[41] Supporting this view, the thesis uses a comparative method to find out what can be learned from the relationship between the EU and economic UN Security Council sanctions for the understanding of the EU's relationship with UN Security Council resolutions in the context of the use of force. The comparative method is novel since it is based on the claim that economic and military sanctions can be compared according to the effects they produce within the international legal order as well as within the European legal order. In addition, the EU's comprehensive concept of crisis management is used to support the usefulness of a comparison between both types of instruments.

The second major contribution of this research project is the examination of the meaning of silence in the context of the use of force. Based on the assumption that a silence needs to be qualified so as to have a precise legal meaning, existing literature on the UN's system of vertical centralised law enforcement[42] will be used to interpret the meaning of silence in the context of the United Nations and whether it can be interpreted as an authorisation to use force. In the context of the European Union, it will be assessed whether a possible development of an *acquis securitaire* could qualify the meaning of silence in the common security and defence policy to have a precise legal meaning. The terminology of an *acquis securitaire* has been used before[43] but the thesis will try to define the sources for its development and its possible implications for the EU and for its European member states.

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[40] Joined Cases 21 to 24-72 International *Fruit Company NV and others v Produktschap voor Groenten en Fruit*, Netherlands [1972] ECR I-1219.
[41] Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649 para 207.
[42] E De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford 2004); K Osteneck, *Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft: Völker- und europarechtliche Rahmenbedingungen für ein Tätigwerden der Europäischen Gemeinschaft im Bereich von UN-Wirtschaftssanktionsregimen unter besonderer Berücksichtigung der Umsetzungspraxis der EG-Organe***,** Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 168 (Springer Verlag, Berlin 2004); D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, Oxford 1999.
[43] See, for example, Blockmans (n 14) 3.

6. *Kadi*

The *Kadi* case raises several legal issues that will be referred to throughout this thesis. So as to provide a consistent overview and to avoid repetition as much as possible, the next part will offer a summary of the facts of the *Kadi* case, an overview of the existing literature and a critical assessment of the decisions of the Court of First Instance[44] and the European Court of Justice.[45]

The *Kadi* case deals with targeted sanctions against individuals.[46] Smart or targeted sanctions against individuals entail complex human rights dimensions. The individuals included on sanction lists are the object of far reaching restrictive measures including travel bans and the freezing of funds and assets. The inclusion on such a list is often the result of mere suspicion and no reasons for the listing need to be provided. The listing is not the outcome of a criminal process. Once they appear on a list, individuals are not equipped with an effective judicial remedy on the international level. They must rely on diplomatic efforts for a successful de-listing procedure that can only reached by consensus.

Overall, the *Kadi* case raises questions about the competence of the European Union to adopt sanctions targeted against individuals, the competence of the European courts to review Community instruments that implement UN Security Council resolutions in the Community legal order, the relationship between European law and

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[44] Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649.
[45] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.
[46] The literature on the development and impact of targeted sanctions is extensive. See for example M Craven, 'Humanitarianism and the Quest for Smarter Sanctions' (2002) 13 European Journal of International Law 43-61; M Brzoska, 'From Dumb to Smart? Recent Reforms of UN Sanctions' (2003) 9 Global Governance 519-535; B Fassbender, 'Targeted Sanctions and Due Process: The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter', Study commissioned by the United Nations, Office for Legal Affairs – Office of the Legal Counsel, 20 March 2006 (final) < http://untreaty.un.org/ola/media/info_from_lc/Fassbender_study.pdf>; I Cameron, 'The European Convention on Human Rights, Due Process and United Nations Security Council Counter-terrorism Sanctions', Report, Council of Europe, 06/02/2006 <http://www.coe.int/t/dlapil/cahdi/Texts_&_Documents/Docs%202006/I.%20Cameron%20Report%2006.pdf>; I Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 Nordic Journal of International Law 159-214; D Cortright and G A Lopez, *Sanctions and the Search for Security: Challenges to UN Action* (Lynne Rienner Publishers, Boulder 2002).

the international legal order, and questions of differing human rights standards. The following chapters will address some of these problems.

Chapter four of this thesis, 'The international legal framework for the use of force', will argue that the UN Security Council is limited by human rights as one of the principles and purposes of the UN Charter. The *Kadi* decisions will be used to demonstrate that the criticism the UN Security Council faces in light of human rights concerns in the context of targeted sanctions against individuals is of practical significance. It bears with it the potential to weaken the central role played by the UN Security Council in the maintenance of international peace and security. At the same time, it visualises the importance for the EU to develop its own legitimacy as an international security provider, based on its own standard of human rights protection.

Chapter five, which will focus on economic sanctions within the European legal order, will use the ECJ's *Kadi* decision to demonstrate that the European Union has to respect European fundamental rights when implementing autonomous or non-autonomous economic sanction regulations.

Chapter six, assessing the legal relationship between the European Union and UN Security Council resolutions in more detail, will utilise the European courts' arguments regarding the relationship between the European legal order and the international legal order to argue that the EU is bound by UN Security Council resolutions but that this binding nature is limited by the EU's own standard of human rights protection.

6.1. *Kadi* – facts of the case

In the fight against international terrorism, the UN Security Council adopted Resolution 1267 (1999), condemning the training and sheltering of terrorists on Afghan territory. [47] It demanded that the Taliban turn over Usama bin Laden. To encourage compliance with this demand, paragraph 4 (b) of Resolution 1267 (1999)

[47] For the facts of the *Kadi* case see Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649 paras 10-36.

provided that all states must freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Sanctions Committee.

To implement UNSCR 1267 (1999), the Council adopted Common Position 1999/727/CFSP concerning restrictive measures against the Taliban.[48] On the legal basis of Articles 60 and 301 EC, Community Regulation 337/2000 followed,[49] which provided for the freezing of funds and a flight ban. On several occasions, the UN Security Council adopted new resolutions in order to strengthen the flight ban and the freezing of funds. The European Union reacted to all changes and adopted corresponding common positions and Community regulations in its desire to implement the UN sanction regime against the Taliban and their supporters in the European legal order.

The European member states are obliged under international law to implement mandatory UN Security Council Resolution 1267 (1999) in their domestic legal orders as members of the United Nations. The legal significance of the Community regulation implementing Resolution 1267 (1999) is that it creates a Community law obligation for the European member states to give effect to the Security Council decision as well. Therefore European member states would not only be violating international law but also EU law if they would not carry out the mentioned targeted sanctions against the listed individuals.

Mr Kadi appeared on the list of persons suspected of supporting terrorism drawn up by the Sanctions Committee. This UN list was annexed to Council Regulation No 881/ 2002 'Specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban' that was adopted on the legal basis of Articles 60, 301 and 308 EC and to implement UN

[48] Council Common Position 1999/727/CFSP concerning restrictive measures against Taliban [1999] OJ L 294/1.
[49] Council Regulation (EC) No 337/2000 concerning a flight ban and a freeze of funds and other financial resources of the Taliban of Afghanistan [2000] OJ L 43/1.

Security Council Resolution 1390 (2002).[50] In reaction to the freezing of his funds and a travel ban, Mr Kadi challenged the lawfulness of Community regulation No 881/2002 by alleging three breaches of human rights, namely the right to a fair hearing, the right to respect of property and of the principle of proportionality, and the right to effective judicial review.[51]

Only if the Court of First Instance would annul the contested Community Regulation, it would stop being directly applicable in all EU member states and Mr Kadi's funds could be freed, at least from a European legal perspective. Nonetheless, from an international law perspective, the EU member states would still be duty bound to implement targeted UN sanction resolutions.

The Court of First Instance did not annul the contested EC regulation and Mr Kadi remained on the list of persons whose funds were frozen. Mr Kadi appealed against this decision and the European Court of Justice found the contested regulation to be in breach of Mr Kadi's fundamental rights.[52]

The following section summarises the main findings of the Court of First Instance, Advocate General Maduro,[53] and the European Court of Justice. All have been widely discussed in the literature and have been subject both to praise and to criticism. The purpose of the next section is to provide an overview of the different approaches that have been taken and to highlight the impact of the *Kadi* decision. This will be followed by the author's own take on the *Kadi* case.

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[50] Council Regulation (EC) No 881/2002 Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9.

[51] *Kadi* (n 47) para 59.

[52] The situation of Mr Kadi is far from being solved. In 2008, the permanent representative of France to the United Nations, acting on behalf of the European Union, requested the UN Sanctions Committee for a disclosure of the reasons for Mr Kadi's listing. In response to this summary, the Commission intended to adopt a legal act so that Mr Kadi should remain on the list in Annex I to Regulation 881/2002. Mr Kadi successfully challenged Commission Regulation (EC) No 1190/2008 of 28 November 2008. See Case T-85/09 *Yassin Abdullah Kadi v Commission* of 30 September 2010. The Commission has appealed against the decision of the General Court. See Case C-584/10 P.

[53] Opinion of Advocate General Maduro in Case C-402/05 P *Yassin Abdullah Kadi v Council and Commission* [2008] ECR I-6351.

6.2. *Kadi* and the Court of First Instance

When addressing the question of whether the Community regulation that gave effect to a UN Security Council resolution within the EU legal order violated Mr Kadi's fundamental rights, the Court of First Instance[54] started its assessment with the question of whether it was competent to review the contested regulation. In substance, it reasoned that if the Community had no discretion to implement the respective UN Security Council resolution, any judgment of the contested regulation would amount to judicial scrutiny of a decision of the UN Security Council for which it would have no competence. Therefore the CFI in a first step approached the question of the relationship between the European legal order and the international legal order and in particular whether the European Community was bound by UN Security Council resolutions. The CFI argued in favour of the primacy of the UN Charter over domestic law as well as over international treaty law.[55] The CFI came to this conclusion after considering norms of international law and after analysing the EC Treaty.

The CFI held that from the standpoint of international law, the obligations of UN member states would prevail over all other obligations stemming from either domestic or international treaty law, including obligations under the Community or the ECHR.[56] Turning to EU law, the CFI found that that the EC Treaty would respect the member states' duty under international law to give precedence to their UN Charter obligations through Articles 307(1) EC and Article 297 EC.[57] Both provisions would justify domestic member state measures that deviate from EC law if they are necessary to fulfil UN legal obligations.[58]

Overall, the Community would have to take all necessary measures to ensure that those UN Security Council resolutions binding on all EU member states are put into

[54] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649 [hereinafter *Kadi*].
[55] *Kadi* (n 54) para 181.
[56] *Kadi* (n 54) para 181.
[57] Today's Articles 351 LTFEU and 347 LTFEU.
[58] *Kadi* (n 54) paras 185-188.

effect.[59] The CFI thus concluded that the rules of general international law as well as specific EC treaty provisions would ask the member states to 'leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations'[60].

The CFI went on to state that

> unlike its Member States, the Community as such is not directly bound by the Charter of the United Nations and that it is not therefore required, as an obligation of general public international law, to accept and carry out the decisions of the Security Council in accordance with Article 25 of that Charter. The reason is that the Community is not a member of the United Nations, or an addressee of the resolutions of the Security Council, or the successor to the rights and obligations of the Member States for the purposes of public international law.
>
> Nevertheless, the Community must be considered to be bound by the obligations under the Charter of the United Nations in the same way as its Member States, by virtue of the Treaty establishing it.[61]

The CFI came to this conclusion using two arguments. First, it held that member states would have acted under circumscribed powers when creating the European Community. Thus they could not have transferred more powers to the EC than they possessed themselves.[62]

Second, it held that old Articles 224 EEC and 234 EEC[63] would demonstrate that the member states wanted to fulfil their UN Charter obligations through their membership of the EC. By drawing an analogy with the *International Fruit Company Case*, the CFI argued that the Community would have functionally substituted the member states in the sphere of economic sanctions.[64]

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[59] *Kadi* (n 54) para189.
[60] *Kadi* (n 54) para 190.
[61] *Kadi* (n 54) paras 192-193.
[62] *Kadi* (n 54) paras 194-195.
[63] Today's Articles 351 LTFEU and 347 LTFEU.
[64] *Kadi* (n 54) paras 196-203.

The CFI held that

> [i]t therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, *the provisions of that Charter have the effect of binding the Community*.[65]
>
> Following that reasoning, it must be held, first, that the Community may not infringe the obligations imposed on its Member states by the Charter of the United nations or impede their performance and, second, that in the exercise of its powers it is bound, by the very Treaty by which it was established, to adopt all the measures necessary to enable its Member States to fulfil those obligations.[66]

From this, the CFI concluded that the Community is bound by UN Security Council resolutions and would be required by its own legal order, the Community order, to give effect to UN Security Council resolutions.[67] It rejected the view of the Community legal order to be a legal order independent of the United Nations, governed by its own rules of law.[68]

In a second step and in consequence of the binding nature of UN Security Council resolutions, the CFI held that it would be limited in reviewing the contested regulation in light of European fundamental rights.[69] It argued that regarding the implementation of UN Security Council resolutions in the Community legal order, the Community institutions would have 'acted under circumscribed powers, with the result that they had no autonomous discretion. In particular, they could neither directly alter the content of the resolutions at issue nor set up any mechanism capable of giving rise to such alteration.'[70]

Overall, it held that:

> [a]ny review of the internal lawfulness of the contested regulation, especially having regard to the provision or general principles of

[65] Emphasis added.
[66] *Kadi* (n 54) paras 203, 204.
[67] *Kadi* (n 54) para 207.
[68] *Kadi* (n 54) para 208.
[69] *Kadi* (n 54) para 209.
[70] *Kadi* (n 54) para 214.

> Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions.[71]
>
> In particular, if the Court were to annul the contested regulation, as the applicant claims it should, although that regulation seems to be imposed by international law, on the ground that that act infringes his fundamental rights which are protected by the Community legal order, such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicant asks the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.[72]

In a third step and despite claiming not be competent to review a Community instrument that is giving effect to UN Security Council decisions in the light of European fundamental rights as part of Community law,[73] the CFI then found itself to be competent to indirectly review UN Security Council resolutions in the light of *jus cogens*.[74]

The Court of First Instance considered the right to respect for property, the right to be heard as well as the right to effective judicial review as forming part of jus cogens.[75] Although the CFI acknowledged that the procedure offered by the Sanction Committee for the de-listing of individuals would not confer a direct right for the concerned persons to make themselves heard by the Committee and that '[t]hose persons are thus dependent, essentially, on the diplomatic protection afforded by the States to their nationals'[76], the Court found no violations of Mr. Kadi's fundamental human rights and in particular the right to be heard or the right to effective judicial review.

When Mr Kadi appealed against the decision of the Court of First Instance, neither Advocate General Maduro nor the Grand Chamber of the European Court of Justice followed the reasoning of the Court of First Instance in substance.

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[71] *Kadi* (n 54) para 215.
[72] *Kadi* (n 54) para 216.
[73] *Kadi* (n 54) para 225.
[74] *Kadi* (n 54) para 231.
[75] *Kadi* (n 54) paras 233-292.
[76] *Kadi* (n 54) para 267.

6.3. *Kadi* and the Opinion of Advocate General Maduro

In respect of the relationship between the international legal order and the Community legal order, Advocate General Maduro[77] held that

> [t]he relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.[78]

Although the ECJ would take great care of the Community's obligations stemming from international law, the Court would try to preserve the constitutional foundations created by the EC treaty itself.[79] Therefore it would be incorrect to assume that once the Community is bound by a rule of international law, the courts would have to apply it in the European legal order unconditionally.[80] There would be no legal basis in the EC Treaty that would allow the conclusion that Community measures implementing UN Security Council resolutions would have 'supra-constitutional status' and thus need to be immune from judicial review.[81] The argument put forward by the UK that Article 307 EC[82] in conjunction with Article 10 EC[83] would require the Community not to prevent the member states from fulfilling their obligation to implement UN Security Council resolutions would not be convincing.[84] Rejecting this view, Advocate General Maduro held that,

> [a]t first sight, it may not be entirely clear how Member States would be prevented from fulfilling their obligations under the United Nations Charter if the Court were to annul the contested regulation. Indeed, in the absence of a Community measure, it would in principle be open to the Member States to take their own implementing measures, since they are allowed, under the Treaty, to adopt measures which, though affecting the functioning of the common market, may be necessary for the

[77] Opinion of Advocate General Maduro in Case C 402/05 P *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351[hereinafter AG Maduro].
[78] AG Maduro (n 77) para 24.
[79] AG Maduro (n 77) para 24.
[80] AG Maduro (n 77) para 24
[81] AG Maduro (n 77) para 28.
[82] Today's Article 351 LTFEU.
[83] Today's Article 4(3) LTEU.
[84] AG Maduro (n 77) para 29.

> maintenance of international peace and security. None the less, the powers retained by the Member states in the field of security policy must be exercised in a manner consistent with Community law. In the light of the Court's ruling in *ERT*, it may be assumed that, to the extent that their actions come within the scope of Community law, the Member States are subject to the same Community rules for the protection of fundamental rights as the Community institutions themselves. On that assumption, if the Court were to annul the contested regulation on the ground that it infringes Community rules for the protection of fundamental rights, then, by implication, Member States could not possibly adopt the same measures without – in so far as those measures came within the scope of Community law- acting in breach of fundamental rights as protected by the Court.[85]

Furthermore, Advocate General Maduro emphasised that Article 307 EC would not allow derogation from Article 6(1) TEU which provides that ʻthe Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.[86]

6.4. *Kadi* and the European Court of Justice

Regarding the scope of judicial review, the Grand Chamber of the European Court of Justice[87] largely agreed with Advocate General Maduro and recalled first that the Community is based on the rule of law

> inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions.[88]

Second, it pointed out that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system'.[89] Third, the Grand Chamber recalled that fundamental rights constitute an integral part of the general principles of law and that respect for human rights would

[85] AG Maduro (n 77) para 30.
[86] AG Maduro (n 77) para 31.
[87] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351[hereinafter *Kadi* (Grand Chamber)].
[88] *Kadi* (Grand Chamber) (n 87) para 281.
[89] *Kadi* (Grand Chamber) (n 87) para 282.

be a condition for the lawfulness of Community acts.[90] The conclusion the Court drew from these three observations was that

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaties.[91]

The Court acknowledged the primacy of UN Security Council resolutions in international law. In contrast to the Court of First Instance, it nevertheless concluded that any judgment stating that a Community instrument intending to give effect to such a resolution would be in breach of a higher rule of the Community legal order would not challenge the primacy of that resolution in the international legal order.[92] It found no legal basis in the EC Treaty that would provide for the immunity from jurisdiction of a Community instrument implementing a UN Security Council resolution.[93] Neither Article 307 EC nor 297 EC could 'be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union'.[94]

It stated that by virtue of Article 300(7) EC,

> supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law. That primacy at the level of Community law would not however, extend to primary law, in particular to the general principles of which fundamental rights form part.[95]

[90] *Kadi* (Grand Chamber) (n 87) paras 283, 284.
[91] *Kadi* (Grand Chamber) (n 87) para 285.
[92] *Kadi* (Grand Chamber) (n 87) para 288.
[93] *Kadi* (Grand Chamber) (n 87) para 300.
[94] *Kadi* (Grand Chamber) (n 87) paras 301-303.
[95] *Kadi* (Grand Chamber) (n 87) paras 306-308.

The Court stressed the autonomy of the Community legal order and confirmed its jurisdiction to review the Community regulation giving effect to a UN Security Council resolution in the light of its internal system of fundamental rights.[96]

The Court did not resort to the concept of *jus cogens* as the Court of First Instance had done. It also did not set out to examine indirectly whether the UN Security Council had observed this standard of peremptory norms with its sanction decisions. Rather it directly assessed the lawfulness of the Community regulation in the light of European fundamental rights as general principles of EC law. The European Court of Justice came to the conclusion that Mr Kadi's fundamental right to respect for property had been infringed and that the contested regulation implementing UN Security Council resolution had to be annulled.[97]

6.5. Literature review

Both *Kadi* decisions as well as the Opinion of Advocate General Maduro have been subject to a wide and diverse academic debate. All three decisions have been praised and criticised for a variety of reasons. The following section will offer a brief overview of the existing literature and is by no means exhaustive.[98] In general, most authors have agreed with the European Courts that saw in *Kadi* the need to address the legal relationship between the European legal order and the international legal order. This relationship has been discussed in terms of a monist approach of the CFI[99] and dualist approach of the ECJ[100] or as part of the fragmentation of international law.[101] In contrast, Piet Eeckhout has suggested that targeted economic sanctions against individuals would rather highlight an internal EU law conflict.

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[96] *Kadi* (Grand Chamber) (n 87) para 317.
[97] *Kadi* (Grand Chamber) (n 87) paras 371, 372.
[98] For another literature survey see S Poli and M Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28 Yearbook of European Law 533-558.
[99] C Tomuschat, 'The *Kadi* Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?' (2009) 28 Yearbook of European Law 657.
[100] Tomuschat (n 99) 659; R Pavoni, 'Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ *Kadi* Judgment: A Misplaced Argument Hindering the Enforcement of International Law in the EC' (2009) 28 Yearbook of European Law 629.
[101] For a systematic overview of the different approaches applied by the CFI, AG Maduro and the ECJ see G De Búrca, 'The European Court of Justice an the International Legal Order after Kadi' (2009) Jean Monnet Working Paper No 01/09 <http://centers.law.nyu.edu/jeanmonnet/papers/09/090101.pdf> 33, 34.

Namely it would be a conflict between 'the Community law imperative to respect fundamental rights and the Community law imperative to respect UN law'.[102] Martin Scheinin sees in *Kadi* evidence of existing tensions within the international legal order as well as of tensions within the European legal order.[103]

6.5.1. The Court of First Instance and the relationship of the European legal order and international law

The Court of First Instance's *Kadi* decision has been welcomed by some for its openness towards public international law. By arguing in favour of the primacy of international law over EC law, it was held that the CFI would follow the European Courts' previous case law that has been characterised by a general friendliness towards international law or in terms of monism. It has also been positively recognised that the judgment of the CFI, by refusing to review a Community instrument that is giving effect to UN Security Council resolutions in the light of European fundamental rights, would not challenge the role of the United Nations in the context of sanctions. It has been suggested that if the CFI would have used its own standard of human rights protection instead of an international ordre public that is defined by public international law to review the contested sanction regulation, UN member states could have been encouraged to do the same.[104] They could stop implementing binding UN Security Council resolutions, using their domestic ordre public as a justification.[105] It has been argued that this could seriously undermine the system of the United Nations.[106]

The legal arguments used by the Court of First Instance to support the thesis that the European Community is bound as a matter of EC law by UN Security Council

[102] P Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit' (2007) 3 European Constitutional Law Review 192.
[103] M Scheinin, 'Is the ECJ Ruling in *Kadi* Incompatible with International Law?' (2009) 28 Yearbook of European Law 637.
[104] A Von Arnauld, 'UN-Sanktionen und gemeinschaftsrechtlicher Grundrechtsschutz: Die 'Soweit-Rechtsprechung' des Europäischen Gerichts Erster Instanz' (2006) 44 Archiv des Völkerrechts 210
[105] Von Arnauld (n 104) 210.
[106] As will be shown later, the practice of the CFI to review UN Security Council resolutions 'indirectly' in the light of *jus cogens* is not without problems either.

resolutions have been supported by a few scholars.[107] They agreed with the Court that the member states would have acted under circumscribed powers when joining the European Economic Community. By creating an international organisation between them, they could not have transferred more powers to the EEC than they themselves possessed. Thus the European Economic Community and thereafter the European Community would have been linked to the EU member states' obligation to fulfil their UN Charter obligations from the beginning.[108]

The analogy the Court draws with the *International Fruit Company* case[109] by speaking in favour of a functional substitution of the European member states in the sphere of economic and financial sanctions through the European Community has been critically received.[110] Those who support the Court's argument of a functional substitution usually do not count an exclusive Community competence amongst the necessary requirements for this concept. They argue that although the Community would not enjoy exclusive competence in the sphere of economic sanctions, the Community would nevertheless have systematically implemented economic UN Security Council sanctions in practice which they regard to be sufficient.[111] Nonetheless, there are also those, who reject the analogy with the *International Fruit Company* case, and basically ask for an exclusive Community competence for a functional substitution.[112]

However, the consequence the Court draws from this finding, namely the primacy of international law and in particular the UN Charter over EC law without distinguishing between secondary or primary EU law, has predominantly been

[107] Von Arnauld (n 104) 201-216; L Martínez, 'Bad Law for Good Reasons: The Contradictions of the *Kadi* Judgment'(2008) 5 International Organizations Law Review 339-357.
[108] Martínez (n 107) 340. This is also often referred to as 'Hypothekentheorie'. See for example V Arnauld (n 107) 206.
[109] *International Fruit Company* case (n 34).
[110] Tomuschat (n 99) 657.
[111] Martínez (n 107) 340; Von Arnauld (n 104) 204.
[112] M Nettesheim, 'U.N. Sanctions Against Individiuals – A Challenge to the Architecture Of European Governence' (2007) 44 Common Market Law Review 585; R Schütze, 'On 'Middle Ground': The European Community and Public International Law' (2007) EUI Working Papers Law No. 2007/13 < http://cadmus.eui.eu/bitstream/handle/1814/6817/LAW-2007-13.pdf?sequence=3> 21. Rather critical is C Eckes, 'Judicial Review of European Anti-Terrorism Measures – The *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 European Law Journal 85.

criticised.[113] It has been held that in particular such provisions as today's Articles 347 LTFEU and 351 LTFEU, which allow EU member states to derogate from EC law under certain strict conditions to give effect to UN Charter obligations, would not allow the Community itself to disregard some of its constitutional foundations, including respect for the rule of law and European fundamental rights.[114]

Others have argued that the CFI's view in *Kadi* would be contrary to the ECJ's earlier case law on international law, fundamental rights and in particular to its judgment in *Bosphorus*.[115] In *Bosphorus*,[116] the ECJ had to interpret Council Regulation No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia[117] as part of a preliminary reference procedure initiated by the Supreme Court of Ireland. Regulation 990/93 was adopted by the Council to give effect to the decision of the Community and the member states, meeting within the framework of political cooperation to implement in the EEC certain aspects of the sanctions imposed by the UN Security under Chapter VII of the UN Charter, including Resolution 820 (1993). Back then, the CFI spent little time assessing a possible infringement of fundamental rights through the Council regulation but also did not signal any problems just because the Community instrument in question was giving effect to a UN Security Council resolution in the Community legal order.

It has been noted by many that the CFI's refusal to review a Community instrument that is giving effect to a UN Security Council resolution within the EU legal order in light of European fundamental rights would result in an inadequate protection of

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[113] M Karayigit, 'The *Yusuf* and *Kadi* Judgments: The Scope of the EC Competences in Respect of Restrictive Measures: Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities;* Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, 21 September 2005' (2006) 33 Legal Issues of Economic Integration 395-397.

[114] Karayigit (n 113) 396; G Gaja, 'Are the Effects of the UN Charter under EC Law Governed by Article 307 of the EC Treaty?' 28 Yearbook of European Law 610-615; N Lavranos, 'The Impact of the *Kadi* Judgment on the International Obligations of the EC Member States and the EC' (2009) 28 Yearbook of European Law 620.

[115] Eeckhout (n 102) 201.

[116] Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, Ireland* [1996] ECR I-3953 [hereinafter *Bosphorus*].

[117] Council Regulation (EEC) No 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L 102/14.

human rights within the EU legal order. This situation would entail the potential of creating a 'solange' situation that ultimately can damage the supremacy of the EU legal order.[118] The *solange* doctrine refers to the readiness of the European member states, and in particular Germany, not to exercise jurisdiction over EC acts in light of domestic human rights as long as the Community would provide an equivalent level of human rights protection. Similar to the *solange* doctrine, it has also been suggested that the refusal of the CFI to review Community acts in light of European fundamental rights could trigger the exercise of a second type of *solange* reasoning, but this time within the relationship between the European Union and the European Convention on Human Rights and Fundamental Freedoms and in particular highlights the unclear division of competence between the European Court of Justice and the European Court on Human Rights.[119] In *Bosphorus*, [120] the ECrtHR viewed itself as competent to review secondary EU law indirectly but it also held that it would not make use of its jurisdiction if the European Union would offer an 'equivalent' or 'comparable' standard of human rights protection as the one guaranteed by the European Convention.[121] Although the level of human rights protection would not need to be 'equivalent', the ECrtHR would resume its competence to review secondary EU law in case 'that the protection of Convention rights was manifestly deficient'.[122] If the European Court of Human Rights would regard the level of human rights protection offered by the European Courts to be manifestly deficient, European member states would be liable under the Convention.[123] In the absence of a clear definition of what is meant by 'manifestly deficient' it has been pointed out by others that it would also be possible for the ECrtHR to accept the Court of First Instance's *Kadi* decision, which would avoid a

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[118] Karayigit (n 113) 401; B Kunoy, 'The Jurisdiction of the ECJ to Review the Legality of the Transposition of an International Act in the EC Legal Order' (2007) 76 Nordic Journal of International Law 35; Eeckhout (n 102) 202.

[119] N Lavranos, 'UN Sanctions and Judicial Review'(2997) 76 Nordic Journal of International Law 16; Joris Larik refers to 'upward solanging'as opposed to 'downward solanging' in J Larik, 'Two Ships in the Night or in the Same Boat together? Why the European Court of Justice Made the Right Choice in the Kadi Case' (2009) EU Diplomacy Papers 3/2009, Department of EU International Relations and Diplomacy Studies, College of Europe <http://aei.pitt.edu/11436/1/EDP_3_2009_Larik.pdf> 19.

[120] *Bosphorus Hava Yollari Turizm ve Ticaret AS, v. Ireland* (App No. 45036/98) ECHR 30 June 2005 [hereinafter *Bosphorus v Ireland*].

[121] *Bosphorus v Ireland* (n 120) para 155.

[122] *Bosphorus v Ireland* (n 120) paras 155 and 156; Lavranos (n 119) 9.

[123] Karayigit (n 113) 402, 403.

clash between the European legal order and the Convention, but would result in the complete lack of judicial protection against UN Security Council resolutions targeted against individuals.[124] International law does not provide for judicial review mechanisms for UN Security Council decisions anyway and national courts of the member states that in theory could provide for effective remedies against acts of their national authorities that are implementing sanction decisions are limited in their scope of review by the supremacy of the EU sanction regulation.[125]

6.5.2. The Court of First Instance's approach to European fundamental rights and *jus cogens*

Although the Court refused to review the contested Community regulation in light of European fundamental rights it nonetheless held itself competent to 'indirectly' review the UN Security Council sanction resolution in light of *jus cogens*. The Court of First Instance's approach to the question whether international organisations and in particular the United Nations are bound by human rights in the form of *jus cogens* has been largely welcomed.[126] Nevertheless, the Court's take on *jus cogens* itself was viewed rather more critically by most. What constitute norms of *jus cogens* is highly debated and so far most scholars recognise the limited nature of the concept of *jus cogens* and only consider norms such as the prohibition of genocide, torture, racial discrimination, the prohibition against slavery as well as the prohibition of the use of force to be included.[127] By examining whether the UN Security Council has violated the right to a fair hearing, the right to respect of property in conjunction with the principle of proportionality and the right to effective judicial review in terms of *jus cogens*, the Court thus appeared to apply a unique European approach to *erga omnes* norms. It has been argued that the CFI's unique approach to *jus cogens* would

[124] Lavranos (n 119) 9; J Heliskoski, 'Case T-253/02, *Chafiq Ayadi v. Council*, Judgment of the Court of First Instance of 12 July 2006 ; Case T-49/04, *Faraj Hassan v. Council and Commission*, Judgment of the Court of First Instance of 12 July 2006, nyr'(2007) 44 Common Market Law Review 1157.
[125] Eckes (n 112) 87.
[126] See for example Karayigit (n 113) 389-390; P Eeckhout, 'EC Law and UN Security Council Resolutions – In Search of the Right Fit' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge 2008) 114. V Arnauld refers to the Court's review in the light of *jus cogens* as a 'soweit'doctrine in contrast to a 'solange' solution (n 104).
[127] Examples mentioned by Eeckhout (n 126) 115.

contribute to the fragmentation of international law.[128] Only a small minority appreciated the Court's take on *jus cogens* and held that the Court's reasoning might have the ability to advance the concept of *jus cogens* in international law.

The CFI's unique take on *jus cogens* and its readiness to judge the UN Security Council has been viewed as providing an example for other regional and national courts to do the same.[129] It has been suggested that this practice would have the potential to undermine the unity, coherence and effectiveness of UN sanction regimes and in the long run would bear with it the potential of questioning the authority of the UN Security Council whose ability to perform its tasks under Chapter VII of the UN Charter would be weakened.[130] By some this has been interpreted as an opportunity for the Security Council to react. It has been held that these existing dangers would ask the Security Council to 'develop its own comprehensive system for human rights protection'.[131]

6.5.3. The Approach of Advocate General Maduro and the European Court of Justice

Rejecting the reasoning of the Court of First Instance, Advocate General Maduro and the Grand Chamber of the European Court of Justice argued in favour of the autonomy of the Community legal order and in consequence also for the competence of the European Courts to review secondary Community law in the light of European fundamental rights. Advocate General Maduro and the ECJ predominantly discussed whether the implementation of UN Security Council resolutions in the European legal order could ignore European fundamental rights protection. In general, both decisions have been predominantly well received and most forwarded criticism seems rather picky.

Advocate General Maduro and the European Court of Justice have been criticised for focusing merely on the compatibility of the Community instrument in light of human

[128] Larik (n 119) 10.
[129] R A Wessel, 'Editorial: The UN, the EU and Jus Cogens' (2006) 3 International Organizations Law Review 6.
[130] Wessel (n 129), 6.
[131] Wessel (n 129) 6.

rights and for not examining the legality of the listing procedure in abstract terms.[132] It has also been negatively commented upon that AG Maduro only briefly addressed the question of Article 103 of the UN Charter and that the European Court of Justice did not address the issue at all.[133] In addition, the outcome of the ECJ's judgment has been praised by Riccardo Pavoni whereas its methods have been criticised. Pavoni argued that the Court could have reviewed the contested regulation in light of human rights as part of customary international law instead of applying a European fundamental rights standard.[134] He suggests that if the Court would have done the latter, the *Kadi* case could be of more significance as it could have served as international law precedent.[135]A more fundamental criticism, however, is that both avoided clear statements about whether the European Union is legally obliged to implement UN Security Council resolutions.[136]

On a more positive note, it has been indicated that the ECJ's *Kadi* decision could create a competition between the ECJ and the ECtHR in theory and might inspire the latter to revise its case law concerning human rights questions in the context of the implementation of UN sanctions.[137] It has also been noted that the ECJ's approach to reviewing Community instruments implementing UN Security Council resolutions in light of fundamental rights would satisfy the ECtHR's doctrine of equivalent protection and would thus prevent European member states from being held responsible under the European Convention on Human Rights and Fundamental Freedoms.[138]

It has also been positively recognised that the ECJ's judgment would represent a good balance between the role of human rights within the EU legal order and the

[132] Scheinin (n 103) 640.
[133] Tomuschat (n 99) 660.
[134] Pavoni (n 100) 630, 631.
[135] Pavoni (n 100) 631.
[136] D Halberstam and E Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009= Jean Monnet Working Paper 02/2009 < http://centers.law.nyu.edu/jeanmonnet/papers/09/090201.pdf> 37; Pavoni (n 100) 634.
[137] A Ciampi, 'The Potentially Competing Jurisdiction of the European Court of Human Rights and the European Court of Justice' (2009) 28 Yearbook of European Law 606, 608.
[138] Ciampi (n 137) 608.

need for UN member states to comply with their UN Charter obligations.[139] At the same time, the Court would nonetheless send a warning signal to the UN Security Council and would thereby require it to reform its regime of targeted sanctions.[140]

7. The author's own take on *Kadi*

7.1. Assessment of the reasoning of the Court of First Instance

Regarding the relationship between the Community legal order and international law, I support the analogy the Court of First Instance draws with the *International Fruit Company* case. As will be explained in detail in chapter six, the European Union has functionally substituted the European member states in respect of economic sanctions. However, I disagree with the conclusion the Court draws from this finding and in particular UN Security Council resolutions would enjoy primacy even over primary EU law, including European fundamental rights, democracy and the rule of law.

The Court's assessment is in clear violation of constitutional principles underpinning the European legal order. The respect of fundamental rights is considered to be a condition for the lawfulness of any EU act. The European courts so far have put a strong emphasis on the protection of fundamental rights that constitute general principles of Union law.[141] To make an exception from this rule just because the Community measure is implementing a decision of the UN Security Council is not required by the EU Treaties itself. Neither Article 347 LTFEU nor Article 351 LTFEU can justify derogation from Article 6 TEU and the general principles of Union law.

Although the Court is correct in assuming that the UN Security Council's discretion to adopt sanction resolutions under Chapter VII of the UN Charter is limited by the norms of *jus cogens*, which will be discussed in chapter four, the Court nevertheless chooses a wrong take on the concept of *jus cogens*. It is still unclear who the competent authority to judge the Security Council is. But maybe more importantly, if

[139] Larik (n 119) 3.
[140] Larik (n 119) 3, 24.
[141] Article 6 LTEU.

the Security Council is to be judged in the light of *jus cogens* norms, the CFI should have addressed the issue of what constitute norms of *jus cogens*, a topic that is highly disputed. So far, the concept of *jus cogens* is predominantly limited to norms such as the prohibition of use force, slavery, genocide, torture as well as racial discrimination.[142] By discussing the right to property as a *jus cogens* norm, the Court of First instance appears to be judging the Security Council against a unique European concept of peremptory norms. Not only is the Court's approach to the concept of *jus cogens* doubtful, but it also cannot compensate for its refusal to grant judicial review in the light of European fundamental rights. The standard of review provided for by general principles of Union law is much greater than that of *jus cogens*.[143] In addition, by using the concept of *jus cogens*, the Court's carefully phrased indirect review of UN Security Council decisions via the Community regulation also turns into a rather direct scrutiny[144] with difficult implications for the UN's system of collective security and the overall authority of the UN Security Council as such,[145] which will be discussed in chapter four.

The conclusion of the Court of First Instance in *Kadi* was that UN Security Council resolutions enjoyed primacy even over primary EU law including European fundamental rights. This entails problematic consequences for European member states, for the functioning of the EU system itself and for the relationship between the EU legal order and the European Convention on Fundamental Rights as mentioned above.

7.2. Assessment of the reasoning of the European Court of Justice

With its *Kadi* decision, the European Court of Justice fulfils its primary function of safeguarding the European legal order. The Court solves the *Kadi* case with the legal tools available in its own legal system. It confirms the central role played by European fundamental rights and the rule of law as the backbone of its legal system. By doing so, the Court not only acts in accordance with Article 6 LTEU and its

[142] Examples mentioned by Eeckhout (n 126)115.
[143] Eeckhout (n 142) 109.
[144] Eeckhout (n 142) 116.
[145] See for example Wessel (n 129) 6.

constitutional requirements but it also avoids the above mentioned two *solange* dangers inherent in the CFI's decision that could have seriously undermined the internal legitimacy of the European project itself. By determining the hierarchy of international law within its own legal order, the Court did not act any differently from states that decide how international law should enter their domestic legal system. In general, international law does not decide about its status within a respective legal order. The Court's approach is also in line with its previous case law, in particular with regards to international agreements and decisions of international organisations. They form an integral part of the EU legal order but they rank below primary EU law.[146] By emphasising the EU's internal commitment to fundamental rights and the rule of law as the backbone of the EU legal order, the ECJ could not avoid promoting its values to the outside world and projecting a critical view on the sanctioning practice of the UN Security Council in light of human rights concerns. However, it must be admitted that this practice was followed by the EU without any questioning at first.

Despite this praise for the ECJ's *Kadi* decision in general, the judgment left several questions about the precise relationship between the European legal order and UN Security Council resolutions unaddressed. The ECJ only offered a clear indication of the limit of the possible binding nature of UN Security Council resolutions by stating that they could not enjoy primacy over primary EU law. The question of whether they enjoy primacy over secondary EU law was avoided by the Court. In line with its previous judgments in *Bosphorus*[147] and *Ebony Maritime*[148], it held that when adopting a Community instrument as part of the second stage of the process of the imposition of economic sanctions in case the EU is implementing a UN Security Council resolution, the Community would have to 'take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation'.[149] The need to interpret a Community instrument in light of a UN Security Council decision

[146] Lavranos (n 114) 616.
[147] *Bosphorus* (n 33).
[148] *Ebony Maritime* (n 33).
[149] *Kadi* (Grand Chamber) (n 87) para 296.

indicates that they could be binding but does not offer an argument which could not be rebutted.

In other words, UN Security Council resolutions could be binding on the EU but if they were to be, they would have to respect in particular the general principles of EU law comprising amongst other things the EU's own standard of European fundamental rights. The way the Court achieved this result was by pointing to Article 300(7) EC.[150] This provision refers to agreements concluded by the Community and provides that these agreements are binding on the member states but also on Community institutions. The European Union has not however and, for the time being, cannot sign and ratify the Charter of the United Nations which is only open to the membership of states. In a second step, however, the Court showed how this obstacle could be overcome. It referred to its earlier decision in *Intertanko*[151] that is substantially linked to the *International Fruit Company* case. Both cases refer to the concept of functional substitution.[152] Both cases deal with the situation in which the European Union although not a party to an international agreement to which all of its member states are parties is bound by that agreement, based on the fact that the European Union has taken over the powers previously exercised by the member states in this field of policy. Nonetheless, the Court then fell short of assessing whether the criteria for a functional substitution of the member states through the European Union with regards to economic sanctions are met.[153] This will be discussed in chapter six.

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[150] *Kadi* (Grand Chamber) (n 87) para 306.

[151] Case C-308/06 *International Association of Independent Tanker Owners (Inertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union, v Secretary of State for Transport* [2008] ECR I-4057 [hereinafter *Intertanko*].

[152] *Kadi* (Grand Chamber) (n 87) para 307.

[153] *Kadi* (Grand Chamber) (n 87) paras 306-308 states that

> Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States. Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law (see, to that effect, Case C□308/06 *Intertanko and Others* [2008] ECR I□0000, paragraph 42 and case-law cited). That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

8. The impact of *Kadi*

The *Kadi* case created awareness of the unresolved legal relationship between the European legal order and the international legal order. So far, the European Union had emphasised its strong commitment to international law and the principles of the United Nations without explicitly addressing the issue of whether or not the EU is legally bound by it. The *Kadi* case demonstrated that there could be differences between the EU system and the UN system particularly regarding applicable human rights standards.

The human rights threshold provided by the European legal order differs from the human rights threshold applicable to the United Nations. It will be argued in chapter four that the UN Security Council is bound by the core of human rights and the core of international humanitarian law when it acts under Chapter VII of the UN Charter.[154] The core content of human rights by which the UN Security Council is bound can be derived from the human rights instruments that have been developed under the umbrella of the United Nations.[155] Although the Security Council is not a party to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil or Political Rights (ICCPR) or to the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, these human rights instruments have been said to reflect the UN's notion of human rights, as indicated by Article 1(3) UN Charter.[156] The non-derogable rights expressed in these instruments have to be respected by the UN Security Council when acting under Chapter VII.[157] Most of the non-derogable rights mentioned in the ICCPR enjoy the status of *jus cogens*. This reinforces the Security Council's obligation not to infringe them.[158] Derogable rights can be limited in times of emergency, subject to

[154] For a detailed discussion of the core content of international human rights and international humanitarian law, see De Wet (n 42) 198-215.
[155] De Wet (n 42) 199.
[156] De Wet (n 42) 199, 200.
[157] Article 4 (2) ICCPR refers, for example, to the right to life; the prohibition of torture or cruel, inhuman or degrading treatment or punishment and the prohibition of slavery.
[158] De Wet (n 42) 201.

proportionality considerations.[159] Even in the case of derogable rights, the Security Council needs to respect the essential content of each right.[160]

The core content of international humanitarian law refers to the rules concerned with the means and methods of warfare as well as to the treatment of civilians.[161] It has been held that the essence of these norms which the UN Security Council has to respect can be found in common Article 3 of the Geneva Conventions of 1949.[162] Article 3 refers to a 'minimum' standard of protection and prohibits torture, violence to life and persons, mutilation, outrages on personal dignity and the passing of sentences and the carrying out of executions without previous judgment, for example.

The core content of international human rights and international humanitarian law that the UN Security Council is bound by differs from the European fundamental rights that the European Union has to respect as general principles of Union law.[163] The European fundamental right system recognises the right to a fair hearing, the right to respect of property and the right to effective judicial review which have been challenged in the *Kadi* case. These rights, however, do not form part of the core of international human rights. It has been held that regarding the protection of human rights the European system is more developed than international law. [164]

The indirect criticism of targeted sanctions against individuals and in particular the methods of listing and de-listing of persons and entities within the European legal order in *Kadi*, created increased awareness for their shortcomings at the international level and might have been influential in the still reluctant reform process surrounding the de-listing procedure.[165] In 2003, the Security Council asked states within a

[159] See for example Article 4 (1) ICCPR; De Wet (n 42) 201.
[160] De Wet (n 42) 201-203.
[161] For a detailed discussion, see De Wet (n 42) 211-215.
[162] De Wet (n 42) 212.
[163] Article 6(2) EUV.
[164] N D White, 'The EU as a Regional Security Actor within the International Legal Order' in M Trybus and N D White (eds), *European Security Law* (Oxford University Press, Oxford 2007) 338.
[165] Albert Posch argues that '*Kadi* stands for a new bottom-up process in which a regional court pressures the UN Security Council to change its policy towards fundamental rights.' In A Posch, 'The

declaration on the issue of combating terrorism to 'ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law'.[166]

UN Resolution 1730 (2006) introduced a focal point, established within the Secretariat to receive de-listing requests from individuals who do not want to address their state of residence of citizenship.[167] Nevertheless, the Committee still decided by consensus over a de-listing request.[168] In 2009, the focal point was abolished in favour of the Office of the Ombudsperson that shall assist the Committee in the de-listing process.[169] The Ombudsperson that shall be an 'eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions' and is involved in three two-month long stages of the de-listing process of 'information gathering', 'dialogue' and 'Committee Discussion and Decision'.[170] But there is as yet no change regarding the consensus requirement.

In the context of targeted sanctions against individuals, the *Kadi* case created awareness of the unresolved relationship between the European legal order and the international legal order. It questioned whether and if so to what extent the EU is bound by economic UN Security Council resolutions and it particularly scrutinised whether European human rights could pose a limit for their possible binding nature. The legal relationship between the European Union as an emerging international military actor and UN Security Council resolutions in the context of the use of force, too is unresolved. The European Union, unlike all its member states, is not a member of the United Nations but it is engaged in military crisis management operations.

Kadi Case: Rethinking the Relationship between EU Law and International Law?' (2009) 15 Columbia Journal of European Law Online 5.

[166] UN Security Council Resolution 1456 (2003) on *High-level Meeting of the Security Council: Combating Terrorism*, Annex, para 6. On the impact of UNSCR 1456 (2003) see M Winkler, 'When Legal System Collide: The Judicial Review of Freezing Measures in the Fight against International Terrorism' (2007) Yale Law School Student Scholarship Series, Paper 40 <http://lsr.nellco.org/yale/student/papers/40> 13.

[167] UN Security Council Resolution 1730 (2006).

[168] Heliskoski (n 124) 1157.

[169] UN Security Council Resolution 1904 (2009) para 20.

[170] UNSCR 1904 (2009) para 20 and Annex II.

Operation Atalanta, that implements Chapter VII UN Security Council resolutions, has been welcomed by the UN Security Council for its contribution to the fight against piracy.[171] The operation mandate includes the use of force, not merely in self-defence.[172] The following chapters will examine the European Union as an emerging international military actor and its legal relationship with UN Security Council resolutions.

[171] UN Security Council Resolution 1851 (2008).
[172] Council Joint Action 2008/851/CFSP (n 3) Article 2.

Chapter 2: The EU and the use of force: A European perspective

Introduction

The European Union has so far been engaged in nine crisis management missions of a military nature.[1] All of these missions have been carried out with the consent of the host state.[2] They have often been accompanied by a UN Security Council resolution authorising the use of force,[3] although a UN mandate is not required in a strict sense, once the host state has consented to the deployment of military personnel for a specific purpose on its territory. In addition to these already conducted crisis management operations, the European Union has expressed the political will[4] and is equipped with military capabilities for engaging in peace-enforcement operations. Robust military interventions against targets raise difficult questions about the relationship of the European Union as an international actor and the United Nations.

All European crisis management missions of a military nature – with or without the consent of the host state – take place within the framework of the EU's common security and defence policy. The aim of the present chapter and of chapter three below is to analyse the European legal framework for the use of military force during

[1] Operation CONCORDIA/FYROM, Council Joint Action 2003/92/CFSP on the European Union military operation in the Former Yugoslav Republic of Macedonia [2003] OJ L 34/26; Operation ARTEMIS, Council Joint Action 2003/423/CFSP of on the European Union military operation in the Democratic Republic of Congo [2003] OJ L 143/50; Operation EUFOR Althea, Council Joint Action 2004/570/CFSP on the European Union military operation in Bosnia and Herzegovina [2004] OJ L 252/10; Operation AMIS, Council Joint Action 2005/557/CFSP on the European Union civilian – military supporting action to the African Union mission in the Darfur region of Sudan [2005] OJ L 188/46; Operation EUFOR RD Congo, Council Joint Action 2006/319/CFSP on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process [2006] OJ L 116/98; Operation EUFOR Tchad/RCA, Council Joint Action 2007/677/CFSP of on the European Union military operation in the Republic of Chad and in the Central African Republic [2007] OJ L 279/21; EUNAVFOR Operation Atalanta, Council Joint Action 2008/851/CFSP of on a European military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L 301/33; Operation EUTM Somalia, Council Decision 2010/197/CFSP on the launch of a European Union military mission to contribute to the training of Somali security forces (EUTM Somalia) [2010] OJ L 87/33.

[2] Some operations have been carried out by the explicit request of the host state or a regional organisation. Operation Concordia has been carried out at the request of the FYROM government. Operation AMIS has been carried out on the request of the African Union.

[3] Operation EUFOR RD Congo has been authorised by UN Security Council Resolution 1671 (2006).

[4] See for example European Council, *'A Secure Europe in a Better World: European Security Strategy'* Brussels, 12 December 2003 <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> 11[hereinafter *European Security Strategy*].

the conduct of EU crisis management missions. The analysis of the common security and defence policy will offer an insight on how the European Union organises itself as an emerging international military actor from an inside-out perspective. The question of whether the European Union must fulfil additional requirements originating from public international law and its relationship with the United Nations when conducting military operations without the consent of the host state will be discussed in chapters six and seven. Chapter six will pay special attention to the question of whether the European Union needs to obtain a UN Security Council mandate before resorting to the use of force. Chapter seven will then assess whether the European Union is bound by UN Security Council resolutions regarding the use of force once they are in place although the European Union is not a member of the United Nations

The present chapter, 'The EU and the use of force: A European perspective', will be structured in three parts. By using a descriptive approach, the development of the common foreign and security policy and the common security and defence policy will be outlined in part one, with the aim of illustrating the gradual process of European integration in the EU's external relations. Particular emphasis will be put on the EU as a military actor, whose development has been characterised by many set-backs because of the reluctance of European member states to give away some of their powers in security and defence matters. It will be shown that former attempts to coordinate member state action in this highly political and sensitive area have been too ambitious at times and have been followed by long cooling-off periods. The member states have found it easier to cooperate gradually on foreign affairs issues on a political level; attempts to coordinate European defence issues have been dormant for some time. A major breakthrough was achieved with the Treaty of Maastricht which codified the informal arrangements between the European member states with regards to the coordination of their domestic foreign policies and introduced a provision that recognised the goal of the 'eventual framing of a common defence policy, which might in time lead to a common defence.' [5]

[5] Article J.4 TEU (Maastricht version).

Especially during the last two decades, the ongoing process of European integration within foreign, security and defence matters has been heavily influenced by international moments of crisis during which the European Union felt unable to react in a way that would correspond to its economic influence in the international community.[6] Overall, the development of a European common foreign and security policy and the increased commitment to a common defence policy has been characterised by a bottom-up approach outside the treaty framework and through an institutionalisation of past practices that gradually led to the introduction of new institutions, procedures and structures.

Although it still lags behind the development of the common foreign and security policy, European development in security and defence matters got new impetus through the shortcomings experienced by the European Union during the Kosovo crisis of the 1990s, during which the EU was incapable of significantly influencing the violent outbreaks in its neighbourhood. The St Malo Declaration by France and the United Kingdom, which asked for the creation of an operational capability for the European Union to enable it to fulfil its role on the international scene, influenced subsequent European Council meetings. These meetings led to the creation of civilian and military capabilities needed for preparing the EU for crisis management operations. They also encouraged the introduction of new bodies, designed to equip the EU to become an international crisis management actor. The inability of the European Union to speak with one voice during the war against Iraq in 2003 encouraged the drafting of the *European Security Strategy* of 2003,[7] the first strategic document of the European Union.[8] In the same year the European security and defence policy became operational. In January 2003, the EU began its first civilian crisis management mission – the police mission EUPM in Bosnia and Herzegovina.[9]

[6] In general, the development of security structures seems to have made most progress in the aftermath of an international crisis or conflict. For a detailed discussion on the reform of the United Nations see S Chesterman, 'Reforming the United Nations: Legitimacy, Effectiveness and Power after Iraq' (2006) 10 Singapore Year Book of International Law 59.
[7] *European Security Strategy* (n 4).
[8] For a detailed analysis of the *European Security Strategy*, see S Biscop, 'The ABC of the European Union Security Strategy: Ambition, Benchmark, Culture' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 55-73.
[9] Council Joint Action (2002/210/CFSP) on the European Union Police Mission EUPM in Bosnia Herzegovina [2002]OJ L 70/1.

The first crisis management operation of a military nature, Operation CONCORDIA, followed in March.

Part two of the chapter will outline the status quo of the EU's common security and defence policy under the Treaty of Lisbon. The focus will be put on the procedures and instruments with which European crisis management missions are undertaken. The chapter will be concluded by a brief overview of how a European military crisis management operation is launched and conducted in practice.

Part 1

The development of a common foreign and security policy and a common security and defence policy – from the 1950s to the Treaty of Nice

EU-led crisis management missions of a military nature take place under the auspices of the common security and defence policy. The development of the common security and defence policy can only be understood within the context of the development of the common foreign and security policy of which it forms an integral part.[10] The following will describe the historic development that led to the equiping of the European Union with military capabilities and thus enabled the European Union to become a military crisis management actor.

1. The European Defence Community and the European Political Community – too ambitious too soon

In the aftermath of the Second World War, Robert Schuman proposed in 1950 to secure peace in Europe and in the world by placing the key industries of Germany and France under a High Authority and by offering other states the possibility to join the common organisation at a later stage.[11] This proposal led to the foundation of the European Coal and Steal Community (ECSC) in 1951. In parallel to the birth of European economic integration, the Korean conflict of 1950 inspired proposals for

[10] Article 42 (1) LTEU.
[11] Robert Schuman, Declaration of 9 May 1950 <http://europa.eu/abc/symbols/9-may/decl_en.htm> paras 2, 4.

