

THE SCOPE OF « INTERNATIONAL PEACE AND SECURITY » UNDER THE U.N.

BY

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INTRODUCTION

The reactivation of the Security Council at the beginning of this decade as a result of a newly-found consensus, has resulted, since the invasion of Kuwait on August 2, 1990, in the proliferation of wide-ranging collective enforcement measures adopted under Chapter VII of the Charter. These have been applied against Iraq, the former territory of Yugoslavia, the Federal Republic of Yugoslavia (Serbia and Montenegro), Somalia, Libya, Liberia, and Haiti (1). They have ranged over arms embargoes, selective and quasi-comprehensive economic, financial and diplomatic measures, and authorised uses of military force for a variety of purposes — such as enforcement of economic sanctions at sea, large-scale efforts to counter aggression, and forcible provision of humanitarian relief. The Council has also adopted measures which are not so evident as measures under Chapter VII : assessment of reparations, « *technical* » demarcation of boundaries, imposition of disarmament, and establishment of an international criminal tribunal. Finally, some of these measures have been adopted on the basis of a reconceptualization of threats to the peace which now encompass grave violations of human rights and humanitarian law, taking place within a State's own borders. SC Res. 688 (1991) relating to the Kurds, SC Res. 787 (1992), rejecting, *inter alia*, practices of « *ethnic cleansing* »

(1) The main ones imposing economic sanctions are : Iraq : SC res. 661 and 670 (1990) ; Federal Republic of Yugoslavia (Serbia and Montenegro) : SC res. 713 (1991), 757, 787 (1992), 820 (1993) ; Somalia : SC res. 733 (1992) ; Libya : SC res. 748 (1992) ; Liberia : SC res. 788 (1992) ; Haiti : SC res. 841 (1993). Res. 864 (1993) imposing sanctions on UNITA in Angola, should also be included. Technically, the legal basis of the sanctions imposed by SC res. 792 on Cambodia, is that of the Paris Agreement, Article VII of annex 2, and not Chapter VII of the Charter.

in the conflict in former Yugoslavia, « *Operation Restore Hope* » in Somalia decided by resolution 794 (1992), or SC Res. 841 (1993) and 940 (1994) linking threats to peace and security with the humanitarian crisis in Haiti, arising from the failure to reinstate the legitimate government of President Aristide, all symbolize this link between collective security and the international protection of human rights in its broad sense.

Indeed, the Security Council's Summit Declaration of January 31, 1991, acknowledged that threats to international peace and security can come from « ... *sources of instability in the economic, social, humanitarian and ecological field* ».

These actions of the Security Council have raised crucial issues which lie at the heart of the on-going ethical and legal debate on the validity of humanitarian intervention : the antinomy between human rights and domestic jurisdiction on the one hand ; the link between systematic violations of human rights and international peace and security on the other. They have also raised crucial issues related to the existence of a centralized system for the enforcement of obligations which affect the interests of the international community as a whole.

This debate is not new, however, though few remember its antecedents and have relegated the facts to history. On December 16, 1966 the United Nations resorted to the first use in the history of the organization of the mandatory provisions of article 41 of Chapter VII, by applying first selective and then in May 1968, quasi-comprehensive non-forcible sanctions against the British territory of Southern Rhodesia. On November 4, 1977, the Security Council adopted limited sanctions under article 41 — a mandatory arms embargo against South Africa — setting a precedent once again, since this was the first time in its history that these mechanisms were used against a member State.

In both these cases, the Charter's enforcement machinery, though applied on the basis of strict legality, was utilized not as part of a policing effort aimed at the defence of the status quo against aggression — as had been originally envisaged at San Francisco — but to end systematic policies of racial discrimination, in other words to promote the evolution of the international system in conformity with a new vision of human rights.

It is therefore more than of historical import to recall the precedent of Southern Rhodesia, and the controversy that surrounded it, since it remained the only case of comprehensive economic sanctions until the invasion of Kuwait by Iraq, and indeed, served as a model — at least in the early days of the Iraq conflict.

