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CHAPTER IV

THE GOVERNMENT OF RHODESIA

SECTION I

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GOVERNMENT AND STATE DISTINGUISHED.

We previously discussed the concept of independent statehood which we found to possess three characteristics, viz. population, territory and a government which is both independent and effective.¹⁾ It follows from this that the concept of a government must be distinguished from the concept of a state in that the government merely constitutes one of the essential elements of a state. The state is an entity which upon recognition becomes an international person.²⁾ The government on the other hand, is merely the representative organ of the state,³⁾ for whose activities the state will be internationally responsible.⁴⁾ It possesses no international personality⁵⁾ but will upon recognition have an international law status.⁶⁾

From/...

- 1) Supra, pp. 147 et seqq.
- 2) Supra, p. 281.
- 3) Briggs, p. 122; Oppenheim, I, pp. 131, 757; Schwarzenberger, Manual, p. 74; Sorensen, p. 271; Sir John Fisher Williams, "La doctrine de la reconnaissance en droit international et ses developpements recents" (44) H.R., 1933, II, p.203 at p. 241; Chen, pp. 103-104; B.R. Bot, Non Recognition and Treaty Relations, Leiden, 1968, p. 186; Resolutions of the Institute De Droit International concerning the recognition of New States and Governments, Article 10 at (30) A.J.I.L., 1936, Supp., p. 186; H. Kelsen, "Recognition in International Law - Theoretical Observations" (35) A.J.I.L., 1941, p. 605 at p.615.
- 4) Tinoco case (1923) R.I.A.A., I, 375; Massey claim (1927) R.I.A.A., IV, 155; Bensley case, Moore, International Arbitrations, III, 3016; Slocum case, ibid., 3140; Leichardt case, ibid., 3133; Sorensen, pp. 544, 546-547; O'Connell, II, p. 963; Schwarzenberger, Manual, p. 178; Brownlie, pp. 368-370; Oppenheim, I, p. 341; Starke, p.304; Briggs, p. 680; Brierly, "The Theory of Implied State Complicity in International Claims" (9) B.Y.I.L., 1928, p. 42.
- 5) Briggs, p. 122; Schwarzenberger, Manual, p. 74; Sorensen, pp.270-271; Oppenheim, I, p. 758.
- 6) Sorensen, p. 272; Starke, p. 142; Schwarzenberger, Manual, p.74. A newly recognized government is regarded as being the same legal entity as the old. O'Connell, I, p. 134. Scelle, Precis de droit des Gens, 1932, I, p. 103 would however obviate the distinction between recognition of states and recognition of governments and argues that there should only be recognition of competences gouvernementales.

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From the fact that state and government are different concepts and that the latter is merely an element of the former, a number of important conclusions must be drawn.

- (1) The existence of a state may continue despite changes in its government or governmental structure.⁷⁾
- (2) The recognition of government is a separate act from the recognition of a state.⁸⁾ It is possible however for recognition of both a state and its government to be simultaneous, being incorporated into one act or one instrument. Thus Article 1 of the Treaty of General Relations between the United States and the Phillipines signed at Manilla on 4th July, 1946 contains both a recognition of the State of the Phillipines and of the Government instituted under the Constitution thereof.⁹⁾ In practice, therefore, states do not keep the two forms of recognition in separate watertight departments.¹⁰⁾ But this must not obscure the fact that in such cases there are two juristic acts of recognition, which take place simultaneously merely for the purpose of convenience.

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- 7) The Sapphire (1870) 11 Wall, 164, 168; Russian Government v. Lehigh Valley R.R. (1919) 293 Fed. 133, 135; Ex parte Lehigh Valley R.R. (1924) 265 U.S. 573; Lehigh Valley R.R. Co. v. State of Russia (1927) 21 F (2d) 396; Agency of Canadian Car and Foundry Co. Ltd., v. American Can Co. (1918) 253 Fed. 152; (1919) 258 Fed. 363; Guaranty Trust Co. v. U.S. (1938) 304 U.S. 126, 141; In re Lepeschkin (1923) Ann Dig. 1923-1924, Case No. 189, p. 323; Roselius & Co. v. Karsten and the Turkish Republic (1926) *ibid.*, 1925-1926, Case No. 26, p. 35; Lowinsky v. Receiver in Bankruptcy of the Egyptisch - Turksche Handwerksigaretten - fabriek 'Jake' Ltd. (1932) *ibid.*, 1931-1932, Case No. 16, p. 40; N. and M. Skipoff v. Elte (1931) *ibid.*, Case No. 17, p. 41; U.S S R. v. Belaiew, 42 T.L.R. 21; Claim of the Russian Volunteer Fleet (1925) Ann. Dig., 1925-1926, Case No. 152, p. 210.
 - 8) Fischer Williams, note 3 *supra*, p. 241; Chen, p. 98; Starke, p. 141.
 - 9) See Herbert W. Briggs, "Recognition of States : Some Reflections on Doctrine and Practice". (43) A.J.I L., 1949, p. 113, at p. 115. In 1919 Britain and the United States recognized both State and Government of Finland. Lauterpacht, p. 29.
 - 10) Chen, p. 101.

- (3) Recognition of government entails of necessity the recognition of the state.¹¹⁾

Fisher Williams states the reason for this:

"Il est impossible de reconnaître un Etat nouveau sans en reconnaître en meme temps le gouvernement qui au moment de la reconnaissance, détient le pouvoir." 12)

In practice it very often happens that recognition is merely given to a government and from this recognition of state necessarily follows. Thus United Kingdom recognition of Poland in 1919 was in the form of the "formal recognition of the Government of Poland." 13)

- (4) Recognition of a state does not necessarily entail recognition of the government of that state.¹⁴⁾

It is therefore possible that a state may be recognized as an international person and yet the government of that state is not recognized as having international law status to represent the

international/...

- 11) Chen, pp. 101, 102-103. The converse proposition that non-recognition of government necessarily entails non-recognition of state, a proposition which is supported by Fisher Williams, note (3) supra, pp. 242-243 is not correct as will appear from the discussion which follows.
- 12) Note 3) supra, p. 241. Lauterpacht, pp. 94-95 says: "An authority cannot be recognized ... as a government without being recognized as the government of a state." For the same reason non-recognition of state entails non-recognition of government.
- 13) Lauterpacht, p. 29. For further examples see Chen, pp. 101-102.
- 14) Lauterpacht, p. 29; G. Scalfati Fusco, Il riconoscimento di Stati nel diritto internazionale, Naples, 1938, p. 272; Whiteman, II, pp. 653-654. Sed contra P. Kleist, Die Volkerrechtliche Anerkennung Sowjetrusslands, 1934; Konigsberg, Berlin, p.19, Chen, pp. 102-103; P. Marshall Brown, "The Legal Effects of Recognition" (44) A.J.I.L., 1950, p. 617 at p. 627; A. Raestad, "La Reconnaissance Internationale des nouveaux etats et des nouveaux Gouvernements" (17) Revue de Droit International et de Legislation Comparée, 1936, p. 257 at pp. 280, 312.

international person.¹⁵⁾ This usually happens when a new government comes to power by unconstitutional means in an established state and other states refuse to recognize the new government.¹⁶⁾

Where a state is recognized this does imply that it has an effective government¹⁷⁾ because this, as we have seen, is one of the essential characteristics of statehood.¹⁸⁾ This effective government need not however be a recognized government and thus the effective government will have no international capacity to act on behalf of the recognized state which it governs.

Where the circumstances warrant, it is, of course, possible to imply recognition of government from recognition of state. There is probably even a presumption in favour of such an implication,¹⁹⁾ but the point we are making is that the implication is not an inevitable one.

As/...