European defence cooperation.[12] After Churchill had articulated the idea of a European Army under the command of a European Minister of Defence in August of 1950, the *Pleven Plan* by the French minister of defence went a step further and suggested to incorporate the European Ministry of Defence in an institutional structure similar to the one of the European Coal and Steal Community.[13] The *Pleven Plan* was built into the Treaty establishing the European Defence Community[14] which was signed by all the member states of the European Coal and Steal Community in 1952.[15] The European Defence Community (EDC) was supposed to enjoy legal personality[16] and it was designed to be supranational in nature.[17]

The Community was structured around a collective defence clause and one of the Treaty's aims was to set up a permanent European army that should operate within the framework of the Atlantic Alliance.[18] The Treaty obliged the member states to contribute troops which should melt into a European army.[19] At the same time, the Treaty prohibited them in general from keeping national armies and only allowed the upkeep of national troops in strictly defined circumstances.[20]

The ambitions of the EDC Treaty regarding the merger of the member states' armed forces goes beyond today's integration of member states' troops within the European Union or NATO.[21] The provisions on the permanent European army also show that the European Defence Community, as indicated by its name and by its context in the Cold War, was solely concerned with the defence of Western Europe against possible

[12] R A Wessel, *The European Union's Foreign and Security Policy: A Legal Institutional Perspective* (Kluwer Law International, The Hague 1999) 2.
[13] Wessel (n 12), 2.
[14]Treaty establishing the European Defence Community (Paris, 27 Mai 1952) [hereinafter EDC].
[15] Wessel (n 12) 2.
[16] Article 7 EDC.
[17] Article 1 EDC. For a detailed analysis of the European Defence Community see M Trybus, 'The Vision of the European Defence Community and a Common Defence for the European Union' in M Trybus and N D White (eds), *European Security Law* (Oxford University Press, Oxford 2007) 13-42. The European Defence Community was build around the Board of Commissioners that would have been equipped with the powers to adopt decisions binding on its member states, sometimes by qualified majority voting. The Court of Justice of the ECSC would have had jurisdiction over the EDC. Article 24, Article 52 EDC.
[18] Article 2 EDC.
[19] Article 9 EDC
[20] See chapter II and in particular Article 10 EDC for more details.
[21] Trybus (n 17) 26 with regards to NATO and WEU.

Soviet threats.[22] A security policy was missing and if the member states wanted to participate in humanitarian, peacekeeping, peacemaking and peace enforcement missions, they would have to do so within the context of the UN but outside the EDC framework.[23] Today, the European security and defence policy is concerned mainly with security issues instead.

As provided for by the EDC Treaty,[24] the Foreign Ministers of the ECSC asked the Assembly to draft a Statute for a European Political Community[25] under the leadership of the president of the Assembly, the Belgian Foreign Minister Spaak.[26] In March 1953 the Statute was adopted. It included the taking-over of the existing powers of the ECSC and the signed but not ratified EDC by the institutions of the European Political Community.[27] Among other things, the draft Treaty embodying the Statute of the European Community aimed at ensuring the coordination of the foreign policies of the member states[28] and envisaged that the European Political Community would form a legal union with the ECSC and the EDC.[29] Like the EDC before, the European Political Community was supposed to be supranational in nature[30] and would have had a 'juridical personality'.[31] However, in August 1954, the French Assemblée Génerale refused to ratify the Treaty establishing a European Defence Community due to its supranational elements, and thereby automatically ended the project of a European Political Community temporarily.[32]

[22] Trybus (n 17) 30.
[23] Trybus (n 17), 30.
[24] Artikel 38(2) EDC.
[25] Draft Treaty embodying the Statute of the European Community (10 March 1953) [hereinafter DTSEC].
[26] Wessel (n 12) 2.
[27] Wessel (n 12) 2.
[28] Article 2 DTSEC.
[29] Article 5 DTSEC.
[30] Article 1 DTSEC.
[31] Article 4 DTSEC.
[32] F Cameron, *The Foreign and Security Policy of the European Union: Past, Present and* Future (Sheffield Academic Press, Sheffield 1999)16; J W De Zwaan, 'Foreign Policy and Defence Cooperation in the European Union: Legal Foundations' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 19; Trybus (n 17) 20; Wessel (n 12) 3;

2. De Gaulle and Fouchet

In the following years, the idea to create a common foreign policy as well as a common defence policy was never given up completely by the six EEC member states of the European Economic Community (EEC). In March 1961, De Gaulle presented the first Fouchet Plan.[33] The plan consisted of a draft Treaty for a Union of States, aiming amongst other things for the adoption of a common foreign policy and a common defence policy.[34] In the November version of 1961, France outlined that the common defence policy would strengthen the Atlantic Alliance.[35] However, De Gaulle chose to prepare a new proposal, *Fouchet II*.[36] The second Fouchet Plan dropped amongst other initiatives the plan of cooperation with NATO and the creation of a Secretary General and thus caused friction between France and the other EEC member states.[37] The persistent opposition of Belgium and the Netherlands ended the Fouchet process in 1962[38] and demonstrated that cooperation in matters of foreign policy lies at the very heart of state sovereignty that the member states are reluctant to lose.[39] Nonetheless, both Fouchet plans encouraged a discussion on highly sensitive security issues and could be regarded as a guide for following attempts of European cooperation.[40]

3. European Political Cooperation: from the adoption of reports to the codification in the Single European Act

It was not until 1969 that the project of political cooperation obtained new impetus through the adoption of reports that primarily recognised past practices of the foreign ministers of the member states. The system of European Political Cooperation was intergovernmental in nature and was guided by rules of international law. Therefore

[33] Cameron (n 32) 16.
[34] Wessel (n 12) 4.
[35] Wessel (n 12) 4.
[36] Wessel, (n 12) 5.
[37] Wessel (n 12) 5.
[38] Wessel (n 12) 5.
[39] S A Pappas and S Vanhoonacker, 'CFSP and 1996: A New Intergovernmental Conference, an Old Debate?' in S A Pappas and S Vanhoonacker (eds) *The European Union's Common Foreign and Security Policy: The Challenges of the Future, Proceedings of EIPA Colloquium, Maastricht, 19-20 October 1995* (European Institute of Public Administration, Maastricht 1996) 6.
[40] Cameron (n 32) 16.

'the principles of consultation, consensus and confidentiality' have been dominant.[41] The member States avoided formal and legally binding commitments and rather chose 'gentlemen's agreements'.[42] The adopted reports entailed no legally binding obligations.[43]

With a view to future European developments in security and defence matters, it is interesting to note that the *London Report* included a paragraph on 'Crisis Procedures' which stated that

> [i]n order to improve the capacity of the Ten to react in an emergency, working groups are encouraged to analyse areas of potential crisis and to prepare a range of possible reactions by the Ten.[44]

The results achieved by European Political Cooperation have been dominated by the notion of the ten foreign ministries of the member states and not so much of a distinct 'European' approach. The member states were cautious of guarding their national competences. The predominant way they tried to approach the project of European Political Cooperation was comparable to a national approach to foreign policy - by keeping it mainly reactive in nature. Nonetheless, the Ten also felt the need to be part of the international community and to shape events in a way that corresponded to their combined economic weight in the world. To achieve this goal, they recognised the importance of speaking with one voice and to consult each other particularly regarding common positions and even seeking joint action in the future.[45] Therefore, first signs of European integration started to show.

In 1986, the EPC was finally codified by the Single European Act and thus acquired the status of primary law.[46] The Single European Act (SEA) built heavily on the

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[41] RG Bono, 'Some Reflections on the CFSP Legal Order' (2006) 43 Common Market Law Review 338.
[42] Bono (n 41) 338.
[43] E Stein, 'European Political Cooperation (EPC) as a Component of the European Foreign Affairs System' (1983) 43 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 52.
[44] *Report on European Political Co-operation issued by the Foreign Ministers of the Ten on 13 October 1981 (London Report)* Press and Information Office, Federal Republic of Germany, Bonn, 1988, part II, para 13 [hereinafter *London Report*].
[45] See Part I of the *London Report* (n 44).
[46] Bono (n 41) 339.

previously achieved forms of cooperation[47] and predominantly codified past practices. Despite the inclusion of the already existing European Council into the SEA,[48] Article 30 SEA neither created new institutions nor granted existing ones any law making power.[49] The Treaty obligations rested with the High Contracting Parties[50] who 'shall endeavour jointly to formulate and implement a European Foreign Policy'.[51]

Although it seemed to avoid the language of legal obligations by using the term 'endeavour', the Single European Act also contained hard law terms such as 'shall ensure'. Title III of the SEA was guided by the principle of consensus and the decisions about European cooperation were of a rather political nature, governed by international law.[52]

With regards to matters of security and defence, the Single European Act formally recognised the necessity of establishing a European identity on the international scene, a goal that had already been expressed by the *London Report*. Back then, however, the emphasis had been put on the ten member states' combined influence in the world and not on Europe as such. Now the SEA stated that,

> [t]he High Contracting Parties consider that closer co-operation on questions of European security would contribute in an essential way to the development of a European identity in external policy matters. They are ready to co-ordinate their positions more closely on the political and economic aspects of security.[53]

However, these still rather vague commitments were not supposed to undermine the framework of the Western European Union (WEU) or of NATO.[54] The Single European Act was merely concerned with security issues but did not ask for defence

[47] Article 1 (3) SEA.
[48] Bono (n 41) 340.
[49] E Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, Oxford 2002) 43.
[50] The SEA therefore changed the terminology used in the reports on the EPC from 'Member States' into 'High Contracting Parties'.
[51] Article 30 (1) SEA.
[52] Bono (n 41) 339.
[53] Article 30 (6) SEA.
[54] Article 30 (6)(c) SEA.

commitments.[55] It demonstrated a clear departure from the ideas of the European Defence Community that had predominantly focused on defence.

4. Treaty of Maastricht

The Treaty of Maastricht that came into force in 1993 established for the first time a common foreign and security policy, albeit outside the supranational Community legal order. An initiative by the Dutch Government to include the common foreign and security policy into the former had failed.[56] In fact, the creation of the three pillar system of the European Union has been viewed as a compromise between those member states wishing to deepen European integration through supranational methods and between those member states strongly relying on the concept of intergovernmental cooperation to safeguard their national sovereignty.[57]

Throughout the provisions on the common foreign and security policy, the Treaty refers to the 'Union' and/or the 'Member States' and thereby abandons the language used in the Single European Act that merely referred to the High Contracting Parties in its provisions on European cooperation in foreign policy.[58] The Treaty explicitly sets out the obligation of the Union and its member states to 'define and implement a common foreign and security policy'.[59] The policy itself is broad and vaguely defined as it shall cover 'all areas of the common foreign and security policy'.

The objectives of the common foreign and security policy place the European Union within the international community but at the same time stress the EU's confidence in its own values and interests. The objectives include the Union's commitment to preserving and strengthening international peace and security in accordance with the principles of the UN Charter, the promotion of international cooperation and a strong commitment to democracy, the rule of law, and respect for human rights and fundamental freedoms. Apart from its desire to play a role as an international actor,

[55] Denza (n 49) 45.
[56] Wessel (n 12) 9.
[57] R A Wessel, 'The State of Affairs in EU Security and Defence Policy: The Breakthrough in the Treaty of Nice' (2003) 8 Journal of Conflict and Security Law 271; Wessel (n 12) 8.
[58] M R Eaton, 'Common Foreign and Security Policy' in D O'Keeffe and M Towmey (eds), *Legal Issues Of The Maastricht Treaty* (Chancery Law, Publishing Ltd, Chichester 1994) 220.
[59] Article J.1(1) TEU.

the EU also aimed 'to safeguard the common values, fundamental interests and independence of the Union' and thereby emphasised its vision of being an autonomous international player based on its own values. The importance of this objective was underlined by its systematic context within Article J. 1(2) TEU, where it is mentioned as the first of all foreign policy objectives.[60] The Treaty on European Union created legal obligations for the member states to pursue its objectives and moves away from the soft terms used in the Single European Act.[61]

In respect to security and defence matters considerable progress was also made. Article J.4 explicitly referred to security and defence issues and mentioned in its first paragraph the

> eventual framing of a common defence policy, which might in time lead to a common defence.

This wording is the result of a compromise between those member states that welcomed the connection between security policy and defence issues and those member states that rejected any involvement of the Union in defence matters.[62] Another compromise entailed in the Maastricht Treaty with respect to security and defence issues could be found in Article J.4(2) TEU, introducing a procedure concerning defence matters. According to this provision, the WEU which was supposed to form an integral part of the development of the Union was requested by the Union to elaborate and implement decisions and actions of the Union which have defence implications. The provision was the outcome of the increased awareness that it is not manageable to completely exclude defence decisions from general decision-making in the EU.[63]

The WEU member states that were also members of the European Union stated in a declaration that was annexed to the Treaty that their goal would be

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[60] The relationship between the EU legal order and the international legal order will be discussed in more detail in chapter six.
[61] Eaton (n 58) 220. The usage of the term 'endeavour' for example has been abolished.
[62] Eaton (n 58) 218; D Hurd, 'Developing the Common Foreign and Security Policy' (1994) 70 International Affairs 426; Wessel (n 57) 271, 271.
[63] Wessel (n 57), 271, 272.

> to strengthen the role of the WEU, in the longer term perspective of a common defence policy within the European Union which might in time lead to a common defence, compatible with that of the Atlantic Alliance.[64]

They also expressed 'the need to develop a genuine European security and defence identity and a greater European responsibility on defence matters'.[65] However, Denmark, not a WEU-member, was allowed to opt out from the implementation of decisions and actions of the Union having defence implications[66] to enable the ratification of the Maastricht Treaty.

5. Treaty of Amsterdam

In 1996, an Intergovernmental Conference began to review the Treaty on European Union and in particular its provisions related to defence issues. This process led to the signing of the Treaty of Amsterdam in 1997. The Treaty of Amsterdam introduced procedural changes, aimed at facilitating the adoption of instruments with which the common foreign and security policy were to be conducted. From then on, common provisions and joint actions could be adopted by qualified majority when no defence or military matters were concerned.[67] Nevertheless, the impact of this novelty was limited as the Treaty also introduced possibilities of blocking the use of qualified majority voting (QMV) for important and stated reasons of national policy. Apart from the increased use of QMV, the possibility of a qualified or constructive abstention was introduced. When decisions have to be taken by the Council acting unanimously, abstention by member states does not prevent the adoption of such decisions. When a member state abstains in a vote but qualifies its abstention through a formal declaration, this particular member state does not have to apply this decision. In light of the principle of mutual solidarity, the abstaining member state is

[64] *Declaration on Western European Union*, annexed to the Treaty on European Union, 29 July 1992, OJ C 191 [hereinafter *Declaration on Western European Union*] para 1.
[65] *Declaration on Western European Union* (n 64) para.1.
[66] *Declaration on Denmark and the Treaty on European Union*, Annex 1,section C, 31 December 1992 OJ C 348.
[67] Article 23(2) TEU.

under the negative obligation to 'refrain from any action likely to conflict with or to impede Union action based on that decision'.[68]

The Treaty of Amsterdam also introduced new bodies and institutions. It established the Secretary-General of the Council who also acted as the High Representative for the common foreign and security policy. The Secretary-General was assigned with two main functions. On the initiative of the Presidency, he represented the Union in relation to third countries.[69] On his own initiative, he formulated, prepared, and implemented documents that indicated the diplomatic options for the European Union.[70] In response to claims that the common foreign and security policy would lack a common approach to diplomatic matters,[71] a *Declaration on the Establishment of a Policy Planning and Early Warning Unit* was annexed to the Amsterdam Treaty. Its tasks included the monitoring and analysing of CFSP developments, the identification of Union interests, and the timely alert of dangerous situations and the preparation of policy options.

It is probably in the area of security and defence that the Treaty of Amsterdam introduced the most significant changes. Article 17 TEU referred to 'the progressive framing of a common defence policy' leading to a common defence if the European Council should so decide.[72] In contrast to the Treaty of Maastricht, the Union did not simply ask the WEU to elaborate and implement decisions and actions of the Union, but now the European Union availed 'itself of the WEU to elaborate and implement decisions and actions of the Union which have defence implications'.[73] Furthermore, with the integration of the Petersberg tasks in the Treaty of Amsterdam, the WEU acquis was incorporated into the CFSP framework.[74]

[68] Article 23(1) TEU.
[69] Article 26 TEU.
[70] F Dehousse, 'After Amsterdam: A Report on the Common Foreign and Security Policy of the European Union' (1998) 9 European Journal of International Law 534.
[71] Dehousse (n 70) 532.
[72] Article 17 TEU.
[73] Article 17(3) TEU ; Wessel (n 57) 272.
[74] Article 17(2) TEU.

The Petersberg missions, defined by the WEU in 1992, entail three kinds of tasks - namely humanitarian and rescue tasks, peace-keeping tasks and tasks of combat forces in crisis management, including peacemaking.[75]

The significance of the introduction of the Petersberg missions into the Treaty of Amsterdam was twofold. Not only did it introduce a policy for the Union's defence ambitions but also the neutral European member states have had to recognise their responsibility in the international security system.[76] With the inclusion of peace-keeping missions, the Treaty of Amsterdam was the first treaty of an international organisation to codify this concept.[77]

The Treaty of Amsterdam brought about procedural changes and introduced new institutions in the field of the common foreign and security policy. These changes were needed to provide the EU with a more functional common foreign and security policy by making it easier to come to decisions within the CFSP and by creating a central position, the High Representative, which could help the Union to shape its identity on the international scene. In relation to defence matters, the Treaty also shaped the EU's profile by incorporating possible tasks that could be carried out in the future and thereby offered a more concrete concept of what could constitute a European defence.

6. The St Malo Declaration of 1998 and the European Council meeting in Cologne of 1999: the birth of the European Security and Defence Policy

In the time between the signing of the Treaty of Amsterdam and the Treaty of Nice, the European Union made profound progress in the development of a European defence policy. Especially since December 1998, the concept of European defence had been pushed forward as never before. This process was a reaction to international events that left the EU feeling paralysed while having to watch conflicts spiralling out of control on its doorstep. The following section will look at the

[75] More information on the WEU and the Petersberg tasks will follow below.
[76] Dehousse (n 70) 536.
[77] F Pagani, 'A New Gear in the CFSP Machinery: Integration of the Petersberg Tasks in the Treaty on European Union' (1998) 9 European Journal of International Law 3.

historical developments that led to the St Malo Declaration of 1998 and the Cologne European Council in the spring of the following year that are often described as the birth of the European Defence and Security Policy.

6.1. Excursus: A look back to coordinated European defence efforts before St Malo and Cologne

To understand the progress that has been made in St Malo and in Cologne in the late 1990s it is crucial to reflect on the security and defence structures the European Union had been relying on before in the context of the Western European Union and NATO. Therefore the sub-sections below will briefly focus on the Western European Union and on the Petersberg Declaration that identified the above mentioned Petersberg tasks as well as on the European Security and Defence Identity.

6.1.1. The Western European Union and the Petersberg Declaration

First attempts to coordinate European defence after Second World War can be traced back to the Franco-British Defence Treaty of Dunkirk in 1947 and the Treaty of Brussels of 1948, also called the *Treaty on Economic, Social and Cultural Collaboration and Collective Self-Defence*, between France, the UK, Belgium, the Netherlands and Luxembourg.[78] The then-called Brussels Treaty Organisation provided for military cooperation and adopted a plan for common defence including a joint command organisation as well as integrating air defences.[79] In 1954, the Treaty was modified to include Italy and Germany and thereby established the Western European Union.[80]

When the project of a European Defence Community, including the idea of a European army, failed in the early 1950s, only the WEU managed to create a European forum for the discussion of security related matters. Throughout the Cold War, the organisation kept a low profile, being of a rather marginal military significance and having a low political impact. In essence therefore, Western

[78] WEU Secretariat-General, *WEU today* (WEU Secretariat-General, Brussels 2000) 39.
[79] WEU Secretariat-General (n 78) 39.
[80] WEU Secretariat-General (n 78) 40.

European Security for the non-neutral states not belonging to the Warsaw Pact was provided for by NATO until the fall of the Berlin Wall.[81]

The relaunch of a European defence concept with the beginning of the 1990s was inspired by three factors. Through the approaching end of the Cold War, the transatlantic relationship shifted and Europe stopped being the focus of American security policy.[82] Thus, Europe not only had to become more active to ensure its own security, but the US also pushed Europe to take on more responsibilities in the military field, albeit within a UN or NATO framework.[83] The conflicts in the former Yugoslavia during which Europe could not play a decisive role made Europeans aware that conflicts actually take place in Europe's neighbourhood and are no longer confined to other continents.[84] In addition, the genocide in Rwanda in 1994 and the Balkan crisis showed Europe that it had a huge security deficit.[85] Although the use of force has never been first choice of the European Union to resolve a crisis, it has been acknowledged that Europe should have at its disposal some kind of ready and efficient forces and that Europe should move away from simply being a civilian power.[86]

Inspired by some of these shortcomings, Europe started to rethink its military capabilities. In response to the Maastricht declarations of the WEU member states in 1991, to develop the organisation as the defence component of the European Union and to strengthen the European commitment in the Atlantic Alliance, the WEU Council of Ministers met in Petersberg, Bonn and adopted the *Petersberg Declaration in 1992* to define the WEU's operational role. The Declaration set out three tasks for which military units of the WEU member states could be employed.

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[81] T Koivula, 'EU Battlegroup: The Big Picture' in M Kerttunen and others (eds), *EU Battlegroups: Theory and Development in the Light of Finnish-Swedish Co-operation, Research Reports No 30*, National Defence College, Department of Strategic and Defence Studies, Helsinki 2005 <http://www.pana.ie/download/eubattlegroups.pdf > 5.
[82] J Howorth, *Security and Defence Policy in the European Union* (Palgrave Macmillan, New York 2007) 5.
[83] Koivula (n 81) 7.
[84] W F Van Eekelen and S Blockmans, 'European Crisis Management *avant la Lettre*' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 44.
[85] Koivula (n 81) 6.
[86] Koivula (n 81) 7.

These tasks entail humanitarian and rescue tasks; peace-keeping tasks and tasks of combat forces in crisis management, including peace-making.[87]

The so-called *Petersberg tasks* might appear to put a strong emphasis on civilian crisis management. However, according to the WEU Secretariat General, peace-making is generally understood as peace enforcement.[88] Within the context of the European Union, peace-making therefore has to be interpreted as including peace-enforcement measures.[89] Peace-enforcement missions use military personnel to enforce a solution to a party.[90]

6.1.2. NATO and the European Security and Defence Identity

In the mid 1990s, NATO decided to strengthen its European pillar through the creation of a European Security and Defence Identity (ESDI). The goal was for European states to assume greater responsibility for their own security matters as well as to develop a more balanced transatlantic relationship.[91] The NATO Council in Berlin in 1996 acknowledged that the European Union should have the capacity for autonomous action for crisis management where NATO as a whole is not involved, that NATO and EU should develop more effective mutual cooperation and transparency based on the already existing mechanisms between the Alliance and the WEU, and that unnecessary duplication of defence capabilities for EU member states were to be avoided.[92] The key concept was that for WEU-led operations separable but not separate NATO capabilities and assets should be used.[93]

6.2. St Malo and the Joint Declaration on European Defence

However, the new concept of ESDI had been overrun by the *Joint Declaration on European Defence* at the Franco-British Summit in St Malo in December 1998, the

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[87] Western European Union, Council of Ministers, Petersberg Declaration, Bonn, 19th June 1992, II. On strengthening WEU's operational role <http://www.weu.int/documents/920619peten.pdf>.
[88] WEU Secretariat-General (n 78) 11 at FN 1.
[89] S Blockmans, 'An Introduction to the Role of the EU in Crisis Management' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 9.
[90] Blockmans (n 89) 9.
[91] NATO Office of Information and Press, *NATO Handbook* (NATO Office of Information and Press, Brussels 2001) 97 [hereinafter NATO Handbook].
[92] NATO Handbook (n 91) 97, 98.
[93] NATO Handbook (n 91) 97, 98.

so-called *St Malo Declaration*.[94] Together with the Cologne European Council[95] it marked the birth of the European Security and Defence Policy. But what encouraged the European Union to adopt a European Security and Defence Policy entailing autonomous capabilities that went beyond the development of an ESDI within the existing NATO framework?

Within Europe, defence matters have always been dominated by the UK and France, the two major European military actors. Traditionally, the UK has always built on a strong partnership with the US through the Atlantic Alliance. However, NATO's difficulties during the Balkan crisis created the fear that Europe's weak operational capacities could eventually jeopardise this partnership.[96] France meanwhile had always favoured Europe as a security actor as a counterbalance to US dominance as a means of safeguarding French interests.[97] Influenced not only by the war in the Balkans but also through the experience of joint military operations in that region the two countries reached a compromise that combined France's desire for an autonomous European military capacity with the UK's demand for conformity with existing NATO obligations.[98] It was decided that,

> [t]he European Union needs to be in a position to play its full role on the international stage. This means making a reality of the Treaty of Amsterdam, which will provide the essential basis for Union action.[99]
>
> To this end, the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them and a readiness to do so, in order to respond to international crises.[100]

This bilateral initiative on an autonomous European Security and Defence Policy, overshadowed by Europe's weaknesses during the Kosovo conflict, was accepted by

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[94] Franco-British Summit, *Joint Declaration on European* Defense, Saint-Malo, 4 December 1998, available at <http://www.atlanticcommunity.org/Saint-Malo%20Declaration%20Text.html> [hereinafter *St.Malo Declaration*].
[95] Cologne European Council, Presidency Conclusions, 3 and 4 June 1999, Annex III, *European Council Declaration On Strengthening The Common European Policy On Security And Defence*
[96] Koivula (n 81) 9.
[97] Koivula (n 81) 9.
[98] *St.Malo Declaration* (n 94) para 2.
[99] *St.Malo Declaration* (n 94) para 1.
[100] *St.Malo Declaration* (n 94) para 2.

the other European member states and transformed the ESDI into the European Security and Defence Policy (ESDP).[101] During the Kosovo conflict, the European member states had found it challenging to send 40-50.000 soldiers although their combined troops included more than 1.5 million personnel.[102]

6.3. European Council meetings in Cologne and Helsinki preparing the EU for military crisis management missions

At the European Council meeting in Cologne in 1999, the heads of states and government declared that they

> are convinced that the Council should have the ability to take decisions on the full range of conflict prevention and crisis management tasks defined in the Treaty on European Union, the 'Petersberg tasks'. To this end, the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crisis without prejudice to actions by NATO. The EU will thereby increase its ability to contribute to international peace and security in accordance with the principles of the UN Charter.[103]

In the following years, the European Union was therefore equipped with the necessary military and civilian capabilities to engage in international crisis management. The Helsinki European Council in December of the same year introduced four initiatives for that purpose, including the adoption of a European headline goal for readily deployable military capabilities, the establishment of new political as well as military bodies within the Council, the agreement of principles on cooperation with non-European members of the Atlantic Alliance and other EU partners in EU-led military crisis management missions and the Council also

[101] Koivula (n 81) 10.
[102] S Biscop, 'The European Security Strategy: Implementing a Distinctive Approach to Security' (2004) 'Sécurité & Sratégie', Paper No. 82, the Royal Defence College (IRSD-KHID), Brussels <http://www.politologischinstituut.be/PE2004/documents/6Biscop.pdf> 3.
[103] Cologne European Council, Presidency Conclusions, 3 and 4 June 1999, Annex III, *European Council Declaration On Strengthening The Common European Policy On Security And Defence*, para 1.

requested EU member states to improve their national and multinational military capabilities to carry out Petersberg tasks.[104]

With the *Helsinki Headline Goal* the European Council underlined its determination to develop an autonomous military capacity 'to launch and conduct EU-led military operations in response to international crises'.[105] This process did not entail the creation of a European army.[106]

By the year 2003, the EU member states wanted to

> be able to deploy rapidly and then sustain forces capable of the full range of the Petersberg tasks as set out in the Amsterdam Treaty, including the most demanding, in operations up to corps level (up to 15 brigades or 50,000 – 60,000 persons). These forces should be militarily self-sustaining with the necessary command, control and intelligence capabilities, logistics, other combat support services and additionally, as appropriate, air and naval elements.[107]

Member states wanted to be able to deploy these forces within sixty days and they intended 'to sustain such a deployment for at least one year'.[108] The *Helsinki Headline Goal* indicates that European military operations should potentially be capable of tackling any crisis similar to the one in Yugoslavia.[109]

Of practical significance for the undertaking of autonomous EU-led operations in which NATO as a whole is not engaged is the *Berlin Plus Agreement* of December 2002 between NATO and the EU which assured that the EU would have access to NATO's planning capabilities; presumed availability of NATO capabilities and common assets such as communications units and headquarters and the availability

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[104] Helsinki European Council, Presidency Conclusions, 10 And 11 December 1999, Annex 1 to Annex IV, *Presidency Progress Report To The Helsinki European Council On Strengthening The Common European Policy On Security And Defence*, Introduction [hereinafter *Helsinki European Council*]
[105] *Helsinki European Council* (n 104) para. 27
[106] *Helsinki European Council* (n 104) para. 27.
[107] *Helsinki European Council* (n 104) Military capabilities for Petersberg tasks.
[108] *Helsinki European Council* (n 104) Military capabilities for Petersberg tasks.
[109] J Coelmont, 'Europe's Military Ambitions' in S Biscop and F Algieri (eds), *The Lisbon Treaty and ESDP: Transformation and Integration* (June 2008) Egmont Paper 24, Egmont – The Royal Institute for International Relations <http://www.egmontinstitute.be/paperegm/ep24.pdf> 6.

of NATO European command options.[110] The EU crisis management operation CONCORDIA in the Former Yugoslav Republic of Macedonia was carried out by the EU using NATO assets and capabilities.[111]

Despite all of these developments, the EU still lacked a clear and comprehensive plan of how to manage the security issues it faces in order to become a reliable self-standing security actor on the international scene.[112] Influenced by the terrorist attacks of 9/11 and the war against Iraq in 2003 during which the EU could not speak with one voice, the *European Security Strategy* of *2003*[113] was intended as the answer not only to this problem but also as a means for providing the missing European culture of crisis management.[114]

The *European Security Strategy* is based on three pillars. First, it identifies the global challenges and key threats, including terrorism, the proliferation of weapons of mass destruction, regional conflicts, state failure and organised crime. This is followed by the setting up of strategic objectives on how these threats can be addressed, entailing the creation of a secure European neighbourhood and the commitment to an international order based on multilateralism. The final part of the Security Strategy focuses on how Europe can build a more coherent foreign policy and increase the effectiveness of its crisis management. The adoption of the Security Strategy led to the broadening of possible ESDP missions, adding security sector reform as part of broader institution-building, joint disarmament operations and the support for third states in combating terrorism. The six missions are sometimes referred to as the *Petersberg Plus Tasks.*

In June 2004, the Brussels European Council adopted the *2010 Headline Goal* in an attempt to reflect not only the *European Security Strategy* but also to build on the

[110] For a detailed analysis of the Berlin Plus Agreement that consists of 14 documents, see M Reichard, 'The EU-NATO 'Berlin Plus' Agreement: The Silent Eye of the Storm' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 233-253.
[111] Operation CONCORDIA/FYROM, Council Joint Action 2003/92/CFSP on the European Union military operation in the Former Yugoslav Republic of Macedonia [2003] OJ L 34/26, Article 1 (3).
[112] Koivula (n 81) 13.
[113] *European Security Strategy* (n 4) 11.
[114]Biscop (n 102) 7; Koivula (n 81) 13.

experience of past EU-led military operation *Artemis* in the Democratic Republic of Congo.[115] The main innovation of the *2010 Headline Goal* was the commitment of the EU member states to 'respond with rapid and decisive action applying a full coherent approach to the whole spectrum of crisis management operations covered by the Treaty on European Union'. [116] As part of EU rapid response, the *battlegroup-concept* was developed.[117] Battlegroups are composed of 1,500 troops and can be deployed for a period of up to 120 days within ten days. They have been designed to 'strengthen the EU's ability to respond to possible UN requests'.[118] The European Council meetings in Helsinki, Feira, Nice and Laeken provided for the establishment of the necessary new organs.[119] Among these institutions were the Political and Security Committee (PSC),[120] the EU Military Committee (EUMC)[121] and the EU Military Staff (EUMS)[122].[123]

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[115] N Gnesotto, (chair), 'European defence: A proposal for a White Paper' (2004) Report of an independent Task Force, EU Institute for Security Studies <http://www.iss.europa.eu/uploads/media/wp2004.pdf > 59.

[116] *Headline Goal 2010*, approved by General Affairs and External Relations Council on 17 May 2004, endorsed by the European Council of 17 and 18 June 2004, para 2 [hereinafter *Headline Goal 2010*].

[117] *Headline Goal 2010* (n 116) para 4.

[118] *Headline Goal 2010* (n 116) para 4. Apart from the development of the Union's military capabilities through the *Helsinki Headline Goal* and the *2010 Headline Goal*, the EU's civilian capabilities have also been enhanced. The Feira European Council of June 2000 established the civilian aspects of EU crisis management in the following four areas: rule of law, civil administration, police and the protection of the civilian population. In 2004, the Brussels European Council then went on to approve the *Civilian Headline Goal 2008*, which states that the Union should be able to undertake monitoring missions and to provide support for EU special representatives. Included activities are security sector reform as well as support of reintegration, disarmament and demobilisation processes. In November 2007, the *Civilian Headline Goal 2010* was approved, demanding the incorporation of human rights and gender issues into the system of civilian operations as well as the enhancement of coherence through the better exploitation of synergies between civilian and military EDSP action and Community action.

[119] M Ortega, 'Beyond Petersberg Missions for the EU Military forces' in N Gnesotto (ed), *EU Security and Defence Policy: The first five years (1999-2004)* (Institute for Security Studies, European Union, Paris 2004

[120] Council Decision 2001/78/CFSP setting up the Political and Security Committee [2001] OJ L27/1.

[121] Council Decision 2001/79/CFSP setting up the Military Committee of the European Union [2001] OJ L 27/4.

[122] Council Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union [2005] OJ L132/17.

[123] For more information on the PSC, EUMC and EUMS see S Duke, 'Peculiarities in the Institutionalisation of CFSP and ESDP' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 79-81, 83-85.

7. Treaty of Nice

The Treaty of Nice which entered into force in 2003 reflects these ongoing developments and put more emphasis on the development of a common security and defence policy.[124] The provision on the EU's relationship with the WEU in old Article 17 (1) TEU as well as the provision dealing with the role of the WEU in the implementation of EU decisions focusing on defence matters were removed. From now on, the EU was granted with the competence to act in the spheres of all the Petersberg tasks, a decision indicating that consensus had finally been reached on a European Security and Defence Policy.[125] The Treaty of Nice also introduced a treaty basis for the Political and Security Committee and assigned it with new tasks.[126]

Since the Cologne European Council in 1999, the European Union has gradually been equipped with institutions, procedures and structures that enable it to become an international military actor. One of the latest innovations before the entry into force of the Treaty of Lisbon but outside the Treaty framework was the introduction of a European Defence Agency.[127] The agency's key role in developing the military capabilities identified in the *Headline Goal 2010* has been emphasised by the *Declaration on Strengthening Capabilities.*[128]

Part 2

The state of affairs of the common security and defence policy under the Treaty of Lisbon

In the context of the failed process of creating a Constitution for Europe, the *Laeken Declaration on the Future of the European Union* identified the need to enhance the effectiveness and coherence of European foreign policy as a key question.[129] This awareness carried on into the mandate of the Intergovernmental Conference that was

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[124] P Koutrakos, *EU International Relations Law* (Hart Publishing, Oxford 2006) 455.
[125] Wessel (n 57) 274.
[126] Article 25 TEU Nice version.
[127] Council Joint Action 2004/551/CFSP on the establishment of the European Defence Agency [2004] OJ L 245/17.
[128] Council of the European Union, *Declaration on Strengthening Capabilities*, Brussels 11 December 2008 <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/esdp/104676.pdf> 4.
[129] Presidency Conclusions, European Council Meeting in Laeken 14 and 15 December 2001, Annex I *Laeken Declaration on the future of the European Union*, SN 300/1/01 REV 1.

assigned with the task to draw up the reform treaty in 2007.[130] The Treaty of Lisbon responded to this request by creating new organs and by introducing new concepts. The next part will describe the status quo of the common security and defence policy as an integral part of the common foreign and security policy[131] under the regime established by the Treaty of Lisbon. The Treaty of Lisbon renamed the European security and defence policy the common security and defence policy (CSDP) and for the first time included a whole section on this topic.[132]

Through the Treaty of Lisbon the European Community was superseded by the European Union. This development in turn indicated the formal abolition of the pillar structure. Nevertheless, the common foreign and security policy is still subject to specific rules and procedures.[133] The systematic context of the common security and defence policy as an integral part of the common foreign and security policy indicates that the treaty section covering the former entails some lex specialis provisions. These relate in particular to procedures and institutional settings. The CSDP still does not provide for unique security and defence instruments. Thus, the foreign policy tools available under the common foreign and security policy need to be used if the EU launches and conducts a military crisis management mission. Due to this structure, the main focus of the next section will be put on the common security and defence policy under which military crisis management missions take place. Differences between the former and the common foreign and security policy will be pointed out when necessary.

The Treaty of Lisbon was aimed at strengthening the Union's common security and defence policy. To this end it introduced institutions, extended the definition of the Petersberg tasks[134] and provided for the inclusion of a mutual defence clause, a

[130] Brussels European Council, Presidency Conclusions, 21/22 June 2007, ANNEX I, IGC Mandate, 11177/1/07 REV 1, para 1.
[131] Article 41(1) 1st sentence LTEU. See also Article 24(1) 1st sentence LTEU that states that the common foreign and security policy shall include the progressive framing of a common defence policy.
[132] Articles 42-46 LTEU.
[133] Article 24 (1) subparagraph 2 LTEU 1st sentence.
[134] In practice, their scope had already been expanded before the entry into force of the Lisbon Treaty. See A Missiroli, 'The New EU 'Foreign Policy' System after Lisbon: A Work in Progress' (2010) 15 European Foreign Affairs Review 445.

solidarity clause and an explicit reference to NATO. In addition, the Treaty enlarged the concept of enhanced cooperation. For the first time it also covers the common security and defence policy. The Treaty of Lisbon also introduced the mechanism of permanent structured cooperation. All of this will be explained in the following but first, the scope of the common security and defence policy will be explained.

1. The scope of the common security and defence policy

The EU's competence regarding the common security and defence policy is not defined by the Treaty itself and it can be difficult to determine what constitutes security within the meaning of the common foreign and security policy or within the meaning of the common security and defence policy. So far all military crisis management missions of the European Union have been adopted within the framework of the common security and defence policy. This practice indicates that at least all matters of a military nature irrespective of the question of how robust their mandate is are covered by the common security and defence policy. The question of the delimitation of both policy fields is not without practical significance due to differing procedural rules and institutional involvement.

Although lacking definitions, the common security and defence policy identifies its specific purpose within the EU's foreign policy structure and points out the goals that are to be achieved. The Treaty of Lisbon now states,

> [t]he common security and defence shall include the progressive framing of a common Union defence policy [which] will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member State the adoption of such a decision in accordance with their respective constitutional requirements.[135]

In comparison to the Treaty of Nice, the Treaty language is now more affirmative. The wording has changed from 'might' to 'will' and replaced 'should' to 'when'. From the Treaty of Maastricht, asking for the 'eventual framing of a common defence policy which might in time lead to a common defence', via the Treaty of

[135] Article 42 (2) LTEU.

Amsterdam, stating 'the progressive framing of a common defence policy which might lead to a common defence should the Council so decide' and to the Treaty of Nice which deleted all operational references to the WEU, the CSDP has made profound progress.

The purpose of the common security and defence policy is to

> provide the Union with an operational capacity [for] missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.[136]

The Treaty of Lisbon has extended the definition of the so called Petersberg tasks[137] with which the common security and defence policy is carried out. They

> shall include join disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.[138]

This wording indicates a broad range of military tasks, including peace enforcement.[139] The Treaty therefore helped to provide a much clearer understanding of the Petersberg tasks that have been subject to differing interpretations by the individual member states before.[140]

The Treaty of Lisbon also helped to clarify the nature of the common security and defence policy. The Treaty introduced a mutual assistance clause that provides that '[i]f a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the

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[136] Article 42 (1) LTEU.
[137] S Biscop and J Coelmont, 'Permanent Strutured Cooperation: In Defence of the Obvious' (2010) ISS Opinion, European Union Institute for Security Studies <http://www.iss.europa.eu/uploads/media/Permanent_structured_cooperation.pdf> 1.
[138] Article 43(1) LTEU.
[139] J Coelmont, 'Europe's Military Ambitions' in S Biscop and F Algieri (eds), *The Lisbon Treaty and ESDP: Transformation and Integration* (2008) Egmont Paper 24, Egmont – The Royal Institute for International Relations <http://www.egmontinstitute.be/paperegm/ep24.pdf> 6.
[140] Coelmont (n 139) 6.

means in their power, in accordance with Article 51 of the United Nations Charter'.[141] Although the Treaty text speaks of mutual defence, the 'obligation of aid and assistance' is rather a duty of mutual assistance.[142] It is for each member state to decide how to assist – with or without military instruments.[143] Therefore the mutual assistance clause will not alter the European Union into a military alliance.[144]

In addition, a solidarity clause has been introduced outside the CSDP framework in Article 222 LTFEU which nonetheless has a military dimension.[145] In case of a terrorist attack or a natural or man-made disaster, the Union and the European member states are called to act jointly in a spirit of solidarity. In such a case, the Union is asked to make all instruments at its disposal available, including military resources made available by the member states.[146]

2. Objectives of the common security and defence policy

The Treaty of Lisbon aimed to achieve greater coherence and consistency in the EU's external relations. For this purpose, it has introduced a single set of objectives and principles that guide external Union action, irrespective of which policy sector is concerned. Thus the common security and defence policy shall be guided by the general principles of the EU's external action.[147]

These general principles put a strong emphasis on fundamental rights and demonstrate a strong commitment to international law. They include the

> principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the

[141] Article 42 (7) LTEU.
[142] P Koutrakos, 'The Role of Law in Common Security and Defence Policy: Functions, Limitations and Perceptions' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* Edward Elgar Publishing Limited, Cheltenham 2011) 238.
[143] Koutrakos (n 142) 238.
[144] Koutrakos (n 142) 238; B Angelet, Bruno and I Vrailas, 'European Defence in the Wake of the Lisbon Treaty' (2008) Egmont Paper 21, Egmont – The Royal Institute for International Relations <http://www.egmontinstitute.be/paperegm/ep.21.pdf> 31.
[145] Koutrakos (n 142) 240.
[146] Article 222(1) LTFEU.
[147] Article 23 LTEU, Article 21(3) LTEU.

> principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[148]

Furthermore, the Union is asked to,

> (a) safeguard its values, fundamental interests, security, independence and integrity;
> (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
> (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
> (h) promote an international system based on stronger multilateral cooperation and good global governance.[149]

These references to international law, the purposes and the principles of the United Nations and to human rights will be discussed in chapter six below which will examine the legal relationship of the European Union with UN Security Council resolutions.

3. CSDP Instruments

The Treaty of Lisbon introduced some modest changes regarding the instruments with which the common security and defence policy is conducted. These changes mainly resulted in the renaming of the instruments. For example, the terms 'common positions' and 'joint actions' were deleted in favour of the term 'Council decision' but the instruments as such still exist.

According to Article 25 LTEU,

> [t]he Union shall conduct the common foreign and security policy by:
> (a) defining the general guidelines;
> (b) adopting decisions defining:
> (i) actions to be undertaken by the Union;
> (ii) positions to be taken by the Union;

[148] Article 21(1) LTEU.
[149] Article 21(2) LTEU.

(iii) arrangements for the implementation of the decisions referred to in points (i) and (ii);
and by
(c) strengthening systematic cooperation between Member States in the conduct of policy.

Over the past few years, practice has also led to the development of decisions *sui generis*. In addition, the conclusion of international agreements should be included in the list of instruments at the disposal of the European Union to conduct its security and defence policy.[150] If a military crisis management mission is carried out with the consent of the host state, the EU will conclude a status of mission agreement (SOMA) or a status of force agreement (SOFA) with the host state, setting out the legal status of the deployed troops.[151]

In the following, the Council decision defining actions to be undertaken by the Union, formerly known as joint actions, as well as Council decisions defining positions to be taken by the Union, formerly known as common positions, will be briefly outlined as they are the instruments used in practice when the European Union conducts its crisis management operations.

3.1. Council decisions defining actions to be undertaken by the Union

The Lisbon Treaty replaced the instrument of joint actions that 'shall address specific situations where operational action by the Union is deemed to be required'[152] with Council decisions where 'the international situation requires operational action'.[153] In practice, the instrument is merely referred to as a 'Council Decision' and cited in conjunction with Article 43 (2) LTEU.[154]

[150] Article 37 LTEU, Article 216 LTFEU..
[151] T Hadden (ed), *A Responsibility to Assist: EU Policy and Practice in Crisis-Management Operations under European Security and Defence Policy: A COST Report* (Hart Publishing, Oxford 2009) 67.
[152] Article 14 TEU Nice version.
[153] Article 28 LTEU.
[154] See for example, Council Decision 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces [2010] OJ L 44/16.

Before the entry into force of the Treaty of Lisbon, joint actions based on old Article 14 TEU (Nice version) were used for military[155] as well as civilian ESDP missions.[156] The current Treaty on European Union, like its previous version, lacks a clear definition of this type of instrument but it appears that Council decisions defining action to be undertaken by the Union continue to be used in the same way as they were previously.

3.2. Council decisions defining positions to be taken by the Union

According to Article 29 LTEU, the

> Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.

Although the Treaty offers the criterion that Council decisions defining positions to be taken by the Union shall refer to a particular matter of a geographical or thematic nature,[157] the TEU lacks a detailed definition of this instrument (formerly been known as a common position). In practice, this type of instrument is merely referred to as a Council decision.[158]

3.3. Procedure for the adoption of CSDP instruments

The procedure for the adoption of Council decisions within the context of the common security and defence policy differs slightly from the procedure applied within the common foreign and security policy. Council decisions including those initiating a crisis management mission of a military nature need to be adopted by the Council that either acts on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy or in response to an initiative from a member

[155] Council Joint Action 2003/423/CFSP on the European Union military operation in the Democratic Republic of Congo [2003] OJ L143/50.
[156] Council Joint Action 2003/681/CFSP on the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL 'Proxima') [2003] OJ L 249/66
[157] Before the Treaty of Amsterdam, neither the Single European Act nor the Treaty of Maastricht offered even this rather vague condition.
[158] See for example, Council Decision 2010/126/CFSP amending Common Position 2009/138/CFSP concerning restrictive measures against Somalia [2010] OJ L 51/18, which is based on Article 29 LTEU.

state.[159] Security and defence decisions require a unanimous vote.[160] The institutional involvement and voting requirements therefore slightly differ from the adoption of common foreign and security policy instruments. The latter are adopted by the European Council and the Council (which must act unanimously)[161] unless a qualified majority vote is permitted according to the rare exceptions mentioned in Articles 31(2) and (3) LTEU. Nevertheless, decisions that have military or defence implications always require a unanimous vote.[162]

Member states, however, still have the possibility of abstaining from a vote in the Council without blocking a Council decision, according to the principle of constructive abstention.[163] Under the condition that they make a formal declaration qualifying their abstention, they are not obliged to apply the decision. The Council decision nevertheless commits the Union as a whole and it is not without effects for the abstaining member states. 'In a spirit of mutual solidarity', they are under the negative obligation to 'refrain from any action likely to conflict with or to impede Union action based on that decision'.[164] However, if the abstaining states represent one third of the member states as well as one third of the Union's population, the Council decision cannot be adopted.

For the first time, the Treaty of Lisbon also enabled member states within the common security and defence policy to use the concept of enhanced cooperation.[165] This concept allows a group of at least nine member states to adopt CSDP acts under

[159] Article 42(4) LTEU.
[160] Article 42(4) LTEU.
[161] Article 31(1) LTEU.
[162] Article 31(4) LTEU.
[163] Article 31(1) LTEU.
[164] Article 31(1) LTEU.
[165] Article 20 LTEU in conjunction with Articles 326 LTFEU-334 LTFEU. The concept of enhanced cooperation was introduced by the Treaty of Amsterdam. Back then it excluded the common foreign and security policy. The Treaty of Nice extended the concept to the CFSP but only referred to the implementation of CFSP instruments and not to their adoption. The Treaty of Lisbon abolished this distinction. For a detailed analysis of the concept of enhanced cooperation see M Cremona, 'Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU' (2009) EUI Working Paper Law 2009/21 <http://cadmus.eui.eu/bitstream/handle/1814/13002/LAW_2009_21.pdf?sequence=1> 1-17; R Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' in M Trybus and N White (eds), *European Security Law* (Oxford University Press, Oxford 2007) 225-248.

strict substantive and procedural conditions. Enhanced cooperation is only permissible if it furthers Union objectives, protects Union interests and reinforces the process of European integration.[166] According to the last resort principle, the Council shall only authorise enhanced cooperation if the objectives of such cooperation cannot be attained by the Union as whole within a reasonable time.[167] CSDP instruments adopted within the framework of enhanced cooperation are only binding on those member states that participate.[168]

3.4. Implementation of CSDP instruments

In the absence of a European army, the European Union needs capable and willing member states to make their military personnel available for EU-led military crisis management missions. Although European member states are not obliged to deploy their troops for a European mission, the Treaty of Lisbon asks Member states 'to make civilian and military capabilities available to the Union for the implementation of the common security and defence policy'.[169] They are also explicitly asked to improve their military capabilities.[170]

The Treaty of Lisbon codified past practice and formally recognised two ways in which a group of member states can be assigned with the implementation of the Union's common security and defence policy. According to the concept of ad hoc cooperation,[171] 'the Council may entrust the execution of a task…to a group of Member States in order to protect the Union's values and serve its interests'.[172]

In addition, the Treaty introduced the possibility of permanent structured cooperation[173] for those 'Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area

[166] Article 20(1) LTEU.
[167] Article 20(2) LTEU.
[168] Article 20(4) LTEU.
[169] Article 42(3) subparagraph 1 LTEU.
[170] Article 42(3) subparagraph 2 LTEU.
[171] Article 42(5) LTEU, Article 44 LTEU.
[172] Article 42(5) LTEU.
[173] Article 42(6) LTEU, Article 46 LTEU in conjunction with the Protocol on Permanent Structured Cooperation.

with a view to the most demanding missions'.[174] The *Protocol on Permanent Structured Cooperation* annexed to the Treaty of Lisbon[175] sets out the conditions for participation and outlines the objectives that ought to be achieved. According to its preamble, the High Contracting Parties are determined 'to ensure that the Union is capable of fully assuming its responsibilities within the international community'. The preamble also reveals that the strengthening of the EU's security and defence policy asks member states to put more efforts into their capabilities. In addition, the concept is viewed as one possible means to put the EU's call for effective multilateralism as expressed in its *European Security Strategy* into concrete forms. The preamble recognises 'that the United Nations Organisation may request the Union's assistance for urgent implementation of missions undertaken under Chapter VI and VII of the United Nations Charter'. Thus, the two objectives to be achieved through the concept of permanent structured cooperation are the intensification of the development of defence capabilities and the capacity to supply a battle group.[176]

4. Institutions

One aim that was to be achieved with the failed constitution and that was carried over to the Treaty of Lisbon was the need to make the common foreign and security policy more coherent, effective and if possible more democratic.[177] For that purpose, the Treaty altered the institutional setting of the common foreign and security policy. New bodies like the High Representative for Foreign Affairs and Security that will be assisted by the European External Action Service as well a permanent President of the European Council have been introduced. The limited role played by the Commission and the European Parliament have been slightly enhanced.[178]

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[174] Article 42(6) LTEU. For a discussion of the concept of permanent structured cooperation see for example S Biscop, 'Permanent Structured Cooperation and the Future of ESDP' (2008) Egmont Paper 20, Egmont-The Royal Institute for International Relations <http://aei.pitt.edu/8970/1/ep20.pdf> 1-19.
[175] Protocol (NO 10) on Permanent Structured Cooperation Established by Article 42 of The Treaty On European Union [hereinafter Protocol on Permanent Structured Cooperation].
[176] Article 1a) and b) Protocol on Permanent Structured Cooperation
[177] European Council, Presidency Conclusions, *Laeken Declaration On the Future Of The European Union*, European Council Meeting in Laeken, 14 and 15 December 2001, Annex I, 23, SN 300/1/01 REV.
[178] The European Parliament can now hold a debate on the progress made in the implementation of the common security and defence policy twice a year, Article 36 (2) LTEU. For the role of the European Parliament in crisis management see K Raube, 'European Parliamentary Oversight of Crisis Management' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 181-198.

4.1. The High Representative and the European External Action Service

The new position of the High Representative for Foreign Affairs and Security Policy led to the abolition of the position of the Secretary-General of the Council that exercised the function of High Representative for the common foreign and security policy[179] and also made the position of the Commissioner for External Relations redundant. This office now links the Council with the Commission as she chairs the Foreign Affairs Council[180] and serves as one of the vice presidents of the Commission.[181] The High Representative's task is to conduct the Union's common foreign and security policy as well as its common security and defence policy.[182] She shall contribute through her proposals towards the preparation of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.[183] The High Representative represents the Union for matters relating to the common foreign and security policy, conducts political dialogue with third parties on the Union's behalf, and expresses the Union's position in international organisations and at international conferences.[184]

The High Representative enjoys its strongest role within the common security and defence policy. Decisions relating to the common security and defence policy initiating a crisis management mission are adopted by the Council on either its proposal or on the initiative of a member state.[185] Council decisions that form part only of the common foreign and security policy do not have to be proposed by the High Representative.

In her work, the High Representative is assisted by the European External Action Service.[186] The European External Action Service (EEAS) is a functionally

[179] Article 18(3) TEU.
[180] Article 18(3) LTEU.
[181] Article 18(4) LTEU.
[182] Article 18(2) LTEU.
[183] Article 27(1) LTEU.
[184] Article 27(2) LTEU.
[185] Article 42(4) LTEU.
[186] Article 27(3) LTEU.

autonomous body that works under the authority of the High Representative.[187] Several departments and functions that were previously exercised by the General Secretariat of the Council and by the Commission and Commission Delegations have been transferred to the European External Action Service. In addition to being in charge of the Policy Unit and the CSDP and crisis management structures that contain the Crisis Management and Planning Directorate, the Civilian and Conduct Capabilities and the European Union Military Staff; the EEAS will take over the Directorate-General E as well as the officials of the General Secretariat of the Council on secondment to European Union Special Representatives and CSDP missions.[188] In relation to the departments and functions previously exercised by the Commission, the European External Action Service will take over the Directorate-General for External Relations, including for example Directorate A (Crisis Platform and policy coordination in CFSP), Directorate B (Multilateral Relations and Human Rights) and Directorate D (European Neighbourhood Policy Coordination). Additionally, the Directorate-General for Development as well as the Commission's External Service will be transferred to the EEAS.

The expectations for the European External Action Service are high and Catherine Ashton, the first EU High Representative for Foreign Affairs and Security Policy, has argued that European External Action Service

> will mark a new beginning for European foreign and security policy as we bring together and streamline all of the Union's existing resources, staff and instruments….This combination of staff and resources will be more than the sum of its parts: we will be able to find synergies and develop new ideas, which will enhance our ability to act more creatively and decisively in an increasingly challenging world.[189]

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[187] Council of the European Union, Council Decision Establishing the Organisation and Functioning of the European External Action Service, Brussels, 20 July 2010, 11665/1/10/REV1, para 1.
[188] A detailed list can be found in Council of the European Union, Council Decision Establishing the Organisation and Functioning of the European External Action Service, Brussels, 20 July 2010, Annex, 11665/1/10/REV1
[189] EUROPA Press Release, *A new step in the setting-up of the EEAS: Transfer of staff on 1 January 2011*, Brussels, 21 December 2010, IP/10/1769 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1769&format=HTML&aged=0&language=EN&guiLanguage=en>.

4.2. The Permanent President of the European Council

According to Article 15 (6) LTEU,

> [t]he President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

However, the High Representative, too 'shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.'[190] The TEU does not offer much guidance on the question of how the President and the High Representative should divide the task of representing the Union between each other in practice.

4.3. The Court of Justice

The jurisdiction granted to the Court of Justice of the European Union with respect to the common foreign and security policy was slightly improved by the Treaty of Lisbon. In general, it still has no competence to review acts by the Union institutions adopted in this policy field.[191] The Treaty of Lisbon nevertheless codified past practice and the Court now formally has jurisdiction to protect the Union competences from being intruded on by the common foreign and security policy.[192] In addition, natural or legal persons now have the opportunity to use the annulment procedure under Article 263 LTFEU to have the legality of decisions providing for restrictive measures adopted on the basis of the common foreign and security policy reviewed.[193] This introduction might be of importance for restrictive measures, that unlike economic and financial sanctions, do not combine CFSP decisions with instruments of secondary Union legislation that are subject to judicial review anyway.