The case of Southern Rhodesia is at first glance to be situated in the context of decolonization. Because however of the existence of a minority regime, as in the case of South Africa, the issue of colonialism was linked to that of apartheid and racial discrimination and, for purposes of enforcement, to the maintenance of international peace and security.

There were two phases to the involvement of the United Nations : the first, which lasted from October 1961 (when the question was first brought before the United Nations Decolonization Committee) until 11 November 1965, aimed — paradoxically for an Organization bent on dismantling the colonial system — at preventing the progressive evolution towards independence of a territory under minority rule. The second, from 11 November 1965 (date of the unilateral declaration of independence of Rhodesia), until 17 April 1980 (the birth of Zimbabwe), aimed at the demise of the Ian Smith regime and the achievement of self-determination of the African majority.

Three aspects will be examined : 1. its importance as a human rights issue leading to UN involvement ; 2. the legal basis of international jurisdiction ; 3. the legal basis of UN enforcement action.

I. — RHODESIA AS A HUMAN RIGHTS ISSUE

The origins of the human rights situation in Rhodesia which was to trigger off UN concern can in fact be traced back to British policy of entrusting local administration of the colony, which had been conquered between 1888 and 1894 (2), to a chartered company, and then gradually delegating powers of self-government to the European settlers (constitutions of 1923 and 1961). Though the

(2) Instigated by Cecil Rhodes, the British had in 1888 first acquired a sphere of influence in the territory and had then secured exclusive mineral rights from the local chief, following this up by occupation in 1890 and conquest in 1894.

British retained certain veto powers over internal affairs, these remained largely unused (3).

As a result, while no formal system of apartheid akin to that of South Africa was instituted, deliberate white Rhodesian governmental policies effectively ensured the exclusion of the large majority of Africans from the political process for an indeterminate future. These policies, which included a two-tier voting system based on rigorous educational and income qualifications and a complex web of governmental legislation ranging over education, labour and land ownership (regulated by the Land Apportionment Act 1941), formalized the racial divide.

Following the failure of independence negotiations with the United Kingdom, which under considerable international pressure had demanded guarantees for the political advancement of the African majority (the so-called Six Principles which included the principle of unimpeded progress to majority rule), the white minority government under the leadership of Ian Smith and the Rhodesian Front, unilaterally declared its independence on 11 November 1965 (UDI). Significantly, the Independence Proclamation whilst echoing the 1776 American Declaration of Independence, notably omitted the assertion that « *all Men are created equal* ».

The Constitution of 1969 which severed the final links with the United Kingdom by proclaiming the establishment of a republic, precluded on a permanent basis the gradual transition to majority rule and instead aimed in a very distant future for parity of political representation between the races. How remote that prospect was can be shown from the electoral rolls which in 1970 were composed of 8,326 voters representing 4.8 million Africans and 87,000 voters representing 230,000 Europeans, 15,000 Coloured and 8,700 Asians (4). The introduction to these constitutional proposals proved to be the apotheosis of Rhodesian Front Principles : « *The Government of Rhodesia believe that the present Constitution is no longer acceptable to the people of Rhodesia because it contains a number of objectionable features, the principal ones being that it provides for*

(3) See generally, Claire PALLEY, *The Constitutional History and Law of Southern Rhodesia 1888-1965, with Special Reference to Imperial Control*, Oxford, Clarendon Press, 1966; VERA GOWLLAND-DEBBAS, *Collective Responses to Illegal Acts in International Law : United Nations Action in the Question of Southern Rhodesia*, Dordrecht, Martinus Nijhoff, 1990.
(4) Charles ROUSSEAU, « *Chronique des faits* », *RGDIP*, 1970, p. 501-503.

eventual African rule... and that it does not guarantee that government will be retained in responsible hands » (5).