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- 15) Thus in 1920 Albania was a recognized state without a recognized government. Lauterpacht, p. 29; Chen, p. 103. In the Russian Roubles (Attempted Counterfeiting) case (1919) Ann. Dig. 1919-1922, Case No. 15, p. 31, the Supreme Court of Japan decided that, although without a recognized government, Russia did not cease to be a state. The proposition that non-recognition of government necessarily entails non-recognition of state is therefore incorrect. See note (11) supra.
- 16) Sorensen, p. 271; Akehurst, p. 77; Starke, p. 150; Briggs, p. 121; Schwarzenberger, Manual, p. 75; Oppenheim, I, pp. 130-131; Lehigh Valley Railroad Co. v. The State of Russia (1927) 21F (2d) 396.
- 17) Kelsen, note 3) supra, p. 615 gives the reasons for this. A state must have a government and a community which has no government is no state. Recognition of a community as a state implies that the recognized community has a government.
- 18) Loss of this characteristic would bring the statehood of the entity into question. Gelston v. Hoyt (1818) 3 Wheat 246 at 324; The Conserva (1889) 38 Fed. 431; J.B. Moore, Digest of International Law, Washington, 1906, I, p. 201.
- 19) "When a new state is recognized, it may generally be presumed that the recognition also applies to the government". Chen, p. 103.

As a result of the Unilateral Declaration of Independence by Rhodesia, the following primary legal questions arise for solution.

1. Is Rhodesia a state? ²⁰⁾
2. If so, is it an international person?²¹⁾
3. Has Rhodesia a government?
4. If so, has that government any international status?

It is the purpose of the writer to examine the latter two questions and their implications in this chapter. For it is conceivable that the State of Rhodesia might be an international person with an effective government and for that effective government to be completely lacking in international status.

SECTION II

EXISTENCE AND NATURE OF GOVERNMENT.

The criterion for the existence of a government is its effectiveness.¹⁾

The ability to fulfil obligations may be a relevant factor in determining effectiveness²⁾ and the expression of popular approval of a regime may also be evidence of its effectiveness.³⁾ The means by which such popular approval/...

20) Examined supra, pp. 147 et seqq.

21) Examined supra, pp. 377-382.

- 1) There must be effective power with a reasonable prospect of permanency (Lauterpacht, p. 98) an expectation of durability (B.R.Bot, Non Recognition and Treaty Relations, Leiden, 1968, p.21) factual control of the apparatus of Government, ability to exercise activities without substantial resistance (H.R. Hahlo, "The Privy Council and the 'Gentle Revolution'" (86) S.A.L.J., 1969, p. 419 at p. 432) expectation that control will continue for a considerable length of time - but an extremely radical revolution may be less likely to persist than a more moderate one (Quincy Wright, "The Chinese Recognition Problem" (49) A.J.I.L., 1955, p. 320 at p. 325). On the criterion of effectiveness see supra, pp. 154-157, 297-301.
- 2) Lauterpacht, p. 112. Willingness to fulfil obligations should be distinguished from ability to do so.
- 3) Ibid. pp. 115, 117, 124; Quincy Wright, note (1) supra, p. 325. This factor was in fact elevated at certain times into a doctrine of subsequent legitimation applying in the field of recognition of governments. See Lauterpacht, p. 115. The doctrine is discussed infra, pp. 419-422 in relation to recognition duties.

approval might be expressed could be a national assembly vote or a popular vote.⁴⁾ It is, however, apparent that popular approval is merely one evidential factor to be taken into consideration in determining effectiveness. It is in no way essential to the existence of effectiveness and its presence or absence is in no way conclusive.⁵⁾

In the course of discussing whether Rhodesia could be regarded as an independent state, it was necessary to enquire whether the Government thereof was effective. For reasons given this question was answered in the affirmative⁶⁾ and the arguments need not be repeated here.

It is now necessary to comment briefly on the legality of this effective Government. From an international law point of view, the position is simple and has been covered already. As pointed out international law does not prohibit revolution aimed at secession or the overthrow of an existing order.⁷⁾ From an international law point of view the legality of a revolution is a matter of indifference. In principle there is no difference between a revolutionary and a constitutional change of government.⁸⁾ As Lauterpacht points out:

"So long as international law does not stigmatize revolutions as being in the nature of crimes against the law of nations, it cannot condemn the means by which revolutions are achieved." 9)

Since/...

4) Lauterpacht, p. 123.

5) Bot, note 1) supra, pp. 21-22; Quincy Wright, note 1) supra, p. 325; Hahlo note, 1) supra, p. 432. Sir John Fisher Williams, "La doctrine de le reconnaissance en droit international et ses developpements récents" (44) H.R. 1933, II, p. 203 at p. 204 sums it up by saying that a government may be freely chosen or imposed. See too Akehurst, p. 84.

6) Supra, pp. 154-157.

7) Supra, pp. 137-138.

8) Grotius, II, Ch. IX, §8; Lauterpacht, p. 92; Fisher Williams, note 5) supra, p. 297.

9) P. 107.

Since the Unilateral Declaration of Independence is not illegal in international law, so too the creatures of that declaration, viz. the State and Government of Rhodesia, are not illegal.

From the point of view of the constitutional law applicable on 11th November, 1965, the Unilateral Declaration was, as pointed out, illegal,¹⁰⁾ and as a result the Government of Rhodesia must be stigmatized as being constitutionally illegal at the moment of its inception. This has important consequences in relation to the question of international recognition as will shortly appear.

The net position therefore is that Rhodesia possesses an effective government which is unconstitutional in origin. Whether that effective government has any international law status will receive attention in the remainder of this chapter.

SECTION III

RECOGNITION OF GOVERNMENT AS A PREREQUISITE FOR THE ENJOYMENT OF INTERNATIONAL LAW STATUS.

If a government comes to power in a normal and constitutional manner, no recognition by other states is necessary to give it status in international law.¹⁾

When/...

10) Supra, pp. 135-137.

1) Akehurst, p. 77; Briggs, p. 121; Oppenheim, I, p. 149; O'Connell, I, p. 137; Schwarzenberger, Manual, p. 75; Sorensen, p. 271; Starke, p. 150; In re Amand [1941] 2 K.B. 239; Lorentzen v. Lydden [1942] 2 K.B. 202; Anderson v. Transardine Handelsmaat-Shappi 289 N.Y.7; Ann.Dig. 1941-1942, Case No. 4, p. 10; Re de Bruijn [1942] Dominion Law Reports, p. 249; Haak and Others v. Minister of External Affairs, 1942 A.D. 318.

When, however, as in the case of Rhodesia, a government comes to power in an unconstitutional manner, the matter is more uncertain. It is usually conceded that recognition is necessary here²⁾ but the effect of such recognition is disputed. We have here again to contend with the Constitutive and Declaratory theories of recognition. According to the Constitutive theory, it is only by virtue of recognition that a government acquires the international law status to represent the state.³⁾ Recognition when granted is the starting point of governmental capacity.⁴⁾ According to the Declaratory theory, recognition is inessential. If the government merely has the characteristic of effectiveness - an objective fact - this in itself is sufficient to bestow international law status on it.⁵⁾ We have seen before how Kelsen postulated a distinction between political and legal recognition.⁶⁾ We submitted that in his approach to the recognition of states, Kelsen was in fact a constitutivist.⁷⁾ It is interesting to/...