[190] Article 27(2) LTEU.
[191] Article 24(1) subparagraph 2 LTEU 3rd sentence.
[192] Article 40 LTEU, Article 275(2) LTFEU.
[193] Article 275 LTFEU.

Apart from these two novelties, neither the member states nor the EU institutions can initiate an annulment procedure in a dispute concerning their respective powers. Member state courts also have not been provided with the opportunity to start a preliminary rulings procedure with regards to the meaning, scope or validity of a measure based on the common foreign and security policy.[194] Nonetheless, chapter three will show that military crisis management missions under the framework of the common security and defence policy are guided by legal rules. It will be argued that European member states are constrained in the conduct of their domestic foreign policies though Council decisions adopted within the context of CSDP missions.

Part 3

European military crisis management missions in practice

Before the impact of the instruments of the common security and defence policy that are adopted during the course of a military crisis management mission on the EU member states' domestic foreign policies will be assessed in chapter three, which will serve as an indicator of the already achieved level of European integration in security and defence matters, the next part will take a closer look at how a European military crisis management mission is conducted in practice. Following some general remarks, part three will conclude by providing an overview of EU-led Operation Atalanta.

1. European military crisis management missions – some general remarks

Before the European Union actively engages in a conflict it has to go through a complex decision-making process. Suggestions that an intervention may be appropriate may originate from member states or the High Representative for Foreign Affairs and Security Policy but they may even come from outside.[195] The

[194] M-G Garbagnati Ketvel, 'The Jurisdiction of the European Court of Justice in Respect of the Common Foreign and Security Policy' (2006) International and Comparative Law Quarterly 18.
[195] A Björkdahl and M Strömvik, 'The Decision-Making Process Behind Launching an ESDP Crisis Management Operation' (April 2008) DIS Brief (Danish Institute For International Studies) <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=55772> 1.

United Nations for example, called on the European Union in UNSCR 1671 (2006) to take all appropriate steps in its EUFOR RD Congo mission.

At each stage of the decision-making process, the different actors involved will reflect on the role the EU should assume in a particular conflict: i.e. whether the EU should start an independent EU-led operation on its own or in cooperation with other international actors, or whether the European member states should rather contribute their troops to missions under the auspices of the UN, NATO or an ad hoc coalition of states or international organisations outside a European framework.[196]

The decision-making procedure starts with the monitoring of the situation to identify whether a serious international or internal conflict may arise that could create a threat to either international security or to the population, in particular with regards to serious human rights violations.[197] If the assessment of a conflict situation or external pressure, for example through the media or non-governmental organisations, indicates that an intervention will be seriously discussed within European policy circles, the Political and Security Committee will initiate the drafting of a crisis management concept, containing guidelines of a broad and general nature of what type of action will be acceptable to European member states.[198] At this stage the EU must address the framework under which the intervention should best be planned: e.g. should it be the EU at the forefront or should the action take place under the auspices of the United Nations or NATO?[199] At an operational level a detailed discussion between senior representatives from military, police or civilian backgrounds within the EU, the UN and NATO will take place to assess the most effective arrangements concerning the recruitment and deployment of personnel that might be available from member states.[200] Once the provisional decision has been reached that an EU mission would be not only appropriate but also feasible, the Political and Security Committee will prepare a formal proposal often including a selection of strategic options for military deployments and civilian modules that go

[196] Hadden (n 151) 46.
[197] Hadden (n 151) 46.
[198] Hadden (n 151) 46, 48.
[199] Hadden(n 151) 48.
[200] Hadden (n 151) 48.

along with it.[201] After the Council has formally approved the mission, its implementation will be prepared.[202] This stage entails the preparation of formal documents that set out the mandate of anybody involved in the mission and classify their legal status.[203] In addition, the development of more detailed plans regarding operational questions and force generation will be set into motion.[204]

The mandate of a mission can be divided into external and internal aspects.[205] If the mission will be carried out with the consent of the host state, the EU will conclude a SOMA or SOFA agreement with the host state.[206] This agreement will determine the legal status of the deployed troops and will contain their duties, privileges and freedoms. It is not the same as the mission mandate.[207] With regards to special freedoms it might include, for example, provisions regarding the freedom of movement of EU personnel and the freedom to carry arms.[208]

Internally, the EU will adopt a Council decision in the form of the instrument that has been formerly known as a joint action. The Council decision concerning operational action to be undertaken by the European Union is usually not very detailed. For example, a Council decision could set out the broader framework of the EU's operational action, including the purpose of the operation[209]as well as limits of time and territory.[210] In contrast to civilian crisis management missions whose mandates are phrased in more precise terms and are published, the details of the mandate of a military operation can be found in the rules of engagement that are not publicly available.[211] The rules of engagement will determine how robust a military mission is designed to be and may determine whether deadly force will be used

[201] Hadden (n 151) 48, 49.
[202] Hadden (n 151) 49.
[203] Hadden (n 151) 49.
[204] Hadden (n 151) 49.
[205] Hadden (n 151) 67.
[206] Hadden (n 151) 67.
[207] Hadden (n 151) 67, 69.
[208] Hadden (n 151) 69.
[209] For example, to support the election process in the Democratic Republic of Congo.
[210] See for example, Council Joint Action 2006/319/CFSP on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process [2006] OJ L 116/98.
[211] Hadden (n 151) 71.

merely in self-defence or for the protection of others or in general for the attainment of the mission's goals.[212] Rules of Engagement often contain provisions on the positioning of troops; when and how troops should intervene; what weapons the personnel is allowed to choose from; the identification of legitimate targets; and on the use of force in general.[213] In the context of crisis management missions, the EU also adopts Council decisions formerly known as common positions to express a common stance on a certain topic that will guide the implementation of the EU mission. Such a Council decision could include, for example, the EU's commitment to support the observance of a ceasefire agreement and therefore can be viewed as putting the mandate for a mission into more concrete terms.[214]

2. Operation Atalanta as a practical example

In the case of Operation Atalanta, the Security Council authorised states to use all necessary means, including the use of military force, in Resolutions 1814 (2008), 1816 (2008) and 1838 (2008). The Transitional Federal Government of Somalia (TFG) had requested that the UN Security Council take action 'to protect shipping involved with the transportation and delivery of humanitarian aid'[215] and also expressed its willingness to work with others 'to combat piracy and armed robbery at sea off the coast of Somalia'.[216] Initially the authorisation 'to use all necessary means' was limited in scope and restricted the use of force to the high seas and airspace off the coast of Somalia, as well as within the territorial waters of Somalia.[217]

In reaction to the above mentioned UN Security Council resolutions, the European member states agreed to conduct a crisis management operation within the framework of the EU's common security and defence policy. The EU offered its

[212] Hadden (n 151) 73, 74.
[213] For a detailed description and analysis of Rules of Engagement, see Hadden (n 151) 73, from whom these examples are taken.
[214] See for example, Council Common Position 2003/319/CFSP concerning European Union support for the implementation of the Lusaka Ceasefire Agreement and the peace process in the Democratic Republic of Congo (DRC) [2003] OJ L 115/87.
[215] UN Security Council Resolution 1814 (2008) para 11.
[216] UN Security Council Resolution 1838 (2008).
[217] UN Security Council Resolution 1816 (2008) para 7 b, UN Security Council Resolution 1838 (2008) para 3.

cooperation to the TFG.[218] The Council adopted a joint action, the instrument that was renamed by the Treaty of Lisbon into a decision defining action to be undertaken by the Union, Article 28, 25 LTEU. *Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast*[219] sets out the mandate of the mission to protect vessels of the World Food Programme as well as merchant vessels. Operation Atalanta shall

> take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present.[220]

The forces deployed were only allowed to 'operate, up to 500 nautical miles off the Somali coast and neighbouring countries'.[221] The mandate was supposed to terminate after twelve months, subject to the prolongation of the relevant UN Security Council Resolutions.[222]

In response to UN Security Council Resolution 1851 (2008) that welcomed the launch of EU Operation Atalanta and that extended the mandate to 'all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea' provided that any measures 'shall be undertaken consistent with applicable international humanitarian and human rights law',[223] the Council amended the mandate of the mission. Currently, the area of Operation Atalanta includes 'the Somali coastal territory and internal waters, and the maritime areas off the coasts of Somalia and neighbouring countries'.[224]

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[218] Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L 301/33 Article 5.
[219] Council Joint Action 2008/851/CFSP (n 218).
[220] Council Joint Action 2008/851/CFSP (n 218) Article 2.
[221] Council Joint Action 2008/851/CFSP (n 218) Article 1(2).
[222] Council Joint Action 2008/851/CFSP (n 218) Article 16.
[223] UN Security Council Resolution 1851 (2008) para 6.
[224] Council Decision 2012/174/CFSP amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2012] OJ L 89/69.

Apart from setting out the mission mandate, Council Joint Action 2008/851/CFSP introduced the institutional framework for the conduct of the military crisis management operation. It appointed the EU Operation Commander[225] and designated the EU Operational Headquarters to be located in Northwood, UK.[226]

The Political and Security Committee (PSC) under the responsibility of the Council has been assigned the task of exercising political control and strategic direction for the military operation. The Council authorised the PSC to take the relevant decision in accordance with Article 38 LTEU, including 'the powers to amend the planning document, including the Operation Plan, the Chain of Command and the Rules of Engagement' and 'the powers to take decisions on the appointment of the EU Operation Commander and /or EU Force Commander'.[227] The PSC is under the obligation to report to the Council at regular intervals.[228] In turn, the PSC receives reports from the chairman of the EU Military Committee in respect of the conduct of the military operation.[229]

With regards to military direction, the joint action provides that it is for the EU Military Committee to monitor the proper execution of the EU military operation under the responsibility of the EU Operation Commander. For that purpose, the latter has to provide the former with reports in regular intervals.[230] Furthermore, the joint action touches upon the status of EU-led forces and their personnel[231] which are negotiated in detail in a SOFA agreement, concluded by the European Union and the Somali Republic.[232] The Operation Plan and the rules of engagement are not publicly available but they have been approved by the Council.[233]

[225] Council Joint Action 2008/851/CFSP (n 218) Article 3.
[226] Council Joint Action 2008/851/CFSP (n 218) Article 4.
[227] Council Joint Action 2008/851/CFSP (n 218) Article 6 (1).
[228] Council Joint Action 2008/851/CFSP (n 218) Article 6 (2).
[229] Council Joint Action 2008/851/CFSP (n 218) Article 6 (3).
[230] Council Joint Action 2008/851/CFSP (n 218) Article 7.
[231] Council Joint Action 2008/851/CFSP (n 218) Article 11.
[232] Agreement between the European Union and the Somali Republic on the status of the European union-led naval force in the Somali Republic in the framework of the EU military operation Atalanta [2009] OJ L 10/29, attached to Council Decision 2009/29/CFSP [2009] OJ L 10/27.
[233] See Council Decision 2008/918/CFSP [2008] OJ L 330/19.

Apart from provisions on political control, strategic direction as well as on military direction, the joint action furthermore provides for the authority of the Political and Security Committee to invite third states to participate in the operation.[234] To help manage their military contributions, the PSC has set up a Committee of Contributors. The Committee provides 'the main forum where contributing States collectively address questions relating to the employment of their forces in the Operation.[235] Norway and Croatia are participating in the EU's operation Atalanta.[236]

Conclusion

The purpose of this chapter was to describe the historical development and the state of affairs of the European common security and defence policy under which European crisis management operations of a military nature are launched and conducted. For a long time, it has been unthinkable to imagine Europe as a military actor. Although attempts to coordinate European member states' defence policies can be dated back to the 1950s, real progress was not made until the late 1990s. Gradually, the European Union has been equipped with bodies, structures and capabilities that enable it to become an emerging international military security provider. Since 2003, the CSDP is operational and military force has been used several times in EU-led crisis management operations. Whether or not the EU will engage in robust peace-enforcement operations in the future is to be seen. To complete the examination of the European legal framework on the use of force, the next chapter will analyse the legal effects produced by the instruments with which the European Union conducts its common security and defence policy. It will be examined whether and if so to what extent European member states are constrained in the conduct of their national foreign policies through Council decisions adopted in the context of EU military crisis management operations.

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[234] Council Joint Action 2008/851/CFSP (n 218) Article 10.

[235] Political and Security Committee Decision Atalanta/3/2009 on the setting up of the Committee of Contributors for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) [2009] OJ L 112/9.

[236] Political and Security Committee Decision Atalanta/2/2009 on the acceptance of third States' contribution to the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta*)* [2009] OJ L 109/52; Council Decision 2009/597/CFSP on the signing and provisional application of the Agreement between the European Union and the Republic Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta) [2009] OJ L 202/83.

Chapter 3: The level of integration achieved in the common security and defence policy: Are the member states constrained in the conduct of their national foreign policies by decisions adopted within the common security and defence policy?

Introduction

Chapter two offered a historical and descriptive overview of how the European Union was equipped with organs, procedures and instruments to enable it to become an international military crisis management actor. These new structures and ever more detailed provisions regarding its common defence and security policy indicate an ongoing process of integration. However, its scale is still unclear. The purpose of this chapter is to assess the vertical relationship between the European Union and European member states in the context of European military crisis management missions. It will be analysed whether and if so to what extent the European member states are constrained in the conduct of their national foreign and defence policies through the EU's common security and defence policy.[1] This assessment will be of importance for the discussion in chapter six that will examine whether or not European member states have been functionally substituted by the European Union with regards to the use of force applied in the context of European military crisis management operations.

The next section will focus on the binding nature of CSDP instruments with which the Union's common security and defence policy is exercised. This will be followed by a look at primary CFSP law, which will highlight the principle of systematic cooperation and the principle of loyal cooperation.

[1] For a detailed discussion of how the common foreign and security may constrain member states in the conduct of their domestic foreign policies, see C Hillion and R Wessel, 'Restraining External Competences of EU Member States under CFSP' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals: Essays in European Law* (Hart Publishing, Oxford 2008) 79-121.

1. Military crisis management missions and their legal constraints on the member states' domestic foreign policy choices – the binding nature of CSDP instruments

When it starts a military crisis management operation, the European Union usually adopts a Council decision (formerly known as a joint action) in which it sets out the broader framework of its operational action, including the purpose of the operation[2] as well as limits of time and territory.[3] In the context of crisis management missions, the EU also adopts Council decisions (formerly known as common positions) to express a common stance regarding a certain topic that will guide the implementation of the EU mission, including for example its commitment to support the observance of ceasefire agreements.[4] It will be argued here that European member states are bound by both types of secondary common foreign and security instruments.[5] It will also be held that their binding nature is reinforced by the guiding principles of primary CFSP law itself. [6] Thus, although they are not obliged to make their capabilities available for an EU-led crisis management mission, European member states are under an obligation to support EU crisis management operations actively and they are also asked not undermine the success of a Union mission.

This holds true even for the neutral and non-aligned EU member states, including Austria, Cyprus, Finland, Ireland, Malta and Sweden since they fully participate in the EU's common security and defence policy.[7] Denmark is an exception. According to Protocol No 22 on the Position of Denmark annexed to the Treaty on European

[2] For example to support the election process in the Democratic Republic of Congo.
[3] See, for example, Council Joint Action 2006/319/CFSP on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process [2006] OJ L 116/98.
[4] See, for example, Council Common Position 2003/319/CFSP concerning European Union support for the implementation of the Lusaka Ceasefire Agreement and the peace process in the Democratic Republic of Congo (DRC) [2003] OJ L 115/87.
[5] Crisis management missions fall within the common security and defence policy. The latter however forms an integral part of the common foreign and security policy and has to make use of CFSP instruments.
[6] For a detailed discussion of how the common foreign and security may constrain member states in the conduct of their domestic foreign policies, see Hillion and Wessel (n 1).
[7] J Ladzik, Federal Trust and Global Policy Institute, 'The EU's Member States and European Defence: ESDP in the Lisbon Treaty' (2008) European Policy Brief April 2008 <http://www.fedtrust.co.uk/content.php?cat_id=3&content_id=127>. Finland and Sweden participate in the Nordic Battlegroup. See Swedish Armed Forces, 'Nordic Battlegroup' <http://www.forsvarsmakten.se/en/Organisation/Nordic-Battlegroup/>.

Union and to the Treaty on the Functioning of the European Union, 'Denmark does not participate in the elaboration and implementation of decisions and actions of the Union which have defence implications. Therefore Denmark does not participate in their adoption' and it also does not 'make military capabilities available to the Union'.[8]

1.1. The binding nature of Council decisions defining actions to be undertaken by the Union

To find out whether Council decisions defining actions to be undertaken by the Union that were formerly known as joint actions are legally binding, the wording of Article 28 LTEU, its systematic context, and its underlying rationale have to be analysed.[9] According to Article 28(2) LTEU, Council decisions commit the member states to the position they adopt in the conduct of their activity. The use of the word 'shall' in this article indicates its legally binding character in respect of the member states and the conduct of their national foreign policies. This reasoning is supported by the systematic relationship of Article 28(2) LTEU with paragraph 1, second subparagraph, and paragraphs 4 and 5 of the same Article. Paragraph 1, subparagraph 2 states that even when there has been a substantial change of circumstances underlying a decision, 'the Council shall review the principles and objectives of that decision and take the necessary decisions'. The Council thus adopts a new decision and until it does so the member states are bound by the old decision.[10] It is in this respect that the Treaty of Nice was more supportive of the binding nature of Council decisions than the Treaty of Lisbon. Article 14(2) TEU (Nice version) stated that the

[8] Article 5 Protocol No 22 on the Position of Denmark [2010] OJ C 83/301. Council Decisions adopted within the CSDP framework usually refer in their preamble to the opt-out of Denmark. See for example Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery of the Somali coast [2008] OJ L 301/33. Although it is not participating in Operation Atalanta, Denmark is contributing to the fight against piracy off the coast of Somalia. See UN Security Council Resolution 1846 (2008) para 6.

[9] On the binding nature of common strategies that have been abolished with the entry into force of the Lisbon Treaty, see A Dashwood, 'Decision-Making at the Summit' (2000) 3 The Cambridge Yearbook of European Legal Studies 86. On decisions sui generis and their binding nature, see A Dashwood, 'The Law and Practice of CFSP Joint Actions' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals: Essays in European law* (Hart Publishing, Oxford 2008) 60 and P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, Oxford 2004) 407, 408.

[10] Hillion and Wessel (n 1) 84.

joint action shall stand as long as the Council has not acted. Nonetheless, the wording of Article 28 LTEU is still clear enough to conclude that Article 28(1) subparagraph 2 LTEU does not allow the member states to invoke a radical change of circumstances to pursue their national foreign policies. Instead, it is for the Council to decide what should be done. However, paragraph 4 allows a member state, in the case of imperative need arising from a change in situation and after failing to obtain a new Council decision, to take necessary measures as a matter of urgency, accompanied by the duty of immediately informing the Council. Apart from this provision which seems to be the only exception from the binding nature of an operational decision,[11] a member state facing difficulties in implementing a Council decision is asked to address the Council in order for it to seek an appropriate solution.[12] In sum, the wording of Article 28 LTEU together with its systematic context indicates that operational decisions are binding onthe member states in the conduct of their national security and defence policies.

1.2. The binding nature of Council decisions defining positions to be taken by the Union

According to Article 29 LTEU, the

> Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.

Although the Treaty text offers the criterion that Council decisions defining positions to be taken by the Union[13] shall refer to a particular matter of a geographical or thematic nature,[14] the Treaty on European Union lacks a detailed definition of this instrument that was formerly known as a common position. The wording of the Lisbon Treaty in respect of Union positions is identical to the provision on common positions in the Nice Treaty.

[11] Hillion and Wessel (n 1) 84.
[12] Article 28(5) LTEU.
[13] Council decisions defining positions to be taken by the Union will be referred to as Union positions in the following.
[14] Before the Treaty of Amsterdam, neither the Single European Act nor the Treaty of Maastricht offered even this rather vague condition.

When turning to the question whether Union positions are binding on the member states, it should be mentioned that Article 29 LTEU still falls short of offering the amount of information that the provisions on operational decisions do. The wording of Article 29 LTEU that member states 'shall ensure that their national policies conform to the Union positions' appears not to be as strict as the wording of Article 28(2) LTEU, which stresses that operational decisions 'shall commit the Member States in the provisions they adopt and in the conduct of their activity'. However, there is still not enough substance to conclude that the difference in wording of operational decisions and Union positions should indicate as an *actus contrarius* argument that Union positions are not binding on the member states. Rather, the use of the term 'conformity' implies that the member states are under a negative as well as a positive obligation in respect of the conduct of their national foreign policy.[15] On the one hand, they are under the negative obligation to refrain from adopting any national foreign policy measures that would hinder the effect of existing or anticipated Union positions. On the other hand, they are under the positive obligation to modify their national foreign policy decisions that run counter to Union positions.[16] Both obligations are elements of the more general legal requirement created by Union positions that member states are not supposed to undermine the goals and aims of a Union position thorough their action or inaction.[17] Viewed from this perspective, it has been argued that Article 29 LTFEU would itself therefore incorporate a loyalty obligation for the member states in the context of the common foreign and security policy.[18]

The instruments with which the European Union conducts its military crisis management missions within the framework of the common security and defence policy are legally binding on the member states. The following section will show that their binding nature is underlined and reinforced by the legal obligations created

[15] Hillion and Wessel (n 1) 85.
[16] Hillion and Wessel (n 1) 85.
[17] N Lavranos, *Legal Interaction between Decisions of International Organizations and European Law* (European Law Publishing, Groningen; Amsterdam 2004) 198.
[18] Lavranos (n 17) 198.

through primary CFSP law – in particular through the principle of systematic cooperation and the principle of loyal cooperation.

2. Binding nature of primary EU law in the context of crisis management operations: the principle of systematic cooperation and the principle of loyal cooperation

The analysis of the binding nature of primary EU law will focus on the principle of systematic cooperation as stipulated by Article 32 LTEU and the loyalty obligation of Article 24 (3) LTEU.

2.1. The principle of systematic cooperation

The principle of systematic cooperation as codified in Article 32 LTEU states that the member states

> shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach.[19]

The wording indicates through the use of the word 'shall' that the member states are under the obligation to consult each other. One of the minor changes Article 32 LTEU brought in contrast to the Nice Treaty provision[20] is the removal of the explicit obligation for the member states to inform one another on any matter of general interest. However, as consultation between the member states is only possible after information has taken place, the obligation to inform seems to be contained in the obligation to consult each other. Thus, the scope of the principle of systematic cooperation has not been limited by the Treaty of Lisbon, despite the slight change in the wording. When analysing the obligation to consult one another, two questions need to be addressed, namely what is entailed in the obligation to consult and when are the member states obliged to consult one another.

[19] Article 32 LTEU.
[20] Article 16 TEU Nice version.

In international law, the obligation of consultation comprises the duty to avoid a position being taken before the matter has been discussed with the other partners.[21] Article 32 LTEU does not indicate any deviation from this concept of consultation. As a result, the principle of systematic cooperation as expressed in Article 32 LTEU entails the negative obligation for the member states not to go public with a domestic position on CFSP matters of general interest before the matter has been discussed within the CFSP framework first.[22] This interpretation of Article 32 LTEU is supported by the systematic relationship with Article 24(3) LTEU that entails the principle of loyal cooperation. This will be addressed in the next section.

When determining in what circumstances the member states are under the obligation to consult each other, it seems that matters of foreign and security policy of 'general interest' are a broad category. A 'general interest' supposedly goes beyond purely national interests. But who defines what general interest is? The wording of Article 32 sentence 1 LTEU suggests that it is defined by the member states, which would therefore limit the content of the obligation.[23] However, in contrast to old Article 16 TEU (Nice version), which stated that the duty to inform and to consult exists 'in order to ensure that the Union's influence is exerted as effectively as possible by means of concerted and convergent action', Article 32 LTEU now contains the sentence that the member states 'shall ensure, through the convergence of their actions, that the Union is able to assert its interest and values on the international scene'. The new wording, probably in line with the granting of legal personality to the EU,[24] thus speaks in favour of determining matters of foreign and security policy of general interest not from the perspective of the member states but from the perspective of the European Union itself. In consequence, the Lisbon Treaty stresses the importance of the principle of systematic cooperation. However, as the member states in practice can still prevent topics from being placed on the agenda of the Union, the impact of the new wording will be limited. In sum, when a topic of foreign and security policy of general interest to the Union is concerned, the member

[21] Hillion and Wessel (n 1) 82.
[22] Hillion and Wessel (n 1) 82.
[23] See Hillion and Wessel (n 1) 81.
[24] Article 47 LTEU.

states are not free to act as they please. They are under the obligation to consult one another in the forum of the Union to ensure a common approach.

2.2. The principle of loyal cooperation

The principle of loyal cooperation as expressed in Article 24 (3) LTEU lays down that the member states

> shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.
>
> The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The principle of loyal cooperation, included in Title V on General Provisions on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy, is more specific than the general obligation of the member states to fulfil treaty obligations and the principle of sincere cooperation as expressed in Article 4(3) LTEU which forms part of Title I on Common Provisions.[25] The principle of sincere cooperation states that

> the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union' tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

[25] W Wessels, and F Bopp, 'The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional Breakthrough or Challenges ahead? (June 2008) CHALLENGE - The Changing Landscape of European Liberty and Security, Research Paper No. 10 <http://www.ceps.eu/files/book/1677.pdf> 12.

Through the use of the term 'shall', the wording of the principle of loyal cooperation indicates that the member states are obliged to act loyally and to cooperate. The mandatory character is underlined through the requirement that the member states have to support the Union's policy 'actively' and 'unreservedly'.[26]

The loyalty obligation involves both positive and negative obligations.[27] The positive obligation asks the member states actively to work together to enhance and develop the Union's external and security policy. The negative obligation requests the member states to refrain from any action which runs counter to the interests of the EU or which is likely to infringe its effectiveness. The Lisbon Treaty introduced an amendment in comparison to old Article 11(2) TEU (Nice version) stating that the member states 'shall comply with the Union's action' in the area of external and security policy. However, this amendment relates to the already expressed positive as well as negative obligations of the member states in the context of loyal cooperation, without giving them a new meaning. It rather puts more emphasis on their importance. In sum, the loyalty obligation as expressed in the Lisbon Treaty thus stresses the member states' obligation to respect the Union's CFSP *acquis* and to refrain from unilateral action that could undermine the Union's common foreign and security interests.

The real significance of the binding nature of primary CFSP provisions becomes visible in conjunction with secondary CFSP law. When the member states reach a solution in the Council, and the Council adopts a Union decision, the principle of systematic cooperation and the loyalty obligation underline and enhance the member states' obligation to conduct their national foreign policy in line with the Union's common foreign and security policy. In other words, the member states are constrained in the conduct of their national policy by instruments of the common security and defence policy in conjunction with the principles of primary CFSP law.[28] In this respect, the principle of loyal cooperation, containing the positive obligation for the member states actively to support the Union's foreign and security

[26] Hillion and Wessel (n 1) 91.
[27] Hillion and Wessel (n 1) 91, 92.
[28] Hillion and Wessel (n 1) 84, 85 and 96.

policy, as well as the negative obligation to refrain from any action that might run counter to the Union's CFSP *acquis*, seems to be of greater significance than the principle of sincere cooperation that asks the member states to consult one another to ensure a Union decision.

Conclusion

The analysis of the provisions of the common foreign and security policy of which the common security and defence policy forms an integral part, leads to the conclusion that European member states are constrained in the conduct of their national foreign policies.[29] Council decisions defining actions to be undertaken by the Union in the context of military crisis management missions, as well as Union positions, are legally binding on them.[30] Their binding nature is enhanced and reinforced by the principle of systematic cooperation and the principle of loyal cooperation.[31] Once a Council decision has been adopted, the member states are on the one hand under the obligation actively to support the Union's policy and on the other hand they are under the obligation to refrain from any unilateral or multilateral action that could undermine the respective Council decision. Hence, the member states are constrained in the conduct of their national security and defence policies by secondary CSDP provisions.[32]

However, the member states are only constrained once they have voted in the Council and the Council has adopted a CSDP instrument. No obligation exists to

[29] Advocte General Maduro appears to share this view when he states that 'the powers retained by the Member states in the field of security policy must be exercised in a manner consistent with Community law', Opinion of Advocate General Maduro in Case C-402/05 P *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351 para 30.

[30] Hillion and Wessel (n 1) 84, 85; K Lenaerts and T Corthaut 301, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 European Law Review 301.

[31] For a detailed discussion of how the common foreign and security policy may constrain member states in the conduct of their domestic foreign policies, see Hillion and Wessel (n 1).

[32] On the binding nature of common positions and joint actions see also M Cremona, 'Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU' (2009) EUI Working Paper Law2009/21 <http://cadmus.eui.eu/bitstream/handle/1814/13002/LAW_2009_21.pdf?sequence=1> 2 and M Koskenniemi, 'International Law Aspects of the Common Foreign and Security Policy' in M Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International, The Hague 1998) 31-35.

create a common policy in respect of certain issues.[33] Thus, the common security and defence policy creates legal obligations for the member states but they are of a limited nature.[34] Nonetheless, if the member states decide in the Council to start a military crisis management operation, they are not free to act as they please anymore and they are limited in their use of force outside a European mission. They would violate CSDP law if they would deploy soldiers outside the territory defined in a Council decision, if they would continue to use force once the time limit identified by Council decision has expired or if they would use force to pursue a purpose that has not been identified by the Council decision, for example by using force to get certain politicians out of office instead of supporting the peaceful conduct of an election process. The question if member states could be constrained by the Union's common security and defence policy even if a CSDP decision has not been adopted yet will be discussed in chapter seven.

Integration in the common security and defence policy is ongoing. Once, the European Union conducts a military crisis management operations, the member states are not only constrained by CSDP provisions adopted for that purpose but the contributing member states also stop being the only relevant actors. Although the military personnel in EU crisis management missions are deployed by the member states that retain some power over their troops, the Political and Security Committee plays a major and decisive role in crisis management operations. As explained in the context of operation Atalanta in chapter two, it is for the PSC to exercise political control and strategic direction. With regards to military direction, it is for the EU Military Committee to monitor the proper execution of the EU military operation under the responsibility of the EU Operation Commander. The EU Operation Commander himself is appointed by the Political and Security Committee. The Military Committee is under the obligation to report to the PSC in regular intervals.

[33] Lenaerts and Corthaut (n 30) 301.
[34] On the limits of legal rules in the sphere of the Union's common security and defence policy see also P Koutrakos, 'The Role of Law in Common Security and Defence Policy: Functions, Limitations and Perceptions' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing Limited, Cheltenham 2011) 235-258.

A chain of command can be established with the Political and Security Committee at its centre.

Thus, the conduct of military personnel of the member states that is put at the disposal of the EU are in principle not attributable to their nation states but to the Union, due to a transfer of authority to the EU mission.[35] Overall, it has been held that the command and control arrangements in crisis management operations allow concluding that these missions are de facto organs of the EU over which the Union has effective control.[36]

This finding is not uncontested as some of the member states have appeared as the driving forces behind EU crisis management missions. In particular France has been considered to be the decisive power before the launch and during the conduct of operation EUFOR in Chad.[37] In addition, the PSC that plays a key role in the context of European crisis management operations is a Council body. The member states are still the driving forces in the Council.

Nonetheless, due to the command and control structure of EU military missions that even third parties contributing their military capabilities to an EU mission[38] have to accept,[39] it will be held in the following that in the context of military crisis management operations, the European Union appears as the relevant military actor.[40] This argument can be reinforced by the legally binding nature of the CSDP instruments with which military crisis management operations are launched and conducted as explained above.

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[35] F Naert, 'Accountability For Violations Of Human Rights Law By EU Forces' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 380.
[36] Naert (n 35) 379.
[37] G Gya, 'Chad: Civilian – Military and Humanitarian Intervention' (2007) 35 European Security Review, ISIS Europe < http://www.isis-europe.eu/sites/default/files/programmes-downloads/2007_artrel_23_esr35chad-humanitarian.pdf> 2.
[38] Croatia and Norway are contributing to Operation Atalanta.
[39] Political and Security Committee Decision Atalanda/3/2009 on the setting up of the Committee of Contributors for the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta) [2009] OJ L 112/9.
[40] V Falco, 'The International Legal Order of the European Union as a Complementary Framework for its Obligations under IHL' (2009) 42 Israel Law Review 181, 182.

The conclusion that the European Union is the relevant military actor and the potential party to a conflict[41] creates complex questions about the EU's relationship with human rights and humanitarian law. These questions are not merely of a theoretical nature but are also of practical significance.

Operation Atalanta is not conducted in a traditional post-conflict environment and is mandated to use force not merely in self-defence. The military personnel deployed in Operation Atalanta are confronted with heavily armed pirates and have been authorised under Chapter VII of the UN Charter to 'take the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where it is present'.[42] Thus, the EU as an international military actor is likely to act in scenarios in which human rights law or international humanitarian law might be applicable.[43]

The EU is bound by European fundamental rights, even when it is acting externally, according to Article 6 (3) LTEU.[44] The European Union is not and, for the time being, cannot accede to the main humanitarian law instruments. In 2005, the EU has adopted guidelines in which it emphasises 'the goal of promoting compliance with IHL' as one of its founding principles.[45] It has been held that humanitarian law should be read into the obligations deriving from Article 6(3) LTEU.[46] In addition it

[41] Falco (n 40) 182.
[42] Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L 301/33 Article 2.
[43] Operation Atalanta is not conducted in an international armed conflict and therefore international humanitarian law is not applicable. For a detailed examination, see D Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?' (2010) 11 Melbourne Journal of International Law 141.
[44] See for example Naert (n 35) 388;
[45] European Union Guidelines on promoting compliance with international humanitarian law (IHL) [2005] OJ C 327/04 para 3.
[46] M Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitraian Law by EU Crisis Management Operations' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 402.

has been argued that the EU as a military actor is bound by those rules of humanitarian law that have acquired the status of customary law over time.[47]

The development of new crisis management tools and techniques underlines the importance of ensuring respect for human rights and humanitarian law in EU military missions. Although the EU, unlike other international actors, has not yet used unmanned aerial vehicles or drones the European Defence Agency has identified in its 2012 work programme the support of 'the development of a European civil/military UAV agenda' as one of its cross-cutting programmes, projects, and initiatives.[48] Apart from surveillance tasks, drones could be used to target the boats or the equipment of pirates and even to target the pirates themselves. If pirates that are not combatants are killed instead of arrested, the EU could be responsible for violations of human rights law.[49]

Chapters two and three have outlined the European legal framework for the use of force in European crisis management operations of a military nature. Using a descriptive approach, the historic development of a common security and defence policy has been outlined. This was followed by a description of the current legal framework established under the Treaty of Lisbon for the launch and conduct of European military crisis management operations. Although member states are reluctant to lose some of their powers in security and defence matters, chapter three has used an analytical approach to demonstrate that European integration in this highly sensitive policy field has already taken place. Once the European member states have agreed to the launch of a military operation within the framework of the common security and defence policy, they are legally bound by the instruments with which such operations are conducted. Following the assessment of the European

[47] V Falco, 'Human Rights and International Humanitarian Law in the Common Security and Defence Policy: Legal Framework and Perspectives for PMSC Regulation' (2009) EUI Working Papers, AEL 2009/25, Academy of European Law, PRIV-WAR project <http://cadmus.eui.eu/bitstream/handle/1814/13573/AEL_2009_25.pdf;jsessionid=BE83910B9169FD48A72A11D54CB33843?sequence=1> 14.

[48] European Defence Agency, EDA Work Programme 2012, approved by the EAD Steering Board on 30 November 2011 <http://www.eda.europa.eu/Libraries/Documents/EDA_Work_Programme_2012.sflb.ashx> 16, 17.

[49] On the question whether international human rights law or international humanitarian law should be applicable in the context of targeted killings of individuals, see W J Fisher, 'Targeted Killings, Norms, and International Law' (2007) 45 Columbia Journal of Transnational Law 711.

legal framework for the use of force in European crisis management missions, the next chapter will examine the international legal framework for the use of force. This framework has been developed primarily with states in mind. Whether or not these conditions created by international law constitute additional requirements that the European Union as an emerging international military actor needs to fulfil before it can lawfully engage in the use of force will be discussed in chapter six.

Chapter 4: The international legal framework for the use of force

Introduction

The use of force was centralised with the founding of the United Nations in the aftermath of the Second World War. Apart from few exceptions, most of which are highly debated, military force is considered to be lawful only if it is authorised by the UN Security Council. Due to the almost universal membership of the United Nations,[1] most states are bound by the UN Charter and UN Security Council resolutions directly. The general prohibition of the use of force, the cornerstone of the UN Charter, has also acquired the status of customary law. The European Union is a rather new military actor and has signalled its future readiness to undertake robust military interventions without the consent of the target state. As indicated in the previous chapter, the European Union's engagement in military crisis management missions affects its member states, in that they are constrained in the conduct of their domestic foreign and defence policies through Council decisions adopted in the context of EU military operations. In this scenario, a question arises about whether the European Union as an international organisation is bound by UN Security Council resolutions regarding the use of force. The EU, unlike all its member states, is not a member of the United Nations, and cannot accede as the UN Charter only allows for the membership of individual states. The question of whether the EU must obtain a UN Security Council mandate before it can lawfully resort to the use of force and whether the EU is bound by UN Security Council resolutions regarding the use of force once they have been adopted will be the topic of chapter six below. But before it can be tested whether the conditions set up by international law for the use of force that have been designed in 1945 for states and regional arrangements need to be applied to the European Union as well,[2] the general international legal framework for the use of force needs to be assessed.

[1] With the admittance of South Sudan as a new member of the United Nations in July 2011 by the General Assembly, the UN currently has 193 members.

[2] The European Union is not formally a regional arrangement within the meaning of Article 53 UN Charter. For a detailed discussion, see part 2, section 2.1.below.

The first part of this chapter will describe the UN's system of collective security and will discuss where UN Security Council decisions derive their legitimacy. When the European Union conducts a military crisis management operation on the request of the United Nations, it partly draws legitimacy for the use of force from the respective UN mandate. The second part will briefly outline the legal framework for the use of force under Chapter VII of the UN Charter. It will be argued that the general prohibition of the use of force has acquired the status of customary law and is thus binding on the European Union as an emerging military actor. When looking at the exceptions to this principle, special emphasis will be put on the EU's approach to the responsibility to protect. The third part will describe the procedure under Chapter VII of the UN Charter which the UN Security Council must follow for the adoption of military sanctions. In addition, the legal effects produced by UN Security Council resolutions adopted for the maintenance and restoration of international peace and security will be analysed. The examination of the legal effects of UN Security Council resolutions with regards to the use of force is essential to prepare for the comparative method used in chapter six that will scrutinise the EU's relationship with UN Security Council resolutions in more detail. Part four of the present chapter will examine the limits the Security Council faces when acting under Chapter VII UN Charter to show that once the Security Council oversteps these boundaries, its sanction resolutions stop being binding. If the EU were to be bound by UN Security Council resolutions, which will be discussed in chapter six, these limits would need to be applied to the Union as a military actor well. The final part of the chapter will briefly analyse the criticism the UN Security Council faces in the context of the fight against international terrorism and in particular with regards to the human rights concerns raised in the context of targeted sanctions against individuals as visualised by the European courts' *Kadi* decisions.[3] The more the legitimacy of UN Security Council decisions is questioned, the more the EU could be encouraged to develop its own legitimacy as a military crisis management actor. The *European Security*

[3] Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

Strategy[4] has already indicated that a key element in the EU's ambition to become an international security provider is a security based on the EU's internal values including human rights, democracy and the rule of law.

Part 1

The system of the United Nations – founding ideas

Understanding the theoretical foundations of the system of the United Nations and the key role created for the UN Security Council herein for the maintenance and restoration of international peace and security will influence an understanding of why UN Security Council decision are perceived to be legitimate and why in turn member states have largely renounced their sovereign powers to resort to the use of military force. Knowing the theoretical foundations of the United Nations is crucial for an understanding of why, to what extent and for whom decisions of the UN Security Council are binding.

1. The UN as a vertical centralised system of law enforcement

International law in general offers two basic concepts of law enforcement, apart from peaceful means of settling disputes – namely the concepts of self-help and the creation of a central institution within an international organisation that is competent to settle disputes between two of its parties.[5] With regards to the concept of self-help, a subject of international law enjoys the right within the limits of international law to review an act addressed against it and to decide and to implement the measures it considers as appropriate to end the wrongdoing against it.[6] The assessment of the wrongdoing in question is undertaken from a subjective perspective and the measures

[4] European Council, '*A Secure Europe in a Better World: European Security Strategy*' Brussels, 12 December 2003 <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf > 11[hereinafter *European Security Strategy*].
[5]K Osteneck, *Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft: Völker- und europarechtliche Rahmenbedingungen für ein Tätigwerden der Europäischen Gemeinschaft im Bereich von UN-Wirtschaftssanktionsregimen unter besonderer Berücksichtigung der Umsetzungspraxis der EG-Organe***,** Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 168 (Springer Verlag, Berlin 2004) 6, 7.
[6] Osteneck (n 5) 7.

chosen are invoked within a horizontal framework between two subjects of international law.[7]

In contrast to this horizontal and decentralised approach, subjects of international law can also create an international organisation to establish an objective, vertical and centralised method of law enforcement by an independent institution.[8] The members of this organisation agreed to the founding treaties, which set up procedures and substantive rules. They thereby created the competence for this institution to solve disputes through decisions that are binding on them in turn. The United Nations is the key example of a vertical law enforcement framework.[9] Within the United Nations, member states are exercising their sovereign rights in respect to the use of military force together via the UN Security Council.[10]

Despite the categorisation used here that refers to different systems of law enforcement, a violation of international law is not a necessary condition for the Security Council to become active under Chapter VII of the UN Charter and to adopt enforcement measures of an economic or military nature.[11] The focus of the UN Charter is rather put on the maintenance of international peace and security and not on the restoration of international law as such, although violations of international law are often interconnected with threats to peace, breaches of peace or acts of aggression.[12] Maybe it would therefore be more accurate to refer to the United Nations as a vertical framework of peace and security enforcement, but this chapter will continue to use the traditional terminology.

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[7] E Paasivirta and A Rosas, 'Sanctions, Countermeasures and Related Actions in the External Relations of the EU: A Search for Legal Frameworks' in E Canizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International, The Hague 2002) 208.
[8] Osteneck (n 5) 8.
[9] V Gowlland-Debbas, 'Sanctions Regimes under Article 41 of the UN Charter' in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A comparative Study*, The Graduate Institute of International Studies (Martinus Nijhoff Publishers, Leiden 2004) 19; Paasivirta and Rosas (n 7) 208.
[10] K Annan, Address of the UN Secretary-General Kofi Annan in the General Assembly, *When Force Is Considered, There Is No Substitute For Legitimacy Provided*, 12 September 2002, Press Release SG/SM/8378, GA/10045.
[11] T Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, Manchester 2005) 8.
[12] Gazzini (n 11) 8.

The benefits of a vertical and centralised system of law enforcement lie in the perceived objective approach to the solution of a dispute based on the norms and values all members have agreed to in the founding treaty of the international organisation. Transferring this reasoning to the United Nations, the UN Security Council is perceived to base its resolutions within Chapter VII on 'Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression' solely on the purposes and principles of the UN Charter. As these are values and interests common to all UN member states, decisions of the UN Security Council are expected to be impartial and free from domestic policy considerations. The wide acceptance of the purposes and principles of the United Nations is mirrored in its almost universal membership and has inspired the school of thought that considers the UN Charter as the constitution of the international community.[13]

1.1. The UN as a system of collective security

The notion of the United Nations as a centralised system of law enforcement with the Security Council as its main decision-making body is linked to the design of the United Nations as a system of collective security. One characteristic of a system of collective security is the goal to limit the sovereignty of its members with regards to the use force institutionally.[14] Therefore elements of a system of collective security can only marginally be combined with a system of self-help. The Covenant of the League of Nations, the predecessor of the United Nations, is such an example. The Covenant largely kept a system of self-help and did not create a monopoly for the use of force for the community itself.[15] Under the Covenant, the member states were in

[13] See, for example, B Fassbender, 'The United Nations Charter as Constitution of The International Community' (1998) 36 Columbia Journal of Transnational Law 529-619. For a critical discussion on the UN Charter as a constitution, see G Arangio-Ruiz, 'The 'Federal Aanalogy' and UN Charter Interpretation: A Crucial Issue' (1997) 8 European Journal of International Law 1-28. Whether an international community as such exists and where it originates from is debated. See for example B Cronin, 'The Two Faces of the United Nations: The Tension between Intergovernmentalism and Transnationalism' (2002) 8 Global Governance 60-64.

[14] D Fidler, 'Caught Between Traditions: The Security Council in Philosophical Conundrum' (1996) 17 Michigan Journal of International Law 425.

[15] H Kelsen, 'Collective Security and Collective Self-Defense under the Charter of the United Nations' (1948) The American Journal Of International Law, 787. Fidler on the other hand qualifies the League of Nations as a system of collective security comparable to the one of the United Nations. See Fidler (n 14) 425, 426.

the position to decide not only if the Covenant had been violated but also to choose what measures should be imposed in response. [16] The member states could resort to force unilaterally whenever the Council either could not come to an agreement or merely remained inactive.[17]

The system of collective security of the United Nations is based on two pillars. The first pillar is made up of the prohibition of the threat to use force or the use of force according to Article 2(4) UN Charter. The second pillar centres around the conferral of the

> primary responsibility for the maintenance of international peace and security [from the member states to the UN Security Council that] in carrying out its duties under this responsibility […] acts on their behalf.[18]

By assigning the UN Security Council with the main responsibility to maintain international peace and security, the member states largely renounced their sovereign powers under international law to use force unilaterally in favour of the former's competence to adopt collective sanction decisions that are legally binding on them in turn.[19]

2. Legitimacy of UN Security Council resolutions

A functioning system of collective security can only be maintained if its member states experience their individual interests as served through the protection of the purposes and principles to which all the members of the international organisation have agreed and thus respect their circumscribed powers to resort to military force.[20]

Legitimacy can be studied from a substantive perspective or from a procedural perspective. A procedural focus on legitimacy asks whether the rule in question has originated from the right process of decision-making. In the context of the United

[16] Kelsen (n 15) 787.
[17] Gazzini (n 11) 22.
[18] M Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 Michigan Journal of International Law, 456; The specific powers granted to the UN Security Council to obtain its mandate are laid down in chapter VII of the UN Charter which will be discussed in more detail later on.
[19] Article 48(2) UN Charter, Article 25 UN Charter; Koskenniemi (n 18) 456.
[20] D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, Oxford, 1999) 5, 6.

Nations, this perspective would address issues of the permanent members of the UN Security Council and their right to veto.[21] Legitimacy in the present chapter however is largely used to describe the substantive quality of a rule which it derives from the perception of its addressees that the rule is based on some higher norms and values they all have agreed on and that they are therefore prepared to follow even in the absence of strong enforcement mechanisms.

The legitimacy of UN Security Council resolutions is based on the assumption that UN Security Council decisions are founded on commonly agreed values and therefore do not represent the biased preferences of some member states. Interlinked with this idea is the twofold notion of the collective nature of UN Security Council decisions.[22] Decisions of the UN Security Council are supposed to be based on the values shared by the UN member states and are thus presumed to represent the collective will of all UN members. By adopting sanction resolutions, the UN Security Council is envisaged to put the content of the purposes and principles of the United Nations into concrete forms in the specific case.[23] The actors that are implementing the UN Security Council's sanction decisions therefore carry with them the assumption that they are acting on behalf of common interests and not out of purely national interests. Therefore, it has been held that the UN Security Council's decisions are adopted in the name of the international community of states and are binding on them in turn.[24] In consequence, even the target of a UN sanction regime is expected to accept the measures imposed against it, and for example, could not lawfully exercise its right to self-defence nor could it claim a breach of the peace and ask for collective UN action in return. If UN Security Council decisions are however to be considered to be based on the political will of some, the UN Security Council will stop being a centre of authority within the international system and the legitimacy of its decisions will be weakened.[25]

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[21] See, for example, T Franck, 'Legitimacy in the International System' (1988) 82 The American Journal of International Law, 706; D Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 The American Journal of International Law, 562, 565.
[22] I Hurd, 'Legitimacy, Power, and the Symbolic Life of the UN Security Council' (2002) 8 Global Governance, 48.
[23] Sarooshi (n 20) 6.
[24] Caron (n 21) 552.
[25] Hurd (n 22) 48.

It will be suggested here that a key source for the legitimacy of decisions of the UN Security Council to maintain or restore international peace and security is the fact that its sanction resolutions are experienced to be in line with the purposes and principles of the UN Charter. Within these commonly agreed values, human rights play a special role. The reading of the purposes of the United Nations reveals that the respect and promotion of human rights is one of the overall goals of the UN and considered to be a pre-requisite for the achievement of universal peace.[26] This interpretation is supported by the founding history of the United Nations as well as by the wording of the preamble that recognises the determination of the peoples of the United Nations 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.'

The present chapter will use the terminology of human rights and will not take part in the discussion about whether the United Nations is founded on international community interests that need to be promoted through its decisions in turn. [27] In general, the discussion surrounding international community interest is linked to the debate of whether or not an international community as such exists and if answering this question in the affirmative who is a member of this community.[28] What constitutes an international community interest is also unclear, but it has been proposed that that it would at least include the protection and promotion of human rights, the protection of the environment and peace.[29] International community interests are generally perceived to go beyond the interests of individual states.[30] They have been used not only to legitimise the use of force authorised by the UN Security Council but also to justify unilateral military action, for example in the

[26] Article 1 UN Charter.
[27] For a discussion on international community interest see for example, B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Columbia Journal of Transnational Law 529-619; N Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council' (1999) 3 Max Planck Yearbook of United Nations Law 59-103.
[28] Krisch (n 27) 59.
[29] Krisch (n 27) 59.
[30] Krisch (n 27) 59; B Simma and A L Paulus, 'The 'International Community': Facing the Challenge of Globalization' (1998) 9 European Journal of International Law 268.

cases of Kosovo and Iraq.[31] Both cases will be discussed below under the topic of humanitarian interventions.

The purposes and principles of the UN Charter, most importantly human rights, will play an important role throughout the discussion in this chapter. It will be argued that human rights will limit the UN Security Council's discretion when acting under Chapter VII. This discussion will be of relevance for the analysis in chapter six that will assess whether and if so to what extent the EU is bound by UN Security Council resolutions with regards to the use of force. In addition, the recent practice of the UN Security Council to adopt targeted sanctions against individuals reveals serious human rights concerns that not only challenge the authority of the UN Security Council but that might also weaken the system of collective security of the United Nations.

Part 2

Chapter VII of the UN Charter: the international legal framework for the multilateral use of force

To assess the legal framework for the multilateral use of force as set up by Chapter VII of the UN Charter, this section will start with some remarks on the prohibition of the unilateral use of force in general. This will be followed by a discussion of some of the exceptions that are either recognised by the UN Charter itself or that are discussed in the political and scholarly debate. Special emphasis will be put on the authorisation technique used by the UN Security Council and the right to humanitarian intervention or the concept of the Responsibility to Protect, a concept to which the EU claims to be in particular committed.[32]

[31] Krisch (n 27) 60.
[32] Council of the European Union, *'I/A' Item Note*, Brussels, 9 June 2009EU, Annex, *Priorities for the 64rd [sic]General Assembly of the United Nations*, 10809/90, para 8 [hereinafter *Priorities for the 64th General Assembly of the United Nations*].

1. The prohibition of the unilateral use of force and the *erga omnes* character of Article 2 (4) UN Charter – implications for the EU as an emerging international military actor

As indicated above, one of the pillars of the system of collective security of the United Nations is the general prohibition of the unilateral use of force in favour of collective measures. The main provision entailing the negative duty to abstain from the unilateral use of force is Article 2(4) UN Charter which provides that,

> [a]ll members shall refrain in their international relations from the threat to or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The system of collective security and its counterpart, the prohibition of the unilateral use of force, are further underlined by the seventh recital of the UN Charter preamble that asks the peoples of the United Nations not to make use of armed force 'save in the common interests'.

The prohibition of the use of force has been consolidated in international law through subsequent declarations and treaties, for example the *1966 Non-Intervention Declaration, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* and the NATO Treaty (1949).[33] In 1986, the International Court of Justice classified the prohibition of the use of force in its *Nicaragua* judgment as a principle of customary international law as both necessary conditions, namely state practice and opinion iuris, would be met.[34]

[33] For a detailed analysis see N Schrijver, 'Challenges to the Prohibition to the Use of Force: Does the Straitjacket of Article 2(4) UN Charter Begin to Call Too Much?' in N Blokker and N Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (Martinus Nijhoff Publishers, Leiden 2005) 34, 35.

[34] International Court of Justice, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, ICJ Reports 1986, p14, para 184, 189, 190 [hereinafter *Nicaragua*].

Whether the prohibition of the use of force also enjoys the status of *jus cogens* is debated.[35] The concept of *jus cogens* refers to peremptory norms of international law from which no derogation is permitted and has been developed in the context of treaties through the Vienna Convention on the Law of Treaties in 1969.[36] In general, three conditions have to be met for a norm to qualify as *jus cogens* – it has to be a norm that is recognised by a large majority of states that also accept its nature as unconditional and it must be a norm from which no derogation is allowed.[37] The main characteristics of a *jus cogens* norm are that it is aimed at protecting the interest of the community of states and therefore cannot be complied with partially. Presuming that Article 2(4) UN Charter would form part of *jus cogens*, a state violating the prohibition to use force would violate this norm not only with regards to the state it is using military force against but also with regards to all other states.[38]

The International Court of Justice has left the question whether the prohibition of the use of force is part of *jus cogens* undecided in *Nicaragua*. However, it cited the opinion of the International Law Commission that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*',[39] a quote that is generally used to support the *jus cogens* character of Article 2(4) UN Charter.[40]

In consequence of the customary law nature of the prohibition of the use of force, the European Union as an international organisation that enjoys international legal personality is bound by it despite not being a member of the United Nations.[41] Therefore, the European Union can only legally undertake a robust military crisis

[35] Schrijver (n 33) 41. Arguing in favour of a *jus cogens* character of Article 2(4) UN Charter: M A Weisburd, 'The Emptiness of the Concept of *Jus Cogens*, as illustrated by the War in Bosnia-Herzegovina' (1995) 17 Michigan Journal of International Law 41; V Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance' (2000) 11 European Journal of International Law 377; whereas Schrijver appears to be more negative, in particular in light of recent developments of international law, for example the increased reference to the responsibility to protect (n 33) 42, 43.
[36] Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT).
[37] Schrijver (n 33) 42.
[38] Gazzini (n 11) 20, 21.
[39] *Nicaragua* (n 34) para 190.
[40] Schrijver (n 33) 41.
[41] An analysis of the EU's relationship with international law will follow in chapter six.

management operation without the consent of the host state if it can base its action on one of the recognised exceptions to the prohibition of the use of force. If the EU would violate the general prohibition of the use of force, it would violate *jus cogens* in respect of all other states.