While UK Prime Minister Harold Wilson's statement that sanctions would succeed in bringing down the illegal régime « *in a matter of weeks, rather than months* » was far from corroborated, neither was Smith's boast that the UDI would prove to be « *a three-day wonder* » (6).

Until it was finally compelled to accept the negotiated settlement at Lancaster House, London, on December 21 1979, however, this white government preferred to face alienation from the international community, wide-ranging economic sanctions and the threat of armed intervention, as well as a costly war within and without its borders, « *rather than risk offering equal economic, social and political rights to their fellow, black Rhodesians* » (7).

II. — THE LEGAL BASIS OF INTERNATIONAL JURISDICTION

A. — The General Assembly's determination of non-self-governing status

The fundamental question from the start was the competence of the UN to deal with a matter that was considered to be essentially a domestic one, a mere constitutional dispute between the UK and one of its dependent territories.

The majority in the General Assembly, then composed of the Afro-Asian and socialist states, and, on some issues, the Latin-American states, sought from the start to ground international jurisdiction on the international status of Southern Rhodesia.

In June 1962 the General Assembly, in resolution 1747, determined that Southern Rhodesia was a Non-Self-governing Territory

(5) See Elaine WINDRICH, *The Rhodesian Problem. A Documentary Record 1923-1973*, London, Routledge, 1975, p. 72-75.

(6) *The Times*, October 9, 1968.

(7) James P. Rhodesia BARBER, *The Road to Rebellion*, London, Oxford UP, 1967, p. 305.

under Chapter XI of the Charter (8). The territory was thus proclaimed a self-determination unit to which could be applied the law on decolonization which had progressively been shaped and which reached its apogee in the famous 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res. 1514 [XV]).

This determination provided the legal grounds for UN intervention until April 1980. On this basis the UN insisted on : a) the international accountability of the Administering Authority for its territory ; b) the exercise of the right to self-determination, i.e. the right of the majority to determine its own future both with regard to the internal choice of its government and to the external status of the territory, i.e. independence.

B. — *The challenge to international jurisdiction*

Until 1965, the UK opposed such UN involvement on the twin grounds of the special self-governing status of Southern Rhodesia and the UK's special responsibility for the territory. Arguing on the basis of Article 2 (7) which debars the Organization from intervening in matters which are « *essentially within the domestic jurisdiction of any State* », and interpreting « intervention » in its broad sense of interference, the UK contended that even discussion by the General Assembly would « *exceed what was permissible under the Charter* ». In its view, therefore, UN action in this matter was ultra vires and it consequently refused to carry out any of its resolutions. In this it was backed by a number of Western States, including France.

The majority rejected the UK's argument that status under constitutional law had any relevance to international jurisdiction. Judging Southern Rhodesia in the light of international standards, they concluded that it did not fulfil either external or internal conditions laid down ; in particular the system of government was not

(8) The Declaration on Non-Self-Governing Territories in article 73 declares : « Members of the UN which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government... accept as a sacred trust the obligation to promote to the utmost... the well-being of the inhabitants of these territories... » and to this end, undertake, inter alia : « a) to ensure their political, economic, social and educational advancement ; b) to develop self-government ».

the result of a voluntary choice by the peoples of the Territory concerned, freely expressed by informed and democratic processes (9).

C. — *The legal issues raised*

The question of validity of UN acts under the Charter, and in particular whether the bounds of domestic jurisdiction have been transgressed, is a central question today.

Undoubtedly under traditional international law, colonial questions were considered domestic matters. But the borderline between internal and external affairs is constantly in a state of flux for, in the words of the Permanent Court of International Justice (*Nationality decrees in Tunis and Morocco*) (10). « *The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question ; it depends upon the development of international relations* » and the current state of international law.