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- 2) See A. Raestad, "La reconnaissance Internationale des nouveaux états et des nouveaux gouvernements" (17) Revue de Droit International et de Legislation Comparee, 1936, p. 257 at pp. 311-312. The same writer (at pp. 300-302) specifies the various kinds of unconstitutional changes which can occur and which require recognition. These are: (i) change in the form of government (this does not necessarily involve a change of personnel in the head of state or government); (ii) change in the person of the head of state without change of the form of government; (iii) change of the personnel of government without change of the form of government. U.D.I. would appear to be a change of the first species.
- 3) Akehurst, p. 78; Sorensen, p. 272; Raestad, note (2) supra, p. 272.
- 4) Lauterpacht, p. 370. A.J.G.M. Sanders, "Die Erkennung van State en Regerings" (33) T.H.R. -H.R., 1970, p. 259 at pp.260, 265. The latter applies the Constitutive theory hypothetically to South African recognition of the Government of Lesotho after the January, 1970 coup (p.265).
- 5) Sir John Fisher Williams, "La doctrine de la reconnaissance en droit international et ses developpements récents" (44) H.R., 1933, II, p. 203 at p. 243; Chen, p. 4; R. Erich, "La Naissance et la Reconnaissance des Etats" H.R., 1926, III p. 431 at pp. 459-460; Akehurst, pp. 78-79; Sorensen, pp. 271-272; Resolutions of the Institute de Droit International concerning the Recognition of New States and New Governments (text at (30) A.J.I.L., 1936, supp. pp. 185-187), Article 10; Sanders, note (4) supra, p. 265. The latter also applies the Declaratory theory to South African recognition of the Government of Lesotho in 1970 (pp. 265, 267).
- 6) Supra, pp. 269-270.
- 7) Supra, p. 270.

to note now that Kelsen postulates the same distinction in relation to recognition of governments but here he appears to be in the declaratory camp.⁸⁾ Kelsen argues that when a state admits that another community is a state in the international law sense, it cannot declare that this state has no government. Therefore, it may never refuse recognition in such a case. Hence recognition or non-recognition here can only have a political character. The unrecognized government is competent to fulfil the duties and pursue the rights of the state (which is of course recognized). It is submitted, however, that recognition of the state amounts only to an acknowledgement that it has an effective government - and not necessarily a recognized government which has the capacity to commit the state and act on its behalf.⁹⁾

The merits and demerits of the respective theories were fully discussed in the last chapter¹⁰⁾ and need not be repeated here. The writer expressed a preference for the Constitutive theory¹¹⁾ and applied the results to determine the international personality of Rhodesia.¹²⁾ For the same reasons the Constitutive theory is preferred here. Thus any international status which the Government of Rhodesia may have will flow from recognition. Just as in the case of the recognition of states, recognition of governments may be full de iure recognition or limited
recognition/...

8) H. Kelsen, "Recognition in International Law - Theoretical Observations" (35) A.J.I.L., 1941, p. 605 at pp. 614, 615, 616.

9) Supra, pp.405-406. A government may exist without being recognized. G.N.Barrie, "Rhodesian U.D.I. - an unruly horse" (1) C.I.L.S.A., 1968, p. 110 at p. 114.

10) Supra, pp. 177-279.

11) Supra, p 281.

12) Supra, pp. 377-382.

recognition such as de facto recognition.¹³⁾ It may also be retrospective¹⁴⁾ and this, it is submitted, depends again on intention.¹⁵⁾

SECTION IV

THE DUTY TO RECOGNIZE AND THE DUTY NOT TO RECOGNIZE.

It has been asserted by Lauterpacht that there is a duty to recognize the effective government of a state which enjoys the habitual obedience of the population and has a reasonable prospect of permanency.¹⁾

Lauterpacht admits that this doctrine is not generally accepted in that there is freedom to refuse recognition to a government of revolutionary origin.²⁾ This is of course tantamount to a general denial of the doctrine. There are, however, certain other writers who, while opposing any duty to recognize a state, affirm the existence of an obligation to recognize a government.³⁾ The following reasons are given in support of the existence of the duty.

(1)/...

- 13) Chen, p. 8, Resolutions of the Institute de Droit International, note 5) supra, Article 11. This seems to give declaratists difficulties in isolating the difference between a government recognized de iure and one recognized de facto. For example, Chen, p. 8 says the former is a general government, the latter is a partial government. For other ideas on this see Chen, pp. 290-300. For the constitivist the distinction is easily explicable. A government recognized de iure has full capacity to commit the state and act on behalf of it. One recognized de facto has certain limitations placed on its capacity here.
- 14) Resolutions of the Institute de Droit International, note 5) supra, Article 15.
- 15) Supra, p. 280.
- 1) Pp. 88, 141, 158, 170. He also requires the government to enjoy the willing obedience of the bulk of the population though he admits that this is a controversial proposition. Ibid., p. 88.
- 2) Ibid.
- 3) D. Anzilotti, Cours de Droit International (translated Gidel), Paris, 1929, I, p. 179. Lauterpacht also relies on Cavaglieri and Fauchille as supporting such a theory. Kelsen, "Recognition in International Law - Theoretical Observations" (35) A.J.I.L., 1941, p. 605 at pp. 615, 616 might also be quoted in support of such a view but in the present writer's opinion, it is preferable to interpret Kelsen as saying that the effective government of a recognized state simply does not need recognition. Supra, pp. 410-411.

- (1) The state should have a right to be represented by a government chosen or tolerated by the people.⁴⁾ This argument is in fact substantially that contained in the Estrada doctrine. Under this doctrine, it is argued that once having recognized a state, foreign nations must accept whatever régime is in power. Moreover, recognition implies a judgment on the internal affairs of the state and is an insulting practice.⁵⁾

We may observe here that it is one thing to argue that there should be a duty to recognize, it is another thing to say that such a duty exists in international law.

- (2) To refuse to recognize a government may be to deprive a state of many of the usual prerogatives of international personality and of its status as a subject of international law to a substantial extent.⁶⁾ The argument basically is that while in theory the personality of a state is not affected by non-recognition of its government, in practice it is because there may be no entity to claim such rights.⁷⁾ Thus, for instance, treaties remain in force but they may be inoperative.⁸⁾

The above argument is one which is directed to the unsatisfactory results which may flow from non-recognition of the effective government of a recognized state. However one cannot assume a duty to recognize in an attempt to obviate the unpalatable result. O'Connell says that:

"...although/...

4) Lauterpacht, p. 90.

5) See O'Connell, I, pp. 134-135.

6) Lauterpacht, pp. 90, 142.

7) O'Connell, I, p. 135.

8) Aidov v. Bode, Clunet, Vol. XLVIII (1921), p. 228 quoted by Lauterpacht, p. 80.

"... although there is some logical compulsion in the argument that a state incapacitated for want of recognition of its government has been treated unjustly, recognition remains fundamentally a matter of political judgement." 9)

We previously discussed the duty to recognize with reference to states¹⁰⁾ and we saw that in this context a duty to recognize involved conceptual and juristic problems of some magnitude.¹¹⁾ In the case of recognition of governments, these particular problems do not exist. There is no juristic difficulty involved in postulating a duty to recognize the effective government of a recognized state, for the correlative right can here be vested in the state, which can have a right to the recognition of its effective government. Thus the case for the existence of a duty to recognize a government is relatively stronger than the case for a duty to recognize a state. It must however still be examined to see whether it is an established institution of international law.

When the practice of states is examined, it would appear that it does not support a duty to recognize here either and that the grant of recognition is completely discretionary.¹²⁾ In fact Lauterpacht admits that state practice does not support a duty to recognize. He says:

"It is true that there has been no uniformity in the matter of the tests of recognition acted upon by states." 13)

Again/...

9) I, p. 135.

10) Supra, pp. 285-295.

11) Supra, pp. 293-295.

12) Starke, pp. 145-146; O'Connell, I, pp. 135-136; Chen, pp. 129, 130; Briggs, pp. 122-123; Akehurst, p. 79; Sorensen, p. 277; Brierly, pp. 140, 146. See too the discussion of the practice of states supra, pp. 290-293. The arguments preferred are applicable mutatis mutandis here and need not be repeated.

13) P. 159.

Again he says:

"Diplomatic practice shows instances - far less numerous than is generally assumed - of recognition being used for the purpose of securing advantages to the recognizing state" 14)

We may conclude that there is no duty to recognize a government. Other states therefore have no duty to recognize the Government of Rhodesia. In addition even if international law did admit of such a duty it could only apply in the case of the effective government of a recognized state. On this basis too, such a duty would be excluded in the Rhodesian context.