2. Exceptions to the prohibition of the use of force

The prohibition of the use of force is not without exceptions. Some of these are explicitly mentioned in the UN Charter whereas others have developed through practice over time. Most of the latter are highly disputed. These exceptions to the prohibition of the use of force will be assessed in the following section. They do not contradict the statement just made that the 'law of the Charter concerning the prohibition of the use of force' or the 'regime' established by Article 2(4) UN Charter enjoys the status of *jus cogens*.[42] The prohibition of the use of force as laid down in the UN Charter is 'constrained in scope'[43] and already contains the Charter based exceptions, such as the right to self-defence or UN Security Council authorisations to use force.[44] The controversial development of the right to humanitarian intervention outside the UN Charter to protect peoples from genocide, for example, also cannot counter the *jus cogens* quality of the prohibition of the use of force. In general, a peremptory norm can be modified 'by a subsequent norm of general international law having the same character'.[45] The prohibition of genocide has been held to be such another peremptory norm.[46]

[42] C Kahgan, 'Jus Cogens and the Inherent Right to Self-Defense' (1996-1997) 3 ILSA Journal of International and Comparative Law 781, 782; See also Oscar Schachter who refers to 'the rules on force as *jus cogens*', O Schachter, 'In Defense of International Rules on the Use of Force' (1986) 53 The University of Chicago Law Review 126, who refers to 'the rules on force as *jus cogens*'.
[43] See M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nordic Journal of International Law 217, n 20.
[44] See Article 2(4) in conjunction with Article 2(7) and Articles 42, 43, 51 of Chapter VII UN Charter.
[45] Article 53 VCLT. See also N D White, 'The EU as a Regional Security Actor within the International Legal Order' in M Trybus and N D White (eds), *European Security Law* (Oxford University Press, Oxford 2007) 342 who argues that '[t]he Council's power is part of the Charter rules governing the use of force, as is the right of self-defence belonging to individual states, and both are part of the peremptory norm as well'.
[46] Byers (n 43) 219.

2.1. UN Charter related exceptions to the prohibition to the use of force

Despite the creation of the United Nations as a centralised system of vertical law enforcement with the UN Security Council as its key decision-maker, the member states retained their right to resort to collective or individual self-defence as a principle of customary international law, as recognised by Article 51 UN Charter.[47]

In addition, the UN Charter explicitly provides the UN Security Council with the competence to authorise regional arrangements or agencies to use force.[48] The European Union is not formally a regional agency within the meaning of Article 53 UN Charter.[49] The UN Charter does not provide a definition for regional arrangements or regional agencies. In practice, regional organisations such as the Organisation for Security and Cooperation in Europe (OSCE) have declared themselves to be organisations within the meaning of Chapter VIII of the UN Charter.[50] So far, the European Union has not issued such a proclamation.[51] If it claims to be regional agency within the meaning of Article 53 UN Charter,[52] the EU would need to be authorised by the UN Security Council to use military enforcement measures.

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[47] Another Charter based exception to the general prohibition of the use of force is Article 107 UN Charter. Article 107 UN Charter allows for military enforcement action against former enemy states. This exception to the general prohibition to the use of force is obsolete with Germany and Japan now being members of the United Nations. On the topic of Article 107 UN Charter see Schrijver (n 33) 36.

[48] Article 53(1) UN Charter.

[49] J Cloos, 'EU-UN Cooperation in Crisis Management – Putting Effective Multilateralism into Practice' in J Wouters, F Hoffmeister and T Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser Press, The Hague 2006) 265. For a critical discussion, see White (n 45) 332-335.

[50] J Wouters and T Ruys, 'UN-EU Cooperation in Crisis Management' in J Wouters, F Hoffmeister and T Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser Press, The Hague 2006), 256; G Ress and J Bröhmer in B Simma (ed), *The Charter of the United Nations: A* Commentary (2nd edn Oxford University Press, Oxford 2002) Article 53 para 8.

[51] A survey produced by the project team of the UNU-CRIS Project on Regional Security and Global Governance also enumerates the European Union as an 'other intergovernmental' organization 'outside chapter VIII'. See United Nations University (UNU-CRIS), 'Capacity Survey: Regional and other Intergovernmental Organizations in the Maintenance of Peace and Security' (2008) <https://biblio.ugent.be/input/download?func=downloadFile&recordOId=938841&fileOId=938848> 17.

[52] It has been suggested that a regional organisational entity qualifies a regional agency and not just as a regional arrangement if it enjoys a certain degree of a formal structure. See United Nations University (UNU-CRIS) (n 51) 16. The European Union enjoys a legal personality and has been attributed with organisational crisis management structures. It could therefore fulfill the conditions of an agency within the meaning of Article 53 UN Charter.

According to Article 53 (1) UN Charter, the UN Security Council can utilise regional agencies 'for enforcement action under its authority' if it considers enforcement to be necessary. In this case it has been held that a regional agency acts as a UN subsidiary organ.[53] Or if it considers military enforcement measures to be a necessary crisis management tool, the EU would have to obtain authorisation by the UN Security Council.[54] Thus, if the EU would be a regional organisation within the meaning of Chapter VIII of the UN Charter,[55] the European Union would be able to decide autonomously only in the context of the peaceful settlement of disputes under Chapter VI of the UN Charter, in matters of collective self-defence and in the context of consensual peace-keeping missions but not in the adoption of military sanctions.[56] In addition, the EU would be obliged to inform the UN Security Council of its activities in the context of the maintenance of international peace and security.[57] Another consequence of the qualification of the EU as a regional agency would be the EU's responsibility to achieve the peaceful settlement of local disputes before they should be referred to the UN Security Council.[58] Overall, the relationship between the United Nations and regional organisations in the context of Chapter VIII has been described as a 'dual bottom-up, top-down relationship'.[59]

Although the European Union has not formally proclaimed itself to be one, it is worth investigating whether the EU Treaties or political statements made on behalf of the EU indicate that the EU already considers itself to be a regional agency. As demonstrated in chapters two and three, the EU has gradually acquired competence in foreign policy and security matters and a process of European integration is slowly ongoing. Capabilities and structures have been created that enable the EU to become

[53] G Ress and J Bröhmer in B Simma (ed), *The Charter of the United Nations: A* Commentary (2nd edn Oxford University Press, Oxford 2002) Article 53 para 1.
[54] Ress and Bröhmer (n 53) Article 53 para 1.
[55] It has been suggested that a regional organisational entity qualifies a regional agency and not just as a regional arrangement if it enjoys a certain degree of a formal structure. See United Nations University (UNU-CRIS) (n 51) 16. The European Union enjoys a legal personality and has been attributed with organisational crisis management structures. It could therefore fulfill the conditions of an agency within the meaning of Article 53 UN Charter.
[56] White (n 45) 338, 344.
[57] Article 54 UN Charter.
[58] Article 52(2) UN Charter. See also Article 33(1) UN Charter.
[59] B Ki-Moon, Report of the Secretary General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect*, 28 June 2011, A/65/877 – S/211/393 para 5.

an international military crisis management actor. As one of its common foreign and security policy objectives, the EU identifies the promotion of 'multilateral solutions to common problems, in particular in the framework of the United Nations'.[60] In addition, the EU' shall work for a high degree of cooperation in all fields of international relations, in order to preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter'.[61] Political statements such as the *European Security Strategy* emphasises its commitment to effective multilateralism with the United Nations at the centre.[62] Nonetheless, these obligations are not strong and precise enough to read into them the desire of the European Union to be covered by Chapter VIII of the UN Charter.[63]

In practice, whenever the EU has been requested by the UN to act, no reference has been made to Chapter VIII UN Charter either. Instead the European member states and the European Union itself as an international organisation have been authorised by the UN Security Council under Chapter VII to use military sanctions. UN Security Council resolution 1671 (2006) for example welcomed 'the intention of the European Union to deploy a force to support MONUC during the electoral period in the Democratic Republic of the Congo' and decided

> that Eufor R.D.Congo is authorized to take all necessary measures, within its means and capabilities, to carry out the following tasks, in accordance with the agreement to be reached between the European Union and the United Nations:
> (a) to support MONUC to stabilize a situation, in case MONUC faces serious difficulties in fulfilling its mandate within its existing capabilities,
> (b) to contribute to the protection of civilians under imminent threat of physical violence in the areas of its deployment, and without prejudice to the responsibility of the Government of the Democratic Republic of the Congo,

[60] Article 21(1) LTEU.
[61] Article 21(2) (c) LTEU.
[62] The European Security Strategy states that 'The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority'. European Council, '*A Secure Europe in a Better World: European Security Strategy'* Brussels, 12 December 2003 <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf> 9.
[63] See White (n 45) 334 who has analysed the provision of the failed Constitution in this regard.

> (c) to contribute to airport protection in Kinshasa,
> (d) to ensure the security and freedom of movement of the personnel as well as the protection of the installations of Eufor R.D.Congo,
> (e) to execute operations of limited character in order to extract individuals in danger.[64]

EUFOR R.D. Congo was conducted as an autonomous EU-led military operation[65] under the auspices of the EU's common security and defence policy.[66]

The authorisation technique that has been increasingly used after the end of the Cold War was not anticipated by the drafters of the UN Charter, who originally designed the Security Council to undertake military enforcement measures directly under Chapter VII through military forces made available to it by the member states on a permanent standby basis through formal agreements, concluded on the basis of Article 43 UN Charter. The initial idea was that national troops would remain subject to domestic regulations and would answer to their respective national commanders who in turn would take orders from a UN Force Commander who would be under the command of the Military Staff Committee through which the Security Council would exercise its overall command and control.[67]

According to the former Secretary General in *An Agenda for Peace*,

> [t]he ready availability of armed forces on call could serve, in itself, as a means of deterring breaches of the peace since a potential aggressor would know that the Council had at its disposal a means of response.[68]

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[64] UN Security Council Resolution 1671 (2006) para 8.
[65] Council Joint Action 2006/319/CFSP on the European Union military operation in support of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) during the election process [2006] OJ L 116/98.
[66] Another example is operation Tchad/RCA. See UN Security Council Resolution 1778 (2007) para 6.
[67] Sarooshi (n 20) 142. During the drafting of the UN Charter three models of how military forces should be made available for the maintenance of international peace and security were discussed. For a detailed discussion on this topic see L M Goodrich and E Hambro, *Charter of the United Nations: Commentary and Documents* (2nd edn Stevens & Sons Limited, London 1949) 281, 282.
[68] UN Secretary General Boutros Boutros-Ghali, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, 17 June 1992, A/47/277 - S/24111, para 43. [hereinafter *Agenda For Peace*].

However, until today, no Article 43 UN Charter agreement has been concluded and one of the consequences of the lack of Article 43 agreements is that the UN Security Council cannot oblige its member states to contribute troops to implement military sanctions.[69] To fill this void and to provide the UN Security Council with capable and willing actors to restore international peace and security, the UN Security Council developed the practice of delegating its Chapter VII powers to states. [70] A standard wording used by the UN Security Council to grant states the right to use force is that it 'authorises states to use all necessary means'.

In the absence of an explicit competence of the UN Security Council to delegate its Chapter VII powers, the legal foundations of the UN Security Council's competence to authorise states to use military measures is disputed. Thoughts are divided between those that argue that the Security Council's competence to delegate its Chapter VII powers can be deduced from the wording and systematic context of UN Charter provisions,[71] whereas others refer to an implied power[72] to authorise the use of force. A third stream argues in favour of a general competence to delegate as a general principle of the law of international organisations.[73] The UN Security Council's competence to authorise the use of force was confirmed in practice.

[69] Sarooshi (n 20) 142.
[70] According to Sarooshi, a delegation of power is broader than an authorisation to carry out a particular objective. The former entails 'the transfer of a power of discretionary decision making.' Even when the Security Council uses the terminology of authorisation, it might in substance delegate some of its discretionary powers to the member states. Sarooshi (n 20) 11-13. In the following, the terms 'authorisation' and 'delegation' will be used interchangeably to refer to a delegation of power in substance.
[71] The school of thought that finds the Security Council's power to delegate military enforcement measures based on UN Charter provisions is divided into two major streams. Some refer to Article 51 UN Charter whereas the majority bases the Security Council's competence to authorise the use of force on Article 42 UN Charter either individually or in conjunction with a variety of Charter provisions, including Article 48 (1), Article 106 or Article 53 UN Charter.
[72] N Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'' (2000) 11 European Journal of International Law, 547-554, 567.
[73] For a detailed discussion of the different views see Sarooshi (n 20) and E De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford 2004).

2.2. Exceptions to the prohibition of the unilateral use of force without a UN Charter basis

During the Cold War, the permanent members of the UN Security Council could hardly come to agreement and the Security Council was largely unable to adopt collective enforcement measures under Chapter VII of the UN Charter.[74]

In 1950 in response to these shortcomings, the General Assembly adopted the *Uniting for Peace Resolution* which provides that

> if the Security Council, because of lack of unanimity of permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate *recommendations*[75] for Members for collective measures, including in the case of a breach of a peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

Unlike UN Security Council resolutions, recommendations of the General Assembly are not binding on UN member states.[76]

Also partly linked to the inability of the UN Security Council to adopt enforcement measures when faced with a crisis of a humanitarian nature is the highly disputed development of a right to individual or unilateral humanitarian intervention. Humanitarian interventions refer to the

> forcible deployment of military forces into a country without the consent of the local government to prevent the commission of severe and widespread human rights atrocities against the civilian population.[77]

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[74] T M Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States' (1970) 64 The American Journal of International Law 810.
[75] Emphasis added.
[76] The Uniting for Peace Resolution has only been implemented during Chinese aggression against Korea in 1951. See C Tomuschat, 'Uniting for Peace' (2008) United Nations Audiovisual Library of International Law <http://untreaty.un.org/cod/avl/pdf/ha/ufp/ufp_e.pdf> 3.
[77] S D Murphy, 'The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War' (1994) 32 Columbia Journal of Transnational Law 229.

Unilateral humanitarian interventions have to be distinguished from collective humanitarian interventions. The latter are authorised by the UN Security Council and are controversially discussed in terms of whether human rights violations can be qualified as a threat to the peace according to Article 39 UN Charter and thus open the gateway to collective enforcement measures under Chapter VII of the UN Charter.[78] Military operations that have been discussed in terms of collective humanitarian interventions include the US-led operation in Somalia in 1992/1993, authorised by UN Security Council Resolution 794 (1992);[79] the French military operation in Rwanda in 1994 authorised by UN Security Council Resolution 929 (1994)[80] and the NATO intervention in Bosnia in 1995 authorised by UN Security Council Resolution 816 (1993).[81]

The focus here will be on unilateral and therefore unauthorised humanitarian interventions as a possible exception to the general prohibition of the use of force to avoid a humanitarian catastrophe. The most prominent case of a unilateral humanitarian intervention is the NATO campaign in Kosovo in 1999 that will be discussed in more detail in chapter seven below.

The controversy behind the right to use force for humanitarian purposes without authorisation by the UN Security Council is centred on the balance between the principle of non-intervention which is derived from Article 2(7) and Article 2(4) UN Charter and the importance of the protection of human rights. [82] The principle of non-intervention relates to respect for the sovereignty of the individual member states and entails the duty not to interfere with their internal affairs. Human rights are recognised as values of international law and as forming an important element of the purposes and principles of the UN Charter. Those who speak in favour of a right to

[78] Murphy (n 77) 229, 230; I Österdahl, 'By All Means, Intervene! – The Security Council and the Use of Force under Chapter VII of the UN Charter in Iraq (to protect the Kurds), in Bosnia, Somalia, Rwanda and Haiti' (1997) 66 Nordic Journal of International Law 270, 271.
On the topic of collective humanitarian intervention see also F R Tesón, 'Collective Humanitarian Intervention' (1996) 17 Michigan Journal of International Law 323-371.
[79] Tesón (n 78) 352.
[80] Tesón (n 78) 365.
[81] Tesón (n 78) 367, 368.
[82] C Greenwood, 'International Law and the NATO Intervention in Kosovo'(2000) 49 International and Comparative Law Quarterly 929.

humanitarian intervention argue that such an intervention would not go against the teological meaning of Article 2(4) UN Charter and the general prohibition of the use of force which would be aimed at protecting the territorial integrity of a state. The aim of humanitarian interventions would not however be to interfere with a state's territory or political independence but to save people from gross human rights violations.[83]

In addition, it is often held that unilateral action would undermine the system of collective security as it would either replace a previous decision of the UN Security Council in respect of the maintenance of international peace or security or have the potential of pre-empting it.[84]

In practical terms, the use of force for humanitarian reasons that is not authorised by the UN Security Council opens up the possibility of political abuse. This is not only because the claim to intervene for humanitarian reasons is predominantly open to powerful states[85] but also because there seems to be no agreement as to what conditions have to be met for a 'rightful' humanitarian intervention.[86] So far it has been predominantly argued in favour of the illegality of humanitarian interventions[87] although some support the possibility of the slow emergence of a new doctrine of international law.[88] It has been held by many that the use of force not authorised by

[83]N Rodley, and B Cali, 'Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law' (2007) 7 Human Rights Law Review 281.
[84] W M Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention' (2000) 11 European Journal of International Law 4.
[85] I Brownlie and C J Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects' (2000) 49 International and Comparative Law Quarterly 905.
[86] Cassese for example suggests that the conditions for a lawful humanitarian intervention would include 'gross and egregious breaches of human rights involving the loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity', the inability of the UN Security Council to adopt coercive action due to a veto or a lack of majority, the exhaustion of appropriate peaceful means, and the willingness of a group of states as opposed to a 'single hegemonic Power' to get involved with the support of the non-objection of the majority of the UN member states and the use of force solely for the purpose of ending human rights violations. A Cassese, 'Ex inuiria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 European Journal of International Law 27. Greenwood only asks for either an existing or immediate threat of 'the most serious humanitarian emergency involving large scale loss of life' and the 'necessity of a military intervention' to either end or prevent the loss of life. See Greenwood (n 82) 931.
[87] Brownlie and Apperley (n 85) 891.
[88] Cassese (n 86) 29, 30.

the UN Security Council to stop grave human rights violations should remain a narrow exception.[89]

Over the years the terminology and the emphasis of the legal and political discussion around the so-called 'right to humanitarian intervention' has changed in favour of the concept of the 'responsibility to protect'. In the aftermath of NATO's military intervention in Kosovo without a UN Security Council Resolution authorising the use of force to stop a humanitarian catastrophe, the Canadian Government established the *International Commission on Intervention and State Sovereignty* that issued its report on 'The Responsibility to Protect' in December 2001. The Commission changed the emphasis of the discussion behind the right to humanitarian intervention from an understanding of '*sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties'.[90] Therefore, states would have the primary responsibility to ensure the protection of their population from gross human rights violations. If states fail to fulfil this obligation, the responsibility to protect resides with the international community.[91]

The concept of the responsibility to protect is comprised of three elements – the responsibility to prevent, the responsibility to react and the responsibility to rebuild. The responsibility to react might ask for military intervention. The Commission argues that the decision to determine whether a force should be used for human protection purposes should rest with the UN Security Council.[92] However, if the Security Council fails to act, it is possible to seek support from two thirds of the General Assembly to invoke the Uniting for Peace Resolution. The Security Council would then have the primary but not the sole responsibility for the maintenance of peace and security.[93] In case this possibility also fails, the Commission emphasises that unilateral military interventions by an ad hoc coalition of states without a prior

[89] K Naumann, 'NATO, Kosovo and Military Intervention' (2002) 8 Global Governance 14; B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 European Journal of International Law 22.
[90] Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (2001) <http://responsibilitytoprotect.org/ICISS%20Report.pdf> para 2.14 [hereinafter *Responsibility to Protect*].
[91] *Responsibility to Protect* (n 90) Synopsis, xi.
[92] *Responsibility to Protect* (n 90) 6.28.
[93] *Responsibility to Protect* (n 90) 6.29, 6.30, 6.7.

obtained Security Council mandate would not be widely accepted.[94] But it nevertheless indicates that unilateral action still might be necessary in extreme scenarios.[95]

The possibility of the collective use of military force as a last resort to react to genocide, war crimes, ethnic cleansing and crimes against humanity was recognised by the United Nations but the question of the right to unilateral humanitarian intervention was not addressed.[96] The European Union supported the new concept[97] and accepted the responsibility to protect as part of the EU's international responsibility. The *Report on the Implementation of the European Security Strategy: Providing Security in a Changing World* of 2008 states that

> [s]overeign governments must take responsibility for the consequences of their actions and hold a shared responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[98]

Like the UN, the European Union seems to be reluctant to acknowledge openly the concept of unilateral military interventions as part of the concept of the responsibility to protect in favour of UN authorised collective action to stop humanitarian catastrophes. For example, the 'EU Priorities for the 64th General Assembly of the United Nations' highlight the EU's support for the implementation of the responsibility to protect *within* the United Nations.[99] However, the EU's support of

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[94] *Responsibility to Protect* (n 90) 6.36.
[95] *Responsibility to Protect* (n 90), 6.40.
[96] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 'A More Secure World: *Our Shared Responsibility*' (2004) <http://www.un.org/secureworld/report2.pdf> paras 199-203; General Assembly Resolution 60/1, '2005 World Summit Outcome', 24 October 2005, paras 138-140.
[97] M Vincent and J Wouters, 'The Responsibility to Protect: Where does the EU Stand?' (2008) Policy Brief, Madariaga Report, Madariaga – College of Europe Foundation <http://www.madariaga.org/images/madariagareports/2008-jul-1%20-%20r2p%20where%20does%20the%20eu%20stand.pdf> 5.
[98] General Secretariat of the Council of the EU, J Solana, *'Report on the Implementation of the European Security Strategy: Providing Security in a Changing World'* Brussels, 11 December 2008, S407/08, 2.
[99] *Priorities for the 64th General Assembly of the United Nations* (n 32) para 8.

NATO's action in Kosovo[100] nevertheless indicates that the EU might consider unilateral humanitarian intervention to be legitimate in scenarios of extreme need.

As long no agreed definition on the conditions for a rightful unilateral humanitarian intervention exists and as long as there is no wide acceptance of the concept, humanitarian interventions might be legitimate but they will lack legality. The European Union could help to foster the concept of humanitarian intervention by issuing and following clear guidelines. By doing so, the European Union could serve as an example to other international actors and could support the development of a rule of customary law.

For the European Union as an emerging military actor, the above findings indicate that the EU is bound by the general principle of the prohibition of the use of force. From the perspective of international law, the EU can only legally resort to military sanctions if it can base its actions on one of the exceptions to the use of force. In practice, the EU would thus have to seek the authorisation of the Security Council. When authorisation cannot be obtained, the EU can utilise the emergency procedure as established by the Uniting for Peace resolution. Nevertheless, when a Security Council mandate cannot be obtained the actor also might be less likely to get the approval of two thirds of the General Assembly. Although the use of force based on a General Assembly recommendation might give the EU's operation legitimacy, it would still leave it questionable in legal terms. The same has to be said of unilateral European humanitarian interventions.

Part 3

Procedure for the adoption of UN Security Council sanctions and the legal effects they produce

If the Security Council wants to adopt military enforcement measures to maintain or restore international peace and security it has to follow the procedure set up by Chapter VII of the UN Charter which deals with 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. The first section will

[100] N Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council' (1999) 3 Max Planck Yearbook of United Nations Law 83.

briefly outline the two-step procedure established by the UN Charter before the legal effects of UN Security Council enforcement decisions will be examined. The following section will then focus on questions about whether and if so under what circumstances UN Security Council resolutions stop being binding on UN member states. It will be argued in chapter six that the European Union is bound by UN Security Council resolutions. The limit of this binding nature is of course reached when UN Security Council decisions stop being binding in general.

1. Two-step procedure for the adoption of military sanctions

In a first step the UN Security Council has to determine either a threat to the peace, breach of the peace or act of aggression if it considers the collective use of force to be necessary to maintaining or restoring international peace and security. The determination of an Article 39 UN Charter situation lies within the discretion of the Security Council as indicated by the phrase 'determination' as well as by its systematic context with Articles 40 and 42 UN Charter.[101] These provisions allow the Security Council to choose from a variety of measures. It would not be consistent if the Security Council's flexibility in respect of the choice of measures would be weakened by a strict reading of the conditions for actions under Article 39 UN Charter.[102] The conditions that have to be met by Article 39 UN Charter are not described in much detail but the practice of the Security Council has led to the development of some minimum conditions before an enforcement action can be taken. The Security Council is supposed to apply the same standard in similar cases, as the determination of an Article 39 UN Charter situation is a pre-requisite for Chapter VII enforcement measures and should not be based on purely political considerations.[103]

Following the determination of threat to the peace, breach of the peace or act of aggression, the UN Security Council has discretion whether or not to adopt in a

[101] J Frowein and N Krisch in B Simma (ed), *The Charter of the United Nations: A* Commentary (2nd edn Oxford University Press, Oxford 2002) Article 39 para 4.
[102] Frowein and Krisch (n 101) Article 39 para 4.
[103] Frowein and Krisch (n 101) Article 39 para 26.

second step a resolution with regards to military sanctions according to Article 42 UN Charter. This article provides that,

> [s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of the United Nations.

2. Legal effects of UN Security Council sanctions

Although UN Security Council resolutions are binding on UN member states according to Article 48(2) UN Charter,[104] their legal effects differ depending on whether they are of an economic or military nature. Although for the purpose of the present chapter an analysis of the legal effects produced by UN Security Council sanctions of a military nature would be sufficient, the binding effect of the former will be addressed first to create awareness about their similarities and differences. An understanding of this issue will be of importance for chapter six, which will discuss whether the analysis of the legal relationship between the European Union and UN Security Council resolutions with regards to economic sanctions can be helpful for understanding the relationship between the European Union and UN Security Council resolutions with regards to the use of force by using a comparative method.

2.1. Excursus: Legal effects produced by UN Security Council economic sanctions

Economic sanction decisions by the UN Security Council produce two effects. On the one hand they create not merely a right but an international law obligation for UN member states to implement them.[105] According to Article 48(2) UN Charter decisions of the Security Council for the maintenance of international peace and security 'shall be carried out by the Members of the United Nations directly and

[104] Article 48 UN Charter is lex specialis to Article 25 UN Charter.
[105] V Gowlland-Debbas, 'Sanctions Regimes under Article 41 of the UN Charter' in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, The Graduate Institute of International Studies (Martinus Nijhoff Publishers, Leiden 2004) 19.

through their action in the appropriate international agencies of which they are members'. Otherwise, economic sanction regimes would be deprived of their effectiveness. On the other hand, economic sanctions also serve as entitlements. The target has to accept the economic measures adopted and implemented against it as it agreed to the vertical system of law enforcement of the United Nations through its membership in the organisation.[106] Hence, UN Security Council resolutions legalise actions by member states against the target that could not otherwise be justified under general international law.[107]

2.2. The binding nature of military sanctions – some general remarks

The legal effects produced by UN Security Council resolutions authorising the use of force differ slightly from the effects produced by economic sanctions. Like the latter, they are binding on UN member states. However, the binding nature differs in strength, depending on the role played by the respective UN member state in the actual exercise of the use of force on behalf of the UN Security Council.[108] Member states do not have to accept a Security Council resolution authorising the use of force in the sense that they have to deploy land, air or naval forces.[109] Nonetheless, if a UN member state accepts a UN mandate and agrees on sending its armed forces, it is bound by the UN Security Council resolution in its entirety. The UN member state has to respect the conditions set or the use of force by the resolution, including for example geographical or time-limits.

2.2.1. A duty of assistance and cooperation and the duty not to undermine the success of a military operation

UN Security Council resolutions are also binding on those member states that decide not to participate in a mission by sending troops. UN member states are legally

[106] Osteneck (n 5) 36.
[107] Osteneck (n 5) 36; see also Gazzini (n 11) 15 who refers to the permissive effect of mandatory UN Security Council economic sanctions.
[108] This assumption will be explained in more detail in the following section.
[109] T D Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) XXVI Netherlands Yearbook of International Law 60.

obliged to offer other forms of cooperation and assistance apart from providing forces.[110]

In addition to the positive obligation to provide assistance to add value to an UN authorised operation, all UN member states are under the negative obligation not to undermine the effectiveness of a UN authorised military operation through their action or inaction. This negative obligation results from a loyalty obligation that is inherent in the vertical centralised system of law enforcement of the United Nations to which the UN members have agreed. The negative obligation to abstain from anything that would undermine the effectiveness of the use of force authorised by the Security Council can ask UN member states to become active and to introduce travel bans for example. But it can also ask member states to refrain from doing something, for example to abstain from selling weapons and other military equipment to the target. Usually an economic sanction regime would be in place when the UN Security Council resorts to the use of force but this does not necessarily have to be the case.

The duty of UN member states not to hinder a UN operation through active or passive cooperation with the target has a treaty basis in Article 2(5) UN Charter, which provides that,

> [a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

The negative obligation not to undermine the effectiveness of UN military operations either through action or inaction as well as the positive obligation to assist the United Nations with its operations are also interconnected with the UN Charter's system of collective security and the general prohibition of the unilateral use of force.[111]

[110] Gill (n 109) 60.
[111] A Verdross, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 The American Journal Of International Law 60. Verdross speaks in favour of three interconnected rules with regards to the use of force – namely the prohibition of the unilateral use of force, the settlement of disputes by peaceful means and the obligation to assist the United Nations in enforcement action. Gill also argues

Member states, in favour of creating the main responsibility for the UN Security Council to restore and maintain international peace and security, have largely renounced their individual sovereign powers to use military enforcement action. A side effect of this loss of power is the duty to enable the UN Security Council to fulfil the function for which it has been created for.

2.2.2. Military UN Security Council sanctions as an entitlement to use force

Military sanctions do not merely create legal obligations of differing natures for UN member states. Like economic sanctions, military Security Council sanctions also function as an entitlement. UN member states have largely renounced their power to use force unilaterally in favour of creating the primary responsibility of the Security Council to maintain and restore international peace and security in the system of centralised vertical law enforcement of the United Nations. The authorisation of member states by the Security Council to resort to military force is one of the view exceptions to the general prohibition of the use of force. The authorisation of the use of force therefore fulfils two functions. It grants to UN member states the right to use force in a particular case. It also prevents the target from claiming that the military measures deployed against it would be in violation of the principle of non-intervention as stipulated in Article 2(4) UN Charter.[112]

To summarise briefly, both economic and military sanctions provide entitlements for the sender state to use economic or military measures that the target has to accept. Both types of sanction resolutions are binding on the UN member states although their binding nature differs. The general finding that UN Security Council resolutions serve as an entitlement to resort to enforcement measures and that they are binding on the member states of the United Nations is not without exceptions. It will be argued in the following that decisions by the UN Security Council that are either illegal or *ultra vires* do not produce the above described legal effects.

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that UN members are obliged under chapter VII to 'provide some degree of cooperation with collective enforcement measures short of actual military participation', Gill (n 109) 83.

[112] See Gazzini (n 11) 21.

3. When do UN Security Council resolutions stop being binding? – *Ultra vires* and illegal UN Security Council decisions

The UN Charter indicates that if the UN Security Council oversteps its limits, its decisions become unlawful[113] and they cease to be binding on UN member states. The member states have agreed only to 'accept and carry out decisions of the Security Council in accordance with the present Charter'.[114] However, the question of whether acts by the UN Security Council can be unlawful and, if so, whether they stop being binding is controversial. The substantive limits the UN Security Council faces when adopting enforcement measures under Chapter VII of the UN Charter will be discussed below in part four. This section will first take a closer look at the debate surrounding the effects of illegal UN Security Council decisions.[115]

Two types of illegal decisions of international organisations can be identified.[116] Like states, international organisations can breach international law.[117] And if international organisations exceed their competences, they act *ultra vires*.[118] Therefore if the UN Security Council oversteps the powers granted to it by the founding treaty and does not act in accordance with the purposes and principles of the UN Charter as expressed in Article 24(2) UN Charter, its acts stop being *intra vires*. It is also not within the competence of any international actor to violate the norms of *jus cogens*. If it does this, the Security Council's decisions must be classified as *ultra vires*.[119] The next section will focus on the legal effects produced by ultra vires acts of the UN Security Council. The legal limits faced by the Security Council are either linked to the purposes and principles of the UN Charter or to international law in the form of *jus cogens*. Therefore if the Security Council oversteps its boundaries it does not merely act illegally but also *ultra vires*.

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[113] Gazzini (n 11) 26.
[114] Article 25 UN Charter.
[115] For an analysis of the question as to whether UN Security Council resolutions that violate UN Charter procedures have to be complied with see B Conforti, 'The Legal Effect of Non-compliance with Rules of Procedure in the U.N. General Assembly and Security Council' (1969) 63 The American Journal of International Law 479-489.
[116] J Gardam, 'Legal Restraints on Security Council Military Enforcement Action' (1996) 17 Michigan Journal of International Law 289.
[117] Gardam (n 116) 289.
[118] Gardam (n 116) 289.
[119] A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 European Journal of International Law 68.

With regards to *ultra vires* acts of the UN Security Council, several questions need to be clarified. First, who is competent to challenge the validity of Security Council decisions? The member states of the United Nations seem to have the right to challenge UN Security Council decisions since they created or agreed to the founding treaty of the United Nations. They created the United Nations to fulfil certain objectives and purposes and therefore they have the right to check if its decisions reflect them.[120] Second, it has to be decided whether *ultra vires* acts are *void ab initio* or just voidable. If they are *void ab initio* they do not produce legally binding effects and there would be no need to determine their invalidity. The UN member states could simply refuse to comply with UN Security Council resolutions.[121] If *ultra vires acts* would however be merely voidable, they would produce legally binding effects until the time of their invalidation.[122] The International Court of Justice held in the *Certain Expenses* case[123] that acts of the United Nations carry with them the presumption of being *intra vires*.[124] If the latter is the case, a follow up question must be addressed – namely who is competent to determine the invalidity of UN Security Council acts. The UN Charter does not contain a provision on who is competent to judge the UN Security Council. To fill this gap, some who argue that *ultra vires* acts of the UN Security Council are not void but voidable hold the view that *ultra vires* acts that are 'manifestly *ultra vires'* would not produce legal effects.[125] What constitutes a manifestly *ultra vires* act is not however entirely clear. It has been suggested that this qualification would apply to all decisions of an international organisation that violate its objectives and purposes.[126] If that reasoning were to be transferred to the United Nations, manifestly *ultra vires* acts could not be distinguished from ordinary *ultra vires* acts. The UN Security Council oversteps its competences when it is acting contrary to the purposes and

[120] E Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations' (1993) 77 The American Journal Of International Law 240.
[121] Gazzini (n 11) 27.
[122] Osieke (n 120) 244.
[123] International Court of Justice, Certain Expenses of the United Nations (Article 17 paragraph 2 of the Charter) Advisory Opinion, ICJ Reports 1962, p 151, 168.
[124] Gazzini (n 11) 27.
[125] Osieke (n 120) 249.
[126] Osieke (n 120) 249.

principles of the UN Charter.[127] If the UN Security Council violates the norms of *jus cogens* it is also hard to imagine not qualifying this breach of international law as a 'manifestly' *ultra vires* act.

In the absence of a body that is competent to review acts of the UN Security Council, UN member states have no guarantee against illegal UN Security Council decisions. Therefore member states need to have as a right of last resort the opportunity not only to challenge the lawfulness of UN Security Council decisions but also to refuse compliance.[128] States that refuse compliance with UN Security Council resolutions are asked to make their position known. States that are also members of the UN Security Council are requested to vote against the proposed Security Council resolution based on legal and not just purely political reasons.[129]

In sum, if it oversteps substantive limits, the UN Security Council's sanction decisions are void and not legally binding. The next part will look in more detail at the substantive limits the Security Council faces when acting under Chapter VII of the UN Charter with a particular emphasis on military sanctions.

Part 4

The Security Council and the use of force – limits to its discretion under Chapter VII of the UN Charter

When they agreed to the system of the United Nations and assigned the UN Security Council with the main responsibility for the maintenance of international peace and security, states did not give the Security Council unlimited powers.[130] As outlined above, if the UN Security Council oversteps these boundaries, its sanction decisions are *ultra vires* and they lose their binding force. In consequence, UN member states are not obliged to assist the United Nations in the above defined manner during the course of a military operation and they are not required to abstain from any action that could undermine the success of a planned military operation. UN Security

[127] Article 24 (2) UN Charter.
[128] Gazzini (n 11) 28.
[129] Gazzini (n 11) 28, 29.
[130] Gazzini (n 11) 24.

Council resolutions also lose their function of being an entitlement to use force and the target of military sanctions could rightfully exercise its right of self-defence against actions that can be qualified as an act of aggression.

Furthermore, if states start to question seriously whether it violates the limits of its ideological foundations, namely to act on behalf of shared values and norms, the UN Security Council would find it more difficult to find capable and willing entities that help it to fulfil its mandate by implementing its resolutions. They would have lost the notion of being legitimate.

The following part will examine the limits the UN Security Council faces under Chapter VII of the UN Charter when adopting military sanction resolutions. It will be argued here that the UN Security Council is bound by the purposes and principles of the UN Charter and by general international law of which the norms of *jus cogens* and the principle of proportionality will be of interest. Human rights and humanitarian law play central roles when assessing the legal limits of the UN Security Council to impose military sanctions. Both sets of norms are included in the purposes and principles of the UN Charter; some of them have acquired the status of *jus cogens* over time and their exercise is unavoidably linked with questions of proportionality.

The Security Council enjoys discretion in both steps of the Chapter VII UN Charter procedure for the adoption of military sanctions. The UN Security Council enjoys discretion in deciding whether a crisis is grave enough to constitute a threat to the peace, breach of the peace or act of aggression according to Article 39 UN Charter. Once it has paved the way for enforcement measures in general, it enjoys discretion whether and if so what kind of coercive measures should be adopted according to Articles 41 and 42 of the UN Charter.[131]

Regarding the question of whether the Security Council's discretion is limited, three schools of thought can be identified. Some argue that the Security Council's

[131] The recommendation does not form part of this analysis.

discretion about when and how to intervene is completely unbound by law.[132] Others claim that the Security Council is absolutely free in determining an Article 39 UN Charter situation, but that it is limited by general international law and constitutional requirements in its choice of action, once the obstacle of Article 39 UN Charter has been overcome.[133] Finally, others hold the view that the Security Council is limited in its decision as to when to act but not how to act.[134]

1. Limits to the Security Council's discretion in determining a threat to the peace, breach of the peace or act of aggression: Article 39 UN Charter

The Security Council is neither under the duty to determine whether a crisis is covered by the terms of Article 39 UN Charter nor is its use of this provision limited to those situations in which it is also willing and able to take effective enforcement measures.[135] No final legal conclusions can be drawn from these findings about the question of whether the Security Council's discretion is limited under this provision. The political nature of the qualification of a situation as a threat to the peace, breach of the peace and act of aggression does not mean that once the Security Council decides to make this determination, it is unbound by law.[136]

The wording of Article 39 UN Charter and its systematic context within Chapter VII speaks in favour of a limited discretion.[137] Article 39 UN Charter distinguishes between three different situations that require enforcement action to restore or maintain international peace and security – namely a threat to the peace, breach of the peace or act of aggression, and therefore requires the Security Council to qualify the situation along these terms. Although the terms used are vague, they nevertheless indicate different impacts on international peace and security and they have been

[132] G Oosthuizen, 'Playing the Devil's Advocate: The United Nations Security Council is Unbound by Law' (1999) 12 Leiden Journal of International Law 562; G Kirk, 'The Enforcement of Security' (1946) 55 The Yale Law Journal 1089, 1090.
[133] Gill (n 109) 40, 64.
[134] See De Wet (n 73) 134 for references.
[135] Gill (n 109) 40.
[136] De Wet (n 73), 136; also arguing in favour of a limited discretion to interpret Article 39 UN Charter is Tesón (n 78) 338, 339.
[137] De Wet (n 73) 136, 137.

further developed by recent practice.[138] The systematic context of Article 39 UN Charter within Chapter VII of the UN Charter, that allows for the adoption of binding Security Council enforcement decisions once its gateway has been passed, supports the view that the Security Council is not unbound by law.[139] If the Security Council is free to decide that the coercive measures mentioned in Chapter VII are applicable, the boundaries between Chapter VI of the UN Charter that focuses on non-binding Security Council decisions in relation to the pacific settlements of disputes and Chapter VII become irrelevant.[140]

2. Limits to the Security Council's discretion to adopt enforcement measures under Article 42 UN Charter

Once it has overcome the obstacle of Article 39 UN Charter and decided that there is a threat to the peace, breach of the peace or act of aggression, the Security Council has discretion about whether and if so what kind of military or non-military enforcement measure should be adopted for the maintenance of international peace and security. Nevertheless the Security Council's discretion to do so under Chapter VII of the UN Charter is not without substantive limits. In the following it will be argued that the Security Council is bound by the constitutional limits created by the UN Charter, namely by the principles and purposes of the United Nations. In addition, the Security Council is also subject to some rules of general international law, including in particular to the norms of *jus cogens* and the principle of proportionality. It is not proposed here that the Security Council has to correspond to international law in its entirety.[141]

2.1. Purposes and Principles of the UN Charter

In general, the legality of a law enforcement measure depends on the framework in which it is adopted. Measures of vertical law enforcement have to comply with the founding treaties of the international organisation in question.[142] Transferring this reasoning to the system of the United Nations indicates that the Security Council is

[138] De Wet (n 73) 136.
[139] De Wet (n 73) 137.
[140] De Wet (n 73) 137.
[141] See also Gill (n 109) 73.
[142] Osteneck (n 5) 9.

faced with constitutional limits stemming from the UN Charter itself when it is adopting enforcement measures. The second paragraph of Article 24 UN Charter puts this general concept into concrete form by asking the Security Council to 'act in accordance with the Purposes and Principles of the United Nations' when it exercises its primary responsibility for the maintenance of international peace and security under Chapter VII.

The claim made by some that the purposes and principles of the UN Charter could not serve as limits to the Security Council's discretion as they would be too openly phrased[143] and as Article 24(2) UN Charter would only be infringed when the Security Council impinges upon the collectivity of all charter purposes and principles is not convincing.[144] The collective reference to the purposes and principles in Article 24 UN Charter can be explained by their more detailed enumeration in Chapter I of the UN Charter.[145] It will be argued here that the UN Security Council is legally bound to respect the core of some human rights and the core of humanitarian law when it adopts military enforcement measures and that this obligation is re-enforced by the principle of good faith that is addressed not only to UN member states but also to the United Nations as an international organisation.

2.1.1. Human rights as one of the purposes of the UN Charter

The promotion and encouragement of human rights is mentioned in Article 1(3) UN Charter as constituting one of the purposes of the UN Charter. The reading of Article 1(3) UN Charter in conjunction with Article 24(2) UN Charter therefore provides for the constitutional basis for the Security Council's duty to respect human rights when adopting military or non-military enforcement actions.[146] The view that the Security Council is bound by human rights in general is furthermore supported by Article 55(c) of Chapter IX on 'International Economic and Social Co-operation' that requires the Security Council 'to promote universal respect for, and observance of,

[143] M Craven, 'Humanitarianism and the Quest for Smarter Sanctions' (2002) 13 European Journal of International Law 51.
[144] De Wet (n 73) 192, 193.
[145] De Wet (n 73) 193.
[146] De Wet (n 73) 193; Gardam (n 116) 306; Gill (n 109) 74; H Köchler, 'Ethical Aspects of Sanctions in International Law: The Practice of the Sanctions Policy and Human Rights' I.P.O Research Papers <http://www.i-p-o.org/sanctp.htm>.

human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.

Furthermore it would be at odds with the founding ideas of the United Nations if the Security Council violated human rights. The United Nations was founded with the view of stopping the two world wars of the twentieth century from happening again. The peoples of the United Nations declared themselves in the preamble of the UN Charter to be determined

> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.[147]

The development of human rights law since the entry into force of the UN Charter in 1945 also strongly suggests a duty not to touch on the core of human rights.[148] In its advisory opinion in the *Namibia* case of June 1971,[149] the International Court of Justice, cited a statement by the Secretary-General providing that the only limits the Security Council faces when maintaining international peace and security through the powers granted to it by Chapter VII of the UN Charter would be 'the fundamental principles and purposes found in Chapter 1 of the Charter'.[150]

The UN Security Council is bound by the purposes of the UN Charter and therefore must respect human rights when adopting sanction decisions. However, it only has to respect the core of human rights.[151] The negative side effect of the member states' duty to implement UN sanction resolutions is that some of the rights states in general enjoy under international law will be restricted, suspended or even infringed upon.[152] A trade embargo, for example, not only has a negative impact on the target state and

[147] Preamble of the UN Charter, second incident.
[148] Gill (n 109) 77.
[149] International Court of Justice, *Legal Consequences for States of the Continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16 [hereinafter *Namibia*].
[150] *Namibia* (n 149) 52 para 110.
[151] On the core of international human rights, see chapter 1, section 8.
[152] Gill (n 109) 63.

its population but can also be costly on those states that have established trade relations with the target.[153]

2.1.2. Humanitarian law

The purposes and principles of the UN Charter limiting the UN Security Council also include the core of humanitarian law.[154] Although it is not a member of the four 1949 Geneva Conventions and its official statement is that it is not bound by them, the United Nations' actual practice suggests otherwise –namely that it is bound by the basic norms of humanitarian law.[155]

According to the *Legal Opinions of the Secretariat of the United Nations on the Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims*,[156] the United Nations with regards to peace-keeping operations 'is not substantively in a position to become a party to the 1949 Conventions'[157] although the 'International Committee of the Red Cross has been of the opinion that the United Nations should formally undertake by accession to apply the Convention each time Forces of the United Nations are engaged in operations'.[158] The substantive limits refer to obligations that in the view of the UN Secretariat

> can only be discharged by the exercise of juridical and administrative powers which the Organization does not possess, such as the authority to exercise criminal jurisdiction over members of the Forces, or administrative competence relating to territorial sovereignty. Thus the United Nations is unable to fulfil obligations which for their execution require the exercise of powers granted to the Organization, and therefore cannot accede to the Conventions.[159]

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[153] De Wet (n 73) 182; Gill (n 109) 62; T G Weiss and others, *The United Nations and Changing World Politics* (5th edn Westview Press, Boulder 2007) 6.
[154] De Wet (n 73) 20 4; Gill (n 109), 79. On the core of international humanitarian law, see also chapter 1, section 8.
[155] De Wet (n 73) 204, 207; Gill (n 109) 80.
[156] Secretariat of the United Nations, *Legal Opinions of the Secretariat of the United Nations on the Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims* (1972) United Nations Juridical Yearbook 153 [hereinafter *UN Secretariat Legal Opinion*].
[157] *UN Secretariat Legal Opinion* (n 156) 153 para 3.
[158] *UN Secretariat Legal Opinion* (n 156) 153 para 2.
[159] *UN Secretariat Legal Opinion* (n 156) 153 para 3.

However, today's practice reveals that through the exchange of letters, the United Nations binds troop-contributing governments to make sure that their contingents respect the Conventions and also requests that these forces 'respect the humanitarian principles and spirit of the Conventions'.[160] Therefore, the official statement dating from 1972 rather has to 'be understood as meaning that the UN is not bound by these norms in exactly the same manner as states and that the Security Council may authorise some limitation of the norms of international humanitarian law if the circumstances so require' but that its is nevertheless bound by the core of humanitarian law.[161]

2.1.3. Good faith

The assumption that the Security Council is bound by the core of human rights and humanitarian law when adopting enforcement measures is reinforced by its obligation to act in good faith, which forms another principle on which the United Nations is based.[162] The wording of the first sentence of Article 2 UN Charter, in conjunction with its second paragraph, shows that the United Nations itself and therefore the Security Council 'shall fulfil in good faith the obligations assumed by them in accordance with the present Charter'[163] and that it is not only for UN member states to act accordingly.[164]

The principle of good faith is supposed to prevent the Security Council from acting contrary to the legitimate expectations it has created through previous actions.[165] By identifying the promotion and the encouragement of respect for human rights and fundamental freedoms as one of the purposes of the UN Charter,[166] by creating the idea of a certain human rights standard protected by the United Nations through

[160] *UN Secretariat Legal Opinion* (n 156) 153 para 4.
[161] De Wet (n 73) 208.
[162] De Wet (n 73) 198.
[163] Article 2 sentence 1 provides that 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.' Article 2(2) UN Charter reads as follows: 'All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.'
[164] De Wet (n 73) 195.
[165] De Wet (n 73) 195-198.
[166] Article 1(3) UN Charter.

human rights instruments such as the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights as well as the United Nations Declaration of Human Rights of 1948 and statements by the Secretary General with regards to humanitarian law, the Security Council has therefore created the expectation to observe the core of human rights and humanitarian law itself.[167] The principle of good faith thus reinforces the limits the UN Security Council faces.

2.2 International law and the norms of *jus cogens*

But it is not only the literal, teleological and historical interpretations of the UN Charter that speak in favour of limiting the Security Council's discretion to use enforcement measures by human rights considerations or considerations of humanitarian law as one of the purposes and principles of the UN Charter. The Security Council is also bound by general international law and in particular by the norms of *jus cogens* when it exercises its Chapter VII powers. There are two sources for this claim.

First, as an international organisation, the United Nations is bound by customary international law, albeit not by all of its rules. According to the principle of functionality, international organisations are bound by general international law as a corollary of their international legal personality; they have to obey those rules that are related to their functions.[168] Based on this concept, it has been argued that the United Nations is bound by humanitarian law during peace-keeping operations.[169] Generalising the concept of functionality it could therefore be concluded that the UN Security Council is bound by human rights and humanitarian law when authorising the use of force according to Article 42 UN Charter.

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[167] De Wet (n 73) 200, 206 with regards to humanitarian law.
[168] M Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 401; V Falco, 'The International Legal Order of the European Union as a Complementary Framework for its Obligations under IHL' (2009) 41 Israel Law Review 187.
[169] Zwanenburg (n 168) 401.

Second, the UN Charter itself calls for respect of international law. According to Article 1(1) UN Charter,

> [t]he purposes of the United Nations are: To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The contrary claim put forward by some that the wording of Article 1(1) UN Charter would merely suggest that the Security Council is bound by the principles of justice and international law when it is engaged in settling disputes by peaceful means according to Chapter VI of the UN Charter but not when it is undertaking collective security measures to prevent and to remove threats to maintain international peace and security is not convincing.[170]

2.2.1. *Jus cogens*

When examining in more detail by which human rights and by which norms of humanitarian law the UN Security Council is bound as part of general international law, it will be argued here that its discretion to act under Article 42 UN Charter is limited by the concept of *jus cogens*.[171] The concept of *jus cogens* is comprised of the peremptory norms of international law and has been developed in the context of treaties. According to Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT),

> [a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized 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.

[170] Gardam (n 116) 297.
[171] De Wet (n 73) 187.

The concept of *jus cogens* is applicable to the UN Charter because both prerequisites are met. First, the Charter qualifies as a treaty. The fact that the UN Charter represents the constitution of the United Nations as an international organisation with legal personality that is distinct from its member states cannot justify another classification.[172] Otherwise, the member states that are individually bound by the norms of *jus cogens* themselves[173] would be able to avoid their obligations by the establishment of an international organisation.[174]

Second, the UN Charter is not immune from the influence of the Vienna Convention although the latter was agreed after the UN Charter came into force. The conferral of powers from the member states to the Security Council cannot be viewed as a static process but as an ongoing development, indicating that the powers conferred on the Security Council are circumscribed by the ongoing development of *jus cogens.*[175] Nevertheless, the finding that the Security Council is bound by *jus cogens* is not of much value in the light of the vagueness of the concept of *jus cogens*. No agreement exists as to what is covered by *erga omnes* norms. Most scholars recognise the limited nature of this concept and only consider norms such as the prohibition of genocide, torture, racial discrimination, the prohibition against slavery as well as the prohibition of the use of force as included.[176]

2.3. Proportionality

The Security Council is not only obliged to respect the core of basic human rights and the core of humanitarian law when it exercises its discretion under Article 42 UN Charter: it also must respect the principle of proportionality with its sanction decisions. The general principle of proportionality contains three elements. First, the chosen measure must be suitable for achieving the desired aim. Second, the chosen measure must be the least destructive measure albeit being immediately effective in achieving its aim. Finally, the negative effects of the chosen measure must be

[172] De Wet (n 73) 188.
[173] De Wet (n 73) 190.
[174] De Wet (n 73) 188, 189.
[175] De Wet (n 73) 189, 190.
[176] Examples mentioned by P Eeckhout, 'EC Law and UN Security Council Resolutions – In Search of the Right Fit' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge 2008) 115.

outweighed by its benefits. The first two elements can be referred to as the requirement of necessity whereas the last element might be qualified as the principle of proportionality. Hence, the requirement of necessity asks whether an incident warrants the use of military measures and the requirement of proportionality in a strict sense determines the legitimate amount of force that can be used to achieve a certain aim.[177] The principle of proportionality does not demand that the Security Council make use of all non-binding and non-military enforcement measures first before military measures can be implemented. It is possible to resort to the use of force immediately if economic measures, for example, cannot restore peace and security.

Article 42 UN Charter itself requires that military measures are proportionate and necessary.[178] According to this provision, the Security Council has to determine, first, that non-military measures under Article 41 UN Charter 'would be inadequate or have proved to be inadequate' and, second, that the Security Council 'may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'. In consequence, the principle of proportionality in conjunction with the core of basic human rights and humanitarian law constrains the Security Council's discretion when it wants to resort to military enforcement measures according to Article 42 UN Charter.[179]

In sum, the Security Council's discretion under Article 42 UN Charter to authorise the use of force is limited by *jus cogens* and the principles and purposes of the UN Charter. One of the most important limitations on the Security Council's discretion to resort to military enforcement measures is created by the core of basic human rights. On the one hand, the core of the basic human rights is partly covered by the concept of *jus cogens*, although no agreement exists as to the exact content of this concept. On the other hand, the United Nations is based on respect and promotion of human rights. The concept of good faith enhances the boundaries for the Security Council created through the United Nations' own policy of human rights protection and

[177] Gardam (n 116) 305.
[178] Gardam (n 116) 298.
[179] Gardam (n 116) 306.

humanitarian law. Additionally, the principle of proportionality underlines the importance of human rights considerations when the Security Council is faced with the decision to resort to non-binding measures, non-military measures or military enforcement measures to fulfil its mandate to restore international peace and security. If the UN Security Council oversteps its boundaries and violates the core of basic human rights or the core of humanitarian law, its sanction resolutions lose their legally binding force as pointed out above.

Part 5

The practical significance of the discussion of whether or not the UN Security Council is limited in the exercise of its Chapter VII powers – The *Kadi* case

The discussion about the limits the UN Security Council is under when acting under Chapter VII of the UN Charter is not without practical significance as demonstrated by the *Kadi* case,[180] discussed in chapter one above. In *Kadi*, the European courts had to decide whether they were competent to review a Community instrument that was implementing UN sanction resolutions in the light of European fundamental rights. Related to this problem was the sub-question about whether UN Security Council resolutions can infringe human rights and if so what kind of human rights standard should be applied.

The Court of First Instance[181] refused to review the contested Community instrument in the light of European fundamental rights and claimed that it would otherwise indirectly challenge the lawfulness of the UN Security Council resolution the Community regulation was implementing. In a second step, it nevertheless upgraded European fundamental rights to norms of *jus cogens* and found itself competent to use this new found standard of peremptory norms directly to scrutinise UN Security Council decisions. Although the Court cautiously preferred the term 'indirect review'

[180] Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649 [hereinafter *Kadi*]; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.
[181] *Kadi* (n 180).

it nevertheless directly judged their lawfulness.[182] Its questioning of whether a UN Security Council resolution is compatible with *jus cogens* is far more aggressive than the review of the contested Community instrument in light of European fundamental rights which the Court tried to avoid.[183]

With its decision, the Court of First Instance sent a strong signal to the international community. By judging the UN Security Council, it could encourage other courts, national or regional ones, to scrutinise UN Security Council decisions legally in light of their own human rights standards. By doing so, they would not only reduce the effectiveness of UN Security Council sanction decisions but they would also undermine the authority of the UN Security Council to maintain and restore international peace and security. If the central role of the UN Security Council and its decisions, which are supposed to represent the collective will of the international community, are questioned, the system of vertical centralised law enforcement of the United Nations will be challenged to its core.

A UN Security Council that is viewed as a violator of human rights instead of their promoter cannot transfer the legitimacy that is inherent in the idea of the United Nations with its resolutions. After all, its resolutions are designed to put shared values into concrete forms on a case by case basis. If decisions by the UN Security Council are perceived to be illegitimate, a vicious circle will start. The Security Council will not find capable and willing actors to implement its decisions. If its actions are deemed to be ineffective, it cannot fulfil its mandate to maintain and restore international peace and security, which in turn will weaken its credibility even further. Encouraged by this trend, increasingly more actors will challenge the authority of the UN Security Council to act on their behalf and the unity of the international system will be in serious danger.[184]

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[182] R A Wessel, 'Editorial: The UN, the EU and Jus Cogens' (2006) 3 International Organizations Law Review 3; Eeckhout (n 176) 116.
[183] C Eckes, 'Judicial Review of European Anti-Terrorism Measures – The *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 European Law Journal 88.
[184] Wessel (n 182) 6.