Article 2 (7), which delineates the jurisdictional area between the Organization and its member states (in contrast to the principle of non-intervention which is concerned with intervention by one State into the affairs of another State) makes no mention of who is competent to decide on the question of domestic jurisdiction. However it was recognized in San Francisco that United Nations organs are principally responsible for interpreting those parts of the Charter applicable to their functions (and in the case of the General Assembly this means the majority). The dilemma is that such assertions of competence are not considered authoritative, i.e. binding on recalcitrant states. In practice, what has happened however, is that the General Assembly has overruled objections relating to Article 2 (7) simply by adopting a resolution on the matter and by acting on it. Notwithstanding the fact that Article 2 (7) was meant to be more restrictive than Article 15 (8) of the League of Nations Covenant, it has been consistently eroded, while the field of international jurisdiction has expanded — particularly in the areas of human rights and decolonization. The gradual accretion of such resolutions resulting from the consensus of overwhelmingly large majority and postulating legal principles, have resulted in the creation of an

(9) For references, and summary of the debate in the General Assembly, Fourth Committee, and Security Council, see GOWLLAND-DEBBAS, p. 102-123.

(10) Advisory Opinion on *Nationality Decrees issued in Tunis and Morocco*, PCIJ Series B, 1923, No. 4, p. 23-24.

edifice of international legal norms better adapted to the changing structure and needs of contemporary international society.

The International Court of Justice has appreciated such assertions of competence in the light of the implied powers of the organization. It has stated (*Expenses* case 1962) (11) : « *When the organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the UN, the presumption is that such action is not ultra vires the organization* ».

In deciding on domestic jurisdiction questions, the UN, in its practice, has resorted to two criteria. The first is the objective criterion of international law. Thus a question has not been considered to be « *essentially a matter of domestic jurisdiction if it has become the subject of international obligations undertaken by the State concerned* » (12).

The second is the political one of international concern, that is, the UN has asserted that certain subjects though *prima facie* domestic, cease to be essentially within the domestic jurisdiction of a State if they constitute a potential (though not actual) threat to the peace.

In the case of Southern Rhodesia, it is important to underline that it was neither argued that UN action did not constitute « *intervention* » within the meaning of Article 2 (7), nor was there any claim that the question fell within the exception cited at the end of that Article, namely that it was liable to « *enforcement measures under Chapter VII* ». The determination in December 1966 that Southern Rhodesia was a threat to international peace and security was made not to remove the question from Art. 2 (7), but as a legal prerequisite for the imposition of mandatory measures under Chapter VII.

International jurisdiction was asserted right from the start on the basis of the existence of international obligations. These flowed a) from Charter provisions, namely Chapter XI, b) from various General Assembly resolutions, which whilst in themselves not mandatory had come to be recognized as having an important interpretative function, as well as a role in the formation of customary international law. The most important of these was

undoubtedly resolution 1514 (XV) which proclaimed that « *All peoples have a right to self-determination* » and called for the immediate granting of independence to dependent territories.

D. — *The basis of international jurisdiction after the Unilateral Declaration of Independence*

After the UDI the UK dropped its objections relating to domestic jurisdiction, and itself brought the question before the Security Council, on the basis *inter alia* that it was a matter of world concern, i.e. a potential threat to international peace and security (13). For the majority, however, the basis of jurisdiction after UDI remained the fact that the UDI had not affected the status of Southern Rhodesia, which continued as a Non-Self-Governing Territory. Only France continued to challenge the competence of the Organization, abstaining on all Security Council resolutions until May 1968. It argued that since the constitutional ties between Southern Rhodesia and the UK had not been affected by the UDI, Southern Rhodesia continued to be an internal problem of the UK and that the latter, as the sovereign authority, was alone responsible for restoring legality in Southern Rhodesia. « *The very fact that a rebellion is involved seems... to set a limit to UN action in this affair. The issue is not between States and the conflict between the UK and Southern Rhodesia is not therefore an international one* » (14).