We must now consider whether there is a duty not to recognize a government. In general there is no such duty. The grant of recognition here is, in principle, discretionary.¹⁵⁾ But there are a number of possible exceptions to the principle where there may be a duty not to recognize and these must now be examined.

- (1) There may be a duty not to recognize a government prematurely.

We have seen that a duty of this nature exists in relation to the recognition of states.¹⁶⁾ Unless a government has effective control and a reasonable expectation that the control will continue, recognition of it will be premature and an international tort.¹⁷⁾ In
_____ addition/...

- 14) P. 161. At pp. 162-164 he gives various examples of this but he adds that these do not typify the normal conduct of states (p.165) and that "states do not claim to be entitled to act in this matter by exclusive reference to considerations of national interest and convenience." (p.170).
- 15) See authorities quoted in footnote 12 supra.
- 16) Supra, pp. 295 et seqq.
- 17) Lauterpacht, p. 98; Quincy Wright, "The Chinese Recognition Problem" (49) A.J.I.L., 1955, p. 320 at p. 325; Akehurst, p. 80; Lauterpacht pp. 8, 10-11; Sorensen, pp. 277-278; O'Connell, I, pp.136-137; Government of the Republic of Spain v. The Arantzazu Mendi [1939] A.C. 256; Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No.2)[1966] 2 A.E.R. 536 at 579.

addition as long as the revolution is not fully successful, as long as the previously recognized government, however adversely affected by the revolution, remains within the territory and asserts its authority, recognition of the rebels as a government is premature.¹⁸⁾

Applying these principles to Rhodesia it would appear that recognition of the Government of Rhodesia would no longer be premature and so there is no duty not to recognize under this particular head.

This is based on the fact that the Government of Rhodesia is effective¹⁹⁾ and that the contesting government, viz. that of the United Kingdom, is not within the territory and does not assert its authority in any part of the territory.²⁰⁾

- (2) There may be a duty not to recognize a government which has come to power in a revolutionary manner.

This is in effect the assertion of a doctrine of legitimacy. This doctrine maintains that a government must come to power in compliance with the established legal order of the country. Legality in municipal law determines the legality of international law recognition.²¹⁾ We previously discussed the doctrine of legitimacy in relation to the existence of statehood where we submitted that it did not exist.²²⁾ We saw that there was some ambivalent evidence

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- 18) Lauterpacht, p. 93. The same writer adds (at p. 94) that one proposition is beyond controversy and that is that the lawful government is entitled to recognition de iure as long as a civil war continues, regardless of its prospects in that war. Thus recognition of the rebels as a government at this time is premature. The point is not of relevance in the Rhodesian context because there is no civil war (at least between the Rhodesians and the United Kingdom).
- 19) Supra, pp. 154-157, 297-301.
- 20) The Rhodesian case is in fact unusual in that the generally recognized constitutional authority is not present in the territory. See Rosalyn Higgins, "International Law, Rhodesia and the United Nations" (23) The World Today, 1967, p. 94 at p. 95.
- 21) Chen, p. 105.
- 22) Supra, pp. 164-168

in favour of such a doctrine in early 17th century state practice and in the practice of the Holy Alliance and that it does not enjoy support in case law and writings both classical and modern.²³⁾

The doctrine was somewhat revived in 20th century in part of the American continent under the name of constitutionalism.²⁴⁾ In its revived form it applied to the recognition of governments only.

Thus in 1907 a Treaty was concluded between certain central American Republics who undertook not to recognize regimes which came to power in an unconstitutional manner. This was the Tobar doctrine and to it there was one exception provided by the Treaty which "permitted the original sin to be redeemed by a constitutional reorganization of the people."²⁵⁾ This meant that if the rebels were approved in a referendum, recognition could be afforded. The United States, though not a party to this treaty, approved of it and applied it in what is called the Wilsonian policy.²⁶⁾ The Tobar doctrine differs from the Wilsonian policy in one respect. The application of the former was a matter of legal obligation for the parties to the 1907 Treaty. There was a duty not to recognize. The application of the latter was not a matter of obligation but a matter of discretionary policy for the United States which had no duty not to recognize.

The doctrine of constitutionalism was brought a stage further in a 1923 Treaty between the Central American Republics. This treaty provided that even if the people constitutionally recognized (i.e. approved the rebels in a referendum) recognition should not be given

if/...

23) Supra, pp. 164-168.

24) Chen, p. 107.

25) Chen, pp. 108, 110.

26) Chen, p. 108.

if their choice of head of state should fall on persons connected with the coup d'état.²⁷⁾ Again, the United States, though not a party to the treaty approved of it and applied it.²⁸⁾ The United States adopted the policy enshrined in the 1907 and 1923 treaties and applied it to the Dominican Republic, 1913-1916, Ecuador in 1913, Costa Rica and Cuba in 1917, Honduras in 1924, Nicaragua in 1912 and 1925, Guatemala in 1930 and El Salvador in 1931. It even applied the policy to Bolivia, a non-party to the treaty, in 1920.²⁹⁾ Shortly afterwards the Hoover administration abandoned the doctrine except in Central America and finally Stimson reverted to the declaratory principle originally announced by Jefferson.³⁰⁾ The effect of this was simply to shift the United States attitude to recognition from legitimacy or constitutionalism back to effectiveness.

We are now in a position to comment on the doctrine of legitimacy as a possible restriction on the recognition of governments.

(a) In so far as the doctrine of legitimacy has been enshrined in the 1907 and 1923 treaties, it has a limited application. It only refers to recognition of governments and it is naturally only binding inter partes. It does not therefore constitute evidence of substance in favour of a general rule of international law.

(b) In so far as the United States has applied the doctrine in its Wilsonian policy, this is the practice of only one state.

Further/...

27) Ibid., pp. 108, 109; Lauterpacht, p. 103.

28) Chen, p. 109.

29) Lauterpacht, pp. 129-130; O'Connell, I, p. 138.

30) Chen, p. 110.

Further the practice is not consistent. The history of United States recognition policies shows that the doctrine of legitimacy constituted a statement of policy that might or might not be followed as circumstances dictated.³¹⁾ Finally the practice has in any event ceased. As such, the practice in question is not evidence of substance in favour of a general rule.

We may therefore conclude that there is no doctrine of legitimacy which prohibits the recognition of governments.³²⁾ There is thus no duty to withhold recognition from the Government of Rhodesia on the ground that it is unconstitutional in origin.

- (3) The doctrine of subsequent legitimation might possibly impose a duty not to recognize.

This doctrine would require that the effectiveness of a revolutionary government should be evidenced by a subsequent expression of popular approval.³³⁾ Thus popular consent or approval might be exercised through a national assembly vote or by means of a popular vote for the regime.³⁴⁾ The regime should not be recognized until such legitimation has taken place. British practice followed this doctrine in relation to the successive French and Spanish revolutions of 19th century, in relation to Portugal in 1910, China in 1912/...

31) L.C.Green, "Self-Determination and Settlement of the Arab-Israeli conflict", Proceedings A.S.I.L., 1971, p. 40 at p. 42.

32) See O'Connell, I, p. 137; Chen, p. 111. The latter and Sorensen, p. 271 regards legitimation as amounting to an intervention in domestic affairs. This, it is submitted, goes too far. Since the withholding of recognition is discretionary, a state may, as a matter of policy, give effect to the doctrine of legitimacy. But it has no obligation to do so. For further trenchant criticism of the doctrine of legitimacy, see Chen, pp. 111-116. The doctrine is also inconsistent with the liberty to revolt in international law. Supra, pp. 137-138.

33) Lauterpacht, pp. 115-117.

34) Ibid., p. 123.