In contrast to the Court of First Instance, the European Court of Justice[185] stressed that it would not review decisions by the UN Security Council, but merely the legislative acts adopted within its own legal order in the light of its own standards of human rights, according to its mandate as the guardian of EU law. Nevertheless, by doing so, the Court also could not avoid signalling to others that the UN Security Council resolution that has been implemented in the Community legal order might be in line with an international human rights standard – which is not going to be assessed by the European Court – but that this regulation nevertheless does not satisfy a European standard of fundamental rights protection. From a European perspective that highlights the autonomy of the European legal order, this finding appears to be acceptable. Nonetheless, the legitimacy of decisions of the UN Security Council is questioned. This might encourage the EU even more to develop its own legitimacy as an international military actor, based on its own values, including human rights, democracy and the rule of law as already indicated in its *European Security Strategy*. This could also lead the EU to act outside the framework of the United Nations when it launches and conducts military crisis management operations, for example by referring to the concept of the responsibility to protect.

Conclusion

The aim of this chapter has been to set out the international legal framework for the use of force that has been primarily developed with states as international actors in mind. The system of the United Nations is centred on the general prohibition of the use of force which has acquired the status of customary law over time. As such it is also binding on the European Union as an international legal person that is engaged in military crisis management operations. Therefore, the European Union needs to justify military sanctions on one of the accepted exceptions to the principle of non-intervention. Accepted exceptions include the authorisation of the UN Security Council to use force. Although the European Union seems to be open-minded towards the concept of the responsibility to protect, it is not clear whether it should embark on unilateral action.

[185] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

It has been argued that UN Security Council resolutions of a military nature provide an entitlement to use force. At the same time and similarly to economic UN Security Council sanctions, military resolutions also create legal obligations. Although UN member states are not obliged to send their troops, they are under a positive duty to provide assistance and cooperation and they are under the negative duty not to undermine the success of military operations. This negative obligation results from a loyalty obligation that is inherent in the vertical centralised system of law enforcement of the United Nations. The negative obligation to abstain from anything that might undermine the effectiveness of the use of force authorised by the Security Council means that UN member states can be asked to become active and, for example, to introduce travel bans. But the Security Council can also ask member states to stop doing something, for example, to abstain from selling weapons and other military equipment to the target. Usually economic sanction regimes are in place before the UN Security Council resorts to the use of force, but this does not necessarily have to be the case. UN Security Council resolutions lose these characteristics and stop being binding if they violate the core of human rights and the core of humanitarian law. Whether or not the European Union is bound by existing UN Security Council resolutions of a military nature in the same way as UN member states will be the topic of chapter six.

Chapter 5: The European Union and economic sanctions

Introduction

Although it is an emerging international military actor, the European Union has a rather long tradition of imposing economic sanctions by implementing either UN or autonomous sanction regimes. Like the use of force, economic sanctions are incorporated into the EU's comprehensive concept of crisis management and they pose similar questions regarding the member states' remaining competences in this highly sensitive foreign policy field. The purpose of the present chapter is to examine the legal questions that surround the use of economic sanctions within the European legal order. This will allow for the comparative method that will be used in chapter six. This subsequent chapter will argue that the analysis of the legal relationship between the EU and UN Security Council resolutions about economic sanctions can help with understanding the relationship between the EU and the UN Security Council with regards to the use of force due to the similarities they share.

The first part of this chapter will outline both the European legal framework for adopting economic sanctions and the autonomous and non-autonomous sanction practice of the European Union. The following part will then assess the gradual developments that led to a European competence for the adoption and imposition of economic sanctions. This will serve as an example for European integration in the external policy sphere. Part three will look at the ongoing debate about the nature of the European competence for the imposition of economic sanctions. This debate demonstrates the fear of European member states that they might lose their sovereignty in foreign affairs in favour of European integration.

Part 1

European economic sanctions – practice and legal framework

The European Union has a long tradition of using sanctions or restrictive measures, a terminology it prefers, as a foreign policy tool.[1] European sanctions can be grouped

[1] J Kreutz, 'Hard Measures by a Soft Power? Sanctions Policy of the European Union 1981 – 2004' (2005) Bonn International Center for Conversion (BICC) paper 45 <http://www.bicc.de/uploads/pdf/publications/papers/paper45/paper45.pdf> 5.

into the eight types of measures that include 'arms embargoes, trade sanctions, financial sanctions, flight bans, restriction of admission, diplomatic sanctions, boycotts of sport and cultural events as well as the suspension of co-operation with a third country'.[2] Economic sanctions represent a sub-category of restrictive measures that includes trade sanctions, financial sanctions, flight bans as well as the suspension of financial help.

In the following only those economic sanctions that are adopted on the basis of Article 215 LTFEU, after a decision within the common foreign and security policy has been obtained, will be discussed. These measures concern trade sanctions, financial sanctions, and flight bans. The European Union has so far made use of Article 215 LTFEU to impose embargoes on certain goods, to ban provision of certain services and certain investments, to restrict funds to and from the targeted country, to restrict the establishment of branches and subsidies of and cooperation with banks of the target country, to restrict issuance of and trade in certain bonds, to freeze funds and economic resources, and to restrict access to EU airports for certain cargo flights.[3]

Arms embargoes and restriction of admission will not be addressed in the following analysis. Although they are adopted on the basis of decisions within the common foreign and security policy, arms embargoes are implemented by the member states on the basis of Article 346 (1)(b) LTFEU and not by the Union itself based on Article 215 LTFEU.[4] Article 346 LTFEU allows member states to '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'.

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[2] Kreutz (n 1) 5, 6.

[3] See for example Council Regulation (EU) No 961/2010 on restrictive measures against Iran and repealing Regulation (EC) No 423/2007 [2010] OJ L 281/1. An updated list on EU sanctions in force by the European Commission can be found at <http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf>

[4] E Paasivirta and A Rosas, 'Sanctions, Countermeasures and Related Actions in the External Relations of the EU: A Search for Legal Frameworks' in E Canizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International, The Hague 2002) 217.

Restrictions of admission, including travel and visa bans are also implemented at member state level but for practical reasons. Although member states jointly decide about the refusal to grant individuals access to their territory, the decision is implemented by the respective national immigration authorities.[5]

The next section will briefly introduce the EU's autonomous and non-autonomous sanction practices. This will be followed by a description of the European legal and political framework for their adoption. Special emphasis will be put on the legal procedure for the adoption of economic sanctions and the legal effects they produce as well as on the policy framework in which they are adopted. Finally, the constitutional limits for the adoption of economic sanctions will be discussed, paying special attention to the European courts' case law.

1. Autonomous and non-autonomous European economic sanctions

When imposing economic sanctions against third states or entities, the European Union adopts eitherautonomous or non-autonomous sanctions. The latter category refers to European economic sanctions that are adopted in implementation of a multilateral sanction regime set up by the UN Security Council through UN Security Council resolutions.[6] Economic UN sanction resolutions are binding on the EU member states as signatories of the UN Charter. Whether UN Security Council resolutions are also binding on the European Union will be discussed in chapter six below.

Autonomous sanctions adopted by the European Union represent unilateral sanctions in the sense that the EU as an international organisation with international legal personality bases its sanction decision solely on its Treaties and the constitutional foundations incorporated therein.

[5] Kreutz (n 1) 6, 7.

[6] When adopting economic sanction resolutions, the UN Security Council has to follow a two-step procedure under Chapter VII of the UN Charter. First, it has to decide whether there is a threat to the peace, breach or act of aggression within the meaning of Article 39 UN Charter in order to be empowered in a second step to decide which measure should be employed not involving the use of armed force within the meaning of Article 41 UN Charter.

1.1. Non-autonomous sanctions

The implementation of economic UN Security Council sanction resolutions by the European Union can be seen as one of its contributions to effective multilateralism. According to the *Basic Principles on the Use of Restrictive Measures (Sanctions)*[7] the EU is

> committed to the effective use of sanctions as an important way to maintain and to restore international peace and security in accordance with the principles of the UN Charter and of our common foreign and security policy. In this context, the Council will work continuously to support the UN and to fulfil our obligations under the UN Charter.

The EU seeks to intensify its efforts with the UN to coordinate its action on sanctions and to 'ensure full, effective and timely implementation by the European Union of measures agreed by the UN Security Council'.[8]

When implementing UN sanction resolutions, the European Union assists the UN Security Council in fulfilling its primary responsibilities – the maintenance and restoration of international peace and security. By doing so, the Union also makes the values on which UN sanction decisions are based its own. The practice of the UN Security Council reveals that its economic sanctions are intended to promote and to protect human rights and that sanctions are directed primarily against gross human rights violations.[9] When the EU implements UN sanction regimes it thereby draws from the perceived legitimacy of UN Security Council decisions as outlined in chapter four above.

1.2. Autonomous European economic sanctions

Apart from implementing UN sanction regimes, the EU has also established an autonomous sanctions practice over time. Although this is debated, the EU is entitled under public international law to adopt and implement unilateral economic

[7] Council of the European Union, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' Brussels, 7 June 2004, Annex 1, 10198/1/04 REV 1, para 1[hereinafter *Basic Principles on the Use of Restrictive Measures*].
[8] *Basic Principles on the Use of Restrictive Measures* (n 7) para 2.
[9] B-S Baek, 'Economic Sanctions against Human Rights Violations' (2008) Cornell Law School Inter-University Graduate Student Conference Papers <http://scholarship.law.cornell.edu/lps_clacp/11> 42.

sanctions.[10] The UN Security Council does not have a monopoly on adopting economic coercive measures. The prohibition of the use of force according to Article 2(4) UN Charter does not entail the use of economic coercive measures.[11] At the San Francisco Conference in 1945, Brazil's proposal to insert 'economic coercion' into this paragraph was rejected.[12] However, only a few international actors are politically and economically strong enough to use this liberty and to impose economic sanctions against other actors.[13] The European Union and the United States are among them.[14] The following section will refer to European economic sanctions in general and will only distinguish between autonomous and non-autonomous sanctions if necessary.

2. European framework for the adoption of economic sanctions – legal and policy considerations

The next section will outline the legal framework and the policy considerations that guide the EU's economic sanction practice. It will be argued that the EU faces constitutional limits when it decides to adopt restrictive measures. These are created by its own standard of fundamental rights as indicated by decisions of the European Court of Justice in *Bosphorus*[15] and *Kadi*.[16]

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[10] For a detailed analysis, see K Osteneck, *Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft: Völker- und europarechtliche Rahmenbedingungen für ein Tätigwerden der Europäischen Gemeinschaft im Bereich von UN-Wirtschaftssanktionsregimen unter besonderer Berücksichtigung der Umsetzungspraxis der EG-Organe***,** Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 168 (Springer Verlag, Berlin; Heidelberg; New York 2004) chapter 2.

[11] T Weiss, and others, The *United Nations and Changing World Politics* (5th edn Westview Press, Boulder, Colorado 2007) 12.

[12] P J Kuijper, 'Community Sanctions against Argentina: Lawfulness under Community and International Law' in D O`Keeffe and H G Schermers (eds), *Essays in European Law and Integration, to Mark the Silver Jubilee of the Europa Institute, Leiden 1957-1982* (Kluwer-Deventer, Antwerp 1982) 152, footnote 38.

[13] Baek (n 9) 24.

[14] Baek (n 9) 61.

[15] Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, Ireland* [1996] ECR I-3953 [hereinafter *Bosphorus*].

[16] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649 [hereinafter *Kadi*]. Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 [hereinafter *Kadi* (Grand Chamber)].

2.1. European Economic sanctions – legal framework

Within the European legal order, economic sanctions are adopted by decisions made within the framework of the common foreign and security policy and a related legislative measure based on the Treaty on the Functioning of the European Union. This two-step procedure visualises the underlying tension behind economic sanctions, combining trade measures with foreign policy considerations. In the context of the European Union they therefore link the common foreign and security policy that is still subject to specific rules and procedure despite the de-pillarisation of the European Union through the Treaty of Lisbon to the the Union's remaining policy sectors.[17]

The Treaty of Lisbon amended the legal basis for the imposition of economic sanctions that was first introduced by the Treaty of Maastricht.[18] Article 215 LTFEU now reads as follows.

> 1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
>
> 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons or groups or non-State entities.
>
> 3. The acts referred to in this Article shall include necessary provisions on legal safeguards.

According to this two-step procedure, the member states in the Council adopt a decision under Title V, 'General Provision on the Union's External Action and Specific Provisions on the Common Foreign and Security Policy'. This CFSP

[17] Article 24(1) LTEU.
[18] Article 228 a EC (Maastricht version) was renumbered as Article 301 EC with the entry into force of the Treaty of Amsterdam.

decision usually takes the form of a unanimously adopted[19] Council Decision based on Article 29 LTEU, an instrument that was formerly known as a common position.[20]

The details about how this political decision that creates legally binding effects should be implemented are determined in a second step by the Council which acts by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.[21] The instrument of an EU regulation is usually chosen. Past practice reveals that both steps in the procedure for the adoption of economic sanctions are not always carried out in the order anticipated by the Treaty regime. The Commission has issued proposals for a Council regulation directly after economic UN Security Council resolutions have been adopted but before a legal decision could have been passed in the common foreign and security policy framework.[22] This approach has sometimes been chosen to allow the Council to adopt the CFSP instrument and the regulation at the same time but has always been carried out under the condition that the Commission has received sufficient information on the draft UN Security Council resolution before it

[19] Article 31 LTFEU.
[20] To provide an example of non-autonomous European sanctions targeted against individuals, Council Regulation (EU) No 667/2010 concerning certain restrictive measures in respect of Eritrea [2010] OJ L 195/15, based on Article 215 (1) and (2) LTFEU is implementing Council Decision 2010/127/CFSP of 1 March 2010 concerning restrictive measures against Eritrea based on Article 29 LTEU, which in turn is implementing UN Security Council resolutions setting up amongst other things targeted restrictive measures against individuals and entities as well as an arms embargo. The Council Decision asks for the freezing of funds and economic resources owned or controlled directly or indirectly by persons or entities included in the annex to the Council decision, which is not published in the Official Journal. The Regulation is much more detailed with regards to the freezing of funds and the information that should be included in the annex listing persons, entities and bodies provided by the Security Council or the UN Sanctions Committee. This information should contain for example the grounds for listing and, where available, the necessary information to identify the targets concerned. Furthermore, the Regulation is addressing the difficult human rights implications of targeted sanctions against individuals and asks the Regulation to be applied in accordance with human rights standards, and why there is a need to implement UN Security Council sanction resolutions within the EU legal order. It also briefly focuses on the obligation of its member states whose obligations under the UN Charter should be respected while implementing the Regulation that is binding on them from the perspective of European law.
[21] The European Parliament needs to be informed.
[22] Council of the European Union, 'Guidelines on Implementation and Evaluation of Restrictive Measures (sanctions) in the Framework of the EU Common Foreign and Security Policy', Brussels, 2 December 2005, 15114/05, para 36 [hereinafter *Guidelines on Implementation and Evaluation of Restrictive Measures in the Framework of the EU Common Foreign and Security Policy*].

is adopted to allow scrutiny of the terms and conditions under which it should be implemented by the Council regulation and the respective CFSP instrument.[23]

Economic sanctions are binding on the EU member states. Both the Council Decision adopted within the framework of the common foreign and security policy setting out the general sanction theme and the Council Regulation based on Article 215 LTFEU entailing the details are binding on the member states. The binding nature of Council decisions based on Article 29 LTEU was discussed in chapter three above.

The Council regulation implementing the CFSP decision does not refer to Article 288 LTFEU, the general legal basis for Union regulations, but provides that '[t]his Regulation shall be binding in its entirety and directly applicable in all Member States.'[24]

The Treaty of Lisbon introduced some procedural and substantive changes in the context of economic sanctions. It significantly altered the involvement of the institutions in comparison with the former Nice Treaty version.[25] The new involvement of the European Parliament,[26] although rather weak, can be seen as an attempt to confer greater legitimacy on EU sanctions regulations. The Commission lost its monopoly of initiative and now shares it with the High Representative of the Union for Foreign Affairs and Security Policy. Since the High Representative not only presides over the Foreign Affairs Council[27] but is also one of the Vice-Presidents of the Commission,[28] the institutional balance appears to have drifted in favour of the intergovernmental institutions.

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[23] *Guidelines on Implementation and Evaluation of Restrictive Measures in the Framework of the EU Common Foreign and Security Policy* (n 22) para 36.
[24] See for example Council Regulation (EU) No 667/2010 concerning certain restrictive measures in respect of Eritrea [2010] OJ L 195/15.
[25] Article 301 EC (Nice version) reads as follows: 'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.'
[26] The European Parliament shall be informed, Article 215(1) LTFEU.
[27] Article 27 TEU.
[28] Article 17(4) TEU.

The insertion of an explicit legal basis for the adoption of targeted sanctions against individuals with which the European Union addresses new developments in international sanction practice is one of the most prominent substantive changes. Article 215(2) LTFEU thereby solves the dispute as to whether the European Union has always been competent to adopt restrictive measures targeted against individuals.[29]

Another novelty introduced by the Treaty of Lisbon is the fact that economic and financial sanctions are now covered by the same provision - Article 215 LTFEU. Financial sanctions were previously subject to a separate legal basis as part of capital movement. Former Article 60 EC largely referred to the procedural requirements for the imposition of economic sanctions under former Article 301 EC. The change may not seem to have importance at first. However, the Lisbon Treaty also introduced a new provision for the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities related to the fight against terrorism whose procedural and institutional requirements differ profoundly from Article 215 LTFEU. Article 75 LTFEU does not ask for a prior

[29] The competence of the European Union to implement targeted UN Security Council sanctions against individuals into the Community legal order was one of several problems discussed in *Kadi.* In *Kadi*, the Community regulation freezing the applicant's funds and financial assets had been based on Article 301 EC, Article 60 EC, as well as on Article 301EC, 60EC in conjunction with Article 308 EC respectively. The Court of First Instance held that Articles 60 and 301 EC on their own, as well as Article 308 EC independently would not constitute a sufficient legal basis for the adoption of a Community regulation imposing financial sanctions against individuals in the fight against international terrorism, when no link to a state could be established. However, the CFI held that the combined effect of Articles 301 EC, 60 EC and 308 EC would entitle the Community to adopt the contested regulation. See Case T-315/01 *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3649 paras 97-98, 135.
The European Court of Justice held that Articles 301 EC and 60 EC would not provide for any express or implied power to impose sanctions against individuals not linked to the governing regime of a third country. However, Article 308 EC could additionally be use to fill this void. Article 308 EC could only be used if the action envisaged is designed to attain a Community objective but not a CFSP objective. The Court held that the conditions of the combined legal basis would have been met. See Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 paras 198-201, 216, 235-236.
Advocate General Maduro on the contrary argued that Articles 301 EC and 60 EC would constitute a sufficient legal basis for the adoption of targeted sanctions against individuals as the only requirement that would have to be fulfilled under these provisions would be the interruption or reduction of economic relations with third countries. Hence, they would not be restricted to the interruption or reduction of economic relations with governing regimes. See Opinion of Advocate General Maduro in Case C-402/05 P *Yassin Abdullah Kadi v Council and Commission* [2008] ECR I-6351 para 12.

decision within the common foreign and security policy and does not involve a role for the High Representative of the Union for Foreign Affairs and Security Policy. According to Article 75 LTFEU,

> [w]here necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.
>
> The Council, on a proposal from the Commission, shall adopt measures to implement the framework referred to in the first paragraph**.**
>
> The acts referred to in this Article shall include necessary provisions on legal safeguards.

In consequence, it seems difficult to decide on which legal basis the freezing of funds can be adopted. On the one hand, Article 75 LTFEU, as part of Title V, 'Area of Freedom, Security and Justice', explicitly refers to the fight against international terrorism and could be viewed as a *lex specialis* provision in relation to Article 215 LTFEU. On the other hand, the main reason behind the inclusion of Article 215(2) LTFEU was to create an explicit legal basis for targeted sanctions against individuals who cannot be linked to a state. The freezing of funds and assets held by natural or legal persons, groups or non-State entities has so far been used predominantly against persons and entities suspected of supporting terrorism. If all of these cases are covered by Article 75 LTEU instead, Article 215(2) LTFEU would be deprived of its practical significance. One way of resolving the uncertain boundary between Article 215 LTFEU and Article 75 LTFEU would be to use the former for sanctions against individuals involved in external activities that take place outside the territory of the European Union whereas the latter could be used to sanction internal terrorist activities.[30]

[30] M Cremona, 'EC Competence, 'Smart Sanctions', and the *Kadi* Case' (2009) 28 Yearbook of European Law 591.

2.2. EU policy framework for the effective use of economic sanctions

In addition to these legally binding norms, the European Union has started to develop a policy framework based on its extensive experience in the design, implementation, enforcement, and monitoring of economic sanctions to improve their effectiveness.[31] In reaction to the before mentioned *Basic Principles on the Use of Restrictive Measures (Sanctions)* as requested by the Council to be developed by the Secretary General/ High Representative in association with the Commission and had been prepared by the Political and Security Committee in June 2004,[32] the Relex/Sanctions formation of the Council of the European Union adopted *EU Best Practices for the Effective Implementation of Restrictive Measures* in 2005.[33]

> The Best Practices are to be considered non-exhaustive *recommendations* of a general nature for effective implementation of restrictive measures in accordance with applicable Community/Union law and national legislation. They are not legally binding and should not be read as recommending any action which would be incompatible with applicable Community/Union or national law, including those concerning data protection.[34]

The *EU Best Practices for the Effective Implementation of Restrictive Measures* include provisions on targeted sanctions and the claim of mistaken identity in relation to autonomous and non-autonomous EU measures. They elaborate on the 'freezing of funds' and the 'freezing of economic resources'; and they provide for humanitarian exemptions.[35]

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[31] Council of the European Union, 'Guidelines on Implementation and Evaluation of Restrictive Measures (sanctions) in the Framework of the EU Common Foreign and Security Policy', Brussels, 3 December 2003, 15579/03 [hereinafter *Guidelines on Implementation and Evaluation of Restrictive Measures (sanctions) in the Framework of the EU Common Foreign and Security Policy of 2003*].
[32] *Council of the European Union, 'Basic Principles on the Use of Restrictive Measures (Sanctions)'* Brussels, 7 June 2004, Annex 1, 10198/1/04 REV 1 [*hereinafter Basic Principles on the Use of Restrictive Measures*].
[33] Council of the European Union, 'EU Best Practices for the Effective Implementation of Restrictive Measures', Brussels, 29 November 2005, 15115/05 [*Hereinafter EU Best Practices for the effective implementation of restrictive measures*].
[34] *EU Best Practices for the Effective Implementation of Restrictive Measures* (n 33) para 5.
[35] *EU Best Practices for the Effective Implementation of Restrictive Measures* (n 33).

2.3. Constitutional limits for the imposition of economic sanctions

The *EU Best Practices*' reference to humanitarian exemptions suggests that the EU is not unlimited when adopting economic sanctions. The following section will take a closer look at the constitutional limits for the imposition of economic sanctions. *Guidelines on Implementation and Evaluation of Restrictive Measures in the Framework of the EU Common Foreign and Security Policy*[36] is a political document without any binding legal force that indicates some of the constitutional limits for the imposition of autonomous or non-autonomous economic sanctions. These limits include the principles of international law, human rights, and the principle of proportionality.

These guidelines provide that,

> [t]he introduction and implementation of restrictive measures must always be in accordance with international law. They must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy. The measures must always be proportionate to their objective.
>
> …[T]he restrictive measures should, in particular, be drafted in light of the obligation under Article 6 (2) TEU[37] for the EU to respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, as general principles of Community law….
>
> When deciding on restrictive measures it is important to consider which measure or package of measures is most appropriate.[38]

In the following the limits to the adoption and imposition of economic sanctions created for by the EU's own standard of human rights protection will be examined. In the case law of the European Court of Justice, the question about whether there are constitutional limits to the imposition of economic sanctions occurred in the context of non-autonomous sanctions. The Court had to face the difficult task of assessing

[36] *Guidelines on Implementation and Evaluation of Restrictive Measures in the Framework of the EU Common Foreign and Security Policy* (n 22).
[37] Article 6(3) LTEU.
[38] *Guidelines on Implementation and Evaluation of Restrictive Measures in the Framework of the EU Common Foreign and Security Policy* (n 22) paras 9-13.

whether it would be competent to review Community instruments that implemented UN Security Council resolutions in the light of human rights. It also had to choose which human rights standard to apply – a European standard or an international standard.

2.3.1. European human rights as constitutional limits for the adoption and imposition of economic sanctions

The core legal limits created by the European legal order on the imposition of economic sanctions were addressed by the European courts in *Bosphorus*[39] and more recently in *Kadi*,[40] which has been influential for several other cases in the light of targeted sanctions against individuals in the fight against international terrorism.[41]

2.3.1.1. Bosphorus and human rights

In *Bosphorus*,[42] the ECJ had to interpret Council Regulation No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia as part of a preliminary reference procedure initiated by the Supreme Court of Ireland. Regulation 990/93 was adopted by the Council to give effect to the decision of the Community and the member states, meeting within the framework of political cooperation to implement in the EEC certain aspects of the sanctions imposed by the UN Security under Chapter VII of the UN Charter, including Resolution 820 (1993). Bosphorus Airways, a Turkish company, had leased two aircraft owned by the Yugoslav national airline JAT. The contract was qualified as a 'dry lease' and therefore included only the leasing of the aircraft but not of the cabin or flight crew since the latter were provided by Bosphorus Airways.[43] According to Article 8(1) of Regulation No 990/93

> [a]ll vessels, freight vehicles, rolling stock and aircraft in which a majority of controlling interest is held by a person or undertaking in or

[39] *Bosphorus* (n 15).
[40] *Kadi* and *Kadi* (Grand Chamber) (n 16).
[41] See for example, Case T-253/02 *Chafiq Ayadi v Council* [2006] ECR II-2139 [hereinafter *Ayadi*]; Case T-228/02 *Organisation des Modjahedines du people d'Iran v Council* [2006] ECR II-4665 [hereinafter *OMPI*].
[42] Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, Ireland* [1996] ECR I-3953 [hereinafter *Bosphorus*].
[43] *Bosphorus* (n 15) para 2.

> operating from the Federal Republic of Yugoslavia (Serbia and Montenegro) shall be impounded by the competent authorities of the Member States.

The Supreme Court of Ireland asked the Court to examine whether this provision would have

> to be construed as applying to an aircraft which is owned by an undertaking the majority or controlling interest in which is held by an undertaking in the Federal republic of Yugoslavia (Serbia and Montenegro) where such aircraft has been leased …to an undertaking the majority or controlling interest in which is not held by a person or undertaking in or operating from …the Federal Republic of Yugoslavia.[44]

In the first part of the judgment, the Court had to assess how to interpret a Community instrument that is supposed to implement certain aspects of a UN Security Council resolution.[45] In a second step it was asked to address the claim put forward by Bosphorus Airways that the interpretation of Article 8 of Regulation No 990/93 'as meaning that an aircraft whose day-to-day operation and control are carried out under a lease by a person or undertaking not based in or operating from the Federal Republic of Yugoslavia must nevertheless be impounded because it belongs to an undertaking based in that republic, would infringe Bosphorus' fundamental rights, in particular its right to peaceful enjoyment of its property and its freedom to pursue a commercial activity'.[46] Both rights had been characterised as fundamental rights by the ECJ in previous cases.[47]

The ECJ concluded that the fundamental rights invoked by Bosphorus Airways were not absolute. These might lead to restrictions that were justified by objectives that were of general interest to the Community, such as putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law.[48] The Court spent little time assessing a possible infringement of

[44] *Bosphorus* (n 15) para 6.
[45] This question will be discussed in more detail in chapter six.
[46] *Bosphorus* (n 15) para 19.
[47] P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, Oxford 2004) 445.
[48] *Bosphorus* (n 15) para 21, 26.

fundamental rights through the Council regulation that implemented UN Security Council sanctions, and thereby also avoided a clear statement about the relationship between EU law and UN Security Council resolutions and on whether a UN Security Council decision could violate a European standard of human rights protection.

Advocate General Jacobs came to the same conclusion as the Court but put more emphasis on the possible infringement of fundamental rights. He did not appear to try to avoid this controversial issue.[49] He started his assessment of the relationship between fundamental rights and sanction regulations by recalling the important role played by human rights within the Community legal order. He highlighted that

> [i]t is well established that respect for fundamental rights forms part of the general principles of Community law, and that in ensuring respect for such rights the court takes account of the constitutional traditions of the Member States and of international agreements, notably the Convention for the Protection of Human Rights and Fundamental Freedoms[50] [and that the] [r]espect for fundamental rights is thus a condition of the lawfulness of Community acts – in this case, the Regulation.[51]

Advocate General Jacobs acknowledged that the embargo measures adopted by the UN Security Council that were implemented by the Community restricted Bosphorus Airways' property rights but that these measures were motivated by the public interest to stop the civil war in the former Yugoslavia. Nonetheless, he also drew attention to the need to find a balance between the aim of restoring international peace and security and the restriction of human rights and thereby indicated that the UN Security Council's discretion to adopt economic sanctions was indeed limited by human rights concerns and that it might be necessary for the European Court of Justice to intervene if the Community chose to implement such Security Council decisions.[52]

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[49] Opinion of Advocate General Jacobs Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, Ireland* [1996] ECR I-3953 [hereinafter Opinion of Advocate General Jacobs in *Bosphorus*].
[50] Opinion of Advocate General Jacobs in *Bosphorus* (n 49) para 51.
[51] Opinion of Advocate General Jacobs in *Bosphorus* (n 49) para 53.
[52] Opinion of Advocate General Jacobs in *Bosphorus* (n 49) paras 63-65.

He held that,

> [t]he international community took the view that, in order to stop that war, it was necessary to put pressure on the Federal Republic of Yugoslavia (Serbia and Montenegro) because of the role played by that Republic in the Bosnian conflict. Accordingly, the Security Council decided to adopt, and subsequently strengthen, economic sanctions, which were implemented by the Community.[53]
>
> That does not of course mean that in such circumstances any type of interference with the right to property should be tolerated. If it were demonstrated that such interference was wholly unreasonable in the light of the aims which the competent authorities sought to achieve, then it would be necessary for this Court to intervene. In that regard it may be necessary to consider whether, in the light of any information which may have subsequently come to light and after further consideration of the circumstances, the competent authorities were justified in maintaining a measure taken as a matter of urgency.[54]

Bosphorus demonstrated that there is the possibility of a clear legal conflict between Community law and UN law needs to be addressed. The Court could have evaluated the UN resolution that was implemented in the Community legal order on the basis of two different standards. It could have chosen the standard of protection of human rights in the international law sphere or the respective standard in the Community law sphere.[55] That the respective standards differ can be highlighted by the reference to the right of property.[56] It has been argued that Article 1 of the first Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms is much broader than Article 17 of the Universal Declaration of Human Rights, as the sanctity of property is not stated in the 1966 Covenant on Civil and Political Rights.[57] Although the Court could avoid answering questions about the relationship between the European legal order and the international legal order in the 1990s, mainly due to the nature of the preliminary rulings procedure that focuses only on the interpretation of the regulation concerned, both the Court's and Advocate

[53] Opinion of Advocate General Jacobs in *Bosphorus* (n 49) para 64.
[54] Opinion of Advocate General Jacobs in *Bosphorus* (n 49) para 65.
[55] I Canor, ''Can Two Walk Together, Except They Be Agreed?' The Relationship between International Law and European Law: The Incorporation of United Nations Sanctions against Yugoslavia into European Community Law through the Perspective of the European Court of Justice' (1998) 35 Common Market Law Review, 161, footnote 84.
[56] Canor (n 55) 161, footnote 84.
[57] Canor (n 55) 161, footnote 84.

General Jacobs' assessments indicate that the claimed violations of human rights concern the validity of the Community sanctions regulation.[58] The European courts had to face these problems in more concrete terms in 2001 when Mr Kadi challenged the lawfulness of a Community regulation that implemented UN targeted sanctions against individuals.

2.3.1.2. *Kadi* and European fundamental rights

The facts of the *Kadi* case were presented in chapter one above and it will be sufficient to recall at this point that Mr Kadi was put on a sanction list drawn up by the Sanction Committee. The Sanction Committee is a sub-organ of the UN Security Council. In consequence of his inclusion on the list, states were asked by a UN Security Council resolution to freeze Mr Kadi's funds and financial resources. The European Union implemented the UN Security Council sanction decision in the Community legal order through the adoption of a Community regulation. Community regulations are binding in their entirety and are directly applicable in all the member states.[59] Mr Kadi challenged the lawfulness of the Community regulation implementing UN Security Council resolutions by alleging three breaches of his European fundamental rights, namely the right to a fair hearing, the right to respect for property, and the right to effective judicial review.

The Court of First Instance[60] refused to review the contested Community instrument in the light of European fundamental rights. When Mr Kadi appealed against the decision of the Court of First Instance, the Grand Chamber of the European Court of Justice emphasised that fundamental rights constituted an integral part of the general principles of law and that respect for human rights would be a condition for the lawfulness of Community acts.[61] The conclusion the Court drew from these observations is that

[58] P Eeckhout, 'EC law and UN Security Council Resolutions – In Search of the Right Fit' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge 2008) 121.
[59] Article 288 LTFEU.
[60] *Kadi* (n 16).
[61] *Kadi* (Grand Chamber) (n 16) paras 283, 284.

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaties.[62]

It held that there was no Treaty provision that could 'be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU[63] as a foundation of the Union'.[64]

Thus, the ECJ demonstrated that sanctions within the EU legal order must respect the EU's own standard of human rights protection. Put differently, European fundamental rights represent constitutional limits for the adoption and implementation of sanctions within the European legal order: European economic sanctions that violate these standards are unlawful.

Part 2

The development of a role for the European Union in the adoption and imposition of economic sanctions – an example of European integration in external relations

The next part will outline the gradual development of a European competence for the adoption of economic sanctions as an example of European integration in the external policy sphere. This development highlights the reluctance of the European member states to give away aspects of their sovereignty in the highly sensitive field of foreign policy. At the same time it demonstrates that the European Union has acquired over time external competences that states had been unwilling to give away at first, in unique ways.[65] By now, the gradual creation of a European competence for the adoption and imposition

[62] *Kadi* (Grand Chamber) (n 16) para 285.
[63] Article 6 LTEU.
[64] *Kadi* (Grand Chamber) (n 16) paras 301-303.
[65] C Timmermanns, 'Opening Remarks – Evolution of Mixity since the Leiden 1982 Conference' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, Oxford 2010) 3.

of economic sanctions can almost be regarded as settled. It has been heavily influenced by European developments and in particular by some groundbreaking judgments of the European Court of Justice, in which the Court not only defined the broad scope and exclusive nature of the common commercial policy but also extensively interpreted the European Economic Community's competence to conclude international agreements.

The development of a European competence for the adoption of economic sanctions can serve as an indicator for the rather new development of the EU as an international military actor. The use of force lies even more at the heart of state sovereignty than the use of economic sanctions that combine trade measures with foreign policy considerations. However, even within the common foreign and security policy as well as within the common security and defence policy, a process of European integration is already ongoing as demonstrated in chapter three above. The analysis of the instruments of the common security and defence policy in the context of military crisis management operations in chapter three showed that the member states are already bound by CSDP decisions and that they are constrained in the conduct of their domestic foreign policies. To prepare for the comparative method used in chapter six, which argues that the legal relationship between the EU and UN Security Council resolutions with regards to economic sanctions can be helpful for understanding the relationship between the EU and UN Security Council resolutions with regards to military sanctions, the aim of this section is to show how EU member states are largely constrained in the unilateral use of economic sanctions outside a European framework. Thus, they are similarly constrained in their choice of domestic foreign policy tools in the context of economic sanctions as they are within the common security and defence policy.

Today, the European Union is competent to adopt autonomous and non-autonomous economic sanctions.[66] The special nature of economic restrictive measures, which combine trade measures with foreign policy considerations, is responsible for their special position within the European legal order. Economic sanctions are adopted by

[66] Article 215 LTFEU.

decisions made in the framework of the common foreign and security policy and a related legislative measure based on the Treaty on the Functioning of the European Union. This two-step procedure visualises the underlying tension behind economic sanctions that link the common foreign and security policy, which is still subject to specific rules and procedures despite the de-pillarisation of the European Union through the Treaty of Lisbon, with the rest of EU policy sectors.[67] The hybrid nature of economic sanctions also influenced the gradual creation of a European competence for their adoption, which will be developed in the following section.

1. The Rhodesia doctrine

At the beginning of European involvement in the adoption and imposition of economic sanctions, the European member states referred to Article 224 EEC to implement UN Security Council sanctions through the adoption of unilateral national measures. Between 1965 and 1979, the UN Security Council adopted a comprehensive sanctions regime against Rhodesia. The European Economic Community made no efforts to implement the corresponding UN Security Council resolutions and inserted the country into a list of states with which trade was liberalised.[68] However, faced with the tension between their obligations under international law to implement economic UN Security Council resolutions on the one hand and their obligations towards the European Economic Community on the other hand, the member states opted to act outside the EEC and implemented economic sanctions against Rhodesia through purely national measures under domestic rules.[69] The legal basis for this practice was claimed to be the third ground of Article 224 EEC,[70] which asked member states to

> 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 case of serious internal disturbances affecting public order, in case of

[67] Article 24 (1) LTEU.
[68] D Bethlehem, 'The European Union' in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study, The Graduate Institute of International Studies* (Martinus Nijhoff Publishers, Leiden 2004) 128.
[69] P Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments* (Hart Publishing, Oxford 2001) 58.
[70] Renumbered as Article 297 of the EC Treaty.

> war or of serious international tension constituting a threat of war or in order to carry out undertakings into which it has entered for the purpose of maintaining peace and international security.

At the time, it was commonly agreed that the 'accepted obligations' mentioned in Article 224 EEC could be interpreted as referring to the economic or military sanction decisions[71] of the UN Security Council,[72] which were binding on the member states.[73] The member states argued against any legal role for the European Economic Community.[74] This practice, which later became known as the 'Rhodesia doctrine', was accepted not only by the member states but also by the European institutions. The Commission and the Council held that sanctions by the UN Security Council remained outside the Community legal order.[75]

2. Sanctions against the Soviet Union, Argentina and Iraq- the birth of a European role in the context of economic sanctions

During the late 1970s and the beginning of the 1980s, the inability of the UN Security Council to adopt economic sanction resolutions in times of international crisis slowly forced European member states to rethink their purely national approach on economic sanctions under Article 224 EEC. So far, this provision had been interpreted as referring to UN Security Council decisions.[76]

When the Soviet Union declared martial law in Poland, the European Economic Community played a role in the context of economic sanctions for the first time. The member states reluctantly decided to utilise Article 113 EEC as the legal basis for sanctions against the Soviet Union.[77] At the time of the implementation of the economic sanctions against the Soviet Union based on a Community regulation

[71] Articles 41 and 42 UN Charter.
[72] S Bohr, 'Sanctions by the United Nations Security Council and the European Community' (1993) 4 EJIL 265.
[73] Bohr (n 72) 265; Koutrakos (n 69) 59.
[74] Koutrakos (n 69) 58.
[75] Koutrakos (n 69) 59, FN 52; P J Kuijper, 'Sanctions Against Rhodesia: The EEC and the Implementation of General International Legal Rules' (1975) 12 Common Market Law Review 239.
[76] Although the wording of Article 224 EEC is open enough to allow the inclusion of autonomous economic sanctions, without a corresponding UN Security Council resolution.
[77] E Denza, *The Intergovernmental Pillars of the European Union* (Oxford University Press, Oxford 2002) 42; Koutrakos (n 69) 60.

under Article 113 EEC, Council Regulation 596/82,[78] the European member states appeared to be unable to assess the legal consequences of the new pattern.[79] In clear contrast to the past practice that had excluded the Community from the adoption and imposition of sanctions, by emphasising their foreign policy aspects that would outweigh their effects on Community trade and the common commercial policy, it was suddenly argued that the interests of the Community would demand the reduction of imports from the Soviet Union.[80] Hence, a highly political decision to adopt sanctions could not prevent them from falling within the scope of the European Economic Community anymore.[81]

In the following years, Article 113 EEC continued to be used as the Treaty basis for the adoption of economic sanctions and the sanction practice continued to develop gradually. Like the sanctions against Argentina before, the comprehensive sanctions adopted against Iraq in 1990 on the basis of Article 113 EEC expressly referred to the political framework that led to their adoption.[82] This time, however, the Council regulation based on Article 113 EEC did not refer to political consultations among the member states under the auspices of Article 224 EEC but instead made reference to decisions taken in the framework of European Political Cooperation. Therefore, the sanctions against Iraq introduced the two-step procedure behind the adoption of economic and financial sanctions, a practice that was codified through the Treaty of Maastricht. The Treaty of Maastricht for the first time included a separate legal basis for the adoption of economic sanctions outside the provision on the common commercial policy,[83] the predecessor of today's Article 215 LTFEU.

[78] Council Regulation (EEC) No 596/82 amending the import arrangements for certain products originating in the USSR [1982] OJ L 72/15.
[79] Koutrakos (n 69) 60.
[80] Koutrakos (n 69) 60.
[81] Koutrakos (n 69) 60.
[82] Koutrakos (n 69) 61.
[83] Article 301 EC.

Part 3

The nature of the EU's competence to adopt economic sanctions - an ongoing debate

One problem the Treaty of Lisbon failed to solve is the nature of the EU's competence to impose sanctions.[84] Article 215 LTFEU is not mentioned in the competence catalogue of the European Union to be of either exclusive or shared competence or as forming part of a policy in which the member states have to coordinate their national policies with Union policies.[85] In *Kadi*, the Court of First Instance avoided answering this question by stating that

> Article 228a of the EC Treaty (now Article 301)[86] was added to the Treaty by the Treaty on European Union in order to provide a specific basis for economic sanctions that the Community, which has exclusive competence in the sphere of the common commercial policy, may need to impose in respect of third countries for political reasons defined by its Member States in connection with the CFSP, most commonly pursuant to a resolution of the Security Council requiring the adoption of such sanctions.[87]

Therefore, the nature of the EU's competence to adopt economic sanctions and, depending on this assessment, the remaining powers of the member states to use this foreign policy tool unilaterally is still open. The answer to the question whether or not the European member states are constrained in the conduct of their domestic foreign policies in the field of economic sanctions is of importance for the comparative method used in chapter six.

The next section will offer an overview of the development of the legal debate surrounding the nature of the EU's competence to adopt economic sanctions, which is still ongoing. This will be followed by an analysis of the remaining competence of EU member states to adopt economic sanctions unilaterally outside the framework of Article 215 LTFEU - either collectively or individually.

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[84] In favour of an exclusive Union competence: K Lenaerts and E De Smitjer, 'The United Nations and the European Union: Living Apart Together' in K Wellens (ed), *International Law: Theory And Practice: Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers, The Hague 1998) 449.
[85] Articles 2 – 6 TFEU.
[86] Today's Article 215 LTFEU.
[87] *Kadi* (n 16) para 202.

1. EU competence for the adoption of economic sanctions

Before the inclusion of an explicit legal basis for the adoption of economic sanctions in the Treaty of Maastricht, economic sanctions were adopted by the European Economic Community on the basis of Article 113 EEC which formed part of the provisions on the common commercial policy. The practice of placing economic sanctions within the common commercial policy entailed serious questions about the member states' remaining competence for the adoption of unilateral economic measures.[88] The European Court of Justice had developed through its case law that the competence of the European Community regarding matters of common commercial policy was exclusive in nature and that 'the exercise of concurrent powers by the Member States and the Community in this matter is impossible'.[89] This conclusion was difficult to accept from a member state's perspective. Economic sanctions represent traditional foreign policy instruments that are at the heart of state sovereignty. If they would form part of the common commercial policy, member states would have lost their competence to impose restrictive measures to the Community. On this background, it has been argued by some that the practice of the adoption of European economic sanctions based on a provision of the common commercial policy does not mean that economic sanctions form part of the common commercial policy *in substance*.[90]

The difficulty in answering the question about whether economic sanctions could be regarded as forming part of the common commercial policy was not so much the effects they produce on international trade but rather whether it matters that they are driven forward by foreign and security considerations and not by actual trade concerns. Hence, it has been argued that economic sanctions, if covered by the common commercial policy at all, could only be found at the outer limits of this

[88] In 1994, after imposing unilateral measures against the Republic of Macedonia prohibiting trade, based on old Article 224 EC, Greece still argued that the sanctions imposed on Southern Rhodesia, South Africa and Argentina would indicate that member states would be the competent actors with regards to sanctions as opposed to the Community. See Opinion of Advocate General Jacobs Case C-120/94 *Commission v Greece* [1996] ECR I-1513 para 20.
[89] Opinion 1/75 [1975] ECR 1359.
[90] Koutrakos (n 69) 66.

policy area.[91] The case law of the European Court of Justice nevertheless has since confirmed the wide interpretation of the common commercial policy including measures motivated by foreign policy considerations.[92] In respect of dual use goods the ECJ had to decide in *Werner*[93] 'whether the common commercial policy solely concerns measures which pursue commercial objectives, or whether it also covers commercial measures having foreign policy and security objectives'.[94] Germany had declined to issue a licence to export dual use goods to Libya.[95] In line with its reasoning in *Opinion 1/78*,[96] the Court opted for a wide interpretation of the scope of the common commercial policy and argued that not only the specific subject matter of the common commercial policy in respect of trade with third countries but also the concept of the common commercial policy as established by the Treaty itself and in particular by 113 EEC,

> requires that a Member State should not be able to restrict its scope by freely deciding, in the light of its own foreign policy or security requirements, whether a measure is covered by Article 113.[97]

Thus, a measure whose effect is to prevent or restrict the export of certain products cannot be treated as falling outside the scope of the common commercial policy solely because it is motivated by foreign policy and security objectives. In consequence, economic sanctions should have been considered to form part of the common commercial policy.

Even after *Werner*, some commentators still challenged whether the Community was in fact competent to adopt restrictive economic measures or whether its lack of competence would have been made visual through the established two-step procedure in practice. According to them, the missing Community competence to

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[91] Osteneck (n 10) 140, 142, 143.
[92] Osteneck (n 10) 143, 144.
[93] Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany* [1995] ECR I-3189 [hereinafter *Werner*].
[94] *Werner* (n 93) para. 7.
[95] Dual use goods are goods that are capable of being used for military purposes.
[96] Opinion 1 /78 [1979] ECR 2894.
[97] *Werner* (n 93) para 11.

adopt economic sanctions had to be substituted by a prior decision of the member states within the framework of European Political Cooperation.[98]

Today, economic sanctions are still based on decisions made within the framework of the common foreign and security policy and legal decisions adopted under the Treaty on the Functioning of the European Union. Therefore, the problems surrounding the nature of the EU's competence with regards to economic sanctions are ongoing. It may also not be appropriate to approach the EU's competence regarding economic sanctions in classical terms of shared or exclusive competence. Economic sanctions have a hybrid nature - they combine trade with foreign policy considerations. They also hold a special position within the European legal order since they build bridges between the common foreign and security policy and the rest of the Union policy sectors. It seems strange to talk of an exclusive European competence that is triggered by a prior decision within the CFSP since the common foreign and security policy is characterised by a different institutional setting. It also seems strange to assume an exclusive competence that still allows for unilateral national measures by the European member states based on Article 347 LTFEU - albeit in very limited circumstances.

To discover the remaining competence of the member states for the adoption of economic sanctions, it is therefore more useful to consider when member states can actually have recourse to Article 347 LTFEU, former Article 224 EEC, to adopt unilateral sanctions either collectively or individually.

Article 347 LTFEU and Article 348 LTFEU particularly

> recognise that the autonomy left to Member States in the field of foreign policy is in stark contrast to the integration achieved in the field of economic and commercial policy. Those articles attempt to define the outer limits of the autonomy left to Member States in the field of foreign policy, bearing in mind that that autonomy may affect the functioning of the common market (Article 347 LTFEU)[99] and may distort the

[98] For a detailed discussion see Osteneck (n 10) 149, 150.
[99] Treaty provision updated by the author.

conditions of competition in the common market (Article 348 LTFEU)[100].

2. What is left for the member states in the sphere of the adoption of economic sanctions? – Legal constraints on the member states' foreign policy choices and Article 347 LTFEU

To examine to what extent European member states are constrained in the adoption of economic sanctions through the European Union, the next sub-section will examine the nature of Article 347 LTFEU. This will be followed by an analysis of when member states can rightfully justify domestic sanctions collectively or individually based on this provision.

2.1. The nature of Article 347 LTFEU

An examination of Article 347 LTFEU demonstrates the struggles underlying the growing EU competence in external relations that goes hand in hand with a loss of power of the member states. Depending on the view one takes with respect to European integration in the foreign policy sphere, Article 347 LTFEU is interpreted narrowly or broadly. The former interpreters perceive this provision as an exceptional clause.[101] The latter argue for the creation of a *domaine reservé*[102] for the member states that allows them to protect their sovereignty and thus their individual domestic foreign and security interests.[103]

The wording of Article 347 LTFEU suggests that it does not fit in with other Treaty provisions allowing a member state to deviate from Union law for reasons of public security, such as Article 36 LTFEU. [104] It is generally said that these provisions need to be interpreted narrowly.[105] Article 347 LTFEU allows for derogation from the rules of the common market in general whereas Article 36 LTFEU provides for the

[100] Treaty provision updated by the author. Opinion of Advocate General Jacobs Case C-120/94 *Commission v Greece* [1996] ECR I-1513 para 66, referring to Articles 224 and 225 EC, the predecessors of Articles 347 and 348 LTFEU.
[101] See for example, Osteneck (n 10) 147.
[102] See for example, Kuijper (n 75) 239.
[103] Osteneck (n 10) 147.
[104] P Koutrakos, 'Is Article 297 EC A 'Reserve of Sovereignty?' (2000) 37 Common Market Law Review 1340.
[105] Koutrakos (n 104), 1340.

derogation from a singular aspect of the common market.[106] Furthermore, Article 347 LTFEU does not put an emphasis on the 'measures which a Member State may be called upon to take' but rather on the duty to consult one another.[107] Hence, the wording of Article 347 LTFEU appears to indicate that it does not create a right for the member states to deviate from the Treaty but, rather, it recognises the existing power of the member states to deal with matters of foreign and security policy, as sovereign subjects of international law.[108] Therefore, Article 347 LTFEU appears to be of a different quality than 'regular' Treaty exceptions, for example Article 36 LTFEU.

Nonetheless, this preliminary conclusion does not allow the assumption that Article 347 LTFEU constitutes a *domain reservé* for the member states. A *domaine reservé* or a reserve of sovereignty allows member states to adopt any measures they regard as appropriate in areas related to the core of their sovereignty without any limitations and irrespective of the procedures established by the EU Treaties and scrutiny of the European Court of Justice.[109] However, if this extremely broad interpretation holds true, Article 347 LTFEU would be transformed into an all-encompassing clause, able to justify any measure not in line with EU law so long as it is linked to politically sensitive areas, for example the armed forces.[110]

The character of Article 347 LTFEU rather has to be found in the middle. The fact that Article 347 LTFEU permits derogations from the rules of the common market in general in three extreme and highly sensitive political scenarios, namely in the event of war, serious international tension constituting a threat of war, or to carry out obligations it has accepted for the purpose of maintaining peace and international security, suggests that Article 347 represents a 'wholly exceptional clause', a phrase used by the European Court of Justice in *Johnston*[111] and *Commission v Greece*.[112]

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[106] Opinion of Advocate General Jacobs in Case C-120/94 *Commission v* Greece [1996] ECR I-1513 para 46.
[107] Koutrakos (n 104) 1340.
[108] Koutrakos (n 104) 1340.
[109] Koutrakos (n 104) 1342.
[110] Koutrakos (n 104) 1343.
[111] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 para 27 [hereinafter *Johnston*].

The extraordinary substantive nature of Article 347 LTFEU is emphasised by the introduction of the extraordinary procedure in Article 348 (2) LTFEU,[113] according to which

> [b]y way of derogation from the procedure laid down in Articles 258 and 259, 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 346 and 347. The Court of Justice shall give its ruling in camera.

Therefore Article 347 LTFEU is of a wholly exceptional nature and the member states are limited in invoking this provision.[114] Its wording together with its ratio – namely the prevention of the disruption of the common market through national measures as far as possible suggests, that it represents a safeguard clause in the situation of domestic emergencies or war.[115] Its function is to limit the member states' obligation under EU law to implement EU acts in a specific case and not to provide them with *carte blanche*.[116]

2.2. The rightful use of Article 347 LTFEU to justify national economic sanctions

The view one takes with regard to the interpretation of Article 347 LTFEU also influences the answer to the question to what extent the member states are constrained in the conduct of their foreign policy in respect of the adoption and implementation of economic sanctions. The next sub-section will explore when the member states can make use of Article 347 LTFEU. First, it will be assessed whether the member states can use Article 347 as the legal basis for collective sanctions

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[112] Case C-120/94 *Commission v Hellenic Republic* [1994] ECR I-3037 [hereinafter *Commission v Greece*]

[113] Article 348 LTFEU reads as follows: 'If measures taken in the circumstances referred to in Articles 346 and 347 have the effect of distorting the conditions of competition in the internal market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaties.
By way of derogation from the procedure laid down in Articles 258 and 259, 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 346 and 347. The Court of Justice shall give its ruling in camera.'

[114] Koutrakos (n 104) 1343.

[115] Kuijper (n 75) 235.

[116] Osteneck (n 10) 147.

either after consultations within the common foreign and security policy have taken place or if no decision within the CFSP has been reached. This will be followed by an examination of whether this provision can serve as the legal basis for individual sanctions by one member state or a group of member states.

2.2.1. Collective member state sanctions based on Article 347 LTFEU following a consultation within the common foreign and security policy

According to Article 215 LTFEU, the European Union can adopt economic sanctions if the conditions of a two-step procedure are fulfilled, as explained above. Hence, a Union instrument is supposed to follow a decision within the common foreign and security policy. However, can EU member states adopt economic sanctions collectively on the basis of Article 347 LTFEU even if a political decision within the CFSP has been reached?

The wording of Article 215 LTFEU suggests that when a CFSP decision has been reached, member states should use a Union instrument to implement economic sanctions. If the member states could rely on Article 347 LTFEU in this case, Article 215 LTFEU would be deprived of its practical significance. If the member states could make use of Article 347 LTFEU, although a CFSP decision has been adopted, they could otherwise control whether they are subject to the ordinary jurisdiction of the ECJ in respect of Article 215 LTFEU or if they are subject to the extraordinary procedures under Article 348 LTFEU. The historic development of European sanctions outlined above shows that, after the practice of the Rhodesia doctrine was abolished, the predecessors of Article 347 LTFEU have not been used as the legal foundation for the adoption of economic sanctions. Hence, the usage of Article 347 LTFEU for collective sanctions once a CFSP decision has been reached would not only ignore the *lex specialis* nature of Article 215 LTFEU but it would also disregard the *acquis politique* against recourse to this provision.[117] National member state measures based on Article 347 LTFEU would represent an improper use of this

[117] Koutrakos (n 69) 82.

provision within the meaning of Article 348 LTFEU and would amount to a *venire contra factum proprium*.[118]

2.2.1.1. Change of facts

There is only one exception to this rule. As already mentioned above, Article 215 LTFEU explicitly links the competence of the European Union to impose economic sanctions to a prior decision within the common foreign and security policy. In consequence, only changes in circumstances that were essential for the conclusion of the respective CFSP decision could enable member states to adopt national measures based on Article 347 LTFEU. It has been suggested that thereby the member states' original competence to impose economic sanctions would revive.[119]

2.2.1.2. EU institutions do not act

A related question is whether member states can utilise Article 347 LTFEU if a decision within the common foreign and security policy has been reached but the Union institution either does not act or adopts measures that do not correspond to the adopted CFSP decision.[120] If the institutions were bound by a decision within the common foreign and security policy in the sense that they would have to utilise the second step of the two step procedure of Article 215 LTFEU and if they would have to adopt economic sanctions, there would be no practical need for the member states to resort to national measures under Article 347 LTFEU.