The basis for international jurisdiction in the case of Southern Rhodesia, in many respects, paralleled that of South-West Africa, or Namibia, in that both territories were considered by the UN to have an international status (NSGT and Mandate, respectively) with the single objective of an ultimate grant of self-determination to the peoples concerned. The International Court of Justice in its important *Namibia* opinion (15), gave judicial backing to UN action in such matters, in recognizing a right to self-determination which had evolved by means of General Assembly resolutions from the original concept of « *sacred trust of civilization* » laid down in Article 22 of the League of Nations Covenant, and in confirming the

(11) Advisory Opinion on *Certain Expenses of the United Nations*, ICJ Rep. 1962, p. 168.

(12) See Georges ABI-SAAB, « *The Newly Independent States and the Scope of Domestic Jurisdiction* », in *Proceedings of the American Society of International Law*, 1960, p. 84-90.

(13) SCOR, 20th yr., 1257th mtg., paras. 20-21.

(14) See e.g. SCOR, 20th yr., 1258th mtg., para. 12.

(15) *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Rep. 1971.

separate and independent status of such territories, as well as the international responsibility of the UN.

III. — THE LEGAL BASIS OF ENFORCEMENT ACTION

Following on the UDI, the Security Council called for collective measures in the form of a dual response : (A) collective non-recognition ; (B) economic, financial and diplomatic sanctions.

A. — *Collective non-recognition*

On the basis of quasi-judicial pronouncements (resolutions 216, 217 [1965], 277 [1970]), the Council determined that the UDI as well as the situation arising from it was not only unconstitutional but also illegal and invalid under international law as it ran counter to the rights of the majority.

Resolution 216 (later 277) initiated a policy of collective non-recognition which was a significant revival of the pre-war Stimson doctrine.

For the next 15 years, Rhodesia was denied independent statehood, despite the fact that in appearance it fulfilled the traditional criteria of statehood (16). Unlike bilateral non-recognition, the duty of non-recognition here went very far, proscribing not only bilateral diplomatic relations, but, *inter alia*, relations in the field of sports, suspension of membership in international organizations, and non-cognizance of the acts of the regime in domestic courts. As a corollary to the illegitimization of the Ian Smith regime, the national liberation movements of Zimbabwe were granted recognition and admitted to observer status in the various organs of the UN.

This policy of collective non-recognition was to serve as an important precedent in UN responses to other situations deemed illegitimate : for example, Namibia, South African bantustans, and Arab occupied territories. The suspension of South Africa's par-

(16) The UK had no physical power over Rhodesia, and had obviously lost control despite its reiterated claims to sovereignty, which led the Indian representative, in referring to the Cheshire Cat in *Alice's Wonderland* to state : « This is the grin without a cat, with which we are dealing. We are dealing with the British responsibility towards the people of Zimbabwe, for which they disclaim any power ». SCOR, 26th yr., 1602nd mtg., para. 7.

ticipation in the work of the General Assembly can also be seen in this light, as can in an opposing sense, the acknowledgement by the General Assembly in resolution 43/177 of 15 November 1988, of the unilateral declaration of a Palestinian state, considered in this case to be in conformity with the right to self-determination of the Palestinian people.

B. — *Economic, financial and diplomatic sanctions*

The decision to resort to enforcement measures under Article 41 of the Charter was a historic occasion. However this was done in a graduated fashion, owing to the confrontation between the UK and Western powers on the one hand, and the UN majority on the other. Though the Council's reaction was immediate, over one year elapsed before the situation resulting from the UDI could be qualified as a threat to international peace and security, within the meaning of Article 39 of the Charter, hence opening the way to mandatory economic sanctions. It took over 15 months to make these sanctions quasi-comprehensive, and several more years to add certain finishing touches to the sanctions régime.

1. *The measures adopted*

a) *Non-mandatory measures*

The Security Council first adopted non-mandatory economic and diplomatic measures outside the framework of Chapter VII of the Charter (resolutions 216 and 217).

The reason for this was, in part, that the UK, desiring to avoid mandatory measures under Chapter VII, had sought to prevent the situation from being characterized in the terms of Article 39. In bringing the question to the Council in November 1965, the UK's motives had been, on the one hand, to seek UN support for its own policies and, on the other, to prevent escalation. When Prime Minister Harold Wilson was asked in the House of Commons why he had brought the question to the UN he replied : « *Because if we do not somebody else will... It is the duty of Her Majesty's Government to keep control of this situation* » (17).