1912, Greece and Albania in 1924.³⁵⁾ United States practice also followed the doctrine in relation to France in 1870, Nicaragua in 1855, Colombia in 1867, Mexico in 1877, Ecuador in 1895, Brazil and Bolivia in 1899, Honduras in 1907, Portugal in 1911, Haiti in 1914 and the Provisional Russian Government in 1917.³⁶⁾ France has also insisted at times on it.³⁷⁾

After the First World War the doctrine of subsequent legitimation disappears. There is a shift in United States practice to "apparent acquiescence" by the people³⁸⁾ or de facto control of the people³⁹⁾ in the place of "approval" by an assembly or plebiscite.⁴⁰⁾ In essence the doctrine of "apparent acquiescence" and that of "de facto control" are the same. They are also no more than a return to the one traditional requirement for the recognition of a government, viz. effectiveness. The reason for the shift to effectiveness was the rise of authoritarian regimes in Europe.⁴¹⁾ In the later history of the practice relating to the doctrine of subsequent legitimation, we can in fact discern a movement from "positive approval" to "passive acquiescence" and "no active resistance", and eventually to "effectiveness".⁴²⁾ At this stage the expression
of/...

35) Ibid., pp. 117-123; O'Connell, I, p. 139.

36) Lauterpacht, pp. 124-127.

37) O'Connell, I, p. 139.

38) The United States applied the doctrine of "acquiescence" or "no active resistance" to Chile in 1932 and Ecuador in 1935. See Lauterpacht, p. 133.

39) The United States applied the principle of de facto control in 1930 to Argentina, Bolivia and Peru. Britain also followed the principle. Lauterpacht, pp. 131-132, 133.

40) Lauterpacht, pp. 130, 131.

41) Thus Britain applies the de facto control principle to the Soviet Union in 1921, the Franco regime in Spain in 1939 and also to Chile in 1924 and Ecuador in 1925. Lauterpacht, pp. 133-136.

42) Ibid., p.133.

of popular approval becomes merely evidence in favour of the proposition that a regime is effective.⁴³⁾ It is no longer treated as a prerequisite for recognition.⁴⁴⁾ Lauterpacht says in relation to the doctrine:

"That principle has behind it a substantial body of practice. It is the most persistent and conspicuous feature of the British and American practice of recognition. There is no compelling reason to assume that its abandonment after the First World War was more than a temporary adaptation to a transient period of political retrogression. Its re-emergence ... must be regarded as a rational development..."⁴⁵⁾

We may now make the following observations on the doctrine of subsequent legitimation.

- (a) The doctrine has only been observed by the practice of a few states, though it must be conceded that the states in question are influential members of the international community. The practice of Italy, Spain and Switzerland in relation to the 1871 French Government of National Defence is at variance with the doctrine.⁴⁶⁾
- (b) Even the practice of those states which may be said to furnish support for the doctrine, is not always consistent. Thus the United States did not apply the doctrine in the case of China in 1913.⁴⁷⁾

(c)/...

43) Lauterpacht, pp. 115, 117.

44) Quincy Wright, note 17 supra, p. 325.

45) Lauterpacht, p. 139. The principle has certainly not yet re-emerged as a general practice, but there are isolated instances of its application, e.g. the United States applied it to China in 1950. O'Connell, I., p. 139. The requirement of "good government" previously discussed may also embody a nascent principle of subsequent legitimation in the process of formation. Supra, pp. 157-163.

46) Lauterpacht, p. 119.

47) Ibid., p. 127.

- (c) The practices which can be said to support the doctrine ceased some fifty years ago.⁴⁸⁾

From the above we may conclude that there is not sufficient evidence to support the existence of the doctrine in general international law.⁴⁹⁾ Even if the doctrine had existed as part of general international law in the past, it is submitted that it was abrogated by disuse and conflicting practices in the last half century. Thus there is no duty not to recognize the Government of Rhodesia until its effectiveness is evidenced by an expression of popular approval.⁵⁰⁾ There is of course nothing to prevent other states from withholding recognition until the Government of Rhodesia has received popular approval since the grant of recognition, even when permissible, is still discretionary. It must be emphasized of course that states would withhold recognition here as a matter of policy and not of obligation.

- (4) Unwillingness to observe international law on the part of the government in question might possibly impose a duty not to recognize it.

The United States has acted upon the proposition that the grant of recognition should be dependent on a willingness to obey international law.⁵¹⁾ The proposition is of doubtful juridical soundness,
of/...

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- 48) We have seen however that there have been isolated instances since. See note 45) supra.
- 49) See further Lauterpacht, pp. 136-139 for a description of the deficiency of the doctrine as a practical proposition.
- 50) Quaere. If the doctrine were part of international law would a "yes" finding by the Pearce Commission (Cmd. 4964) have satisfied the requirement making it possible to recognize the government of Rhodesia? Presumably the answer would be "no" until such time as the Douglas-Home-Smith proposals for a settlement (Cmd. R.R. 46-1971) had actually been implemented.
- 51) Lauterpacht, p. 111; O'Connell, I, p. 136.

of controversial practical value and in any event it only constitutes the practice of some states, notably the United States.⁵²⁾ In the circumstances we can conclude that this doctrine is not part of international law and thus does not impose a duty not to recognize.⁵³⁾ Willingness to fulfil obligations must be distinguished from ability to do so. The latter is a relevant factor in determining the effectiveness of the government.⁵⁴⁾

- (5) A Treaty can always impose a duty not to recognize on the parties to it.

We saw previously that under the Tobar doctrine, which was incorporated in Central American Treaties of 1907 and 1923, the parties to these treaties were obliged not to recognize governments which came to power in an unconstitutional manner.⁵⁵⁾

In addition it is competent for the Security Council of the United Nations to impose a duty not to recognize a government when it acts under Chapter VII of the Charter. It appears from previous discussion that not only has a duty not to recognize the State of Rhodesia in Republican form been imposed but in addition a duty to refrain from recognizing the Government of Rhodesia.⁵⁶⁾ For reasons given before, it is also submitted that the duty not to recognize does not have retrospective effect here and so cannot affect any recognition which might have been accorded to the Government of Rhodesia before the imposition of the obligation
on/...

52) Lauterpacht, p. 113.

53) Akehurst, p. 83.

54) Lauterpacht, p. 112.

55) Supra, pp. 301-302.

56) Supra, pp. 308 et seqq.

on 18th March, 1970.⁵⁷⁾ Member States of the United Nations therefore have a duty not to recognize the present government of Rhodesia.⁵⁸⁾

A member state of the United Nations which accorded recognition to the Government of Rhodesia would commit a breach of obligation for which it would incur international responsibility.⁵⁹⁾ It is submitted, however, that the act of recognition, though unlawful, would be valid and would thus create international capacity in the Government of Rhodesia vis à vis the recognizer.⁶⁰⁾

SECTION V.

THE RECOGNITION OF THE GOVERNMENT OF RHODESIA.

We previously submitted that non-recognition of a state necessarily involved non-recognition of government.¹⁾ It is inconceivable that a government should be recognized, and thus have the capacity to commit a state in international law, if the state itself is unrecognized, incapable of having rights and duties in the system and thus unable to be committed in the system. We may therefore conclude that those states

which/...

57) Supra, p. 317(a).

58) S. Res. 277 (1970) paragraphs 2, 3. Naturally non-member states have no obligations to respect the resolution in question.

59) Oppenheim, International Law, 8th ed., London 1955, I, p. 337, 353; Clyde Eagleton, "Measure of Damages in International Law" (29) Yale Law Journal, 1929-1930, p.52. The question of international responsibility was previously discussed with reference to the wrongful recognition of a state. The same principles apply mutatis mutandis here. See supra, pp. 323-328.

60) It was previously submitted that the unlawful recognition of a state could nevertheless be valid and create international personality in the state vis à vis the recognizer. The same arguments are applicable mutatis mutandis here. See supra, pp.328-333.

1) Supra, pp. 405-406.

which refuse to recognize the State of Rhodesia also refuse to accord recognition to the Government of Rhodesia.²⁾

On the other hand, if the state has been recognized, the government can also be recognized though this does not automatically follow.³⁾ Since the State of Rhodesia has received a limited degree of recognition in three spheres,⁴⁾ it is possible that the Government of Rhodesia might also have received a limited degree of recognition and thus the capacity to act on behalf of the state within these particular spheres. It is therefore necessary to examine the three spheres in which Rhodesian personality exists.