It has been argued that the wording of Article 215 LTFEU indicates an obligation for Union institutions to implement the CFSP decision as they 'shall adopt the necessary measures'.[121] Some who claim that CFSP decisions cannot bind institutions in the context of economic sanctions are of the opinion that a loyalty obligation would ask the institutions to respect the decision within the framework of the common foreign and security policy. Therefore, the institutions would have to implement a CFSP decision either way.[122]

[118] Osteneck (n 10) 197.
[119] Osteneck (n 10) 197.
[120] Osteneck (n 10) 198.
[121] Article 215(1) LTFEU.
[122] Bohr (n 72) 268.

The European courts also seem to disagree on the matter. The Court of First Instance tends to favour the latter solution, albeit without explicitly referring to a loyalty obligation. In *OMPI*, the Court followed the arguments brought forward by the Council, which had argued

> that, as the Community institution which adopted Regulation No 2580/2001 and the decisions implementing that regulation, it did not consider itself to be bound by the common positions adopted as part of the CFSP by the Council in its capacity as the institution composed of the representatives of the Member States, although it did consider it appropriate to ensure that its actions were consistent with the CFSP and the EC Treaty.[123]
>
> [T]he Community does not act under powers circumscribed by the will of the Union or that of its Member States when, as in the present case, the Council adopts economic sanctions measures on the basis of Articles 60 EC, 301 EC and 308 EC. That point of view is, moreover, the only one compatible with the actual wording of Article 301 EC, according to which the Council is to decide on the matter 'by a qualified majority on a proposal from the Commission', and that of Article 60(1) EC, according to which the Council 'may take', following the same procedure, the urgent measures necessary for an act under the CFSP.[124]

In *Kadi*, on the contrary, the European Court of Justice acknowledged that from the perspective of European law, the Community was bound to take the necessary Community measures when a decision within the common foreign and security policy was reached to adopt economic or financial sanctions to allow the two step procedure for the adoption of economic sanctions in the EU legal order.[125]

Both of these views must be rejected. If Union institutions are obliged to implement economic sanction CFSP Council decisions[126] during the second stage of the adoption process, the Commission is downgraded to play the role of an agent to the Council and its right of joint initiative is neglected.[127] Therefore, if the two-step procedure of Article 215 LTFEU does not work because the Commission refuses to

[123] *OMPI* (n 41) para 105.
[124] *OMPI* (n 41) para 106.
[125] *Kadi* (Grand Chamber) (n 16) para 295, 296.
[126] Article 29 LTEU.
[127] Osteneck (n 10) 152, 153.

propose a sanction regulation, member states can resort to Article 347 LTFEU. Admittedly, this scenario is rather unlikely, especially since the Treaty of Lisbon introduced a joint right of initiative that is shared by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The High Representative chairs the Foreign and Affairs Council and also acts as one of the vice presidents of the Commission.

However, even if member states make use of Article 347 LTFEU to justify national measures, they are not free to act as they please. The member states are only entitled to adopt unilateral sanctions after prior consultations amongst the member states have failed and, in this event, they do not have the power to adopt any other national measures that they might prefer in order to implement UN sanctions.[128] According to Article 348 LTFEU, the Commission can examine how this national action can be adjusted *a priori* to the rules of the internal market. If a member state either fails to consult or refuses to adjust its national measures to avoid a distortion of the internal market, the Commission or a member state can bring the matter directly before the Court of Justice *ex posterior*.[129]

2.2.2. Individual member state action based on Article 347 LTFEU

Member states are allowed to invoke Article 347 LTFEU to justify individual sanctions under strict conditions. On the one hand, this is possible if a member state takes the initiative to impose sanctions[130] and no discussion within the common foreign and security has yet taken place. On the other hand, member states may rely on Article 347 LTFEU if they wish to deviate individually from restrictive measures adopted on the basis of Article 215 LTFEU.[131] However, it has been argued that pure political convenience is not sufficient to allow member states to resort to Article 347 LTFEU since Article 215 LTFEU would then be deprived of its practical

[128] K Lenaerts and E De Smitjer, 'The United Nations and the European Union: Living Apart Together' in K Wellens (ed), *Interntional Law: Theory and Practice: Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers, The Hague 1998) 451.
[129] Lenaerts and De Smitjer (n 128) 451.
[130] Koutrakos (n 69) 86.
[131] Koutrakos (n 69) 86.

significance.[132] Nonetheless, even if member states can lawfully make use of Article 347 LTFEU, they are circumscribed in their remaining powers *a priori* and *ex posterior* in the above described manner.[133]

Conclusion

The European Union has acquired a crucial role in the adoption of economic sanctions over time. The special nature of economic sanctions, which combine trade measures with foreign policy considerations, and their unique constitutional setting within the EU legal order, linking the intergovernmental common foreign and security policy with the supranational EU policy sector, indicate that the traditional competence categories of the supranational EU policies are not appropriate for describing the distribution of powers between the EU and the member states in the sphere of economic sanctions. Instead, it is more helpful to analyse the substance of the EU's competence with regards to economic sanctions and to question to what extent the member states are constrained in the conduct of their national foreign policies through EU sanction decisions to determine whether the EU has taken over the place previously exercised by the EU member states.

The member states are largely constrained in their domestic policies through EU sanctions. There is hardly any room for unilateral economic measures and if the member states can make use of Article 347 LTFEU in case the procedure of Article 215 LTFEU does not work, they are not free to act as they please. They are limited *a priori* and *ex posterior*. Therefore the European Union has largely taken over the powers previously exercised by its member states in the sphere of economic sanctions, independently of how one should label the nature of the EU's competence in this hybrid policy field.

The gradual development of a European competence for the imposition of economic sanctions despite the member states' reluctance to accept a European role in this highly sensitive policy field serves as an example of the unique forms of European integration in the external sphere and offers a glimpse of what may still lie ahead for

[132] Koutrakos (n 69) 86.
[133] Lenaerts and De Smitjer (n 128) 451.

the European Union with regards to military crisis management. The European member states are largely constrained in the conduct of their national foreign policies through the EU's power to adopt economic sanctions. Similar to the constraints they face in the light of Council decisions authorising the use of force in crisis management missions, the member states are therefore also limited in their domestic foreign policy choices. Building on these findings, the next chapter will use a comparative method to analyse the EU's relationship with UN Security Council resolutions regarding economic sanctions in order to examine the EU's relationship with UN Security Council resolutions regarding the use of force.

Chapter 6: The EU's relationship with UN Security Council resolutions authorising the use of force

Introduction

The European Union has developed military capabilities and has undertaken military crisis management operations all over the world within a short period of time. All of its military operations have been carried out with the consent of the host states so far and they have often been accompanied by UN Security Council resolutions. If necessary, the European Union has the legal capacity and the political ambitions to undertake robust future military interventions without the consent of host states. The common security and defence policy that is used to pursue the so-called Petersberg tasks allows for peace-enforcement missions against targets.

If the European Union considers undertaking military peace-enforcement operations in the future, two sets of problems need to be addressed. A question arises about whether the European Union needs to obtain UN Security Council mandates before it can legally use military sanctions since, unlike its individual member states, the European Union is not a member of the United Nations. This question was addressed in chapter four above where it was concluded that due to the customary law nature of the prohibition of the use of force, the European Union needs to obtain UN Security Council mandates before it can lawfully engage in military sanctions.

The second question that needs to be addressed is how an existing UN Security Council resolution authorising the use of force affects the European Union as an emerging international military actor. Chapter four has argued that UN member states are legally bound by the UN Security Council with regards to the use of force in two ways. Not only are they required to obtain a UN Security Council mandate before resorting to the use of force but, when the UN Security Council authorises the use of force, they are also under an obligation to support the military operation. If they decide to accept a UN Security Council mandate and choose to deploy troops, UN member states have to follow the wording of the resolution and to respect, for

example, limits of time, territory and means of action. If they choose not to take part activelyin an operation, UN member states are nonetheless under a loyalty obligation not to undermine the effectiveness of the operation. This obligation involves negative as well positive obligations. The loyalty obligation may ask member states to refrain from certain actions, for example, refraining from selling weapons to a target country. It may also ask them to be active, for example, by adopting an economic sanction regime. The increasing role played by the European Union in the international security arena, and its political willingness to engage in robust military interventions as expressed in the *European Security Strategy* of 2003,[1] therefore creates the need to address the question about whether the European Union is bound by UN Security Council resolutions in the sense described above.

This chapter will be structured as follows. Parts one and two will assess whether the European Union is bound by UN Security Council resolutions from the perspective of international law or from the perspective of the European legal order. Part three then goes on to examine what can be learned from the EU's relationship with UN Security Council resolutions respecting economic sanctions to understand its relationship with them in respect of the use of force by using a comparative method. The last part of the chapter will discuss whether there are constitutional limits on the European Union to engage in the use of force.

Part 1

The EU's relationship with UN Security Council resolutions viewed from the perspective of international law

The Treaty of Lisbon formally recognised the international legal personality of the European Union.[2] Therefore the European Union can be the subject of legal obligations and of legal rights[3] even in the framework of the common security and

[1] European Council, '*A Secure Europe in a Better World: European Security Strategy*' Brussels, 12 December 2003 <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf > [hereinafter *European Security Strategy*].
[2] Article 47 LTEU.
[3] E Paasivirta, 'The European Union: From an Aggregate of States to a Legal Person?' (1997) 2 Hofstra Law & Policy Symposium 40.

defence policy, and it has the potential to be the addressee of binding UN Security Council resolutions.

The European Union is not a signatory of the UN Charter. For the time being, the EU cannot join the UN since membership is only open to states. In consequence, the EU is not obliged, unlike its member states, to fulfil UN Security Council resolutions passed under Chapter VII, according to Articles 25 and 48 UN Charter. It is also not convincing to argue that the EU would be bound by mandatory UN Security Council resolutions and obligations of assistance according to Article 25 and 2 (5) UN Charter without being a signatory of the United Nations, based on a controversial interpretation of Article 2 (6) UN Charter.[4]

According to this provision, the

> [o]rganization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

Those who interpret Article 2 (6) UN Charter as creating obligations for non-UN member states have supported their view with the sanctions practice of the UN Security Council. It has been held that

> [t]he Charter establishes a true legal obligation of Members to behave in a certain way only if it attaches to the contrary behaviour a certain sanction. If the Charta attaches a sanction to certain behaviour of non-

[4] Whether UN Security Council resolutions can be binding for UN members and non-UN member states alike based on a controversial interpretation of Article 2(6) UN Charter is disputed. See S Bohr, 'Sanctions by the United Nations Security Council and the European Community' (1993) 4 European Journal of International Law 262 and FN 56; V Gowlland-Debbas, 'Sanctions Regimes under Article 41 of the UN Charter' in V Gowlland-Debbas (ed), *National Implementation of United Nations Sanctions: A Comparative Study*, The Graduate Institute of International Studies (Martinus Nijhoff Publishers, Leiden 2004) 19, 20; T D Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter' (1995) XXVI Netherlands Yearbook of International Law 74; N Lavranos, 'UN Sanctions and Judicial Review' (2997) 76 Nordic Journal of International Law 10; B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 Columbia Journal of Transnational Law 593-594.

> Members, it establishes a true obligation of non-Members to observe the contrary behaviour.[5]

Sometimes this view is additionally supported with the disputed nature of the UN Charter as the constitution of the international community.[6] Despite the wording of Article 2 (6) UN Charter that only mentions non-member states, it has been held that its meaning would also be applicable to international organisations such as the European Union without offering any additional arguments.[7]

However, it is more convincing to interpret Article 2 (6) UN Charter as having no binding effect on non-UN members. Otherwise, this provision creates obligations for third parties without their consent and would be in violation of the *pacta tertiis non nocent* principle.[8] Instead, the purpose of this provision that is addressed to United Nations is to make UN members and non- UN members aware that threats to international peace and security fall within the competence of the United Nations.[9] If non-UN member states do not comply with the principles mentioned in Article 2 UN Charter, they do not violate Article 2(6) UN Charter but they can be subject to action by UN member states.[10]

Although the practice of the UN Security Council reveals that some resolutions address international organisations, as well as UN and non-UN member states alike,

[5] H Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems: With Supplement* (published under the auspices of the London Institute of World Affairs, The Lawbook Exchange LTD., Clark 2008) 107.
[6] B Fassbender, 'The United Nations Charter as Constitution of the International Community" (1998) 36 Columbia Journal of Transnational Law 593.
[7] See K Lenaerts and E De Smitjer (who do not share this view) for references. K Lenaerts and E De Smitjer, 'The United Nations and the European Union: Living Apart Together' in K Wellens (ed), *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Martinus Nijhoff Publishers, The Hague 1998) at n 54; P Gilsdorf, 'Les Réserves de Sécurité du Traité CEE, à la Lumière du Traté sur l'union Européenne' (1994) 374 Revue du Marché et de l'Union Européenne 21, n 24 who states that ‹Or, on ne voit pas pourquoi cet effet contraignant ne s'appliquerait pas aussi aux organisations internationales telles que la CEE dans leur domaine de competence respectives'.
[8] Graf Vitzthum in B Simma (ed), *The Charter of the United Nations: A* Commentary (2nd edn Oxford University Press, Oxford 2002) Article 2(6) para 1.
[9] Graf Vitzthum (n 8) Article 2(6) para 23.
[10] Graf Vitzthum (n 8) Article 2(6) para 23.

for example, UNSC Resolution 687 (1991)[11] and Resolution 748 (1992),[12] no consistent practice can be established as other resolutions refer to 'all states', thus including non-member states but excluding international organisations, such as Resolution 661 (1990).[13]

In Resolution 1671(2006) the UN Security Council referred to the European Union and authorised the European Union force (Eufor R.D.Congo) to act under Chapter VII of the UN Charter.

> …Eufor R.D.Congo is authorized to take all necessary measures, within its means and capabilities, to carry out the following tasks, in accordance with the agreement to be reached between the European Union and the United Nations:
> (a) to support MONUC to stabilize a situation, in case MONUC faces serious difficulties in fulfilling its mandate within its existing capabilities,
> (b) to contribute to the protection of civilians under imminent threat of physical violence in the areas of its deployment, and without prejudice to the responsibility of the Government of the Democratic Republic of the Congo,
> (c) to contribute to airport protection in Kinshasa,
> (d) to ensure the security and freedom of movement of the personnel as well as the protection of the installations of Eufor R.D.Congo,
> (e) to execute operations of limited character in order to extract individuals in danger.[14]

However, this is one of few resolutions addressed to the European Union so far.[15] At this time, it is hard to say whether this represents the establishment of a new rule or

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[11] UN Security Council Resolution 687 (1991) on *Iraq-Kuwait* para 25: '*Calls upon* all States and international organizations to act strictly in accordance with paragraph 24, notwithstanding the existence of any contracts, agreements, licenses or any other arrangements'.

[12] UN Security Council Resolution 748 (1992) on *Libyan Arab Jamahiriya* para 7: '*Calls upon* all States, including States not members of the United Nations, and all international organizations, to act strictly in accordance with the provisions of the present resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to 15 April 1992'.

[13] UN Security Council Resolution 661 (1990) on *Iraq-Kuwait* para 5: '*Calls upon* all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution'; Bohr (n 4), 263.

[14] UN Security Council Resolution 1671 (2006) on *the situation concerning the Democratic Republic of the Congo* para 8.

[15] Another example is operation Tchad/RCA. See UN Security Council Resolution 1778 (2007) para 6 (a) which authorises the EU to deploy a European Union operation.

practice which could support the emergence of a new rule of customary international law that could bind the EU to UN Security Council resolutions.

A comparative analysis of relations between the UN and other regional organisations that engage in military crisis management such as the African Union (AU), ECOWAS or NATO also cannot offer a decisive answer as to the legal relationship between UN Security Council resolutions and the European Union. The African Union has contributed to international peace and security in Africa through a variety of operations and has also cooperated with the UN for that purpose. For example its operation AMIS in Sudan was replaced by the UN/AU mission UNAMID in Darfur.[16] The UN aims to develop an effective partnership with the African Union and welcomed the AU's enhanced peace-keeping role in missions that have been authorised by the Security Council.[17] The Security Council acknowledges the African Union's contribution to the maintenance of international peace and security in a manner consistent with Chapter VIII.[18] Although they cooperate as partners, the UN and the AU still need agree about their respective roles and responsibilities.[19] ECOWAS, too, has developed into a security organisation in the African context[20]and has been engaged in peace-keeping and peace-enforcement.[21] However, its precise relationship with the UN is unclear. Senior staff from both organisations meet regularly to exchange ideas about how to encourage cooperation.[22]

NATO started to cooperate with the United Nations in crisis management missions in the 1990s in the context of the Balkan conflict. Today, NATO and UN specialised bodies meet on a regular basis and discuss matters such as civil-military cooperation.[23] The North Atlantic Treaty does not regulate NATO's relationship with

[16] United Nations University (UNU-CRIS), 'Capacity Survey: Regional and other Intergovernmental Organizations in the Maintenance of Peace and Security' (2008) <https://biblio.ugent.be/input/download?func=downloadFile&recordOId=938841&fileOId=938848> 23-25.
[17] Statement by the President of the Security Council, made in connection with the Council's consideration of the item entitled 'Peace and Security in Africa' 26 October 2009, S/PRST/2009/26.
[18] Statement by the President of the Security Council (n 17).
[19] United Nations University (UNU-CRIS) (n 16) 26.
[20] United Nations University (UNU-CRIS) (n 16) 68.
[21] ECOWAS role in Liberia will be examined in more detail in chapter seven below.
[22] United Nations University (UNU-CRIS) (n 16) 73.
[23] United Nations University (UNU-CRIS) (n 16) 104-105.

UN Security Council resolutions but it emphasises the commitment of NATO's members to the principles and purposes of the UN Charter who refrain from the threat or use of force in a manner consistent with the purposes of the UN Charter and who recognise the Security Council's primary responsibility for the maintenance of peace and security.[24]

The relationship between regional organisation such as AU, ECOWAS and NATO that engage in crisis management and the United Nations is developing. They aim to cooperate as partners. Whether these organisations, that are not members of the United Nations, are bound by UN Security Council resolutions is unclear. Their respective relations with the United Nations therefore cannot help to analyse the EU's legal relationship with the latter.

Although public international law does not bind the EU to UN Security Council resolutions, the European Union could regard itself to be bound by the UN Charter in general and UN Security Council resolutions in particular. This will be the focus of part two.

Part 2

The EU's legal relationship with UN Security Council resolutions viewed from the perspective of EU law

Whether the European legal order itself binds the EU to UN Security Council resolutions will be discussed in the following by examining the provisions of primary EU law and by analysing the case law of the European courts regarding international law in general and UN Security Council resolutions in particular.

1. Primary EU law references to international law and the UN Charter

Although the European Treaties express the EU's strong commitment to international law and the principles of the UN Charter, neither the LTEU nor the LTFEU explicitly state that the European Union is bound by international law. According to Article 3 TEU, which sets out the general objectives of the European Union, the EU

[24] Articles 1, 7 North Atlantic Treaty.

> …shall contribute to…the strict observance and the development of international law, including respect for the principles of the United Nations Charter.[25]

Although these objectives guide all the Union's actions, and therefore the EU's military crisis management operations that form part of the common security and defence policy, the common foreign and security policy of which the latter forms an integral part reinforces this commitment. The EU is asked that its action on the international scene shall be guided by respect for the principles of the United Nations Charter and international law.[26] Furthermore, the principles of the UN Charter as well as of international law are identified as forming part of the principles that have inspired the EU's own creation, development and enlargement. These are principles the EU seeks to advance in the wider world.[27]

The principles of the UN Charter and international law are equally mentioned alongside other values, including human rights, democracy and the rule of law[28] and '[i]n its relations with the wider world, the Union [is asked to] uphold and promote its values and interests and contribute to the protection of its citizens'.[29] Therefore the European Union seems to reinforce the development of its own European standard of human rights and the rule of law by 'gold-plating' the values of the United Nations and international law. Nonetheless, EU treaty provisions, do not offer a precise answer as to whether the European Union is bound by international law and UN Security Council resolutions.

2. Case law on international law

The European courts have made several statements on the relationship between the European legal order and international law. In *Poulsen and Diva Navigation,*[30] the

[25] Article 3(5) TEU.
[26] Article 21(1) LTEU.
[27] Article 21(1) LTEU.
[28] Article 21(2) (a), (c) LTEU.
[29] Article 3(5) TEU.
[30] Case C-286/90 *Anklagemyndighedenv Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-6019 [hereinafter *Poulsen and Diva Navigation*].

European Court of Justice held '…that the European Community must respect international law in the exercise of its powers…'[31]

The Court confirmed its statements in *Racke,*[32] where it decided on the question of whether an individual could challenge the validity of a Community regulation under rules of customary international law. The customary law in question was concerned with the principle that a change of circumstances may lead to the lapse or suspension of a treaty, as formalised in Article 62 of the VCLT to which the Community was not a party at that time (and neither is the European Union today). The Court held that the Community was

> …required to comply with the rules of customary international law when adopting a regulation…[33] [and added that] rules of customary international law …are binding upon the Community institutions and form part of the Community legal order.[34]

The binding nature of customary law in respect of the European Community was confirmed by the Court of First Instance in *Opel Austria*[35] with respect to the principle of good faith. It argued that 'the principle of good faith is a rule of customary international law whose existence is recognized by the International Court of Justice and is therefore binding on the Community'.[36]

An analysis of European case law in relation to international law in general has revealed that the European Union shows an open attitude towards international law and considers itself to be bound by rules of customary international law.

In light of these findings, it can therefore be concluded that the European Union as a military actor is also bound by the principles established by customary international law surrounding the use of force. As outlined in chapter four above, the prohibition

[31] *Poulsen and Diva Navigation* (n 30) para 9.
[32] Case C-162/96 *A. Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655 para 45 [hereinafter *Racke*].
[33] *Racke* (n 32) para 45.
[34] *Racke* (n 32) para 46.
[35] Case T-115/94 *Opel Austria GmbH v Council of the European Union* [1997] ECR II-39 [hereinafter *Opel Austria*].
[36] *Opel Austria* (n 35) para 90.

of the use of force has acquired the status of customary international law. The authorisation of the use of force by the UN Security Council represents one of the few legal exceptions to this rule and has itself acquired the status of customary law. Therefore, the European Union is required by customary international law to obtain a UN Security Council mandate first, before it can impose military sanctions during a military crisis management operation, unless it can refer to another accepted exception to the prohibition of the use of force, as already discussed in chapter four.

Nonetheless, it still needs to be discussed whether the European Union is bound by existing UN Security Council resolutions regarding the use of force in the sense that once it decides to accept a UN Security Council mandate and chooses to deploy troops, the EU has to follow the wording of the resolution and respect limits of time, territory and means of action, for example. It also needs to be discussed what happens if the EU chooses not to take part actively in an operation. Is the Union under a loyalty obligation not to undermine the effectiveness of such an operation? Loyalty obligations might entail negative as well also positive obligations. They may ask the EU to refrain from certain actions, for example, to stop including the target on a list of states with which trade is to be liberalised; but it may also ask the EU to become active, for example to adopt an economic sanction regime.

3. Case law on UN Security Council resolutions

The Court of Justice has no competence to review acts adopted within the common security and defence policy under which military crisis management missions take place. Therefore the European courts have never had a chance to address the legal relationship between the European Union and UN Security Council resolutions regarding the use of force. However, being competent to review Union regulations that are adopted in the second stage of the adoption process of economic sanctions, the Court had the opportunity to address the relationship between secondary Union instruments implementing UN Security Council resolutions within the Union legal order and the latter.

Before the development of targeted sanctions against individuals and the *Kadi* case,[37] the ECJ had to deal in *Bosphorus*,[38] *Ebony Maritime*[39] and *Centro-Com*[40] with economic sanction regulations adopted against the Federal Republic of Yugoslavia (Serbia and Montenegro) that were giving effect to UN Security Council resolutions in the 1990s.

3.1. *Bosphorus* and the interpretation of Community regulations implementing UN Security Council resolutions

The facts of the *Bosphorus* case[41] have already been discussed in chapter five and it is sufficient here to recall that the ECJ had to interpret Council Regulation No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia. Regulation 990/93 was adopted by the Council to give effect to the decision of the Community and the member states, meeting within the framework of political cooperation, to implement in the EEC certain aspects of the sanctions imposed by the UN Security Council under Chapter VII of the UN Charter, including Resolution 820 (1993).

In question was the interpretation of Article 8 of Regulation No 990/93/EEC whose wording mirrored the relevant passage in the Security Council resolution in substance. According to the ECJ, when interpreting a provision of Community law it would be essential to consider its wording, context and aims.[42] As the Regulation in question was implementing UN Security Council resolutions, the Court held that the latter's aim would have to be taken into consideration as well.[43] The Court followed, Advocate General Jacobs on this point who stated that it would be

[37] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649 [hereinafter *Kadi*]. Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 [hereinafter *Kadi* (Grand Chamber)].
[38] Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, Ireland* [1996] ECR I-3953.
[39] Case C-177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others, Italy* [1997] ECR I-1111.
[40] Case 124/95 *The Queen, ex parte Centro-Com Srl v HM Treasury and Bank of England* [1997] ECR I-81. This case will not be discussed in the following.
[41] *Bosphorus* (n 38).
[42] *Bosphorus* (n 38) para11.
[43] *Bosphorus* (n 38) para 14.

> much more difficult to define the precise purpose of a Community measure implementing a resolution of the UN Security Council than it would normally be to ascertain the purpose of an ordinary Community measure.[44]

At issue would not be the intention of the Community institutions themselves but the purpose of the Security Council resolution.[45] Therefore Security Council resolutions would require a specific interpretation of the Community regulation.[46]

Although the question of whether UN resolutions as such are binding on the Community was not expressly decided by the ECJ or by the Advocate General, the fact that a Community regulation had to be interpreted in the light of the respective UN resolution it was implementing, suggests that back then the Community and today the EU is bound by Security Council resolutions.

3.2. *Ebony Maritime*

In *Ebony Maritime*,[47] the same Council Regulation No 990/93 was questioned. The Regulation referred in its preamble to the situation in the former Yugoslavia and to several resolutions of the Security Council. It mentioned that 'the Community and its Member States have agreed to have recourse to a Community instrument, *inter alia*, to ensure a uniform implementation throughout the Community of certain of these measures'.[48] The case concerned a tanker belonging to Loten Navigation and flying the Maltese flag. The vessel was scheduled to deliver a cargo of petroleum products belonging to Ebony Maritime (that had picked it up in Tunisia) to Rijeka in Croatia.[49] The tanker was inspected in Brindisi, Italy to ensure compliance with the sanction regime in force against the Federal Republic of Yugoslavia. During its journey to

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[44] Opinion of Advocate General Jacobs Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others, Ireland* [1996] ECR I-3953 para 41 [hereinafter Opinion of Advocate General Jacobs in *Bosphorus*].
[45] Opinion of Advocate General Jacobs in *Bosphorus* (n 44) para 41.
[46] Opinion of Advocate General Jacobs in *Bosphorus* (n 44) para 47.
[47] Case C-177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and other* [1997] ECR I-1111 [hereinafter *Ebony Maritime*].
[48] Opinion of Advocate General Jacobs Case C-177/95 *Ebony Maritime SA and Loten Navigation Co. Ltd v Prefetto della Provincia di Brindisi and others* [1997] ECR I-1111 para 7 [hereinafter Opinion of Advocate General Jacobs in *Ebony Maritime*].
[49] *Ebony Maritime* (n 47) para 10.

Croatia, the vessel began to take on water and the master changed course towards the nearest coastline of Montenegro, declaring his intention to run the vessel aground.[50] While it was still on the high seas, a NATO/WEU helicopter landed on the deck of the tanker and a Dutch military squad took control of the vessel, which was handed over to Italian authorities in Brindisi.[51] The vessel was impounded and the cargo was confiscated.[52] In a preliminary rulings procedure, the ECJ had to decide how Articles 9 and 10 of the Regulation were to be interpreted. The Court argued that both provisions 'are applicable on those vessels that are within territory of a Member State and thus under the territorial jurisdiction of that State, even if the alleged infringement occurred outside its territory'.[53] It supported its interpretation by referring the wording and purpose of the UN Security Council resolution, 'which, with a view to reinforcing the sanctions already adopted, introduced… the prohibition of entry into the territorial sea of the Federal Republic of Yugoslavia (Serbia and Montenegro) for all commercial maritime traffic and provides…that 'all States shall detain pending investigation all vessels…and cargoes found in their territories and suspected of having violated or being in violation…'' of the previous or the present resolution.[54]

Advocate General Jacobs shared the view of the Court and argued that the Regulation in question had to be interpreted in the light of the Security Council resolutions to make the sanctions fully effective.[55] Again, the need for the interpretation of a Community regulation in the light of UN resolutions speaks in favour of their binding character.

In sum, neither of these cases expressly dealt with the question of whether UN Security Council resolutions are binding on the Community. Nevertheless, the Court's decisions indicate a general openness towards international law. The requirement to interpret EU instruments in the light of UN Security Council

[50] *Ebony Maritime* (n 47) para 11.
[51] *Ebony Maritime* (n 47) para 11.
[52] *Ebony Maritime* (n 47) para 12.
[53] *Ebony Maritime* (n 47) para 19.
[54] *Ebony Maritime* (n 47) para 20.
[55] Opinion of Advocate General Jacobs in *Ebony Maritime* (n 48) para 21.

resolutions suggests that UN Security Council resolutions are considered to be binding the EU in respect of secondary Community law.

3.3. *Kadi*

The *Kadi* case was discussed in chapter one above.[56] It is sufficient to recall here that the European Court of Justice had highlighted the autonomy of the Community legal order *vis à vis* the international legal order. In consequence it found itself to be competent to review secondary Community legislation in the light of European fundamental rights as general principles of EC law independently of whether or not the Community instrument gives effect to UN Security Council resolutions.

Unfortunately, the Court's judgment left several questions about the precise relationship between the European legal order and UN Security Council resolutions unanswered. It only offered a clear indication of the limit of the possible binding nature of UN Security Council resolutions by stating that they could not enjoy primacy over primary EU law. The question of whether UN Security Council resolutions could enjoy primacy over secondary EU law was avoided by the Court. In line with its previous judgments in *Bosphorus* and *Ebony Maritime*, it held that when adopting a Community instrument as part of the second stage of the process for the imposition of economic sanction where the EU is implementing a UN Security Council resolution, the Community would have to

> take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation.[57]

The interpretation of a Community instrument in light of a UN Security Council decision indicates that they could be binding but does not offer an argument that could not be rebutted. In other words, UN Security Council resolutions could be binding on the EU but if they were to be, they would have to respect the general principles of EU law comprising, amongst other things, the EU's own standard of European fundamental rights. The way the Court achieved this result is by pointing

[56] *Kadi* and *Kadi* (Grand Chamber) (n 37).
[57] *Kadi* (Grand Chamber) (n 37) para 296.

to Article 300(7) EC.[58] This provision referred to agreements concluded by the Community and provided that these agreements were binding on the member states but also on Community institutions. The European Union has not however and, for the time, being cannot sign and ratify the Charter of the United Nations since membership is only open to states. In a second step, the Court showed however how this obstacle could be overcome. It referred to its earlier decision in *Intertanko*,[59] which is substantially linked to the *International Fruit Company* case.[60] Both cases refer to the concept of functional substitution.[61] Both cases deal with the situation in which the European Union although not a party to an international agreement to which all of its member states are parties is bound by that agreement, based on the fact that the European Union has taken over the powers previously exercised by the member states in this field of policy. Nonetheless, the Court then fell short of assessing whether the criteria for a functional substitution of the member states through the European Union with regards to economic sanctions were met.[62] Therefore, the EU's legal relationship with UN Security Council resolutions still needs to be addressed.

[58]Today's Article 216 (2)LTFEU; *Kadi* (Grand Chamber) (n37) para 306.

[59] Case C-308/06 *International Association of Independent Tanker Owners (Inertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union, v Secretary of State for Transport* [2008] ECR I-4057 [hereinafter *Intertanko*].

[60] Joined Cases 21 to 24/72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit* [1972] ECR 1219.

[61] *Kadi* (Grand Chamber) (n37) para 307.

[62] *Kadi* (Grand Chamber) (n37) paras 306-308 states that

> 'Article 300(7) EC provides that agreements concluded under the conditions set out in that article are to be binding on the institutions of the Community and on Member States. Thus, by virtue of that provision, supposing it to be applicable to the Charter of the United Nations, the latter would have primacy over acts of secondary Community law (see, to that effect, Case C□308/06 *Intertanko and Others* [2008] ECR I□0000, paragraph 42 and case-law cited). That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.'

Part 3

What can be learned from the relationship between UN Security Council resolutions and the EU in respect of economic sanctions for an understanding of the relationship between the EU and UN Security Council resolutions in respect of the use of force?

Neither public international law nor European law provide explicit answers to the question whether the European Union is bound by UN Security Council resolutions in the conduct of crisis management missions including the use of force. Nevertheless, based on the assumption that the European Union is bound by UN Security Council resolutions in respect of economic sanctions, it will be argued that this finding can be helpful for understanding the relationship between the EU and UN Security Council resolutions involving the use of force. To carry out this analysis, the next section will demonstrate why a comparison between economic and military sanctions is useful in this context. A special focus will be put on the EU's comprehensive concept of crisis management. Section two will show that the European Union is bound by economic UN Security Council resolutions by drawing an analogy with the *International Fruit Company* case. Finally, section three will examine in more detail whether the conditions created by the *International Fruit Company* case for a functional substitution are also met in the context of the use of force and thus whether the EU is legally bound by UN Security Council resolutions.

1. The usefulness of a comparison between economic and military sanctions – the differences and similarities they share

1.1. Perspective of International Law

At first glance, it appears difficult to argue that economic and military coercive measures form comparable grounds from the perspective of international law. Economic sanctions adopted by the UN Security Council primarily represent a duty, asking all UN member states to apply the sanctions regime to allow for its effectiveness. The authorisation of the use of force through the Security Council, on the other hand, provides international actors with the right to use force and allows them to set the principle of non-intervention, the cornerstone of the UN's system of collective security, aside.

Nevertheless, on a closer look, UN Security Council resolutions on economic sanctions do not only create a duty for UN member states to implement economic sanctions,[63] they also serve as an entitlement.[64] The implementing state's position under international agreements and general international law is modified by economic Security Council sanctions. To be able to implement Security Council sanction decisions, the implementing state is entitled to disregard obligations it has entered into with other international actors without facing negative consequences.[65] This is a result of Article 103 UN Charter according to which UN Charter obligations prevail. The target of economic sanctions has to accept their negative impact. Economic UN Security Council sanctions legalise the implementing measures by UN member states that could not otherwise be justified under general international law.[66]

UN Security Council resolutions authorising the use of force do not only entail the right to use force but they also entail obligations. Although in 'ordinary speech to authorise is to permit or allow or licence' but 'not to require or oblige',[67] once a UN member state accepts a Security Council authorisation, it is bound by the wording and spirit of the resolution and 'has an *obligation* to carry out the tasks outlined in the authorization'.[68] Those states that choose not to accept a mandate are required by a general loyalty obligation to abstain from all action or inaction that might undermine the success of military sanctions authorised by the UN Security Council. For example, a UN member state would have to refrain from shipping arms to a targeted country, even if there is no arms embargo in place.

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[63] Article 48(2) UN Charter.
[64] K Osteneck, *Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft: Völker- und europarechtliche Rahmenbedingungen für ein Tätigwerden der Europäischen Gemeinschaft im Bereich von UN-Wirtschaftssanktionsregimen unter besonderer Berücksichtigung der Umsetzungspraxis der EG-Organe***,** Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 168 (Springer Verlag, Berlin 2004) 36.
[65] V Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 International and Comparative Law Quarterly, 87.
[66] Osteneck (n 64) 36; see also T Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press, Manchester 2005) 15 who refers to the permissive effect of mandatory UN Security Council sanctions.
[67] Lord Bingham of Cornhill, Opinions of the Lords of Appeal For Judgment in R (on the application of Al-Jeda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58 para 31.
[68] R Liivoja, 'The Scope of the Supremacy Clause of the United Nations Charter' (2008) 57 International and Comparative Law Quarterly 587.

It has also been held that mandatory economic UN Security Council sanctions and authorised military measures create similar effects regarding UN member states' existing obligations under international law. Both types of measures have been held to prevail over existing international obligations according to Article 103 UN Charter, although the wording of this provision merely refers to 'obligations'.[69] In the absence of a standing UN army, the Security Council cannot do anything to fill this void but to authorise willing and capable states to use force.[70] If the authorisation to use force however cannot prevail over treaty obligations, the UN Security Council is restricted in its attempts to maintain and restore international peace and security.[71]

In addition, the boundary between economic sanctions based on Article 41 UN Charter and military sanctions based on Article 42 UN Charter can be blurred in the sense that to make economic sanctions effective universal application is required. One of the means to achieve universal application is by forceful means, namely by using a blockade that will shut down all commercial activity of the target state.[72] A military blockade is considered however to be a form of military reprisal.[73] In light of the foregoing, international law does not stand in the way of a fruitful comparison between economic and military sanctions.

1.2. Perspective of European law

The European legal order could be open to this method of comparison between the regimes of economic sanctions on the one hand and military sanctions on the other, although both types of instruments are governed by different rules and procedures. Economic sanctions form part of the supranational sphere of the European Union and were formerly covered by the European Community. Crisis management operations involving the use of force, on the contrary, fall within the ambit of the intergovernmental security and defence policy that is still subject to specific rules

[69] Lord Bingham of Cornhill (n 67) para 33.
[70] Lord Bingham of Cornhill (n 67) para 33.
[71] Lord Bingham of Cornhill (n 67) para 33.
[72] J Polakas, 'Economic Sanctions: An Effective Alternative to Military Coercion?' (1980) 6 Brooklyn Journal of International Law 319.
[73] Polakas (n 72) 319.

and procedures, despite de-pillarisation through the Treaty of Lisbon, as outlined in chapter two above. Hence, the former pillars still cast their shadows on the European Union.

Nevertheless, the abolition of the Greek temple model shows a new interest and openness in approaching the project of European integration without internal, European self-made boundaries. By thinking in pillars, Europe prevented itself from seeing the similarities in its project, always highlighting and maybe overestimating its internal differences and neglecting the interrelations between its different policy spheres.[74] The following section will examine the similarities and differences between economic and military sanctions within the European legal order.

It will be argued that both types of instruments constrain European member states in their domestic foreign policy choices. In addition, the European Union appears to have gone through a similar development with regards to the use of force as it has done with economic sanctions. In the context of economic sanctions, a European competence was disputed by the member states at first but the EU has gradually acquired competence in this foreign policy field, as demonstrated in chapter five. Within the framework of the common security and defence policy, a process of European integration is ongoing but on a much slower scale. In addition to these similarities, the European Union and its comprehensive concept of crisis management support the view that an understanding of the EU's relationship with economic UN Security Council sanctions can help with understanding the EU's relationship with UN Security Council resolutions on the use of force. Therefore, if it is possible to argue that the European Union is bound by UN Security Council resolutions with regards to economic sanctions it will also be worth examining whether the criteria used to argue for their binding nature can also be applied to UN Security Council military sanctions.

[74] Wessel, 'The Inside Looking Out: Consistency and Delimitation In EU External Relations' (2000) 37 Common Market Law Review 1135.

1.2.1. Economic sanctions and Council decisions providing for the use of force in the context of an EU crisis management operation – constraining the EU member states in the conduct of their domestic foreign policies

As already discussed in chapter five and in chapter three, European economic sanction regulations as well as Council decisions with which a military crisis management operation is launched and conducted constrain the European member states in the conduct of their national foreign policies. Regarding economic sanctions, member states have largely lost their power to act outside the European framework. With regards to the use of military force, member states are constrained, once they have voted in the Council, to undertake a military crisis management operation. Although member states are not obliged to put a certain topic on the Council agenda and to create a common policy, they are nevertheless constrained in the conduct of their national foreign policies through the instruments with which the EU launches and conducts its crisis management operations, once they are in place.

1.2.2. European integration in external relations

Another similarity behind the adoption of economic and military sanctions within the European legal order is the gradual development of a European role in these highly sensitive foreign policy fields. In the context of economic sanctions, a European competence was disputed by the member states at first but the EU gradually acquired a competence as demonstrated in chapter five above. Within the framework of the common security and defence policy, a process of European integration is ongoing as well, but at a much slower scale as discussed in chapters two and three. European member states are already constrained in the conduct of their foreign policies through Council decisions with which European military crisis management missions are launched and conducted. Both developments have been characterised through a bottom up approach. Most changes were introduced outside the Treaty framework and later became formalised. The European Union appears to have gone through a similar development with regards to the use of force as it has done with economic sanctions.

1.2.3. A comprehensive concept of crisis management and practical needs

Although there is no internationally agreed definition of crisis management, the statements of the EU, most importantly the *European Security Strategy* of 2003[75] which represents the first strategic concept for the EU as well as its actual practice, support the view of a comprehensive concept of crisis management.[76] The European approach to crisis management is comprehensive in two ways. Not only is the European Union prepared and willing to act in the whole life cycle of a conflict, including conflict prevention, peace-making, peace-enforcement, peace-keeping as well as post conflict stabilisation, but it is also willing to use a variety of tools that are at its disposal.[77]

In response to the identified key threats, including terrorism, the proliferation of weapons of mass estruction, regional conflicts, state failure and organised crime, the *European Security Strategy* recommends a mixture of instruments and considers the EU to be 'particularly well equipped to respond to such multi-faceted situations'.[78]

> Proliferation may be contained through export controls and attacked through political, economic and other pressures while the underlying political causes are also tackled. Dealing with terrorism may require a mixture of intelligence, political, judicial, military and other means. In failed states, military instruments may be needed to restore order, humanitarian means to tackle the immediate crisis. Regional conflicts need political solutions but military assets and effective policing may be needed in the post conflict phase. Economic instruments serve reconstruction, and civilian crisis management helps restore civil government.[79]

In the scholarly debate, economic sanctions are not usually incorporated into the concept of European crisis management.[80] However, to address the whole life-cycle

[75] *European Security Strategy* (n 1).
[76] S Blockmans, 'An Introduction to the Role of the EU in Crisis Management' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 10.
[77] *European Security Strategy* (n 1) 11.
[78] *European Security Strategy* (n 1) 7.
[79] *European Security Strategy* (n 1) 7.
[80] In favour of the inclusion of sanctions into the EU's comprehensive approach to crisis management: I Anthony, 'Sanctions Applied by the European Union and the United Nations' SIPRI (Stockholm

of a conflict, a variety of tools is not only necessary and available to the European Union but they are also used in practice. The *European Security Strategy* mentions trade measures, including economic sanctions, alongside other tools when it asks the EU to be more active in pursuing its strategic objectives. This recommendation

> applies to the full spectrum of instruments for crisis management and conflict prevention at our disposal, including political, diplomatic, military and civilian, trade and development activities. Active policies are needed to counter the new dynamic threats. We need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention.[81]

The Council document *Basic Principles on the Use of Restrictive Measures (Sanctions)* perceives 'the effective use of sanctions as an important way to maintain and restore international peace and security' and states that the 'Council is committed to using sanctions as part of an integrated, comprehensive policy approach which should include political dialogue, incentives, conditionality and could even involve, as a last resort, the use of coercive measures in accordance with the UN Charter'.[82] It has been argued that although sanctions are used for crisis management purposes in practice, the EU would prefer to label such instruments as 'measures to promote regional peace and stability, or to uphold Human Rights and democracy'.[83] In addition, economic sanctions are not only used separately but they often accompany civilian and military crisis management operations of the EU. As they provide a tool to end a conflict they should be included in the overall concept of crisis management. The experience of the European Union in Sudan can serve as an illustration of the EU's comprehensive approach to crisis management.

International Peace Research Institute) Yearbook 2002: *Armament, Disarmaments and International Security* (Oxford University Press, Oxford 2002) 203; Including economic sanctions into European security are M Trybus, N D White and others, 'An Introduction to European Security Law' in M Trybus and N White (eds), *European Security Law* (Oxford University Press, Oxford 2007) 4.

[81] *European Security Strategy* (n 1) 11.

[82] Council of the European Union, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' Brussels, 7 June 2004, 10198/1/04 REV 1, PESC 450, Annex 1, para 1 and 5. [hereinafter *Basic Principles on the Use of Restrictive Measures*].

[83] C Portela, 'Where and Why does the EU Impose Sanctions?' (2005) 3 (17) Politique Européenne 98.

The European Union has supported activities by the African Union (AU) in an attempt to stabilise the Darfur region in Sudan with a wide range of measures since 2004. Financial, political and personnel support for the Abuja peace talks process and the Ceasefire Commission followed European assistance with planning, equipment, technical and financial support to the AU's mission in the region (AMIS). Following a request from the AU, the EU launched its first combined civilian and military mission between 2005 and 2007 and assisted and supported the AU's political, police and military efforts in an attempt to end the crisis. Amongst other tasks, the EU assisted and trained the police and made military observers and experts available. The EU also imposed a number of sanctions, including restrictions on admission, the freezing of funds and economic resources, an arms embargo and a ban on the provision of certain services.[84] At the end of 2007, AMIS handed over to a joint UN/AU peacekeeping operation UNAMID authorised by UN Security Council Resolution 1769 (2007).[85]

In sum, European crisis management includes all types of military and civilian CSDP operations, covering the whole life-cycle of a conflict, reaching from conflict prevention to post conflict rehabilitation, and covering the whole external dimension of security, across the different policy areas of the European Union,[86] as well as a variety of economic, diplomatic and political tools. This comprehensive approach to crisis management is also essential if the EU is to become a successful, effective, and credible international security actor. If it falls short of offering an all-encompassing solution to an international crisis, despite having started to interact, the EU appears ineffective and weak and could gradually lose its credibility and legitimacy as an international actor. In consequence, it is beneficial to analyse economic sanctions, civilian or military crisis management missions in unison.

It is possible to use a comparative method to make the examination of the EU´s relationship with economic UN Security Council resolutions helpful for an

[84] Council Common Position 2005/411/CFSP concerning restrictive measures against Sudan and repealing Common Position 2004/31/CFSP [2005] OJ L 139/25.
[85] Consilium Fact Sheet, *EU support to the African Union Mission in Darfur – AMIS*, January 2008 AMIS II/08 <http://www.consilium.europa.eu/uedocs/cmsUpload/080109-Factsheet8-AMISII.pdf>.
[86] Blockmans (n 76) 11.

understanding of the EU's relationship with UN Security Council resolutions in the context of the use of force. Both economic sanctions and military CSDP decisions constrain European member states in their domestic foreign policy choices. The European Union has gone through a similar development regarding the use of force as it has done with economic sanctions. In addition to these similarities, the European Union and its comprehensive concept of crisis management also support the view that an understanding of the EU's relationship with economic UN Security Council sanctions can be made useful for understanding the EU's relationship with UN Security Council resolutions with regards to the use of force. The next part will assess the EU's relationship with economic UN Security Council resolutions in more detail.

2. The EU's legal relationship with economic UN Security Council resolutions

Primary EU law is silent on whether the European Union is bound by UN Security Council resolutions regarding economic sanctions. The European Union nevertheless has a long history of implementing UN Security Council resolutions within the EU legal order. However, whenever it transforms UN sanction decisions into the EU legal order by adopting secondary EU legislation, the EU also has a history of avoiding clear legal statements about whether it considers itself bound by UN Security Council resolutions.

For example, the preamble to Council Regulation (EU) No 667/2010 of 26 July 2010 concerning certain restrictive measures in respect of Eritrea,[87] states that the restrictive measures targeted provided for in Decision 2010/127/CFSP,[88]

> (5) …fall within the scope of the Treaty on the Functioning of the European Union and, therefore, notably with a view to ensuring their uniform application by economic operators in all Member States, legislation at the level of the Union is necessary in order to implement them as far as the Union is concerned.

[87] Council Regulation (EU) No 667/2010 concerning certain restricitve measures in respect of Eritrea [2010] OJ L 195/16.
[88] Council Decision 2010/127/CFSP concerning restricitve measures against Eritrea [2010] OJ L 51/19.

> (6) This Regulation respects the fundamental rights and observes the principles recognised in particular by *the Charter of Fundamental Rights of the European Union* and notably the right to an effective remedy and to a fair trial, the right to property and the right to protection of personal data. *This Regulation should be applied in accordance with those rights and principles.*
>
> (7) *This Regulation also fully respects the obligations of Member States under the Charter of the United Nations and the legally binding nature of Security Council Resolutions*.[89]

By stating its awareness of the binding nature of UN Security Council resolutions regarding its member states but also by highlighting the need for Union instruments to respect the EU's own standard of fundamental rights protection, the EU therefore avoids addressing the EU's relationship with UN Security Council resolutions. The EU also avoids answering questions about what happens if there is a clash between its legal obligations under European law and public international law.

Along the same line, the EU has also avoided clear political statements about whether or not it regards itself to be bound by UN sanction decisions and has stipulated in rather general terms that

> [i]n the case of measures implementing UN SC Resolutions, the EU legal instruments will need to adhere to those Resolutions. However, it is understood that the EU may decide to apply measures that are more restrictive.[90]

Probably the most convincing argument in favour of the claim that the European Union is bound by UN Security Council resolutions with regards to economic sanctions is the analogy drawn from the ECJ's decision in the *International Fruit Company* case. In essence this view is based on the argument that the European Union has functionally substituted for the European member states in the sphere of economic sanctions. This view was promoted by the Court of First Instance in its

[89] Emphasis added.
[90] Council of the European Union, 'Guidelines on Implementation and Evaluation of Restrictive Measures (sanctions) in the Framework of the EU Common Foreign and Security Policy', Brussels, 2 December 2005, 15114/05 para.3 [hereinafter *Guidelines on Implementation and Evaluation of Restrictive Measures in the Framework of the EU Common Foreign and Security Policy*].

Kadi decision, as shown in chapter one above. Unfortunately, the CFI generalised its finding that the European Community is bound by UN Security Council resolutions without distinguishing between primary and secondary Community law. When its decision was appealed, the European Court of Justice left the question of the legally binding nature of UN Security Council resolutions on economic sanctions open and merely addressed the outer limits of their binding character. According to the Grand Chamber, UN Security Council decisions cannot enjoy primacy over primary Union law. Nonetheless, even the ECJ indirectly referred to the *International Fruit Company* case when it mentioned its earlier decision in *Intertanko* that also referred to the concept of functional substitution. The following will describe the ECJ's reasoning in the *International Fruit Company* case before it will be tested whether an analogy with this can be drawn to economic sanctions.

2.1. The *International Fruit Company* Case

In the *International Fruit Company* case,[91] the ECJ was asked whether trade Regulations No 459/70, 565/70 and 686/70, providing for restrictions on the importation of apples from third countries were invalid for violation of GATT.[92] Hence it had to analyse whether GATT was binding on the European Community, although the Community had never formally become a contracting party to the General Agreement on Tariffs and Trade. The Court stated that

> in so far as under the EEC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the general agreement, the provisions of that agreement have the effect of binding the Community.[93]

The argument put forward by the ECJ that the European Community had substituted for the member states as the relevant actors in GATT was based on five grounds.[94] First, all member states were contracting parties to GATT and therefore bound by its

[91] Joined Cases 21 to 24-72 International *Fruit Company NV and others v Produktschap voor Groenten en Fruit*, Netherlands [1972] ECR I-1219 [hereinafter *International Fruit Company* case].
[92] *International Fruit Company* (n 91) para 3.
[93] *International Fruit Company* (n 91) para 18.
[94] Bohr (n 4) 264.

rules when they established the EEC.[95] In line with the non-circumvention principle, '[b]y concluding a treaty between them they could not withdraw from their obligations to third countries'.[96] Instead their desire to obey GATT rules followed from EEC treaty provisions such as former Articles 110 EEC and 234 EEC, as well as from their declarations in GATT.[97]

Second, '[t]he Community has assumed the functions inherent in the tariff and trade policy…by virtue of Articles 111 and 113 of the Treaty'.[98] By conferring powers related to trade and tariff policy on the Community, the member states expressed their wish to bind the Community to the obligations they have entered into in the GATT framework.[99]

Third, the Community showed its willingness to be bound by the provisions of the general agreement.[100] This is illustrated by Article 110 EEC, which mentions GATT objectives, and from statements of the member states when the Treaty of Rome was welcomed under GATT Article XXIV.[101] Additionally, Article 234 EEC provided that '[t]he 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 hand, shall not be affected by the provisions of this Treaty'.

Fourth, the Community has acted within the GATT framework 'and has appeared as a partner in the tariff negotiations and as party to the agreements of all types concluded within the framework of the General Agreement, in accordance with the provisions of Article 114 of the EEC Treaty which provides that the tariff and trade agreements 'shall be concluded … on behalf of the Community'.[102] Therefore, 'the

[95] *International Fruit Company* (n 91) para 10.
[96] *International Fruit Company* (n 91) para 11.
[97] P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, Oxford 2004) 437, 438.
[98] *International Fruit Company* (n 91) para 14.
[99] *International Fruit Company* (n 91) para 15.
[100] *International Fruit Company* (n 91) para 13; Bohr (n 4) 264.
[101] Bohr (n 4) 264.
[102] *International Fruit Company* (n 91) para 17.

transfer of powers which has occurred in the relations between Member Sates and the Community has been put into concrete forms in different ways…'[103]

Fifth, the transfer of powers from the member states to the Community 'has been recognised by the other contracting parties',[104] at least by acquiescence.[105]

2.2. The *International Fruit Company* case and UN Security Council resolutions imposing economic sanctions

If the reasoning of the *International Fruit Company* case could be transferred to the relationship between the EU and the UN Security Council resolutions in respect of economic sanctions, the EU would be bound by the latter. Thus the assessment of the binding character of UN resolutions must start with the above listed criteria established by the ECJ – its core being the functional substitution of the member state by the European Union.[106]

First, all EU member states are signatories of the UN Charter. However, this cannot be sufficient as otherwise all international agreements that are binding on all EU member states would be binding on the European Union, although neither the Treaties nor ECJ case law provide for such a broad claim.[107] However, regarding economic UN Security Council resolutions it has been suggested by some that the circumvention argument applied by the ECJ in the *International Fruit Company* case cannot be applied to the European Union. These critics hold the view that the claim made by others that EU member states who themselves are bound by UN Security Council resolutions would not be in position to transfer more powers than they possess themselves to the European Community - a fact that would indicate that the EU is bound by the UN Charter in the same way as its member states, based on the so called *Hypothekentheorie* - would disregard the development of the

[103] *International Fruit Company* (n 91) para 16.
[104] *International Fruit Company* (n 91) para 16.
[105] Bohr (n 4) 264.
[106] Supporting the view that the EU could be bound by economic Security Council resolutions: Eeckhout (n 97) 438, 439. Rejecting this view is Bohr (n 4), 265; also rather negative is C Eckes, 'Judicial Review of European Anti-Terrorism Measures – The *Yusuf* and *Kadi* Judgments of the Court of First Instance' (2008) 14 European Law Journal, 85.
[107] Eeckhout (n 97) 438.

Community.[108] They argue that the Community has emerged into a 'new governmental power centre which could not be conceptualized as being made up of fragments or splinters of national sovereign authority'.[109] Although it holds true that the European Community and then the EU developed into international organisations of a *sui generis* nature, this does not imply that the EU can invent new powers for itself. The EU is still based on the principle of conferred powers and it therefore matters what powers the member states have that could potentially be transferred to the European Union.