(17) House of Commons Debates, vol. 720, November 11, 1965, col. 355.

The UK claimed therefore that following on the UDI, the question had now become a matter of world concern. The situation was one « *the continuance of which could be a menace to international peace and security...it has not yet developed to a point where there is an actual threat* ».

On the contrary, the Afro-Asian and socialist majority demanded full mandatory sanctions in accordance with the provisions of articles 41, 42 and 43, i.e. including military measures.

In the absence of consensus, resolutions 216 and 217 were compromises with unclear legal bases. Res. 217 determines in para. 1 « *that the situation resulting from the proclamation of independence by the illegal authorities in Southern Rhodesia is extremely grave... and that its continuance in time constitutes a threat to international peace and security* ». This suggests the wording of Chapter VI of the Charter, though the measures envisaged, unlike Chapter VI, were plainly coercive. The UK Government declared to the House of Commons on November 23, 1965, that this « *could be interpreted as something falling between chapter VI and chapter VII* ».

This ambiguity was further underlined by resolution 221 (the famous Beira resolution) which effectively called on the UK to enforce what had been at its origin a non-mandatory oil embargo. The Council in this case made a determination under Article 39 hence bringing the action within Chapter VII but took care to circumscribe the threat as one which concerned merely the arrival at Beira of two vessels suspected of carrying oil to Rhodesia, i.e. not the overall Rhodesian situation.

This deliberate ambiguity was not new however in UN practice at the time, for a number of resolutions relating for instance to apartheid in South Africa and to Portuguese administered territories, had acknowledged the existence of a threat to international peace, but evaded the consequences of this determination by using somewhat different terms to those in Article 39. They had done so by resort to such phrases as : « *a potential threat to international peace and security* » and « *a real threat to the security and sovereignty of independent African states* ». This wording had been insisted upon by the British and United States governments, unwilling to resort to enforcement measures under Chapter VII, but no longer able to oppose action of some kind.

b) Selective mandatory sanctions : Res. 232 (1966)

A remarkable congruence of political interests in the Security Council in December 1966 resulted in the adoption in Resolution 232 of mandatory, though initially selective, measures. Acting under Articles 39 and 41 of the Charter, the Security Council specifically determined that the « *present situation in Southern Rhodesia constitutes a threat to international peace and security* » and decided that all Member States would take the following selective measures in accordance with Article 25 of the Charter : 1. ban on the importation of nine principal Southern Rhodesian commodities, including chrome and tobacco ; 2. embargo on sale of arms ; 3. suspension of financial and economic aid.

c) Quasi-comprehensive sanctions : res. 253 (1968) and 277 (1970)

Under these resolutions, the Council decided on the following measures under Article 41 : 1. extension of the ban on imports and exports to include all commodities and products ; 2. ban on movement of funds ; 3. severance of all existing means of transportation ; 4. ban on entry into member States territories of certain persons travelling on a Southern Rhodesian passport or residents of Southern Rhodesia who were assisting the regime ; 5. severance of diplomatic relations.

Minor extensions to mandatory sanctions were subsequently made in resolutions 333 (1973), 388 (1976) and 409 (1977) (insurance coverage, granting of trade names and franchises). What was notably rejected was the severance of « *postal, telegraphic, radio, and other means of communication* » envisaged under Article 41 (which in fact has never been resorted to), and action against South Africa and Portugal for their assistance to Southern Rhodesia. The use of military force was also rejected. The latter is an important issue in the context of the debate on humanitarian intervention and deserves elaboration.

d) The rejection of military force

While General Assembly resolution 2022 (XX) had requested the UK « *to employ all necessary measures, including military force* » against its colony, the Security Council had more cautiously called on the UK « *to take urgent and effective measures to bring to an end*

the illegal rebellion in Southern Rhodesia » (18). That this did not imply the use of military force can be seen from the fact that more explicit resolutions were vetoed in the Council.