(1) Limited personality available against South Africa.

It appears from our discussion in the previous chapter that South Africa does not recognize British claims made after 11th November, 1965.⁵⁾ These include the vesting of all legislative and governmental control over Rhodesia in the United Kingdom.⁶⁾ It follows from/...

2) See discussion of recognition of the State of Rhodesia, supra, pp. 338-365. In addition, however, many states have, in so many words, also declared their non-recognition of the Government of Rhodesia. These include Australia, S/9853, Annex II, p. 2; Austria, ibid., p. 3; Bulgaria, ibid., p. 7; Canada, ibid., p. 9; Cyprus, ibid., p. 11; Czechoslovakia, The Times, 16th November, 1965, p. 7(e); Dahomey, S/9853, Annex II, p. 13; Denmark, The Times, 12th November, 1965, p. 8(e); Iraq, S/9853, Annex II, p. 24; Israel, The Times, 13th November, 1965, p. 8(b); Japan, ibid., 16th November, 1965, p. 7(e); Kenya, ibid., 12th November, 1965, p. 8(f); Libya, S/9853, Annex II, p. 30; Luxembourg, ibid., p. 31; Mauritius, ibid., p. 35; Netherlands, ibid., p. 37; New Zealand, The Times, 12th November, 1965, p. 8(c); Norway, ibid., p. 8(f); Pakistan, S/9853, Add. I, Annex I, p. 2; Uganda, S/9853, Annex II, p. 53; Sweden, The Times, 12th November, 1965, p. 8(e); Switzerland, ibid., 18th December, 1965, p. 5(d); the Soviet Union, S/9853, Annex II, p. 55; The Times, 16th November, 1965, p. 7(e); the United Kingdom, Madzimbamuto v. Lardner-Burke and Another N.O., 1968 (2) S.A. 284 (R., A.D.) at 285-286.

3) Supra, pp. 405-406.

4) Supra, pp. 378-382.

5) Supra, pp. 368-375.

6) Southern Rhodesia Act, 1965, s. 1,2; Southern Rhodesia (Constitution) Order, (1965 S.1. 1952) s. 2, 3, 4, 6.

from this that South Africa does not recognize a greater degree of governmental authority in the United Kingdom than existed prior to 11th November, 1965. The claim of the government of the United Kingdom to be the Government of Rhodesia in the post-U.D.I. era is not recognized by South Africa. The position therefore relating to recognition of the Government of Rhodesia would appear to be analogous to that relating to the recognition of the State of Rhodesia by South Africa. South Africa recognizes the status quo ante 11th. November, 1965 i.e. it continues to recognize the Government of Rhodesia as the government of a dependency which has been conceded a limited international personality.

(2) Limited personality available against member states of the Organization of American States.

As we have seen, Rhodesia has certain basic rights against and owes certain basic duties to these states.⁷⁾ It is submitted that, unlike in the case of the State of Rhodesia, the Charter of the Organization gives no status to governments.⁸⁾ The relevant articles 6-10 deal with the rights of states and not with the status of governments. The Government of Rhodesia therefore enjoys no status in its relationship with members of the Organization, unless these have otherwise recognized it. It is clear however that no member of the Organization recognizes the Government of Rhodesia⁹⁾ (or the State of Rhodesia apart from the limited recognition/...

7) Supra, pp.378-379.

8) No degree of limited recognition of governments can be implied from it. See supra, pp.378-379 for the implication of limited personality from it.

9) See for example the position of the United States. Shyu Jeng Shyong v. Esperdy, 294 F. Supp. 355. U.S. Dist. Ct., S.D.N.Y.; (63) A.J.I.L., 1969, pp. 828-829; Ngai Chi Lam v. Esperdy, 411 F.2d 310; U.S. Ct. of Appeals, 2d CIR; (64) A.J.I.L., 1970, pp. 423-424. See too S/9853, Annex II, p. 56. For Ecuador see ibid., p. 15.

recognition implied from the Charter). Thus the relevant governmental entity entitled to claim basic Rhodesian rights against member states of the Organization would be the Government of the United Kingdom which is recognized as the governmental authority for the territory in question.¹⁰⁾

(3) Limited personality as a member state of certain international organizations.

We have seen before how Southern Rhodesia continues to be a member of certain international organizations.¹¹⁾ In these instances if the organization accepts the credentials of the Rhodesian Government this would imply recognition of the government for the purpose of representing the member state in the organization. Where the credentials of the Rhodesian Government are not accepted there cannot be any question of recognition of it for the purpose of the organization.

Thus the Administrative Council of I.T.U. regards the authority of the former Rhodesian delegation as having lapsed, and refuses to invite the Rhodesian regime to participate in the work of the Union or to be represented at conferences or meetings held by the organization.¹²⁾

The International Bureau of U.P.U. accepted a British directive to the effect that Her Majesty's Government remained responsible for the international relations, including postal relations, of

Southern/...

10) Shyu and Ngai cases, note 9) supra.

11) Supra, pp. 380-382.

12) R. No. 599. See S/9853, Annex III, pp. 7-8.

Southern Rhodesia. It thereupon refused to have relations with the Rhodesian Postal Administration. No representatives of Southern Rhodesia were to be present at meetings of U.P.U.¹³⁾ Thus it is clear, that for the purposes of Southern Rhodesia's membership of U.P.U., the United Kingdom is the recognized governmental authority.¹⁴⁾

In W.H.O. no representatives of Southern Rhodesia have participated in meetings since U.D.I. and the organization addresses correspondence relating to Rhodesia to the United Kingdom Department of Health and Social Security or to an addressee in Rhodesia designated by the United Kingdom Government.¹⁵⁾ The position would thus appear to be the same as in U.P.U.

No representatives of Rhodesia attended the G.A.T.T. since 1965 nor have they been invited to do so.¹⁶⁾

F.A.O., I.B.R.D. and W.M.O. have not stated their precise position on this question.¹⁷⁾ The World Intellectual Property Organization (W.I.P.O.) does not appear to be able to express an attitude on the question but would appear to leave the matter to its member states/...

13) Ibid., pp. 12-13.

14) As we have seen Southern Rhodesia was a member of the British Overseas Group in U.P.U. and this Group as a whole was one member of the organization. See supra, pp. 86, 105-106. On 27th March, 1968, the Rhodesian Minister of Foreign Affairs formulated a declaration with a view to making Southern Rhodesia a separate member in its own right. The U.P.U. did not accept this. It considered Rhodesia to be ineligible for such admission since it had not been recognized as a "sovereign country". S/9853, Annex III, p.12.

15) Ibid., pp. 14, 15, 17. See too Michael Akehurst, "State Responsibility for the Wrongful Acts of Rebels - An Aspect of the Southern Rhodesian Problem" (43) B.Y.I.L., 1968-1969, p.49 at p. 64.

16) Communication addressed to the writer from the Organization dated 21st October, 1971. See too S/9853, Annex III, p. 3.

17) S/9853, Annex III, pp. 2,4,19; S/9853/Add.1, Annex II, p.2. In the case of I.B.R.D. the question does not assume great importance as Southern Rhodesia was, in any event, included in United Kingdom membership of this organization. See supra, pp.86. 105-106. Chayes, II, p. 1391.

states individually.¹⁸⁾

On the other hand the present authorities in Rhodesia would appear to continue to be accepted in the International Red Locust Control just as they were before U.D.I.¹⁹⁾ To this extent, the Government of Rhodesia again enjoys an international capacity.

SECTION VI

CONCLUSIONS ON THE LEGAL STATUS OF THE RHODESIAN GOVERNMENT.

It is convenient to distinguish between the international law status of the Government and its municipal law status.

(1) International law status.