The member states of the European Union renounced some of their sovereign powers through their membership of the United Nations and it is therefore difficult to imagine how they can regain those powers indirectly through their membership of the European Union - especially in light of the expressed commitment of the European Union to the principles of the United Nations. This commitment can be found in several Treaty provisions, political documents and in case law. Furthermore, the circumvention argument is just one of the arguments used by the Court to argue in favour of the functional substitution of the member states by the European Union.

Second, the EU has assumed functions previously exercised by the member states. As shown in chapter five above, a transfer of power in the field of economic sanctions from the member states to the EU has gradually taken place and the European Union has acquired competence in this field. As discussed in chapter five, it is not clear whether the EU actually has exclusive competence, but the ECJ did not refer to exclusive competence in the *International Fruit Company* case.[110]

[108] C Tomuschat , 'Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, Judgment of the Court of First Instance of 21 September 2005; Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, Judgment of the Court of First Instance of 21 September 2005, nyr' (2006) 43 Common Market Law Review 542, 543.
[109] Tomuschat (n 108) 543.
[110] Eeckhout (n 97) 438.

Subsequent case law is not entirely clear regarding the requirement of exclusive competence either.[111]

In the *Kadi* decision of the Court of First Instance, focusing on financial sanctions against individuals, the cCFI successfully drew a detailed analogy with the *International Fruit Company* case without characterising the EU's competence for the adoption of economic sanctions as exclusive.[112] In respect of the necessary transfer of power, the Court stated that

> [s]ince the entry into force of the Treaty establishing the European Economic Community, the transfer of powers which has occurred in the relations between the Member States and the Community has been put into concrete form in different ways within the framework of the performance of their obligations under the Charter of the United Nations.[113] Thus it is, in particular, that Article 118a of the EC Treaty (now Article 301 EC)[114] was added to the Treaty by the Treaty on European Union in order to provide a specific basis for the economic sanctions that the Community, which has exclusive competence in the sphere of the common commercial policy, may need to impose in respect of third countries for political reasons defined by its Member States in connection with the CFSP, most commonly pursuant to a resolution of the Security Council requiring the adoption of such sanctions.[115] It therefore appears that, in so far as under the EC Treaty the Community has assumed powers previously exercised by Member States in the area governed by the Charter of the United Nations, the provisions of that Charter have the effect of binding the Community.[116]

Although it referred to the exclusive competence of the European Union in the sphere of the common commercial policy, the Court failed to answer the question of whether the EU has exclusive competence in respect of economic and financial sanctions targeted against third parties.

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[111] In favour of the requirement of exclusivity, M Nettesheim , 'U.N. Sanctions Against Individuals – A Challenge To The Architecture Of European Governance' (2007) 44 Common Market Law Review 585.
[112] *Kadi* (n 37) para 195-203; This analogy has been positively received by P Eeckhout, 'EC Law and UN Security Council Resolutions – In Search of the Right Fit' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, Cambridge 2008) 108. Criticizing the CFI's analogy are Nettesheim (n 111) and 585; C Tomuschat (n 108) 542, 543.
[113] *Kadi* (n 37) para 201.
[114] Today's Article 215 LTFEU.
[115] *Kadi* (n 37) para 202.
[116] *Kadi* (n 37) para 203.

Nevertheless, the special nature of economic sanctions, combining trade measures with foreign policy considerations and their unique constitutional setting within the EU legal order, linking the intergovernmental common foreign and security policy with the supranational EU policy sector, might indicate that the traditional competence categories of the supranational EU policies, including shared exclusive and parallel competence, might not be appropriate to describe the distribution of powers between the EU and the member states in the sphere of economic sanctions. This view can be supported by the competence catalogue introduced by the Treaty of Lisbon, which does not categorise the common foreign and security policy. In addition, the Treaty on European Union consistently highlights the special nature of the common foreign and security policy, which is subject to special rules and procedures.

Therefore it is not appropriate to use a formal approach of traditional competence categories to the EU's competence regarding economic sanctions as already indicated in chapter five. Instead it is more helpful to approach the substance of the EU's competence regarding economic sanctions and to examine whether and to what extent the member states are constrained in the conduct of their national foreign policies through EU sanction decisions to determine whether the EU has taken over the space previously occupied by the EU member states. As discussed in chapter five above, the member states are largely limited in their domestic policies through EU sanctions. There is hardly any room left for unilateral economic measures. If the member states can make use of Article 347 LTFEU to justify unilateral measures in case the procedure of Article 215 LTFEU does not work, they are not free to act as they please. They are limited *a priori* and *ex posterior*.

In consequence, the findings of the ECJ in *Intertanko,*[117] which asked for the 'full transfer of powers previously exercised by the Member States to the Community' as a pre-condition for the substitution of the member states through the European Union in respect of the International Convention for the Prevention of Pollution from Ships,

[117] *Intertanko* (n 59).

as supplemented by the Protocol of 17 February 1978 (Marpol 73/78) and the United Nations Convention on the Law of the Seas (UNCLOS),[118] cannot counter the arguments put forward here. The EU has replaced the member states in the sphere of economic sanctions independently of whether one qualifies the nature of EU economic sanctions as exclusive, exclusive albeit in a *sui generis* way, or as non-exclusive.

Third, the EU has shown its willingness to be bound by UN Security Council resolutions. Although the EU never explicitly stated that it would be legally bound by UN Security Council resolutions regarding economic sanctions, the *Basic Principles on the Use of Restrictive Measures (Sanctions)*,[119] a political document, stresses the strong commitment of the European Union towards its obligations under the UN Charter and states that,

> [w]e are committed to the effective use of sanctions as an important way to maintain and restore international peace and security in accordance with the principles of the UN Charter and of our common foreign and security policy. In this context, the Council will work continuously to support the UN and fulfil our obligations under the UN Charter.[120] We will seek to further intensify our efforts within the UN, in line with Article 19 TEU, to coordinate our actions on sanctions. We will ensure full, effective and timely implementation by the European Union of measures agreed by the UN Security Council. We will establish a dialogue with the UN to this effect.[121]

Practice also shows that the EU often implements UN Security Council resolutions when adopting economic sanctions. When doing so, the European Union updates its Council decisions and regulations whenever the Security Council slightly changes its sanctions regimes. The EU thereby indicates its willingness to be bound by them.

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[118] *Intertanko* (n 59) para 49.
[119] Council of the European Union, 'Basic Principles on the Use of Restrictive Measures (Sanctions)' Brussels, 7 June 2004, 10198/1/04 REV 1[hereinafter *Basic Principles on the Use of Restrictive Measures*].
[120] *Basic Principles on the Use of Restrictive Measures* (n 119), Annex I para 1.
[121] *Basic Principles on the Use of Restrictive Measures* (n 119), Annex I para 2.

Furthermore, the intention to be bound can be deduced from past practice, including the sanctions imposed against Iraq during the Kuwait crisis in the 1990s.[122] The member states met in the framework of European Political Cooperation and decided to adopt economic sanctions against Iraq. After these meetings, UN Security Council resolutions were passed that differed in substance to a small extent.[123] Before formally adopting European instruments, the EU therefore adjusted its initial plans to make them run in line with the adopted UN resolutions.[124]

Fourth**,** the EU has acted within the framework of the United Nations through the implementation of economic UN sanctions in the European legal order. Before sanctions are adopted at the UN level, the European Union tries to influence the decision and adoption process. In general, the EU attempts to coordinate its actions on sanctions in the Security Council and tries to encourage the adoption of universal sanctions before it resorts to autonomous EU action, if necessary.[125] When implementing economic UN Security Council sanctions, the EU usually states that 'action by the Community is needed to implement the measures' foreseen in the respective UN Security Council resolution.[126] But it is not only the EU that is present at the United Nations in the context of economic sanctions. The UN sanction regime against Iran that was agreed in June 2010 was, for example, decided by China, Russia, and the US and by the European permanent Security Council member states France and the UK and the non-permanent Security Council member Germany.[127] The High Representative for Foreign Affairs and Security Policy has supported the adoption of the sanctions against Iran and thus demonstrated that the European Union and its member states are both present at the activities of the UN Security Council.[128]

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[122] Bohr (n 4) 264.
[123] Bohr (n 4) 265.
[124] Bohr (n 4) 265.
[125] *Basic Principles on the Use of Restrictive Measures* (n 119) Annex I para 3.
[126] See for example Council Common Position (1999/727/CFSP) concerning restrictive measures against the Taliban, implementing UN Security Council resolution 1267 (1999) of 15 October 1999 [1999] OJ L 294/1.
[127] M Emerson and others, 'Upgrading the EU's Role as a Global Actor: Institutions, Law and the Restructuring of European Diplomacy' (2011) Centre for European Policy Studies (CEPS) <http://ceps.be/system/files/book/2011/01/Upgrading%20the%20EU%20as%20Global%20Actor%20e-version.pdf> 69.
[128] Emerson and others (n 127) 69.

Fifth, the contracting parties of the UN Charter must have recognised the substitution of the member states by the EU. Although it has no seat in the UN Security Council and therefore does not have a status at the United Nations which is equivalent to its seat at the table of GATT,[129] the EU nevertheless plays an influential role within the system of the United Nations that cannot be left unnoticed by other UN member states. Even before the entry into force of the Lisbon Treaty, the influence of the EU was visible and the EU member states that were also members of the UN Security Council were asked to concert and to keep the other member states informed.[130] The permanent UN Security Council members France, and the UK, were obliged to defend European positions and interests through their actions. The Treaty of Lisbon has led to the strengthening of the role played by the EU in the Security Council and the Union was no longer merely represented through its member states. Instead the EU could be represented through the newly created institution of High Representative for Foreign Affairs and Security Policy who could intervene on behalf of the EU. According to Article 34 LTEU,

> [w]hen the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position.

The UN Security Council's Provisional Rules of Procedure enable European positions to be represented at the Security Council once a common position has been agreed on within the common foreign and security policy.[131] According to Provision 39,

> [t]he Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence.

[129] Nettesheim (n 111) 585.
[130] Article 19 TEU (Nice version).
[131] Emerson and others (n 127) 69.

In line with this provision, the European member states that have a seat at the Security Council or the European Union itself can ask to be allowed by the Security Council to participate in its open debates, once agreement on a European position has been reached.[132] Since 2010, this opportunity has been used regularly.[133] However, the High Representative for Foreign Affairs and Security Policy has so far made only a few statements at the UN Security Council.[134] Although it has not substituted the member states in the UN Security Council completely yet, the European Union's partial presence should be recognised by third parties. As all the *International Fruit Company* case criteria are fulfilled, the EU is bound by UN Security Council resolutions with respect to economic sanctions.

3. The *International Fruit Company* case and UN Security Council resolutions authorising the use of force

Although it has no jurisdiction over the common security and defence policy, the European Court of Justice's reasoning in the *International Fruit Company* case might be suitable for comprehending the relationship between the EU and UN resolutions regarding the use of force. The next section will therefore test whether the criteria for functional substitution are met in EU crisis management missions.

First, all member states are contracting parties to the United Nations. They are legally obliged to implement binding UN Security Council resolutions on the use of force. As shown in chapter four, they do not have to accept a military mandate in the sense that the have deploy their military personnel. Nonetheless, they are under a loyalty obligation that asks them not to undermine the success of a military operation. This obligation can entail negative as well as positive obligations.

Second, the EU must have acquired powers in the field of the common security and defence policy, and in particular with regards to the use of force in crisis

[132] Emerson and others (n 127) 69.
[133] Emerson and others (n 127) 69.
[134] N Pirozzi, H Juergenliemk, and Y Spies, 'The European Union and the Reform of the United Nations: Towards a More Effective Security Council?' (2011) Mercury (Multilateralism and the EU in the Contemporary Global Order) E-paper No. 13 November 2011 <http://typo3-8447.rrz.uni-koeln.de/fileadmin/user_upload/E-paper_series_no13_final.pdf> 13.

management operations. The member states are reluctant to lose some of their competences in security and defence matters as they are perceived to lie at the very heart of state sovereignty. Nonetheless, as demonstrated in chapter two, a process of European integration is slowly ongoing within the EU's common security and defence policy. The European Union has been equipped with bodies, institutions and capabilities and has legally binding instruments at its disposal with which it can pursue crisis management tasks. Although Council decisions can only be adopted by unanimous decisions of the member states, member states are not obliged to put certain topics on Council meeting agendas and can thereby avoid unified European approaches to international crises while Council decisions can be phrased in very vague and open terms and could thus leave room for domestic measures, chapter three has demonstrated that once such a decision is in place, European member states are bound by it. Once a Council decision is adopted to launch and conduct a military crisis management operation, member states are constrained in the conduct of their domestic foreign policies.

If the member states in the Council decide to launch a European crisis management mission of a military nature, the legally binding character of the adopted Council decision is reinforced by the principle of loyal cooperation. The principle of loyal cooperation asks the member states to support the EU's external and security policy actively and unreservedly, to comply with the Union's action and to refrain from any action that is contrary to Union interest or might impair the effectiveness of the Union's action as discussed in chapter three.[135]

The entailed positive as well as negative obligations do not ask the member states to take part in a European crisis management operation of a military nature by sending their troops. Member states' military capabilities are not reserved for CSDP purposes.[136] Thus, member states are free to supply their military personnel for a UN

[135] Article 24 (3) LTEU.
[136] European Council, 'EU-UN Co-operation in Military Crisis Management Operations: Elements of Implementation of the EU-UN Joint Declaration', 17-18 June 2004 <http://www.consilium.europa.eu/uedocs/cmsUpload/EU-UN%20co-operation%20in%20Military%20Crisis%20Management%20Operations.pdf> para 4 [hereinafter *EU-UN Co-operation in Military Crisis Management Operations*].

mission, for example, without acting within the framework of a European crisis management operation. In such cases, the EU has offered to provide a 'clearing house process' amongst its member states.[137] 'The 'clearing house process' aims at creating a framework by which Member States could, on a voluntary basis, exchange information on their contributions to a given UN operation and, if they so decide, co-ordinate these national contributions.'[138] Nevertheless, if the member states in the Council decide to launch and to conduct an EU crisis management operation (in support of the UN for example) instead and not just a military coordination operation, this operation would be 'under the political control and strategic direction of the EU'.[139] The two differing roles the EU has foreseen for itself in the context of military operations therefore indicate that once a crisis management operation within the framework of the common security and defence policy is launched, the operation acquires a unique character. A CSDP military operation appears to be of a different nature than a group of European member states coordinating their resources within a European framework.[140] In Somalia, the European Union launched both types of missions in the context of the CSDP. Operation EU NAVCO was a military coordination action in support of UN Security Council Resolution 1816 (2008) under the auspices of the CSDP. Its aim was to 'support the activities of Member States deploying military assets in theatre, with a view to facilitating the availability and operational action of those assets, in particular by setting up a coordination cell in Brussels…'[141] With the start of operation Atalanta, the coordination cell was closed and an EU Operation Commander was appointed.[142] Taken together with the legally binding nature of Council decision adopted in the context of crisis management

[137] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 5.
[138] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 5.
[139] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 7.
[140] According to T Tardy, the clearing house process was activated in 2004 when the EU Satellite Centre was made available to the UN in response to a UN request to strengthen operation MONUC in the Democratic Republic of Congo. See T Tardy, 'EU-UN Cooperation in Peace-Keeping: a Promising Relationship in a Constrained Environment' in M Ortega (ed), *The European Union and the United Nations: Partners in Effective Multilateralism* (2005) 78 Chaillot Paper No. 78, European Institute for Security Studies <http://www.iss.europa.eu/uploads/media/cp078.pdf> 61.
[141] Council Joint Action 2008/749/CFSP on the European Union military coordination action in support of UN Security Council resolution 1816 (2008) (EU NAVCO) [2008] OJ L 252/40, Article 2 (1).
[142] Council Joint Action 2008/851/CFSP on a European military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast [2008] OJ L 301/33, preamble (8), Article 3.

missions it is therefore possible to argue that the European Union has assumed functions in the field of the common security and defence policy.

Third, the EU must have shown its willingness to be bound by the provisions of UN Security Council resolutions. As previously illustrated in this chapter, the EU Treaties avoid a clear statement as to whether or not the European Union is bound by international law and the UN Charter. Nevertheless, they highlight the EU's respect for the international legal order and the values and principles of the UN Charter.

Political documents of the European Union such as the *European Security Strategy* of 2003 emphasise the EU's commitment to upholding and developing international law without admitting to the binding character of the UN Charter.[143] The ESS states that,

> [t]he fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority.[144]

Similarly, the *Joint Declaration on UN-EU Co-operation in Crisis Management* mentions that 'the European Union reasserts its commitment to contribute to the objectives of the United Nations in crisis management'. [145]

In previous years, the European Union has improved its capacity for rapid response military crisis management operations. The *Joint Statement on UN-EU Cooperation in Crisis Management* includes a statement according to which the European battlegroup concept can be used 'in response to requests from the UN Security Council, under a UN mandate where appropriate'.[146] In practice, the European Union

[143] *European Security Strategy* (n 1) 9.
[144] *European Security Strategy* (n 1) 9.
[145] Council of the European Union, 'Joint Declaration on UN-EU Co-operation in Crisis Management', Brussels, 19 September 2003, 12730/03, para 1[hereinafter *Joint Declaration on UN-EU Co-operation in Crisis Management*].
[146] Council of the European Union, 'Joint Statement on UN-EU Cooperation in Crisis Management', Brussles, 7 June 2007, Press Release <http://consilium.europa.eu/uedocs/cmsUpload/EU-

has responded to these statements and has used the newly created capabilities for crisis management. On the request of the United Nations, the European Union has launched and conducted military crisis management operations under the framework of the common security and defence policy for that purpose. Operation Artemis,[147] the Union's first military crisis management operation, was conducted at the request of the United Nations.[148] During the conduct of military crisis management missions, the European Union so far has cooperated with the United Nations and thereby indicated its willingness to be bound. Whenever the European Union has accepted a UN mandate so far it has acted as if it were bound by it.

Fourth, the EU must have acted within the framework of the United Nations. In the absence of a standing army, the United Nations needs capable and willing actors. Therefore, the EU's rapidly deployable troops can add value to the international security system and are of interest to the United Nations.[149] The European rapid response capabilities or the battle group concept, have been designed predominantly for operations requested by the UN.[150] As mentioned above, the European Union considers EU crisis management operations as a way to support the United Nations.[151] This can be done either through an EU stand alone operation or through a modular approach.[152] Within the modular approach the EU would be 'responsible for a specific component within the structure of a UN mission'.[153] The European component 'would operate under political control and strategic direction of the EU'.[154] If a rapid response to a crisis is needed, the *EU-UN Cooperation in Military Crisis Management Operations: Elements of Implementation of the EU-UN Joint Declaration* has developed two models of deployment in support of the United

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UNstatmntoncrsmngmnt.pdf> para 4 [hereinafter *Joint Statement on UN-EU cooperation in crisis Management*].

[147] Council Joint Action 2003/423/CFSP on the European Union military operation in the Democratic Republic of Congo [2003] OJ L 143/50.

[148] *Joint Declaration on UN-EU Co-operation in Crisis Management* (n 145) para 2.

[149] J Wouters and T Ruys, 'UN-EU Cooperation in Crisis Management' in J Wouters, F Hoffmeister and T Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser Press, The Hague 2006) 248.

[150] Wouters and Ruys (n 149) 235.

[151] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 7.

[152] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 7.

[153] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 7.

[154] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 7.

Nations – the bridging model and the stand-by model. The bridging model is designed to give the UN time either to organise a new operation or to reorganise an existing one by deploying an autonomous EU mission.[155] The EU's operation EUFOR Tchad/RCA was conducted as a military bridging operation.[156] The stand-by model consists of an EU reserve in support of an UN mission.[157] Not only was the above mentioned Operation Artemis conducted by the European Union upon the request of the United Nations but also operation EUFOR RD Congo. The structural and operational partnership between the EU and the United Nations in crisis management operations thus supports the view that the EU acts within the UN framework.

Fifth, the EU should have been recognised by the UN as a substitute for the member states in the sphere of military crisis management operations. The United Nations appears to recognise both the European member states and the European Union as partners in international crisis management. In the Security Council, the EU can be represented by the High Representative for Foreign Affairs and Security Policy. According to Article 34(2) LTEU,

> [w]hen the Union has defined a position on a subject which is on the United Nations Security Council agenda, those Member States which sit on the Security Council shall request that the High Representative be invited to present the Union's position.

In addition, the '[m]ember states which are also members of the United Nations Security Council will concert and keep the other Member States and the High Representative fully informed'.[158] This obligation will enable the EU gradually to build up the necessary expertise in cooperating with the United Nations in order to influence the debates in the Security Council in the long term.[159] The High

[155] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 9.
[156] Council Joint Action 2007/677/CFSP on the European Union military operation in the Republic of Chad and in the Central African Republic [2007] OJ L 279/21, Article 1(1).
[157] *EU-UN Co-operation in Military Crisis Management Operations* (n 136) para 13.
[158] Article 34(2) LTEU.
[159] N Pirozzi, H Juergenliemk, and Y Spies, 'The European Union and the Reform of the United Nations: Towards a More Effective Security Council?' (2011) Mercury (Multilateralism and the EU in the Contemporary Global Order) E-paper No. 13 November 2011 <http://typo3-8447.rrz.uni-koeln.de/fileadmin/user_upload/E-paper_series_no13_final.pdf> 13.

Representative for Foreign Affairs and Security Policy can propose military crisis management operations.[160] In consequence, she could potentially enter into negotiations on behalf of European member states with the relevant Security Council members.[161] In practice however, the permanent Security Council members France and the UK still play a significant role in the UN Security Council. In the case of Libya in 2011, both actively supported a possible intervention while the non-permanent UN Security Council member Germany opposed an operation.[162]

The European member states are not restricted using their military capabilities within European operations conducted under the framework of the common security and defence policy. They can deploy their forces within NATO or in an ad hoc coalition of states. If however, the European member states supply their forces as part of a European crisis management operation, the United Nations and other international actors stop contacting the individual contributing member states and build operational structures with EU institutions and bodies. They then communicate with EU bodies such as the EU Operation Commander, the Political and Security Committee and the EU Military Committee, for example.

Additionally, the EU has developed specific crisis management structures. Rapid reaction mechanisms are offered to the United Nations in the name of the EU and not in the name of the individual member states. Therefore the UN experiences the EU as a partner in crisis management.[163] Formal contacts between the UN and the EU in this context started to develop in 2000.[164] In practice, the UN Security Council has authorised the European Union under Chapter VII UN Charter to deploy an operation in Chad.[165] The intention to conduct a European military operation in Bosnia-

[160] Article 42(4) LTEU.
[161] Pirozzi, Juergenliemk and Spies (n 159) 13.
[162] Pirozzi, Juergenliemk and Spies (n 159) 13.
[163] F Hoffmeister and P-J Kuijper, 'The Status of the European Union at the United Nations: Institutional Ambiguities and Political Realities' in J Wouters, F Hoffmeister and T Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (T.M.C. Asser Press, The Hague 2006) 31.
[164] M Webber, 'The Common Security and Defence Policy in a Multilateral World' in P Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar Publishing Limited, 2011 Cheltenham) 227.
[165] UN Security Council Resolution 1778 /2007) para 6.

Herzegovina was welcomed by the UN Security Council.[166] The Security Council decided that the European military crisis management mission 'EUFOR RD Congo is authorised to take all necessary measures'.[167] In the context of the fight against piracy off the Somali coast, the UN Security Council recognised the planning process of a possible EU naval operation[168] and UN Security Council Resolution 1851 (2008) welcomed the launch of EU Operation Atalanta.[169] Consequently the UN recognises both the European member states and the European Union as partners in international crisis management. If however, the European Union launches a military crisis management operation, third parties will stop contacting the contributing EU member states and will build operational structures with EU institutions and bodies. Therefore, the UN should recognise the EU as substituting the member states in the context of European crisis management operations.

All five criteria established in the *International Fruit Company* case are met. Therefore it is possible to conclude that the EU has substituted for its member states in EU-led crisis management mission involving the use of force. This does not mean that the European member states have been replaced by the EU in all aspects of the use of force. Whenever EU member states decide to deploy their forces outside EU crisis management operations they are free to do so. They do not have to involve the EU in military operations. They are free to act outside the CSDP. However, once they decide to act within the common security and defence policy and unanimously vote in favour of an EU-led military crisis management operation, they are represented by the European Union in the international sphere and are constrained in the conduct of their national foreign policies.

In consequence of its substitution for the member states during military crisis management operations, the European Union is bound by UN Security Council resolutions. The European Union does not have to accept a Security Council resolution authorising the use of force in the sense that it has to start a military crisis

[166] UN Security Council Resolution 1551 (2004) para 10.
[167] UN Security Council Resolution 1671 (2006) para 8.
[168] UN Security Council Resolution 1838 (2008).
[169] UN Security Council Resolution 1851 (2008) preamble.

management operation. However, if it accepts a UN mandate, the EU is bound by the UN Security Council resolution in its entirety. Hence, the EU must accept the conditions set up for the use of force by the resolution, including, for example, time-limits. But UN Security Council resolutions are also binding on the Union if it decides not to play an active role. In such a situation, the EU would be under the negative obligation not to undermine the effectiveness of the actions by the UN members that accepted the UN mandate. Hence, in the spirit of a loyalty obligation, the European Union would, for example, have to stop its member states from selling weapons and other military equipments etc. to the target. However, the binding nature of UN Security Council resolutions is not unlimited.

Part 4

Legal limits to the binding nature of UN Security Council resolutions authorising the use of force

Although it has been argued that the EU is bound by UN Security Council resolutions regarding the use of force, this rule is not without exceptions. The limits to the binding nature of UN Security Council resolutions are created by international law as well as by the European legal order.

1. Limits created by international law – *Ultra vires* UN Security Council decisions

It was argued in chapter four above that if the Security Council oversteps the purposes and principles of the UN Charter its acts become *ultra vires*. The same has to be said if it violates norms of *jus cogens*. The purposes and principles of the UN Charter and the concept of *jus cogens* include the core of international human rights and the core of humanitarian law. Security Council resolutions that are *ultra vires* do not produce legal effects and international actors can refuse compliance. Therefore UN Security Council resolutions are not binding on the EU when they are *ultra vires* in consequence of the violation of the core of human rights or the core of humanitarian law.

2. Legal limits created by EU law – European fundamental rights

The European legal order, too, decides when UN Security Council resolutions stop being binding, irrespective of whether they are binding from the perspective of international law. This is a result of the autonomy of the EU legal order. In *Kadi*, the European Court of Justice rightfully held that UN Security Council resolutions cannot enjoy primacy over primary Community law. The European legal order represents an autonomous legal system that is based on general principles of law including the rule of law and European fundamental rights.

The Treaty of Lisbon that de-pillarised the EU and led to the end of the European Community also partly resolved the dispute of whether the European Union is bound by human rights as general principles of EU law when it is acting externally. Article 6(3) LTEU now expressly refers to general principles of Union law. It thus supports the view that the European Union is not only bound by human rights internally but also when it is acting externally under the common foreign and security policy as well as the common security and defence policy.[170]

The European Union is not only bound by human rights but also by rules of humanitarian law when it is engaged in the use of force as recognised by the European Union itself. The *Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law* state that

> [t]he European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. This includes the goal of promoting compliance with IHL.[171]

In consequence, the EU is not bound by UN Security Council resolutions regarding the use of force if the Security Council has acted *ultra vires*, for example, by violating the core of human rights or the core of humanitarian law. In addition, EU law draws the boundaries for the binding nature of UN Security Council decisions.

[170] F Naert, 'Accountability for Violations of human Rights Law by EU Forces' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 388.
[171] Council of the European Union, *Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law* (IHL) of 15 12 2009, OJ C 303/12.

Even if they are valid from an international law perspective, they could be contrary to primary EU law, including European fundamental rights or norms of humanitarian law. *Kadi* has shown that in the view of the European Court of Justice human rights standards applied by the UN Security Council and human rights standards developed within the European legal order could differ from each other. No information is available for humanitarian law, probably due to the rather young development of the EU as a military actor. However, if the EU develops its own standards of humanitarian law that might be stricter than the ones demanded by international law in general, UN Security Council resolutions likely to infringe those standards would not be binding on the European Union.

Conclusion

This chapter has demonstrated that the European Union is legally bound by UN Security Council resolutions within the context of the use of force. The EU needs to obtain an explicit UN Security Council mandate before it can engage in the use of force during a crisis management operation. Once the UN Security Council has authorised the use of force, the European Union is bound. The European Union is obliged to respect the wording and the purpose of the authorisation of the use of force. Force cannot lawfully be used outside the designated territory, after the time limit has expired, for purposes that have not been identified in the UN resolution or in a fashion or manner that is not covered by the resolution itself. It also would not be lawful for the EU to use force to extinguish the governing elite of a state in order to settle a conflict if the resolution does not provide for it; neither is the EU supposed to deploy land forces if the UN Security Council resolution limits the use of force to naval operations.

Even if it does not accept a UN mandate and does not launch a military crisis management mission, the EU is bound by UN Security Council resolutions authorising the use of force in the spirit of a loyalty obligation. The EU is obliged not to undermine the success of a military operation through either its action or inaction.

The binding nature of UN Security Council resolutions is not however without its limits. UN Security Council resolutions stop being binding on the EU when they stop being binding under international law in general, in particular when the UN Security Council is acting *ultra vires*. The EU legal order also creates boundaries for UN Security Council resolutions. If they violate primary EU law, including European fundamental rights, UN Security Council resolutions do not produce legally binding effects in the autonomous European legal order.

Chapter 7: The implications of silence in the context of the use of force

Introduction

So far it has been argued that the European Union is bound by UN Security Council resolutions in the context of the use of force. It has also been held that within the European common security and defence policy, European member states are bound by existing CSDP decisions. The present chapter will test the findings of the previous chapters and will take them a step further. This chapter will look at the meaning of different dimensions of silence in the context of the use of force and how silence affects the three different actors involved - the United Nations, the European Union and the European member states. A key example illustrating the questions raised in this chapter can be found in the EU's inability to speak with one voice during the war against Iraq in 2003.

Within the European Union no serious effort was made to reach a consensus over Iraq. Only the Greek Presidency called for an extraordinary European Council meeting in February 2003 to find common ground and limit damage.[1] The conclusions of this meeting merely recognised the primary responsibility of the UN Security Council to deal with Iraqi disarmament. They emphasised the EU's commitment to UN Security Council Resolution 1441 (1992) in this respect and expressed the wish of the people of Europe to disarm Iraq in a peaceful way. They also emphasised Iraq's final chance to resolve the crisis peacefully.[2] The extraordinary European Council meeting mainly reaffirmed the conclusions of the GAERC of 27 January without making much progress.[3] The presidency conclusions

[1] T Salmon, ''United in its Diversity' (or Disunited in Adversary): That is the Question for the EU and the European Security and Defence Policy' (2004) 5 Perspective European Politics Society, Special Issue on European Security Post Iraq 448.

[2] Council of the European Union, Extraordinary European Council Conclusions, Brussels, 17 February 2003, Conclusions, 6466/03, 1.

[3] 2482nd Council meeting General Affairs and External Relations, Brussels, 27 January 2003, PRES/03/08

'The Council, deeply concerned about the situation in Iraq, reaffirms that its goal remains the effective and complete disarmament of Iraq's weapons of mass destruction. The Council fully supports the efforts of the UN to ensure full and immediate compliance by Iraq with all relevant resolutions of the Security Council, in particular with UNSCR 1441 of 8 November 2002. The resolution gives an unambiguous message that the Iraqi Government has a final opportunity to resolve the crisis peacefully.'

were viewed as a compromise and as an attempt to unite Europe. While trying to achive a peaceful solution, military measures were viewed to be a last resort. Nevertheless, it was held that it would be for the UN Security Council to set a time limit.[4]

Because of profound disagreements between European member states, informal attempts to agree also failed.[5] In consequence, the EU did not adopt a legally binding common position or joint action[6] dealing with support for or the rejection of military action against Iraq. The European Union remained silent in accordance with the absence of a UN Security Council resolution authorizing military sanctions against Iraq. The UK and Spain supported the US led 'Operation Iraqi Freedom', beginning on 19 March 2003, while France and Germany opposed the war.[7]

By examining the relationship between the European Union and the United Nations, chapter six above showed that the European Union is bound by positive UN Security Council decisions authorising the use of force in the sense that the EU, although not obliged to accept military mandates, is nevertheless under an obligation to respect the wording and limits of the authorising UN Security Council resolutions once it decides on engagement. Furthermore, the European Union is duty-bound not to undermine the success of the use of military coercive measures through its actions or inactions if it does not accept a mandate. Nevertheless the question remains about whether the European Union can deploy an EU-led military intervention without an explicit UN Security Council mandate or whether the silence of the UN Security Council needs to be interpreted as a prohibition of the use of force. The answer to this question is linked to an understanding of the UN's system of collective security in general and the nature of the authorisation of the use of force through the UN Security Council in particular.

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[4] Frankfurter Allgemeine Zeitung, FAZ.NET, 'EU einigt sich auf Irak-Erklärung', 17 February 2003 <http://www.faz.net/artikel/C30189/irak-krise-eu-einigt-sich-auf-irak-erklaerung-30124326.html>.
[5] Salmon (n 1) 448.
[6] The instruments are now known as Council decisions.
[7] D McGoldrick, *From '9-11' To The 'Iraq War 2003': International Law in an Age of Complexity* (Hart Publishing, Oxford 2004) 13, 16.

Focusing on the relationship between the European Union and its member states in respect of the use of force, the question arises whether member states are free to use national military sanctions unilaterally, in ad hoc coalitions or within a regional organisations such as NATO, in case no agreement has been reached within the common security and defence policy; or whether silence within the common security and defence policy indicates that the European Union does not want its member states to deploy military force. Are member states free to act as they please, if the EU cannot agree on a common stance?[8] The answer to this question depends on the understanding of the binding nature of the common security and defence policy that was addressed in chapter three above.

To analyse the meaning of silence in the context of the use of force, the first part of this chapter will examine silence as a legal concept. This will be followed in part two with an analysis of the meaning of silence within the United Nations. It will be argued that only an explicit and *a priori* obtained mandate by the UN Security Council to use military sanctions is lawful. Anything else but such an authorisation is equivalent to a silence of the UN Security Council. Part three will demonstrate how the claimed implicit authorisation to use force is open to political abuse in practice. Part four will test how the silence of the UN Security Council affects non UN-members like the European Union. Turning to the EU legal order itself, the final part will examine whether the development of an *acquis securitaire* has the potential of qualifying silence within the common security and defence policy in a certain way.

Part 1

Silence as a legal concept

Usually silence does not have a meaning, or to be more precise, although it might be possible to guess what silence does not mean, to deduce a positive message from a silence is usually too vague to be of any legal value. Therefore, law normally does

[8] In the case of Iraq the EU had implemented economic UN Security Council sanctions. Would it thus be possible to interpret the silence of the EU that ran in line with the absence of a UN Security Council resolution authorising the use of force, as suggesting that the EU rejects military sanctions and considers the past economic sanctions regime as sufficient and proportional? And could this silence prevent member states from imposing autonomous national measures?

not treat silence, which could also be classified as negative action or inaction, as a positive action. The underlying reason for this is that silence is not a declaration of intention. The person who keeps silent expresses neither consent nor rejection.

However, in some national legal systems, for example in Germany, silence can have an objective legal meaning comparable to positive action and can thus be treated as a declaration of intent. Three cases are possible. First, parties can agree beforehand that silence in response to a specified situation should be given a particular meaning; second, a legal provision can grant silence with the specific legal value of a declaration. In slight contrast with the first two scenarios, silence might not be considered to be equivalent to a declaration but it can be treated like one, namely when the party that remained silent would have been under a legal duty to give an opposite declaration, according to *qui tacet, consentire videtur, ubi loqui debuit atque potuit*.[9] In sum, to be treated like positive action, silence must be qualified in a certain way, for example through a duty to act or by legal provisions. In general, silence must be interpreted within the context of its legal system. It is this qualifying act that grants silence a specific value and allows it to be interpreted in narrow terms.

Within the international legal order, the question of the interpretation of silence has been addressed by the International Court of Justice when it was requested to give an advisory opinion on the unilateral declaration of independence in respect of Kosovo.[10] In his dissenting opinion, Judge Bennouna argued that '[i]n all events, silence must be interpreted by reference to the entirety of the direct context and its background'.[11] Although transferring legal principles from one legal order to another can be problematic, especially from the domestic level to the international level, the present chapter will try to show that the above outlined principles are applicable universally.

[9] O Palandt, *Bürgerliches Gesetzbuch:* BGB (46th edn C.H.Beck, München 1987) Einführung von § 116 Rn 3.
[10] International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010.
[11] Judge Bennouna, International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, para 60.

Therefore, this chapter will put special emphasis on the individual elements that qualify silence in the context of the Security Council acting under Chapter VII of the UN Charter and the EU's common security and defence policy. It will be shown that these qualifying elements are to be found in the general system of the United Nations on the one hand and in the structure of the common foreign and security policy on the other hand.

Part 2

The silence of the UN Security Council in the context of the use of force

When turning to the relationship between the European Union and the United Nations and explains how silence of the UN Security Council impacts on the EU and the use of force, two sets of the problems need to be distinguished. First, the meaning and legal implications of silence by the UN Security Council needs to be examined. It will be shown that the UN's system of collective security determines how the silence of the UN Security Council needs to be interpreted by its member states. Second, how the silence of the UN Security Council affects non-members of the United Nations, such as the European Union, will be addressed.

1. Interpreting the silence of the UN Security Council in the context of the UN's system of collective security

Turning to the first question i.e. how the silence of the UN Security Council in respect of the use of force has to be interpreted, the system of collective security of the United Nations is decisive. The assessment will start with the nature of the United Nations as a vertical, centralised system of international law enforcement in which the member states have granted the UN Security Council with the primary responsibility to maintain and restore international peace and security. In consequence, member states are only permitted to use force unilaterally, that is without UN Security Council authorisation, in narrowly defined UN Charter exceptions. Otherwise they must convince the members of the UN Security Council to authorise the use of force or refrain from military sanctions. The argument put forward here is that only the explicit and *a priori* authorisation by the UN Security Council to use force is permissible under the system of the UN Charter. This will be

supported by the delegation technique applied by the UN Security Council in practice.

1.1. The UN as a vertical, centralised system of law enforcement

Through the creation of the United Nations as an international organisation, the UN member states committed themselves to a vertical, centralised system of law enforcement[12] as described above in chapter four. They bound themselves to the procedures and substantive rules of the UN Charter and they created the competence for the UN Security Council to solve disputes through binding decisions. The UN member states conferred 'on the Security Council primary responsibility for the maintenance of international peace and security' and agreed 'that in carrying out its duties under this responsibility the Security Council acts on their behalf'. In turn, they renounced their power to enforce international law on a horizontal level, if and as far as the UN Security Council acts. The member states were motivated to transfer their power to use force to an international organisation by the belief that their individual national interests were best served by the protection of the interests of the community of states as a whole.[13]

The UN Security Council is envisaged as a maker of objective decisions based on the principles and values of the United Nations and thereby avoids becoming a party to disputes.[14] Although it is made up of representatives of fifteen member states, the UN Security Council's decisions are supposed to represent all member states, therefore almost all states in the world. It is this idea of universality and collectivity behind the decisions of the UN Security Council which grants them their legitimacy. In consequence, the target state must accept the collective measures imposed against it and cannot claim to be acting in self-defence. States that suffer economic losses

[12] K Osteneck, *Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft: Völker- und europarechtliche Rahmenbedingungen für ein Tätigwerden der Europäischen Gemeinschaft im Bereich von UN-Wirtschaftssanktionsregimen unter besonderer Berücksichtigung der Umsetzungspraxis der EG-Organe***,** Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 168 (Springer Verlag, Berlin 2004) 8.
[13] D Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford University Press, Oxford 1999) 5- 6.
[14] Osteneck (n 12) 8.

due to collective military sanctions, although not direct targets, have to accept the negative side effects of the enforcement of the collective will.

Another corollary of membership in a vertical centralised system of law enforcement is the rejection of the unilateral use of force in general. The United Nations is based on the principle of non-intervention. This principle, although not explicitly mentioned by the Charter itself, flows from several Charter provisions, including the prohibition of the use of force Article 2(4) UN Charter) the principle of sovereign equality[15] as well as the principle of non-interference in the internal matters of a state.[16] Based on this general understanding of the UN Charter as a system of collective security, member states are only permitted to use force when authorised by the UN Security Council as agents of the collective will.[17] Non-authorised and therefore unilateral use of force requires justification.[18] The UN Charter itself recognises individual and collective self-defence.[19] Whether more unwritten exceptions to the prohibition of the use of force have acquired the status of customary international law is highly disputed.[20] By limiting the possibility for invoking a Charter exception, the subjective use of force that is prone to abuse is limited.

In consequence of this understanding of the UN Charter as a vertical system of law enforcement centred on the UN Security Council as the ultimate decision making body, the authorisation of military coercive measures must be explicit and *a priori*. Only a clear and unambiguous mandate by the UN Security Council has the special legitimising function envisaged by the UN Charter, based on the idea that its decisions are objective and represent the collective will of all member states. Impartial decisions by a third party, based on a procedure all parties to a conflict have agreed to beforehand, are the most effective means to end a conflict and to

[15] Article 2 (1) UN Charter.
[16] Article 2 (7) UN Charter.
[17] Osteneck (n 12) 12.
[18] Osteneck (n 12) 9.
[19] Article 51 UN Charter.
[20] See chapter four.

avoid escalation.[21] To argue against the need for a clear, explicit and *a priori* mandate to use military sanctions would grant states the opportunity to use force based on individual and subjective considerations by pretending to be acting on behalf of the collective will of the international community of states. This practice was tried several times in the past, usually in attempts to legitimise the unilateral use of force by referring to the general legitimising power of UN Security Council decisions under Chapter VII UN Charter. The need to legitimise the unilateral use of force by referring to ambiguous UN Security Council practices is felt, as states that act without a clear military mandate not only violate the system of collective security they claim to be part of but also fall back into the old habits of horizontal and decentralised law enforcement in international law that was widely abolished by the creation of the United Nations.

In light of the arguments put forward here that only an explicit and *a priori* mandate by the UN Security Council corresponds to the system of centralised and vertical law enforcement the member states agreed to through the creation of the United Nations, the silence of the UN Security Council must thus be interpreted as the non-authorisation of the use of force. The non-authorisation of the use of force is equivalent to the rejection of military measures by the international community of states.

1.2. The general law of international institutions and the delegation of the use of force

The view put forward here that authorisation of the use of force cannot be implied but must be made explicit before the use of force is exercised corresponds with the general law of international institutions as well as with the non-delegation doctrine. The general law of international institutions asks the delegator to manifest its desire to delegate its powers expressly.[22] This principle was confirmed in practice in the *Meroni* case[23] in which the European Court of Justice had to assess in an annulment

[21] Osteneck (n 12) 8.
[22] Sarooshi (n 13) 8.
[23] Case 9/56 *Meroni & Co. Industrie Metallurgiche, SpA v High Authority of the European Coal and Steal Community* [1958] ECR 133 [hereinafter *Meroni*].

procedure the claim brought forward that the High Authority of the European Coal and Steel Community would have committed a misuse of its powers by delegating to the Brussels Agency powers conferred to it by the Treaty. The Court held that

> [a] delegation of powers cannot be presumed and even when empowered to delegate its powers the delegating authority must take an express decision transferring them.[24]

Although many differences between the High Authority and the UN Security Council exist, the *Meroni* case refers to a general principle of international law and is therefore relevant for an understanding of the powers of the UN Security Council to delegate its Chapter VII powers to states.[25]

The non-delegation doctrine additionally supports the proposed requirement of an explicit *a priori* UN Security Council authorisation. This doctrine is concerned 'with the extent to which the exercise of a power entrusted to an authority may be delegated to another entity'.[26] Although some argue that the UN Security Council's enforcement powers do not stem from a delegation but rather originate from the UN Charter itself, it is more in line with the wording of Article 24(1) UN Charter[27] to conclude that the Security Council's source of power originates from the collectivity of the member states.[28] The UN member states have transferred their powers via the mechanism of the UN Charter and in particular through Article 24(1),[29] a view that allows the application of the non-delegation doctrine with regards to the Security Council.[30]

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[24] *Meroni* (n 23) 151.
[25] N Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'' (2000) 11 European Journal of International Law 554
[26] Sarooshi (n 13) 21. On the application of the non-delegation doctrine to international organisations see also D Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government (2004) 25 Michigan Journal of International Law 1127 and the following pages.
[27] Article 24 (1) UN Charter states that the UN members 'agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.'
[28] Sarooshi seems to be in favour of delegation by member states.
[29] Sarooshi (n 13) 26, 27.
[30] The nature of the power that has been delegated to the UN Security Council is debated as well. The proposed views range from states' sovereignty per se; to an international police power granted by states that possessed the power to use force to maintain international peace and security prior to the

The non-delegation doctrine argues that the authority that has been attributed with a specific discretion or power by the founders of the organisation must exercise this discretion or power in person. By granting certain powers to the authority, the founders placed their trust in this entity's individual abilities.[31] The drafters of the UN Charter envisaged that the UN Security Council would use its discretion to decide whether a conflict or crisis was grave enough to qualify for an Article 39 UN Charter situation. The Security Council was entrusted with the task of deciding whether and if so what kind of enforcement measure should be applied. By exercising its discretion, the Security Council puts the promotion and protection of the purposes and principles of the UN Charter into concrete terms. If it would be for states to use force in the anticipation that their actions would be approved later by the Security Council, they would take on the Security Council's primary functions themselves. In consequence, the authorisation of the use of force has to be made explicit and *a priori* by the Security Council.

The non-delegation doctrine also limits the competence of the Security Council to delegate its Chapter VII powers to member states. The non-delegation doctrine prevents the Security Council from delegating some of its powers completely, including the decision whether or not an Article 39 UN Charter situation exists, as this decision serves as the gateway to the enforcement measures under chapter VII of the UN Charter.[32] If states resort to military sanctions under Article 42 UN Charter without an explicit Security Council mandate, they control the decision about whether a crisis already represents a threat to the peace, breach of the peace or act of aggression.

Furthermore, the Security Council has to be in overall authority and control with regards to the actual exercise of delegated enforcement powers. The Security Council needs to be competent to influence the way the delegated powers are carried out and

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entry into force of the UN Charter; to policing power delegated from the international community. See Sarooshi for more details (n 13) 28, 29 and M Craven, 'Humanitarianism and the Quest for Smarter Sanctions' (2002) 13 European Journal of International Law 52.

[31] Sarooshi (n 13) 21.

[32] Sarooshi (n 13) 33.

the objectives that should be achieved. It has to be able to ensure that the use of force is exercised in line with the purposes and principles of the UN Charter.[33] The UN Security Council's overall control of the military operation, and in particular the start or termination of an operation, originates from the centralisation of the use of force under the present UN Charter system.[34] Its lack of competence for delegating an unlimited or unspecified power of command and control to member states reinforces the need for a clear Security Council mandate. Otherwise states could assume broad powers that not even the delegator possesses.

1.3. Legitimacy consideration

The legal requirement for capable and willing actors to obtain an explicit UN Security Council mandate before resorting to military enforcement measures is reinforced by the ratio underlying the system of the United Nations as a vertical centralised system of law-enforcement. Only a clear authorisation by the UN Security Council adopted according to the procedural rules of the UN Charter can transfer the perceived legitimacy of UN Security Council decisions onto the states or regional or international organisations. Only if they base their actions on Security Council decisions can military actors appear to be acting on behalf of the international community, without being politically biased or without even becoming a party to the conflict - at least in theory. By following the rules of the system of the United Nations, international actors encourage mutual trust in the values and procedures of the United Nations, which in turn reinforces the legitimacy and effectiveness of its system of collective security.[35]

The above arguments show that only the explicit and *a priori* authorised use of force through a UN Security Council mandate is in line with international law and the non-delegation doctrine on the one hand and the constitutional foundations of the United

[33] Sarooshi (n 13) 35, 156.
[34] E De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing, Oxford 2004) 294.
[35] In light of the first year anniversary of the terrorist attacks of 11 September 2001 UN Secretary-General Kofi Annan stressed the central role of the UN Security Council and emphasised that the effectiveness of an international security system that is based on multilateralism depends on the authority of the Security Council. Address of the UN Secretary-General Kofi Annan in the General Assembly, *When Force is Considered, There is no Substitute for Legitimacy Provided*, 12 September 2002, Press Release SG/SM/8378, GA/10045.

Nations on the other hand. Any use of force that has not been explicit and authorised *a priori* is illegal unless it can be justified by one of the accepted exceptions to the prohibition of the use of force as discussed in chapter four above.[36] In consequence, states that intend to impose military sanctions need an explicit mandate by the delegator – the UN Security Council – granting them the right to use force. To argue otherwise and to allow implicit authorisations would provide the delegates – the states – with the opportunity to decide when to use force. This would be in clear contrast to the delegation model applied in the law of international institutions according to which the delegator has the final say. In the context of the United Nations, it is therefore only for the UN Security Council to decide whether there is a threat to the peace, breach of the peace or act of aggression according to Article 39 UN Charter. It is only for the UN Security Council to decide in a further step whether and if so what kind of military or non-military collective action should be taken.

Whenever the UN Security Council delegates its Chapter VII powers it confers elements of its legitimacy on the delegates, the member states.[37] The use of force based on anything else but an explicit, clear and *a priori* obtained UN Security Council resolution does not enjoy the same degree of legitimacy. The possibility for the abuse of force is evident.

The argument put forward here is that only an explicit, *a priori* mandate corresponds to the system of the United Nations and the law of international institutions, anything else but a clear, explicit and *a priori* mandate by the UN Security Council is equivalent to the lack of a mandate. For the purpose of this chapter, the lack of a mandate to use force is equivalent to the silence of the UN Security Council. The silence of the UN Security Council cannot therefore be interpreted as a legal authorisation to use force. Based on this reasoning, the silence of the UN Security Council can take on many different variations. The following part will look at the practice of some states, ad hoc coalitions and regional organisations that have argued that in the absence of a clear mandate their unilateral use of force would have been implicitly authorised by the UN Security Council. The claim for implicit

[36] De Wet (n 34) 295.
[37] Sarooshi (n 13) 5.

authorisation can be sub-divided into different categories that range from explicit disapproval by the UN Security Council to the revival of a previously obtained authorisation.[38]

Part 3

Claims of implicitly authorised use of force in practice

When they impose military enforcement measures without an *a priori* obtained Security Council authorisation, international actors nevertheless try to base their military actions within the system of the UN Charter. In order to draw from the legitimacy of UN Security Council decisions, they often argue that the use of military force has been authorised by the UN Security Council implicitly. The claims put forward include the revived authorisation to use force, *ex post* authorisations, the rejection of a condemnation of the use of force and an explicit albeit merely symbolic disapproval of the use of force by the Security Council.

All of these sub-categories of implicit authorisation have to be qualified as the silence of the UN Security Council according to the above developed definition. The following section will offer some examples of previous attempts to justify the unauthorised use of force by the silence of the UN Security Council. It will become evident that the different categories of implicit authorisation that have been chosen often appear randomly and have been politically motivated. This reinforces the argument developed above that only the explicit, *a priori* authorisation of the use of force through the UN Security Council is in line with the system of the United Nations and can carry with it the legitimacy of the organisation

1. Revived authorisation to use force - Operation Iraqi Freedom of 2003

The war against Iraq at the beginning of the 21st century divided the international community of states as to whether the use of military force was authorised by the UN

[38] In addition to the claim of an implicit authorisation to use force, it has also been suggested that states and regional organisations would enjoy an implied or residual power to resort to force. The implied power doctrine has predominantly been discussed in the context of unilateral humanitarian interventions when the UN Security Council has been paralysed by a veto. See V Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance' (2000) 11 European Journal of International Law 373, 374. The right to humanitarian intervention has been discussed in chapter four.

Security Council or whether it remained silent on this topic. The legal dispute accompanying the invasion of Iraq and in particular the question whether the use of military sanction can be justified by a revived UN Security Council resolution that had previously allowed for the use of 'all necessary means' can only be understood against the background of Iraq's history, dating back to the beginning of the 1990s.

1.1. The invasion of Kuwait

The UN Security Council condemned Iraq's invasion of Kuwait in 1990 and determined a breach of international peace and security according to Article 39 UN Charter.[39] When Iraq did not withdraw its troops from its neighbouring country, the majority of the UN Security Council, with the abstention of China, adopted UN Security Council Resolution 678 (1990) under Chapter VII of the UN Charter and authorised states to 'use all necessary means' if Iraq would 'comply not fully with Resolution 660 (1990) and all subsequent relevant resolutions'.[40] The mandate to use force was open worded, referring to international peace and security in the area in general although being inspired by the need to liberate Kuwait.[41] This Security Council mandate lacked a time-limit.[42] After Iraq withdrew from Kuwait, the UN Security Council acknowledged the cease-fire agreement with the adoption of Resolution 687 (1991).[43]

UN Security Council Resolution 687 affirmed previous resolutions, including Resolutions 660 and 678, 'except as expressly changed below to achieve the goals of the present resolution, including a formal cease-fire' and 'decides to guarantee the inviolability of the above mentioned boundary and to take, as appropriate, all necessary measures to that end in accordance with the Charter of the United Nations'.[44]

[39] UN Security Council Resolution 660 (1990) .
[40] UN Security Council Resolution 678 (1990).
[41] For a discussion of UN Security Council Resolution 678 (1990) see De Wet (n 34) 281.
[42] De Wet (n 34) 281.
[43] UN Security Council Resolution 687 (1991).
[44] UN Security Council Resolutions 687 (1991) para 1 and para 4.

1.2. Air strikes against Iraq to establish safe havens and no-fly zones between 1991 and 2003

After Iraq was forced to leave Kuwait, the humanitarian situation of Kurds and Shiites in Iraq worsened since they were accused of acting against the Iraqi Government during the Kuwait crisis.[45] In April 1991, the Security Council adopted Resolution 688 (1991), condemning the 'repression of the Iraqi civilian population in many parts of Iraq, including most recently the Kurdish populated areas…which threaten international peace and security in the region'.[46]

To prevent Iraqi citizens from being targeted by their own government, safe havens for refugees in Iraq and no-fly-zones were introduced in 1991 and 1992.[47] France, the UK and the US conducted patrol flights to monitor Iraqi compliance.[48] The legal justification for the introduction of the non-fly zones and the use of force against Iraq whose aircrafts had entered these areas were claimed to be in accordance with either UN Security Council Resolution 688 (1991)[49] or Resolution 688 in conjunction with Resolution 678.[50]

Resolution 688, however, neither explicitly authorised the introduction of no-fly-zones nor explicitly authorised the use of force for that purpose.[51] It merely condemned 'the repression of the Iraqi civilian population in many parts of Iraq'.[52] It is also not convincing to argue that Resolution 688 (1991) would qualify as a 'subsequent resolution' within the scope of Resolution 678 (1990) and that the use force in Resolution 678 (1990) would contain the enforcement of Resolution 688 of 1991.[53] Resolution 678 (1990) refers to resolutions subsequent to Resolution 660

[45] N Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council' (1999) 3 Max Planck Yearbook of United Nations Law 73.
[46] UN Security Council Resolution 688 (1990).
[47] Krisch (n 45) 73, 74.
[48] Krisch (n 45) 74.
[49] UN Security Council Resolution 688 (1991).
[50] T Gazzini, 'The Rules on the Use of Force at the beginning of the XXI Century' (2006) 11 Journal of Conflict & Security Law 323; For a detailed analysis see Krisch (n 45) 74-79.
[51] Krisch (n 45) 75.
[52] UN Security Council Resolution 688 (1991) para 1.
[53] See Krisch (n 45) 76.

(1990) but not to resolutions in the aftermath of Resolution 678 (1990) itself.[54] It can in fact be argued that Resolution 678 (1990) expired with the adoption of Resolution 687 (1990).[55] In addition, Resolution 688 (1991) was not concerned with the relationship between Kuwait and Iraq anymore and this therefore makes it difficult to link it with Resolution 678 (1991), which focuses on Kuwait only.[56] In consequence, the use of force against Iraq was not authorised by the UN Security Council. Its silence could not be interpreted as a delegation of its Chapter VII powers to France, the UK and the US.