The Western powers, ironically in the light of current positions, argued that such a use of military force to bring about constitutional changes in a territory was prohibited by the Charter. The UK declared that it did not believe in the use of violence which would only « *bring measureless misery, not least to those whom it was meant to benefit* » (19).

On the contrary, the Afro-Asian States maintained that the UK was under a moral and legal duty to do so in order to fulfil its obligations under the Charter. That the majority should have considered justifiable the use of force in the case of a rebellion against a colonizing power might have seemed strange, particularly in the face of the strengthening thesis, consecrated in the 1970 General Assembly Declaration on Friendly Relations (Res. 2625) that since a colony had a status separate and distinct from the mother country, the use of force against it was prohibited by article 2 (4). Yet this has to be seen in the light of the objectives : the UK was being urged to use force, not against the peoples of the territory as such, but in order to put an end to attempts to thwart the exercise of their right.

However, as of 1969, the Assembly adopted a more cautious attitude, the reason being the fears expressed by leaders of the national liberation movements that the UK might use the appeal to use force to maintain the illegal regime and that the use of military force should be reserved to the recognized national liberation movements.

2. Legal basis of mandatory sanctions

In Resolution 232 the Security Council clearly stated that it was acting in accordance with Articles 39 and 41 of the Charter. The resolution « *determines that the present situation in Southern Rhodesia constitutes a threat to international peace and security* ». The legal basis of Security Council action in that resolution and all subsequent ones was therefore clearly indicated.

(18) See e.g. SC Res. 288 (1970).

(19) E.g. GAOR (XXII), 4th Cttee., 1683rd mtg., para. II.

This was the first time the Council had coupled a specific determination under Article 39 with an explicit invocation of Article 41. Not until 1977, following on a specific, albeit *limited*, determination under Article 39 that « *having regard to the policies and acts of the South African Government... the acquisition by South Africa of arms and related materiel constitutes a threat to the maintenance of international peace and security* », was the Council to repeat this linkage in deciding to impose a mandatory arms embargo against South Africa under Chapter VII (SC res. 418, 1977) (20).

3. Legal issues raised

Many of the legal issues raised as a result of the adoption of sanctions against Southern Rhodesia have retained their relevance and have resulted in controversy in some of the recent sanctions cases.

a) The validity of the determination of the existence of a threat to the peace

This was not as such questioned by member States, but it did give rise to controversy in academic circles. It was argued that : 1. the policies of the Southern Rhodesian authorities did not constitute aggression since these were confined within the boundaries of the territory ; 2. the acts of the regime violated no international obligations ; 3. if a threat existed it was only a potential one and resulted from the possibility of intervention by neighbouring African States (21). Those defending the Council's findings argued on the contrary that the activities of the Southern Rhodesian regime did involve elements of aggression — seizure and control of a territory under the sovereignty of the UK against the wishes of the indigenous population — as well as elements of illegality, including violations of human rights law and the right to self-determination (22). But these arguments are irrelevant to a consideration of the legality under the Charter of the Council's determinations, for the determination of the existence or non-existence of a threat to

(20) See also SC Res. 558 (1984) and 591 (1986).

(21) See e.g. Charles G. FENWICK, *Threat to the Peace?*, p. 753-755.

(22) See e.g. Myres McDUGAL and Michael W. REISEMAN, « Rhodesia and the United Nations: The Lawfulness of International Concern », *AJIL*, vol. 62, 1968, p. 1-19 at pp. 10-11.

the peace is considered to fall within the discretion of the Council (23).