Whether a government enjoys any international law status depends upon whether it has been recognized or not.¹⁾ Even if it has been recognized, the degree of international status which it possesses still depends on the extent to which it has been recognized. As in the case of states, the recognition accorded here might be full recognition or limited recognition.²⁾

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- 18) Communication dated 5th October, 1971 addressed by the Organization to the writer.
- 19) Communication dated 11th October, 1971 addressed by the Organization to the writer.
- 1) Supra, p. 411.
- 2) A government may be recognized for instance de facto or de iure. Akehurst, p. 83; Sorensen, pp. 280-281; Starke, pp. 153-159; O'Connell, I, pp. 160-162; Briggs, pp. 125-126; Brownlie, pp. 87-88; Haile Selassie v. Cable and Wireless Ltd., (No.2) [1939] Ch. 182; The Government of the Republic of Spain v. The Arantzazu Mendi [1939] A.C. 256; Luther v. Sagor [1921] 3 K.B. 532; Peru Republic v. Drocufus Brothers & Co. (1888) 38 Ch. D. 348; R. v. Governor of Brixton Prison. Ex parte Schtraks [1937] 1 Q.B. 55; Bank of Ethiopia v. National Bank of Egypt and Liguori [1937] Ch. 513.

If a government is fully recognized, i.e. is recognized de iure, it possesses full representative capacity to commit the state in international law.³⁾ Thus treaties concluded by it will be binding on the state. Again recognition is relative here and confers capacity only in relation to the recognizer.⁴⁾

In addition a state will be responsible for the international torts attributable to its recognized government and the various component parts thereof at all levels.⁵⁾

Since the Government of Rhodesia has not been recognized de iure (or even de facto) by any other state,⁶⁾ it does not possess the international status just described. As a result of this the following additional disabilities attach to it.

(a) There is no international law obligation on non-recognizing states to give any effect to the acts of such a government or to its legal system.⁷⁾ This is clear from the practice of several/...

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- 3) Supra, pp.410-412. There is also authority for the proposition that the transactions of a government recognized de facto and subsequently overthrown continue to bind the state. Peru Republic case, note 2) supra. In fact, in this context, the distinction between de iure and de facto recognition is probably insubstantial. Brownlie, p.87; Oppenheim, I, p. 136.
- 4) This flows from the thesis that the Constitutive theory is preferable. Supra, p 411.
- 5) There is even authority to support the proposition that a state may be responsible for the acts of an unrecognized but effective government. Tinoco case (1923) R.I.A.A., I, 375. The United States has in addition pressed claims arising out of the activities of the unrecognized government of Communist China and the unrecognized Huerta Government of Mexico. British practice would also appear to admit such possibilities. Whiteman, I, pp. 649-653. Sed contra J.E.S. Fawcett, "Some Recent Applications of International Law by the United States" (35) B.Y.I.L., 1959, p. 244 at p. 250.
- 6) Supra, pp. 424-425.
- 7) Lauterpacht, p. 144; Starke, p. 160.

several states whose courts have refused to give effect to such acts and laws. These include the United States,⁸⁾ England,⁹⁾ Ireland,¹⁰⁾ France,¹¹⁾ Switzerland,¹²⁾ Hungary,¹³⁾ and Belgium.¹⁴⁾ It has even been suggested that since the Bolsheviki were not acting with the authority of a politically organized and unrecognized society, their acts could be likened to those of pirates or mutineers.¹⁵⁾

- (b) There is no obligation to permit the unrecognized government to sue in the courts of the non-recognizing state or to accord

it/...

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- 8) The Maret, 145 F. 2d. 431; Gelston v. Hoyt, 3 Wheat 246; Rose v. Himley (1808) 4 Cranch 241; The Nereide (1815) 9. Cranch 388; Petrogradsky M.K. Bank v. National City Bank (1930) Ann. Dig. 1929-1930, case no. 20; Latvian State Cargo and Passenger S S.Line v. Clark (1948) 80 F. Supp. 683.
- 9) Thompson v. Byree (12) B.Y.I.L., 1931 p.69; City of Berne v. The Bank of England (1804) 9 Ves-Jun. 347; The Annette; The Dora [1919] p. 105; Murray v. Parkes [1942] 2 K.B. 123; Taylor v. Barclay (1828) 2 Sim. 213; Jones v. Garcia del Rio (1823) Turn. & Russ 297; The Eastern Carrying Insurance Co. v. The National Benefit Life and Property Insurance Co. Ltd. (1919) 35 T.L.R. 292; Luther v. Sagor [1921] I.K.B. 456; Folliott v. Ogden (1789) 1 H.Bl. 123; Ogden v. Folliott (1790) 3 Term. Rep. 726.
- 10) The Ramava (1941) 75 I.L.T. 153.
- 11) Jellinek v. Levy (1940) Ann. Dig. 1939-1942 (Supp. Vol) case no. 12; X. v. Levit & Walter (1939) ibid., case no. 13; Chiger v. Chiger (1926) ibid., 1925-1926, case No. 18.
- 12) Maison de Banque v. Thorsch (1938) Ann. Dig., 1939-1942, p. 42.
- 13) Soviet Marriages in Hungary Case, Ann. Dig., 1925-1926, case no.22.
- 14) Jelinkova v. De Serbouloff, ibid., case no. 20; Digmeloff v. The State Civil Officer of St. Josse-ten Noode, ibid., 1927-1928, case no. 45.
- 15) The Lomonosoff [1921] P.97.

it jurisdictional immunity in the same courts.¹⁶⁾

(c) There is no obligation to accord diplomatic immunity to the representatives of an unrecognized government.¹⁷⁾

(d) Not being the representative of the state, the unrecognized government cannot recover debts or property situated in other countries and due to the state by other international persons.¹⁸⁾

We must now examine two particular matters in relation to the disabilities suffered here by the Government of Rhodesia.

(a) The question of delivering Rhodesian mail.

Under the Universal Postal Convention freedom of transit of mail is guaranteed throughout the territory of the Union.

Prepayment of postage may be effected by means of postage

stamps printed on or affixed to items and valid in the country
of/...

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- 16) Lauterpacht, p. 44; Starke, p. 160; Chen, pp. 135-139; D.W.Greig, "The Carl-Zeiss Case and the Position of an Unrecognized Government in English Law" (83) L.Q.R., 1967, p. 96 at p. 137; The Annette; The Dora [1919] P. 105; City of Berne v. Bank of England (1804) 9 Ves. Jun. 347; Russian Socialist Federated Soviet Republic v. Cibrario (1923) 235 N.Y. 255; Varga v. Credit Suisse (1958) 182 N.Y.S. 2d 17; The Gargara [1919] P.95. For Belgian, Norwegian and Swedish authority to the same effect see Société Despa et Fils v. U.S.S.R., Ann. Dig., 1931-1932, case no. 28; Spanish Government v. Campuzano, Ann. Dig., 1938-1940, case no. 27; The Soviet Government v. Ericsson, Ann. Dig., 1919-1922, case no. 30; Federal Republic of Germany v. Elicofon; Kuntsammlungen zu Weimar v. Elicofon (11) I.L.M., 1972, p. 1259.
- 17) Lauterpacht, pp. 143-144; Greig, note 16) supra, p. 137; Sorensen, p. 279; Schwarzenberger, Manual, p. 73; Starke, p. 160; Hollander v. Baiz, 135 U.S. 403, 432; Rose v. Himely (1808) 4 Cranch 239.
- 18) Starke, p. 160; Oppenheim, I, p. 136; Lauterpacht, p. 143; Gdynia Ameryka Linie v. Boguslawski [1953] A.C. 11; The Jupitier [1924] P. 236; Spanish Government v. Campuzano, Note 16) supra.

of origin. Rhodesia is a member of U.P.U. (or technically part of a member, viz. the British Overseas Territories)¹⁹⁾ and so has a right to the delivery of its mail in other members of the Union.