1.3. Violations of the cease-fire agreement

In 1993, Iraq violated the cease-fire agreement of 1991 several times through the unauthorised crossing of the border with Kuwait and through the non-removal of police posts from the Kuwaiti section of the demilitarised zone.[57] Furthermore, Iraq refused to guarantee the free movement and safety of UN weapons inspectors whose task it was to monitor the compliance with Resolution 687 (1991).[58] The UK, the US and France responded with air strikes and tried to justify their military actions on a revival of Resolution 678 (1990) that would have been triggered by the breach of the cease-fire Resolution 687 (1991).[59] The material breach of Resolution 687 (1991) had been previously acknowledged in a statement of the Presidency of the Security Council.[60] Nevertheless, the UN Security Council failed to authorise the use of force in response to this material breach. Resolution 687 (1991) ended with the decision of the UN Security Council to 'remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the region'.[61] It thereby clearly indicates that it is for the UN Security Council and not for individual states to decide on further action.[62]

[54] See Krisch (n 45) 78; De Wet (n 34) 282; H Neuhold, 'Collective Security After 'Operation Allied Force''(2000) 4 Max Planck Yearbook of United Nations Law 93.
[55] De Wet (n 34) 284.
[56] See Krisch (n 45) 78.
[57] De Wet (n 34) 285.
[58] De Wet (n 34) 285.
[59] De Wet (n 34) 285; J Lobel and M Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93 The American Journal of International Law 150.
[60] De Wet (n 34) 285.
[61] UN Security Council Resolutions 687 (1991) para 34.
[62] Lobel and Ratner (n 59) 150.

Therefore, the silence of the UN Security Council again could not be interpreted as the authorisation of an ad hoc coalition of states to use force.

1.4. Air strikes in response to Iraq's failure to fulfil disarmament obligations

At the beginning of 1998, Iraq denied the UN Special Commission for Iraq for monitoring the Destruction and Surrender of Mass Destruction Weapons (UNSCOM) access to strategic sites.[63] When an agreement with Iraq was finally reached, the Security Council adopted Resolution 1154 (1998), stressing that a violation of Iraq's disarmament obligations would result in 'severest consequences'.[64] In October 1998, Iraq again restricted the weapon inspectors' access to certain strategic sites which resulted in condemnation through the UN Security Council in Resolution 1205 (1998).[65] The US and the UK carried out air strikes in response. This use of force was claimed to be justified by Resolution 1154 (1998) which foresees 'severest consequences' or by a revival of Resolution 678 (1990) that would have been triggered by Resolution 1205.[66]

Resolution 1154 (1998) cannot serve as a UN Security Council authorisation to use force since it is for the collective decision of the UN Security Council to determine when and what kind of 'severest consequences' Iraq should face.[67] The argument of implied authorisation through the revival of Resolution 678 (1990) also fails to convince as its drafters in 1990 had not elaborated the enforcement of weapons inspections in 1998 as one of its purposes.[68] The attempt by the UK and the US to base the use of force on previous UN Security Council resolutions is even more astonishing in light of the events in the Security Council at that time. The air strikes

[63] See Krisch (n 45) 65.
[64] See Krisch (n 45) 65.
[65] UN Security Council Resolution 1205 (1998); Krisch (n 45) 65.
[66] De Wet (n 34) 288; Krisch (n 45) 66.
[67] Lobel and Ratner (n 59) 152.
[68] De Wet (n 34) 288; In favour of a continuous authority to use force stemming from Resolution 687: R Wedgwood, 'Unilateral Action in the UN System' (2000) 11 European Journal of International Law 359; R Wedgwood, 'The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction' (1998) 92 The American Journal of International Law 724-728.

were already under discussion in the Security Council but its members had yet to be consulted in a debate.[69]

1.5. War against Iraq in 2003

During the war against Iraq in 2003, the UK, unlike the US, never claimed justification by self-defence.[70] The Attorney-General of the UK advised the combination of Resolutions 678, 687 and 1441 as being the legal basis for the use of force.[71] After the Iraqi invasion of Kuwait in 1990, UN Security Council resolution 660 (1990) asked Iraq to withdraw immediately.[72] When Iraq did not comply, the Security Council adopted Resolution 678 (1990) which authorised the member states to 'use all necessary means to uphold and implement resolution 660' and 'to restore peace and security in the area'.[73] The expression 'all necessary means' was understood in Security Council debates to include the use of force.[74] The ceasefire Resolution 687 (1990) maintained an extensive sanctions regime, including the inspections regime UNSCOM to monitor and verify Iraq's compliance with a disarmament regime, asking for the destruction of chemical and biological weapons.[75] Although it is possible to argue that once Iraq left Kuwait, peace and security were restored in the area and Resolution 678 was extinct as was the authorisation to use force; others claimed that Resolution 678 remained in force and that it was not repealed by Resolution 687. It was argued that the authorisation of Resolution 678 was only suspended as long as Iraq complied with the ceasefire conditions and that the authorisation could be revived if Iraq would materially breach Resolution 678.[76]

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[69] Krisch (n 45) 65, 67.
[70] P Sands, *Lawless World, America and the Making and Breaking of Global Rules* (Penguin Group, London 2005) 186.
[71] The Advice of the United Kingdom Attorney-General, Lord Goldsmith, on 'The Legal Basis for the Use of Force against Iraq', 17 March 2003, printed in D McGoldrick , *From '9-11' to the 'Iraq War 2003': International Law in an Age of Complexity* (Hart Publishing, Oxford 2004) Appendix VII.
[72] UN Security Council Resolution 666 (1990).
[73] UN Security Council Resolution 678 (1990).
[74] McGoldrick (n 7) 55.
[75] UN Security Council Resolution 687 (1991).
[76] McGoldrick (n 7) 56.

Military action on the basis of revived Resolution 687 had indeed been taken in 1993 and 1998.[77] After Iraq failed to co-operate with UN inspectors,[78] Security Council Resolution 1441 (1992) was adopted, recalling Resolutions 678 and 687 and warning Iraq that it would face 'serious consequences' if it continuously violated its obligations.[79] However, Resolution 1441 did not use the wording 'all necessary means' and Russia and France took steps to remove formulations from the draft that could permit an automatic unilateral use of force.[80] Therefore Resolution 1441 could not authorise the war against Iraq.

The Attorney-General of the UK thus claimed that Resolution1441 would give Iraq a final opportunity to comply with the continuous obligations of Resolution 687.[81] He held that Resolution 687 would not terminate but only suspended Resolution 678. A material breach of Resolution 687 would revive the authority to use force under Resolution 678. The Security Council would have determined that Iraq remained in material breach of Resolution 687 and therefore Resolution 678 would have revived. In consequence, Resolution 1441 would only require a report and a discussion within the Security Council of Iraq's shortcomings, but not an additional decision to authorise force.[82]

This line of argument is not convincing. On the one hand, the purpose of Resolutions 660 and 678 was to get Iraq out of Kuwait. They did not mention the regime change[83] that was anticipated in 2003 by the US and the UK.[84] Something that could not have been authorised in 1991 by Resolutions 660 and 678 could not be revived in 2003. On the other hand, Resolution 1441 as the basis for a claimed revival must be interpreted in the light of its context, its objectives, its purpose, and in good faith.[85] Paragraph 4 provides that if Iraq failed to comply with its obligations, 'this resolution shall constitute a further material breach of Iraq's obligations and will be reported to

[77] McGoldrick (n 7) 56.
[78] Sands (n 70) 184.
[79] UN Security Council Resolution 1441 (2002).
[80] Sands (n 70) 192.
[81] United Kingdom Attorney-General, Lord Goldsmith (n 71).
[82] United Kingdom Attorney-General, Lord Goldsmith (n 71).
[83] Sands (n 70) 189.
[84] Sands (n 70) 183.
[85] Sands (n 70)191.

the Council for assessment'. The requirement of 'assessment' by the Council could only met by a meeting of the Security Council that would decide on the situation of Iraq and that also would consider whether Iraq's behaviour was sufficient to justify military sanctions. A report to the Security Council as such is not sufficient.[86] Therefore, Resolution 1441 was not a revival of the authorisation to use force,[87] and the military sanctions imposed against Iraq could not be based on an explicit UN Security Council resolution.

2. *Ex post* authorisation through acceptance

In practice it has been claimed that use of force without a UN Security Council mandate could be authorised *ex post* through acceptance by the UN Security Council. In this case the use of force would have to be considered legal *ex tunc*. Discussed examples include ECOWAS' military intervention in Liberia in 1990 and NATO's air campaign in Kosovo in 1999.[88]

2.1. ECOWAS and Liberia

In Liberia, ECOWAS militarily intervened without being explicitly authorised to use force by the UN Security Council in order to end the human rights violations during the civil war.[89] Following the military intervention, the UN Security Council commended 'ECOWAS for its efforts to restore peace, security and stability in Liberia'.[90] ECOWAS' initiative generated hardly any international opposition[91] and has therefore been referred to as one of the few examples of uncontested implicit UN Security Council approval.[92] Nevertheless, according to the above outlined criteria, a retroactive authorisation contradicts the system of the United Nations. Thus ECOWAS' action in Liberia might have been legitimate but not legal.

[86] Sands (n 70)191, 192.
[87] Sands (n 70) 192.
[88] De Wet (n 34) 299- 301 & 304-308; Lobel and Ratner (n 59) 132.
[89] Lobel and Ratner (n 59) 132.
[90] UN Security Council Resolution 788 (1992) para 1.
[91] C Greenwood, 'International Law and the NATO Intervention in Kosovo' (2000) 49 International and Comparative Law Quarterly 929.
[92] Lobel and Ratner (n 59) 132. For a more critical view see De Wet (n 34) 299-301.

2.2. NATO and Kosovo

During the later stages of the Kosovo crisis near the end of the 1990s,[93] the UN Security Council adopted Resolution 1160 in 1998, in which it called on the Federal Republic of Yugoslavia to 'achieve a political solution to the issue of Kosovo' and also called upon the Kosovar Albanian leadership to condemn all terrorist action.[94] The resolution emphasised 'that failure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures'.[95] Although the resolution was adopted on the basis of Chapter VII of the UN Charter, the Security Council failed to determine a threat to the peace according to Article 39 UN Charter, due to Russia's opposition.[96]

The situation worsened quickly. The Yugoslav Army and the Serbian security forces employed excessive military force which resulted in large numbers of civilian casualties, the displacement of large amounts of people and an enormous flow of refugees.[97] The Contact Group for the Former Yugoslavia agreed to the imposition of new sanctions against the Federal Republic of Yugoslavia – again with the exception of Russia.[98] In light of the use of force by Serbian security personnel, some states felt the need for more robust action and considered air strikes. They wanted a Security Council resolution authorising the use of force.[99] However, Russia again signalled its disagreement.[100]

In September 1998, the Security Council adopted Resolution 1199 that finally determined that 'the deterioration of the situation in Kosovo' was 'a threat to peace and security in the region'.[101] During the debate in the Security Council, it became obvious that Russia was of the opinion that Resolution 1199 did not consider the use

[93] For a detailed analysis of the events see T Gazzini, 'NATO Coercive Military Activities in the Yugoslav Crisis (1992 – 1999)' (2001) 12 European Journal of International Law 391-435.
[94] UN Security Council Resolution 1160 (1998) para 1, 2.
[95] UN Security Council Resolution 1160 (1998) para 19.
[96] Krisch (n 45) 79.
[97] B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 European Journal of International Law 6.
[98] Simma (n 97) 6.
[99] Krisch (n 45) 80.
[100] Simma (n 45) 6.
[101] UN Security Council Resolution 1199 (1998).

of force, despite its reference to Chapter VII,[102] and that Russia would veto any draft resolution authorising the use of force.[103] The US on the other hand stated that NATO was considering military measures to ensure compliance with Resolution 1199 if need be.[104] Thus, the UN Security Council was paralysed. Although the gateway to Chapter VII measures had been opened through the determination of an Article 39 UN Charter situation, no further resolution could follow authorising the use of force.[105]

In October 1999, NATO Secretary General Solana stated that NATO was prepared to threaten and to use force to end the humanitarian catastrophe in Kosovo without another UN Security Council resolution authorising the use of force, which was unlikely to be adopted in the near future.[106] In the days following the NATO announcement, a cease fire was established and the two Holbrooke agreements between FRY and OSCE as well as between FRY and NATO were concluded.[107] The Security Council formally endorsed the agreements through the adoption of Resolution 1203 (1998), acting under Chapter VII and reaffirming that the situation in Kosovo would represent a 'continuing threat to peace and security in the region'.[108] Gradually, violence again increased and the humanitarian situation worsened. After numerous threats, NATO started a range of air strikes in March 1999.[109]

The NATO air campaign to end a humanitarian catastrophe was both supported and condemned. One of its supporters included the European Union (although the EU did not participate in the use of force).[110] Russia, Belarus and India prepared a draft resolution that was intended to condemn the air strikes but this failed to be adopted.[111] In the absence of an explicit UN Security Council resolution authorising

[102] Gazzini (n 93) 405.
[103] Simma, (n 97) 7.
[104] Gazzini (n 93) 405.
[105] Simma (n 97) 7.
[106] Simma (n 97) 7.
[107] See Simma (n 97) 7.
[108] UN Security Council Resolution 1203 (1998).
[109] Gazzini (n 93) 407.
[110] Krisch (n 45) 83.
[111] Krisch (n 45) 84.

the use of force, justification was sought in the doctrine of humanitarian intervention but also in an implicit *ex post* authorisation through the UN Security Council.[112] In June 1999, the UN Security Council adopted Resolution 1244, which established an international security presence under the auspices of the United Nations made up of states and relevant international organisations. They were authorised to use 'all necessary means' in order to fulfil the responsibilities enumerated in paragraph 9 of Resolution 1244.[113] These responsibilities included the

> [d]eterring [of] renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces.[114]

As the use of 'all necessary means' is textually linked to the future tasks of the security presence it is not however convincing to interpret Resolution 1244 as an *ex post* authorisation to use force. Although the UN Security Council appeared to approve of the results of the NATO air campaign, the results needed to be distinguished from an approval of the means.[115]

3. Rejection of condemning the use of force

It has also been argued that the UN Security Council's rejection of condemning the use of force can be interpreted as the authorisation to use force. Examples include US action in Cuba and NATO's air campaign in Kosovo.

3.1. USA and Cuba

During the Cuban crisis in 1962, the US argued that it was not explicitly but nevertheless implicitly authorised to stop Soviet vessels approaching Cuba.[116] It based its claim on the silence of the UN Security Council. After all, the Security Council would not have voted on a draft Soviet resolution that was aimed at

[112] For a discussion see Simma (n 97) 10; Blokker (n 25) 546; V Gowlland-Debbas (n 38) 374, De Wet (n 34) 307.
[113] UN Security Council Resolution 1244 (1999) para 7.
[114] UN Security Council Resolution 1244 (1999) para 9 a).
[115] Krisch (n 45) 85, 86.
[116] Lobel and Ratner (n 59) 131.

condemning the American action.[117] However, since the Security Council also did not vote on a draft US resolution that was designed to approve American action, it becomes quite obvious that inaction of the Security Council cannot be interpreted as an authorisation to use force.[118]

3.2. NATO and Kosovo

Similarly, the NATO air campaign in Kosovo could not be justified on the basis of a failed attempt to condemn NATO in the UN Security Council through the adoption of a draft resolution initiated by Russia.[119] In the case of Kosovo, this is even more apparent as the motivation to vote against the condemnation of the unauthorised use of force through NATO necessarily resulted not from the wish to approve the use of force but rather from the fear that support for the draft resolution could be interpreted as support for the ongoing events in Yugoslavia.[120] In general, Chapter VII of the UN Charter asks for a positive decision authorising the use of force and ʻnot the absence of a negative one'.[121]

4. Explicit disapproval as implied *ex post* authorisation - The symbolic condemnation by the Security Council in conjunction with the absence of sanctions – the case of Israel and the Osiraq nuclear reactor

It has even been held that explicit disapproval by the UN Security Council can lead to implicit consent. The example discussed under this heading is Israel's air strike of 1981 against the Osiraq nuclear reactor in Iraq. It was claimed that Israel's use of force would have been implicitly authorised by the Security Council, although the organ had strongly condemned the use of force through Resolution 487 in 1981.[122] It

[117] Lobel and Ratner (n 59) 131.
[118] Lobel and Ratner (n 59) 131.
[119] Krisch (n 45) 86.
[120] Krisch (n 45) 84, 86.
[121] Krisch (n 45) 86; Rejecting the retroactive authorisation of the air strikes, see also P Van Walsum, 'The Security Council and the Use of Force: The Cases of Kosovo, East Timor, and Iraq' in N Blokker and N Schrijver (eds), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (Martinus Nijhoff Publishers, Leiden 2005) 67.
[122] A D'Amato, 'Israel's Air Strike upon the Iraqi Nuclear Reactor' (1983) 77 The American Journal of International Law 584-588; For a critical discussion see Lobel and Ratner (n 59) 132.

was argued that this condemnation would have been purely symbolic as no sanctions or penalties would have been imposed against Israel.[123]

In sum, the system of vertical, centralised law enforcement of the United Nations as a system of collective security, together with the general competence of international institutions to delegate powers subject to certain conditions, asks for an explicit and *a priori* mandate to use military force by the UN Security Council. The system of collective security and the law of international institutions qualify the silence of the UN Security Council in the sense that anything but an explicit *a priori* mandate must be interpreted as a non-authorisation of the use of force. Taking this reasoning a step further, non-authorisation of the use of force needs to be interpreted as the refusal by the community of member states to impose military sanctions. International actors that base the use of force on anything but an explicit UN Security Council decisions thus violate their obligations under the UN Charter.

Part 4
How does the silence of the UN Security Council affect non-members of the United Nations such as the European Union?

Now that it has been established that only an explicit *a priori* UN Security Council mandate grants UN member states with the right to use force, we need to address how non-UN member states are affected by this assumption. Are international actors that are not members of the United Nations – either because they choose not to be or because they do not fulfil the membership criteria like the European Union – free to use military force, even when the UN Security Council has not adopted an authorising resolution?

In respect of non-UN members, the argument that member states have renounced their power to enforce international law horizontally in favour of the creation of a central organ whose task it is to decide in an objective manner about the use of force based on values the members of the community have agreed to loses it strength. Non-UN members have not consented to the system of collective security and are

[123] D' Amato (n 122) 586.

therefore not bound by its rules, unless these rules merely codify principles of customary international law.

The prohibition of the use of force as the cornerstone of the UN Charter as well as some of its exceptions have acquired the status of customary international law[124] and are thus binding on all subjects of international law, whether they are members of the United Nations or not and whether they are states or international organisations like the European Union. It has been held in chapter four that in particular the authorization of the use of force through the Security Council in the absence of a standing UN army has acquired the status of customary international law.

The European Union, as an emerging international military actor that is prepared to engage in peace-enforcement without the consent of the target state, needs therefore to seek authorisation from the UN Security Council in order to make use of military measures lawfully. The authorisations of non-UN members need to fulfil the same criteria as the authorization of UN members. All UN Security Council authorisations need to be explicit and *a priori.*

To conclude, anything but the explicit and *a priori* authorisation by the UN Security Council to use force is equivalent to the silence of the UN Security Council. Non-UN members like the EU are bound by the silence of the UN Security Council which is equivalent with the refusal to authorise the use of force. The EU would act illegally if it engaged in the use of military force when the UN Security Council has not yet adopted an authorising resolution. Therefore, the EU needs to obtain a UN Security Council mandate before it can lawfully engage in robust military crisis management operations without the consent of the target state under the auspices of the EU's common security and defence policy.

[124] See chapter four.

Part 5

Silence within the EU's common security and defence policy

When turning to the relationship between the European Union, the member states and the use of force, the questions that need to be addressed are whether member states are free to use national military sanctions if no agreement has been reached within the common security and defence policy or whether silence within the common security and defence policy has to be interpreted as a rejection of the use of military measures. Would this rejection be equivalent to a positive Council decision rejecting the use of force and could it therefore constrain the member states in their domestic foreign policies? As illustrated in chapter three, Council decisions adopted within the framework of the common security and defence policy are binding on the member states. Therefore the next part will examine whether member states are free to act as they please if the EU cannot agree on a common stance, as in the case of Iraq in 2003.

The war against Iraq in 2003 has been one of the most prominent examples so far in which the European member states failed to coordinate their domestic foreign policies and thereby prevented the European Union from speaking with one voice on the international scene. The experience of a divided Europe that was unable to exercise its potential political weight in the world was decisive in the drafting of the *European Security Strategy*[125] that aimed to provide Europe with a strategic concept as explained above in chapter two.

According to the above developed argument that silence in legal terms needs to be interpreted within its legal context, the interpretation of silence within the common security and defence policy is influenced by the nature of the system of the common security and defence policy itself. It will be shown that, unlike the United Nations, the European Union cannot be characterised as a system of collective security. The argument put forward in relation to the United Nations that member states have

[125] European Council, '*A Secure Europe in a Better World: European Security Strategy*' Brussels, 12 December 2003 <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf > 11[hereinafter *European Security Strategy*].

renounced their power to use force in favour of the competence of the UN Security Council does not have an equivalent within the EU.

However, silence within the common security and defence policy could be qualified by past decisions. CSDP Council decisions are binding on member states as shown in chapter three above. If it would be possible to prove that decisions adopted within the common foreign and security policy are capable of producing binding effects for the future and not just for the occasion for which they have been adopted, silence within the common security and defence policy would have to be interpreted in light of past decisions. Therefore the next sections will address the loyalty obligation of the member states within the sphere of the common security and defence policy and the development of an *acquis securitaire* through past practice of the European Union.

1. The structure of the common security and defence policy

The interpretation of the meaning of silence within the common security and defence policy has to start with the structure of the common security and defence policy itself. Unlike the United Nations, the member states did not intend to create a system of collective security. They did not choose to create a strong centralised organ that was empowered to decide with binding force, based on objective values shared by the community of member states. On the contrary, the member states are still the driving forces behind the decisions adopted in the Council as illustrated in chapter two above. EU member states have been unwilling to transfer their sovereign power on security and defence issues to the European Union, as these matters are considered to lie at the very heart of state sovereignty. Council decisions involving the use of military force can only be adopted by the unanimous decision of all EU member states. Once the EU member states decide on the launch of an EU-led military operation, they are legally bound by the respective Council decision. However, EU member states are under no duty to put a specific topic on the Foreign Affairs Council's agenda or to cast a vote on a specific crisis management topic. Nevertheless, the principle of systematic cooperation, the loyalty obligation and the gradual development of an *acquis securitaire* might be capable of qualifying the meaning of silence within the common security and defence policy.

2. The principles underpinning the common security and defence policy – the principle of systematic cooperation and the principle of loyal cooperation

The principle of systematic cooperation states that the member states 'shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach'.[126] The wording of Article 32 LTEU indicates through the usage of the word 'shall' that the member states are under an obligation to inform and consult each other. The principle of systematic cooperation entails the negative obligation for the member states not to go public with domestic positions on CSDP matters of general interest before the matter has been discussed within the CSDP framework first.[127] Matters of general interest have to be determined not from the perspective of the member states but from that of the European Union. When a topic of security and defence policy of general interest to the Union is concerned, the member states are not free to act as they please but are under the obligation to consult one another in the forum of the Union in order to enable a common approach.

However, the principle of systematic cooperation does not indicate that member states have to consult until they reach either a positive or a negative decision within the Council. It merely requires them to provide the opportunity for a potential common approach. The extraordinary meeting of the Greek European Council in respect of the war against Iraq in 2003 fulfils these criteria. If a common approach cannot be reached, member states can opt for unilateral national measures. In consequence, the principle of systematic cooperation viewed independently is not strong enough to conclude that silence within the common foreign and security policy has to be interpreted as a rejection of imposing military sanctions by the Council which would be constraining member states in the adoption of national decisions.

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[126] Article 32 LTEU.

[127] C Hillion and R Wessel, 'Restraining External Competences of EU Member States under CFSP' in M Cremona and B De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals: Essays in European Law* (Hart Publishing, Oxford 2008) 82.

According to the principle of loyal cooperation, Article 24(3) LTEU is more specific than the general obligation of the member states to fulfil Treaty obligations and the principle of sincere cooperation as expressed in Article 4(3) LTEU,[128] since it requires that the member states

> shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

The use of the term 'shall', indicates that the member states are obliged to act loyally and to cooperate. The mandatory character is underlined through the requirement that the member states must support the Union's policy 'actively' and 'unreservedly'.

The loyalty obligation involves both positive and negative obligations. The positive obligation asks the member states to work together actively to enhance and develop the Union's external and security policy. The negative obligation requests that the member states refrain from any action which runs counter to the interests of the EU or is likely to infringe its effectiveness. In consequence, the principle of loyal cooperation in combination with Council decisions constrains the member states in the conduct of their domestic foreign policy as shown above in chapter three.

In relation to the question of how silence within the common security and defence policy is interpreted, the principle of loyal cooperation indicates that member states might have to seek guidance in the general foreign policy interests of the EU. These interests are expressed in political statements by the High Representative for Foreign Affairs and Security Policy and the President of the European Council. Depending on this information, member states are aware of the official line of European external policies and should know whether the EU is anticipating adopting economic

[128] W Wessels and F Bopp, 'The Institutional Architecture of CFSP after the Lisbon Treaty – Constitutional Breakthrough or Challenges Ahead?' (2008) Research Paper No. 10, Challenge – The Changing Landscape of European Liberty and Security <http://www.ceps.eu> 12.

sanctions or is interested in conducting a crisis management mission. Member states are under an obligation to act accordingly; otherwise they violate the negative obligation stemming from the principle of loyal obligation. Nevertheless, this principle viewed on its own is not sufficient to qualify silence within the common security and defence policy with particular meaning.

The next section will look at the gradual development of an *acquis securitaire* that in conjunction with the duty of loyal cooperation might be capable in the future of opening silence within the common security and defence policy to a narrow interpretation. If silence within the CSDP can be interpreted to have a particular meaning, then this silence could be binding on the member states and comparable to a positive CSDP Council decision.

3. The development of an *acquis securitaire*

The European Union undertakes more and more crisis management missions all over the world. The development of a strategic culture enhanced through the lessons learned in these missions will gradually develop an *acquis securitaire*. Comparable to the *acquis communautaire*, the EU and the member states will develop patterns of behaviour and create expectations for acting in certain ways when confronted with certain types of conflict or crisis. Models will emerge in which the EU prefers merely to impose economic sanctions, or when the EU will use a combination of different policy tools or when the EU will use specific types of civilian or military crisis management missions. Future patterns could emerge which will determine when the EU is prepared to engage in a military intervention.

The development of an *acquis securitaire* is evolving. It could reach a stage that member states and EU institutions are in the position to forecast European reactions to international crises. They could be aware of how the EU usually reacts to a certain international crisis - due to political statements made in the past and due to past practice of the EU in a similar situation. In a case like this, the member states would be in the position to interpret the silence of the Council within the common foreign and security policy of which the CSDP forms an integral part. They would be aware

whether a Council decision is likely to be adopted in the near future or whether the EU as a whole is unlikely to impose measures or launch a crisis management operation of a civilian or military nature. Therefore the development of an *acquis securitaire* has the potential to restrict member states in their choice of foreign policy instruments even before a CFSP Council decision has been adopted.

The development of an *acquis securitaire* is still at very early stages but it will be argued in the following section that the more the European Union acts as a crisis management actor, the more its member states, its institutions and third parties will expect the Union to act in a certain way when faced with a certain type and a certain gravity of crisis or conflict. The development of an *acquis* cannot be prevented and it is desirable for the build-up of a unique European identity in international crisis management. The purposes of an *acquis* are to ensure continuity and to preserve a core of values, concepts and principles of the constantly evolving European Union as an external actor.[129] By ensuring consistency the *acquis* also generates an impulse for future EU external action.[130]

3.1. The implications of the development of the *acquis securitaire*

The assumption that the development of an *acquis securitaire* is ongoing entails two consequences for the member states and for the conduct of their national foreign policies. First, the member states of the European Union will find it more difficult to act unilaterally before a Union decision within the common security and defence policy has been taken if they are aware that their domestic action is contrary to an established line of the practice of the European Union. For example, if member states are aware that the EU usually reacts to a certain crisis by imposing first economic sanctions or by using diplomatic tools, or if they know that the EU adopts a certain strategy in relation to particular countries, for example in light of the EU's neighbourhood policy, member states will find it politically challenging to justify unilateral behaviour that is contrary to or more severe than the expected common

[129] L Azoulai, 'The *Acquis* of the European Union and International Organisations' (2005) 11 (2) European Law Journal 196, 197.
[130] Azoulai (n 129) 197.

European approach.[131] If they are completely unbound and act as they please, although they have reason to expect a common European approach in the near future, member states will have it in their power to create situations that could not be reversed by a European approach. They could prevent the EU from speaking with one voice and they could undermine the values, interests and strategies that the EU usually pursues with its external relations. In this regard, the duty to act in accordance with the *acquis securitaire* of the European Union could be reinforced by the above discussed duty of cooperation.

Second, if they are aware from previous experiences that the EU is likely to contribute with an EU-led operation in a similar crisis, member states will find it more difficult to justify their involvement in the settlement of this crisis outside a European framework, and to act only within NATO, the UN or an ad hoc coalition of states. This is even more so in the light of the recent practice of the EU as a crisis management actor. At each stage of the decision making process behind the launch of European crisis management missions, a discussion takes place about the role that the EU should assume in a particular conflict. It will be discussed whether the EU should start an independent EU-led operation on its own or in cooperation with other international actors or whether the European member states should rather contribute their troops to missions under the auspices of the UN, NATO or an ad hoc coalition of states or international organisations outside a European framework instead.[132]

3.2. Sources behind the development of an *acquis securitaire*

The development of an *acquis securitaire* within the European Union is the product of several mixed influences. It is motivated by political documents such as the *European Security Strategy* of 2003[133] but derives one of its biggest impetuses from the actual implementation of the common security and defence policy through crisis

[131] The development of a particular strategy towards certain states is not unknown to the European Union. With regards to democracy, the rule of law and human rights, the EU has for example defined a coherent strategy for its future relations with countries of south-east Europe. See on this topic B Brandtner and A Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 European Journal of International Law 479.
[132] T Hadden (ed), *A Responsibility to Assist: EU Policy and Practice in Crisis-Management Operations under European Security and Defence Policy: A COST Report* (Hart Publishing, Oxford and Portland, Oregon 2009) 46.
[133] *European Security Strategy* (n 125).

management missions in practice. In addition, the Treaty on European Union entails legal provisions that indicate the existence of an *acquis securitaire*. Lastly, the international law principle of good faith supports the idea of a growing *acquis securitaire* against which future EU action has to be measured.

3.2.1. The *European Security Strategy* of 2003 as a benchmark for future military crisis management action

The European Union has developed a distinctive take on security that is based on European values and interest.[134] The *European Security Strategy* of 2003 is the first strategic document of the European Union that covers foreign policy as a whole. It sets out the key threats and challenges faced by the Union and the strategic objectives the EU intends to use in order to address theses threats. The ESS does not provide operational guidelines but it sets out the principles that should guide the EU in its actions in order to 'advance the EU's security interest based on [the core European] values'.[135] The values and principles that distinguish the EU from other security actors are its strong emphasis on the promotion of human rights and the call for effective multilateralism.[136] The ESS states that the

> best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order.[137]

[134] General Secretariat of the Council of the EU, J Solana, *'Report on the Implementation of the European Security Strategy: Providing Security in a changing World'* Brussels, 11 December 2008, S407/08, 2 [hereinafter *ESS Implementation Report 2008*].
[135] *ESS Implementation Report 2008* (n 134) 3. For a detailed discussion of the ESS see S Biscop, 'The ABC of the European Union Security Strategy: Ambition, Benchmark, Culture' in S Blockmans (ed), *The European Union and Crisis Management: Policy and Legal Aspects* (T.M.C. Asser Press, The Hague 2008) 55-73.
[136] A De Vasconcelos (ed), 'The European Security Strategy 2003-2008: Building on Common Interests' (February 2009) ISS Report No. 5, EU Institute for Security Studies <http://www.iss.europa.eu/uploads/media/ISS_Report_05.pdf> 33.
[137] *European Security Strategy* (n 133), 10.

The implementation Report of the European Security Strategy of 2008 also emphasises the EU's commitment to the *Responsibility to Protect* as agreed on the 2005 UN Wold Summit[138] and provides that

> [l]asting solutions to conflict must bind together all regional players with a common stake in peace. Sovereign governments must take responsibility for the consequences of their actions and hold a shared responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.[139]

With regards to effective multilateralism, the *European Security Strategy* states that the EU is

> committed to upholding and developing International Law. The fundamental framework for international relations is the United Nations Charter. The United Nations Security Council has the primary responsibility for the maintenance of international peace and security. Strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively, is a European priority.[140]

The values and interests the EU aims to base its action on as an international security provider will need to be put into concrete forms by the European Union in the actual undertaking of its missions. By doing so, the EU will gradually define what it actually means when referring to such vague terms as human rights promotion or when it calls for effective multilateralism. The actual military crisis management practice of the EU will shape its profile and will build up its portfolio. Not only European member states but also third parties, including states and international or regional organisations, will develop an understanding of when the EU is likely to act and whether the EU is more likely to start 'just' a civilian mission or whether they can expect the support of a military operation and if so whether force is going to be used merely for self-defence and to protect civilians or whether the operation will have a strong and robust mandate. The gradual development of a pattern for how the EU will act when faced with a certain crisis is essential in building up an *acquis*. The

[138] De Vasconcelos (n 136) 6.
[139] *ESS Implementation Report 2008* (n 134) 2.
[140] *European Security Strategy* (n 133) 9.

creation of an *acquis securitaire* is crucial for the build-up of the EU's legitimacy and identity as an international security provider.

3.2.2. The development of an *acquis securitaire* and its foundations in the EU legal order

Unlike the development of the *acquis communautaire* that was driven by the case law of the European Court of Justice, the *acquis securitaire* will predominantly be shaped by the EU's practice as an international security provider, due to the lack of jurisdiction of the European Court over the common foreign and security policy, including the common security and defence policy.

The development of an *acquis securitaire* nevertheless has a basis in the Treaty on European Union. Article 32 LTEU refers to a common approach in matters relating to the common foreign and security policy and indicates that the development of an *acquis securitaire* is viewed as a prerequisite for the Union to assert its interests and values on the international scene. When read in this way, Article 32 LTEU also shows that the development of an *acquis securitaire* is driven forward by the European Council and the Council; and that European institutions and bodies as well as member states have to follow their policy guidelines when putting the common foreign and security policy into concrete forms.

According to Article 32 LTEU

> Member States shall consult one another within the European Council and the Council on any matter of foreign and security policy of general interest in order to determine a common approach. Before undertaking any action on the international scene or entering into any commitment which could affect the Union's interests, each Member State shall consult the others within the European Council or the Council. Member States shall ensure, through the convergence of their actions, that the Union is able to assert its interests and values on the international scene. Member States shall show mutual solidarity.
>
> When the European Council or the Council has defined a common approach of the Union within the meaning of the first paragraph, the High Representative of the Union for Foreign Affairs and Security Policy

> and the Ministers for Foreign Affairs of the Member States shall coordinate their activities within the Council.

The development of an *acquis securitaire* is not only ongoing but it is also desirable from a European perspective. If the EU can transform its values and interests into concrete policy guidelines, it will make its foreign and security policy and its common security and defence policy more effective. Clear foreign policy goals will also enhance the coherence of the EU's external relations competences that are scattered over different policy sectors but form part of the EU's comprehensive concept of crisis management.

3.2.3. The development of an *acquis securitaire* and the principle of good faith

The development of an *acquis securitaire* can also be supported from an international legal perspective. The European Union enjoys international legal personality and as an international organisation it is subject to general rules of international law. The principle of good faith, in the form of equitable estoppel, asks the European Union not to act contrary to the legitimate expectations it has created through its previous behaviour. Therefore, the more the European Union engages in crisis management missions, more concrete patterns of its behaviour will develop. These patterns will reveal when the EU considers human rights violations grave enough to support a mission and they will show what conditions have to be met for the EU to engage in different forms of the use of force, ranging from peace-keeping, humanitarian missions and peace-enforcement.

3.2.4. The duty of loyal cooperation

The argument put forward here that member states are constrained in the conduct of their domestic foreign policies through the development of an *acquis securitaire* can be reinforced by their duty of loyal cooperation. The duty of loyal cooperation has been used in the context of the EU's external relations and in particular regarding the Union's competence to conclude international agreements to argue that even if the EU has not yet exercised its external competence, member states must step away

from any measure that would undermine the future exercise of Union competence.[141] The duty of cooperation in the context of the EU's external relations is linked to the general goal of achieving unity in the EU's international representation. This motive has been influential in creating broad and exclusive European competences for the conclusion of international agreements and the introduction of a European role for the adoption of economic sanctions in order to avoid differing and therefore ineffective unilateral member state sanctions. In line with this reasoning, the development of an *acquis securitaire* and the constraining effects it could produce on member states' domestic foreign policy choices could enhance the EU's ability to speak with one voice in the international arena, which will increase the effectiveness of the use of force by the European Union and could in turn strengthen the legitimacy of the EU as an international military crisis management actor.

The gradual development of an *acquis securitaire* will help to define how the silence of the EU in the common security and defence policy can be interpreted. However, the development of the *acquis securitaire* as a political concept is not yet advanced enough to constrain European member states legally in their domestic foreign policy choices. So long as the Council has not adopted a positive decision within the common security and defence policy, member states are free to act as they please; even if that means that they prevent the European Union from speaking with one voice on the international scene.

Conclusion

By using a speculative approach, it has been questioned how silence in the context of the use of force needs to be interpreted. Silence is generally too vague to be of any legal value unless it can be qualified in a certain way. This qualifying act needs to be found in respective legal systems. In the context of the United Nations, only an explicit and a priori obtained UN Security Council mandate corresponds to the system of collective security, the general law of international institutions and the non-delegation doctrine. Thus, anything but an explicit UN Security Council

[141] A Tizzano, 'The Foreign Relations Law of the EU Between Supranationality and Intergovernmental Model' in E Cannizzaro (ed), *The European Union as an Actor in International Relations* (Kluwer Law International, The Hague 2002) 139.

mandate to use force needs to be interpreted as the silence of the UN Security Council. In turn, the silence of the UN Security Council must be interpreted as a refusal to authorise the use of force.

It has been tested in the context of the EU's common security and defence policy whether silence can be interpreted as constraining the member states in the conduct of their domestic foreign policies. Although the European Union is slowly building up an *acquis securitaire* through its crisis management missions in practice, this political concept is not yet mature enough to provide silence in the context of the CSDP with a precise legal meaning. Silence in the common security and defence policy cannot therefore limit the EU member states in their national foreign policy choices.

Chapter 8: Conclusion - The European Union as an emerging international military actor

Since the common security and defence policy became operational in 2003, the European Union has launched and conducted nine military crisis management operations all over the world. Some of these missions were carried out at the request of the United Nations. All of them were conducted with the consent of the host state. The European Union is slowly taking on more responsibilities as an international security provider. With Operation Atalanta off the Somali coast, it undertook its first naval operation. Although it has not yet engaged in peace-enforcement operations, the European Union has the legal capacities at its disposal and the political will to engage in more robust interventions.

The use of force by the European Union generates a number of questions for the EU legal order itself, for the EU's relationship with its member states and for its place within the international community (and, in particular, for its relationship with the United Nations).

At the beginning of the European project, it was unthinkable that the EU could engage in the use of force. Chapter two of this thesis described the historic development of the European legal framework for the use of force and demonstrated that the creation of a European security and defence policy was characterised by many set backs and cooling off periods. It largely developed outside the Treaty framework through a bottom-up approach that later became codified. The European Union made most progress in security and defence matters in the aftermath of an international crisis. Faced with its inability to react to the conflict in the Former Republic of Yugoslavia on its doorstep, the European Council meeting in Cologne decided that

> the Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crisis without prejudice to

> actions by NATO. The EU will thereby increase its ability to contribute to international peace and security in accordance with the principles of the UN Charter.[1]

Following the war against Iraq during which the EU could not speak with one voice and thus fell short of exercising its political weight in the world, the *European Security Strategy*[2] was supposed to provide the EU with its first strategic concept. The ESS indicates a unique European approach to security. This distinctive approach is characterised through a comprehensive concept of crisis management that approaches different dimensions of security in an integrated way and in a multilateral setting.

The European Union is now equipped with military capabilities, procedures and structures for military crisis management missions. In the absence of a European army the EU depends on capable and willing member states to make their military personnel available to it. The member states are not legally obliged to contribute troops to EU-led operations. Nonetheless, chapter three demonstrated that European member states are legally obliged to support the Union's common security and defence policy actively and that they are not supposed to undermine the success of an operation through their action or inaction. In addition to their loyalty obligations, member states are also bound by Council decisions with which crisis management operations are launched and conducted. Admittedly, the binding nature of Council decisions is limited: they can only be adopted by a unanimous decision. Furthermore, member states do not have to put a topic on the agenda of the Council and can thus prevent a common approach to a crisis. Even when it is adopted, a Council decision can be phrased in very vague terms and therefore leave room for national measures.

Nevertheless, once they have voted in the Council, member states are bound by Council decisions. The member states are, on the one hand, under an obligation to

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[1] Cologne European Council, Presidency Conclusions, 3 and 4 June 1999, Annex III, *European Council Declaration on Strengthening the Common European Policy on Security And Defence*, para 1.
[2] Europan Council, "*A Secure Europe in a Better World: European Security Strategy*" Brussels, 12 December 2003 <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

support the Union's policy actively and, on the other, they are under an obligation to refrain from any unilateral or multilateral actions that could undermine the respective Council decision adopted in the context of military crisis management operations. Their binding nature is enhanced and reinforced by the principle of systematic cooperation and the principle of loyal cooperation. Although they are reluctant to lose some of their powers in the highly sensitive fields of security and defence, chapter three has demonstrated that member states are already constrained in the conduct of their national foreign policies through the EU's common security and defence policy and that a process of European integration continues to evolve.

The use of force in European crisis management missions cannot be understood on the basis of the European legal order alone. The European Union has so far acted upon the request of the United Nations and it is willing to supply the UN with much needed rapid reaction mechanisms. If the European Union engages in peace-enforcement in the future and launches and conducts a military crisis management mission against the will of a host state, which would thus turn into a target, the EU's relationship with the United Nations would need to be addressed. Unlike all its member states, the European Union is not a member of the collective security system of the United Nations. For the time being, the EU cannot accede to the UN. However, in its call for effective multilateralism, the European Union highlights the primary responsibility of the United Nations for the maintenance of international peace and security. In practice, the European Union provides the United Nations with much needed capabilities for this purpose.

Nevertheless, neither EU Treaties nor political statements on behalf of the EU offer an explicit answer regarding the precise legal relationship between the European Union and the UN. In consequence of the lack of jurisdiction of the European courts over the common security and defence policy, no precedent is available regarding the EU's relationship with UN Security Council resolutions in the context of the use of force.

The European Court of Justice has however provided some guidelines on the relationship between the European Union and economic UN Security Council decisions although most aspects are far from being resolved. Based on the assumption that the European Union is bound by UN Security Council resolutions regarding economic sanctions in light of the *International Fruit Company* case[3] of the European Court of Justice, a comparative method was chosen to find out whether the examination of this relationship could be helpful for an understanding of the relationship between the EU and UN Security Council resolutions with regards to the use of force.

The thesis outlined the similarities and differences between economic and military instruments from an international as well as from a European legal perspective. In addition, the EU's comprehensive approach to crisis management was used throughout the thesis to support a comparison of the two types of foreign policy instruments.

Chapter four examined the international legal framework for the use of force. This was to determine whether the European Union as an emerging international actor has to respect not only the EU legal order when it engages in military crisis management missions but if it also has to fulfil additional requirements originating from international law. This framework was primarily developed with states in mind.

Chapter four demonstrated that the system of the United Nations is centred on the general prohibition of the use of force which has acquired the status of customary law over time. As such it was argued that it is binding on the European Union as an international legal actor that is engaged in military crisis management operations. In consequence, the European Union needs to justify military sanctions in the context of peace-enforcement operations on one of the few accepted exceptions to the principle of non-intervention, for example an authorisation to use force by the UN Security Council. The European Union also appears to favour the concept of the responsibility

[3] Joined Cases 21 to 24-72 *International Fruit Company NV and others v Produktschap voor Groenten en Fruit, Netherlands* [1972] ECR 1219.

to protect. Whether or not this still rather unclear concept allows for the use of force without a Security Council authorisation is highly disputed.

Chapter four also showed that UN Security Council resolutions of a military nature provide an entitlement to use force. At the same time and similarly to economic UN Security Council sanctions, they also create legal obligations. Although they are not obliged to send their troops, UN member states are under a positive duty of assistance and cooperation and they are under the negative duty not to undermine the success of a military operation. This negative obligation results from a loyalty obligation that is inherent in the vertical centralised system of law enforcement of the United Nations. The negative obligation to abstain from anything that would undermine the effectiveness of the use of force authorised by the Security Council can ask UN member states, for example, to become active and to introduce travel bans. But it can also ask member states to refrain from doing something, for example to abstain from selling weapons and other military equipment to the target. Usually an economic sanction regime is in place when the UN Security Council resorts to the use of force, but this does not necessarily have to be the case. UN Security Council resolutions lose these characteristics and stop being binding if they violate the core of human rights and humanitarian law.

Chapter five was dedicated to an examination of economic sanctions within the European legal framework in order to prepare for the comparative method used in chapter six. It was demonstrated that the European Union has acquired a crucial role in the adoption of economic sanctions over time. The special nature of economic sanctions, combining trade measures with foreign policy considerations, and their unique constitutional setting within the EU legal order, linking the intergovernmental common foreign and security policy with the supranational EU policy sector, show that the traditional competence categories of the supranational EU policies are not appropriate for describing the distribution of powers between the EU and the member states in the sphere of economic sanctions. Nothing is gained for an understanding of the nature of economic sanctions within the European legal order by labelling the EU's competence for their adoption as exclusive or non-exclusive.

The substance of the EU's competence to impose economic sanctions can only be understood by questioning to what extent the member states are constrained in the conduct of their national foreign policies through EU sanction decisions.

It has been demonstrated that member states are largely constrained in their domestic policies through EU sanction decisions. There is hardly any room left for unilateral economic measures. The European Union has largely taken over the powers previously exercised by its member states in the sphere of economic sanctions.

Chapter six demonstrated that the European Union is legally bound by UN Security Council resolutions in the context of the use of force. The European Union does not have to accept a mandate. It does not have to conduct a military operation. However, if the EU accepts a mandate, it is bound by the respective UN Security Council resolution, in particular its wording and its purpose. The EU needs to respect limits of time, territory and purpose, for example. In the context of a European military crisis management operation, force cannot lawfully be used outside the designated territory, after the time limit has expired, for purposes that have not been identified in the UN resolution or in a fashion or manner that is not covered by the resolution itself. It would also be unlawful for the EU to use force to extinguish the governing elite of a state in order to settle a conflict if the resolution does not provide for it and the EU is not supposed to deploy land forces if the UN Security Council resolution limits the use of force to naval operations, for example.

The EU is bound by UN Security Council resolutions, even if it does not accept a mandate and refuses to take part actively by contributing a crisis management operation. In this case, the European Union is under a loyalty obligation not to undermine the success of the military operation either through its action or inaction. This could, for example, indicate that the EU would have to put an economic sanction regime into place to prevent the selling of certain products to a target or could ask the EU not to put a certain state on a list of states with which trade is going to be liberalised.

The binding nature of UN Security Council resolutions is not however unlimited. UN Security Council resolutions stop being binding on the EU when they stop being binding under international law in general, particularly when the UN Security Council acts *ultra vires*. The EU legal order additionally creates boundaries for UN Security Council resolutions. If they are violating primary EU law, including European fundamental rights, they do not produce legally binding effects in the autonomous European legal order.

The finding that the European Union is bound by UN Security Council resolutions despite not being a member of the United Nations was developed through a comparative method. It was argued that despite their differences, there are enough similarities between economic and military sanctions to allow a comparison between both types of instruments. Chapters three and five demonstrated that the European member states are largely constrained in the conduct of their national foreign policies through the EU's power to adopt economic sanctions. Similar to the constraints they face in the light of Council decisions authorising the use of force in crisis management missions, they are therefore limited in their domestic foreign policy choices.

The gradual development of a European competence for the imposition of economic sanctions despite the member states' reluctance to accept a European role in this highly sensitive policy field was chosen as an example of the unique form of European integration in the external sphere and offers a glimpse of what may still lie ahead for the European Union regarding military crisis management.

In addition, the EU's comprehensive approach to crisis management encourages an open and integrated approach to the analysis of economic and military sanctions. The European approach to crisis management is comprehensive in two ways. Not only is it prepared and willing to act in the whole life cycle of a conflict, including conflict prevention, peace-making, peace-keeping as well as post conflict stabilisation, the European Union is also willing to use a variety of tools that are at its disposal,

including diplomacy, trade measures and civilian or military crisis management missions.

Therefore it was held that if it is possible to conclude that the European Union is bound by economic UN Security Council resolutions, it would be worth testing whether the same criteria could be applied to the relationship between the European Union and UN military sanctions. To assess the legal relationship between the European Union and UN Security Council resolutions regarding economic sanctions, the case law of the European courts with regards to economic UN Security Council sanctions was assessed. The *Kadi* case[4] focused on targeted financial sanctions against individuals but unfortunately left several questions about the legal relationship between the European Union and UN Security Council resolutions open. The Court did not resolve the question of whether the European Union is bound by UN Security Council resolutions. It did however outline the outer limits of a possible binding nature. It held that UN Security Council resolutions could not enjoy primacy over primary EU law. Thus the possible binding nature of UN Security Council resolutions is limited by European fundamental rights.

To examine the legal relationship between the EU and UN economic Security Council resolutions, the reasoning of the *International Fruit Company* case was used to argue in favour of a functional substitution of the European member states by the European Union with regards to economic sanctions, irrespective of whether the competence of the EU to adopt economic sanctions is qualified as exclusive in nature.

When transferring the criteria of the *International Fruit Company* case to the use of force in the context of EU military crisis management operations, it then was argued that all five criteria for functional substitution were met. First, all EU member states are contracting parties to the United Nations. Second, the EU has acquired powers in the field of the common security and defence policy, and in particular with regards to the use of force in crisis management operations. As demonstrated in chapter three,

[4] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

once a Council decision has been adopted to launch and conduct a military crisis management operation, member states are constrained in the conduct of their domestic foreign policies. Third, the EU has shown its willingness to be bound by the provisions of UN Security Council resolutions. In political statements such as the *European Security Strategy* and the *Joint Declaration on UN-EU Co-operation in Crisis Management*,[5] the EU has expressed its commitment to international law and the United Nations and emphasised its aim to contribute to the objectives of the United Nations. In practice, the EU has launched and conducted military crisis management operations at the request of the United Nations, for example Operation Artemis. During the conduct of military crisis management missions, the European Union has so far cooperated with the United Nations and thereby indicated its willingness to be bound. Whenever it has accepted a UN mandate so far, the European Union has acted as if it were bound by it. Fourth, the EU has acted within the framework of the United Nations. It has conducted military crisis management operations on the request of the United Nations. The EU has even developed two models of deployment in support of the United Nations – the bridging model and the stand-by model. Fifth, the UN recognises the EU as a substitute for the member states in the sphere of military crisis management operations. If European member states are prepared to supply their forces as part of a European crisis management operation, the United Nations and other international actors stop contacting the individual contributing member states and will build operational structures with EU institutions and bodies. They will communicate with EU bodies such as the EU Operation Commander, the Political and Security Committee and the EU Military Committee, for example. In the Security Council, the EU will be represented by the High Representative for Foreign Affairs and Security Policy. Additionally, the EU has developed specific crisis management structures as explained above. These rapid reaction mechanisms, for example, are offered to the United Nations in the name of the EU and not in the name of the individual member states. Therefore the UN experiences the EU as a partner in crisis management. In practice, the UN Security

[5] Council of the European Union, 'Joint Declaration on UN-EU Co-operation in Crisis Management', Brussels, 19 September 2003, 12730/03.

Council also authorised the European Union under Chapter VII UN Charter in UN Security Council to deploy an operation in Chad.

It is therefore possible to conclude that the EU has substituted for its member states in EU led crisis management missions involving the use of force. This does not mean that the European member states have been replaced by the EU in all aspects of the use of force. Whenever EU member states decide to deploy their forces outside of EU crisis management operations, they are free to do so. They do not have to involve the EU in military operations. They are free to act outside the CSDP. However, once they decide to act within the common security and defence policy and unanimously vote in favour of EU-led military crisis management missions, they are represented by the European Union in the international sphere and they are constrained in the conduct of their national foreign policies.

Now that it has been established that the European Union is bound by existing UN Security Council resolutions and that the European member states are constrained in the conduct of their national foreign policies through existing Council decisions adopted in the context of military crisis management operations, the last chapter adopted a more speculative approach. It examined the meaning of different dimensions of silence in the context of the use of force and how silence affects the three different actors involved - the United Nations, the European Union and the European member states.

A key example illustrating the questions raised in the final chapter was the EU's inability to speak with one voice during the war against Iraq in 2003, which was not authorised by UN Security Council resolutions. It was demonstrated that the meaning of silence needs to be interpreted within its legal context. Based on the system of collective security of the United Nations and the non-delegation doctrine it was held therefore, that only an explicit authorisation by the UN Security Council before the use of force is exercised can be interpreted as a lawful authorisation to use force. Anything else has to be interpreted as the silence of the UN Security Council. The

silence of the UN Security Council is equivalent to the refusal to authorise the use of force.

Within the context of the European Union, it was examined whether the gradual development of an *acquis securitaire* as a political concept could help to interpret the meaning of silence within the common security and defence policy in the sense that European member states could be constrained in the conduct of their national foreign policies even if no Council decision has been adopted yet. The European Union is undertaking more and more crisis management missions all over the world. It is thereby building up its profile and portfolio as an international security provider. The development of a strategic culture enhanced through the lessons learned in these crisis management missions will gradually develop an *acquis securitaire*. Comparable to the *acquis communautaire*, the EU and the member states will develop patterns of behaviour and create expectations to act in certain ways when confronted with a certain type of conflict or crisis. Models will emerge in which the EU prefers to impose merely economic sanctions, or when the EU will use a combination of different policy tools, or when the EU will use specific types of civilian or military crisis management missions. In addition, patterns could emerge where the EU is prepared to engage in military interventions. The development of an *acquis securitaire* is slowly ongoing. It could reach the stage where member states and EU institutions are in the position of being able to predict European reactions to international crises. They would be aware of how the EU usually reacts to certain situations - from past political statements made and from past practices of the EU in similar scenarios. In these cases, the member states would be in the position to interpret the silence of the Council within the common foreign and security policy of which the CSDP forms an integral part. They would be aware whether a Council decision might be adopted in the near future or whether the EU as a whole is unlikely to impose measures or launch a crisis management operation of a civilian or military nature. Therefore the development of an *acquis securitaire* has the potential to restrict member states in their choice of foreign policy instruments even before a CSDP Council decision has been adopted. However, at this stage, the crisis management practice of the European Union is not advanced enough to argue in

favour of a mature *acquis securitaire*. Therefore, it is not possible to interpret silence in the context of the common security and defence policy in ways that could constrain the member states in the conduct of their domestic foreign policies.

Nevertheless, the development of an *acquis securitaire* is ongoing and desirable from a European perspective. If the EU could create a strong role in it for the values on which it is internally based and that it is also trying to promote externally, including European fundamental rights, democracy and the rule of law, this could add value to the EU's ambition to establish itself as a unique international security provider. If its future military crisis management mission can correspond to its *acquis securitaire*, the EU's credibility as an international security provider could be enhanced. In turn, the EU could strengthen its legitimacy as an emerging international military actor.

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