This is not to say that this very wide discretion is limitless. There are substantive limitations, since the Council is bound to act only in accordance with the Purposes and Principles of the UN (art.24 [2]). There are also procedural limitations in the form of the Council's own voting requirements, although the controversy relating to the effects of abstention of a permanent member has by now been resolved by the ICJ in its *Namibia* Opinion, and an abstention is no longer considered to be tantamount to a veto.

b) Chapter VII and State responsibility for violations of fundamental norms

The Charter does not require the prior violation of an international obligation for the setting into operation of Chapter VII. Though this was not a legal requirement, however, the finding of a threat to international peace and security in the case of Southern Rhodesia did contain elements of international law. For it was undoubtedly the illegal situation created by the UDI in violation of the right to self-determination of the majority as well as the policies of racial discrimination by a white minority regime that formed the pivot of the threat. This is in conformity with the subsequent consistent practice of the Council (ranging from South Africa, through Iraq to Yugoslavia) not to limit itself to a finding of fact (that a situation is dangerous or explosive), but to determine that there has been under international law a breach of fundamental legal obligations. Whilst no one will dispute that the underlying motives and action of the Council as a political organ, are political and selective, nevertheless this use of Chapter VII as a law-enforcement mechanism may be analysed in the light of developments in the field of State responsibility, defined as all the legal consequences following on the illegal conduct of States (24).

(23) See the dissenting opinion of Judge Weeramantry in *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, (Libya v. UK; Libya v. US), Provisional Measures, ICJ Rep. 1992, p. 66, 176.

(24) For a discussion, see Vera GOWLLAND-DEBBAS, « Security Council Enforcement Action and Issues of State Responsibility », *International and Comparative Law Quarterly*, vol. 43, 1994, p. 55-98.

c) Reading Chapter VII in the light of the evolution of human rights and humanitarian law

Beginning with the Rhodesian question, it is interesting to note an emerging consciousness — which is visible in Council debates and academic discussions — that the measures provided for in Article 41 must be read in the light of developments since 1945, in particular in the field of human rights and humanitarian law. The special humanitarian exceptions introduced into the resolutions on Iraq, Yugoslavia and Haiti, may be traced back to the resolutions on Rhodesia, which in fact went further in this respect in providing exceptions also for educational and news materials.

d) The implementation of collective measures by Member States

Many of the issues which have recently been raised as a result of sanctions implementation, particularly in the Iraq and Yugoslav cases, had already emerged in the Rhodesian situation : i) the question of article 50, arising from the fact that some of the sanctioning states suffered more from the sanctions, than the sanctioned state itself ; ii) the problems raised by the domestic implementation of sanctions, for while Security Council decisions require domestic processes for their implementation, these escape the UN's ambit and control ; iii) the problem of enforcement of the embargo, for example the issues raised by the enforcement at sea of economic sanctions.

e) The question of the termination of sanctions

The United Kingdom and the United States had both lifted sanctions unilaterally just before the signing of the Lancaster House Agreement. This competence to take unilateral action was vehemently contested by the Afro-Asian majority which argued that collective action initiated by the Council could be revoked only by a decision of the Council, the latter having the sole competence to determine when the objectives had been met. SC Res. 460 (1979) therefore officially called for the termination of such measures. A different problem has arisen today as a result of open-ended sanctions resolutions with no cut-off date and elastic goals which the operation of a « reverse veto », as it has been called, may prevent from terminating an action in operation.

CONCLUSION

The importance of the Rhodesian precedent to the development of UN enforcement action must be underlined. The issues it raised in the light of recent uses of Chapter VII mechanisms in a human rights context, are still highly topical. The sanctions measures suffered from a number of weaknesses. They lacked universality and « *sanctions busting* » was frequent. The stated objective was only attained after more than 15 years of struggle and was certainly not solely the result of UN efforts — for there were numerous factors at work. Finally, those economic measures which may cause severe hardship to the population of a sanctioned territory should in themselves be questioned. Nevertheless one is entitled to ask whether an independent State of Zimbabwe would have emerged in 1980 had a new State of Rhodesia under white minority rule and modelled along the lines of its southern neighbour been welcomed into the international community and membership of the United Nations in November 1965.