And yet several other countries have completely severed mail links with Rhodesia.²⁰⁾ These include Kenya,²¹⁾ Mali,²²⁾ the Soviet Union²³⁾ and Jordan.²⁴⁾ Other countries did so partially. Thus India suspended the parcel post service with Rhodesia²⁵⁾ and refused to recognize the Rhodesian definitive decimal stamps issued in 1970 as being valid for the prepayment of postage.²⁶⁾ Malawi refused to recognize the Rhodesian "Independence" issue of stamps in 1965 as being valid and would surcharge items bearing such stamps.²⁷⁾ The United Kingdom refused to recognize the "independence" issue of 1965, the "independence" overprints of 1966 and the decimal definitives of 1970 as being valid for the prepayment of postage and surcharged Rhodesian mail accordingly.²⁸⁾

Prima facie such conduct is an infringement of the Universal Postal Convention.²⁹⁾ On closer examination however, it would/...

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- 19) Supra, p. 86.
20) S/9853, Annex III, p. 12.
21) S/9853, Annex II, p. 28.
22) Ibid., p. 34.
23) Ibid., p. 55.
24) S/9853/Add.1, Annex I, p.2.
25) S/9853, Annex II, p. 23.
26) S/9853/Add. 1, Annex I, p.2.
27) The Times, 10th December, 1965, p. 10(b).
28) R.C.Smith, A Supplement to "Rhodesia - a Postal History", Salisbury, 1970, pp. 40-43.
29) Smith, note 28) supra, pp. 40-41 in fact so alleges in relation to the conduct of the United Kingdom.

would not appear to be illegal when all the circumstances are taken into consideration. In the first place the Government of Rhodesia is not entitled to represent the State of Rhodesia for U.P.U. purposes.³⁰⁾ It is not the recognized government of Rhodesia for these purposes and as such its acts, including the issue of postage stamps, need not be recognized as being valid by other members of the Union. It need not be recognized as the legitimate stamp issuing authority for the territory. Hence its stamp issues need not be recognized as being valid in the country of origin³¹⁾ so as to comply with Article 53 of the Universal Postal Convention.

(b) The money-issuing capacity of the Government.

This need not be recognized. Thus the impounding by the West German authorities of banknotes printed in West Germany for the Rhodesian Government would not be breach of international law. West Germany is in no way obliged to recognize the acts of the Rhodesian Government, including its money-issuing capacity.³²⁾

If/...

30) Supra, pp.427-428.

31) This in fact was the attitude of the British Government which affixed a sticker to each surcharged item bearing the following inscription 'Southern Rhodesia Stamps. The Government has announced that stamps issued in Rhodesia of the kind used on this postal packet have no legal basis. The packet is accordingly surcharged.' See Smith, note 28) supra, pp. 42-43.

32) For the history of this incident see Chayes, II, pp.1391-1392. The action was taken by the German authorities at the request of the Rhodesian Reserve Bank in London (regarded by the United Kingdom as the legitimate Reserve Bank for Rhodesia) which had not authorized the issue of the currency. It would appear that, as a matter of German municipal law, the German courts were prepared to allow the export of the currency to Rhodesia despite the attitude of the German authorities who were acting in co-operation with Britain. The matter was however, eventually settled by the Reserve Bank of Rhodesia (in Rhodesia) releasing the printing concern from their contract.

If a government is recognized the above disabilities may fall away and in their place the following five corresponding capacities may exist.

- (a) There is a capacity to represent and commit the state and the state will undoubtedly be responsible for the acts of a recognized government.³³⁾
- (b) It may be that the acts and laws of a recognized regime, applying internally, should be enforced and given effect to in other states.³⁴⁾ This is, in effect, the application of an "act of state" doctrine.³⁵⁾ The practice of affording judicial cognizance to the acts of a recognized regime receives a large measure of support from the practice of many states including the United Kingdom³⁶⁾ and the United States.³⁷⁾

In/...

33) Supra, pp.409-410.

34) H.R.Hahlo, "The Privy Council and the Gentle Revolution" (86) S.A.L.J. 1969, p. 419 at p. 423.

35) Akehurst, pp. 70-71; Sorensen, pp. 445-449; M. Zander, "The Act of State Doctrine" (53) A.J.I.L., 1959, p. 826. H.F. van Panhuys, "In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities" (13) I.C.L.Q. 1964, p. 1193; M.Domke, "Indonesian Nationalization Measures before Foreign Courts" (54) A.J.I.L., 1960, p. 305; H.W.Baade, "Indonesian Nationalization Measures before Foreign Courts - A Reply" (54) A.J.I.L., 1960, p.801; E. Spiro, "Foreign Acts of State and the Conflict of Laws" (16) I.C.L.Q., 1967, p. 145.

36) Luther v. Sagor [1921] 3 K.B. 532; Princess Paley Olga v. Weisz & Others [1929] 1 K B 718; Bragoseo Ltd. v. J Sagor & Co.(1921) 8 Ll. L.R. 388; Lazard Brothers & Co. v. Midland Bank Ltd. [1933] A.C. 289; In Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. [1966] 2 All E.R. 536 at 580 Lord Wilberforce was prepared to enforce the acts of the East German regime as a subordinate authority of the Soviet Union which was a recognized sovereign for East Germany.

37) Oetjen v. Central Leather Co. (1918) 246 U.S. 297, 303; Underhill v. Hernandez (1897) 168 U.S. 250; Eastern States Petroleum Co. v. Asiatic Petroleum Corporation (1939) 28 F. Supp. 279.

In addition courts in the United Kingdom,³⁸⁾ France,³⁹⁾ Italy,⁴⁰⁾ Holland,⁴¹⁾ Japan⁴²⁾ and the United States⁴³⁾ have all gone as far as to hold such acts valid even when in conflict with international law e.g. confiscatory acts. Indian courts have given effect to such acts even when contrary to the municipal law of the state in which performed.⁴⁴⁾ United Kingdom courts have held such acts to be extraterritorially effective in passing title to property situated abroad.⁴⁵⁾ They have also given effect to the acts of governments-in-exile.⁴⁶⁾ French and Egyptian courts have applied the law of a recognized regime, even though no longer in power, when they applied the old law of succession of Russia.⁴⁷⁾

On the other hand there is also a very substantial body of state practice which refuses to accord cognizance to the _____ acts/...

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- 38) The National Bolivian Navigation Co. & Others v. Wilson & Others (1880) L.R. 5 A.C. 176; Russian Commercial and Industrial Bank v. Comptoir D'Escompte de Mulhouse and London County, Westminster and Parr s Bank Limited [1923] 2 K.B. 630; Banque Internationale de Commerce de Petrograd v. Goukassow [1923] 2 K.B. 682. The latter two cases were however reversed on appeal but on grounds relating to the construction of the decrees in question. [1925] A.C. 112; [1925] A.C. 150.
- 39) O'Connell, II, p. 807.
- 40) Anglo-Iranian Co. v. SUPOR, I.L.R., 1955, p. 19.
- 41) O'Connell, II, p. 807.
- 42) Anglo-Iranian Co. v. Idemitsu Kosan Kabushiki Kaisha, I.L.R., 1953, p. 305.
- 43) Banco Nacional de Cuba v. Sabbatino (1964) 376 U.S. 398.
- 44) Chaturbhuy Piramel v. Chunilal Oomkarmal [1933] L.R. 60 Ind. App. 211. See too Akehurst, pp. 70-71.
- 45) Lorentzen v. Lydden & Co. Ltd. [1942] 2 K.B. 202.
- 46) In Re Amand [1941] 2 K.B. 239; [1942] 1 K.B. 445.
- 47) Hanawi v. Credit Lyonnais, Ann. Dig. 1925-1926, case no. 21.

acts of a recognized regime. Thus the courts of Aden,⁴⁸⁾ France, Italy, Holland,⁴⁹⁾ Austria⁵⁰⁾ and the United Kingdom⁵¹⁾ have all handed down decisions refusing to give effect to acts of foreign regimes which are contrary to international law, while the United States Congress has in effect enacted a statute to this effect.⁵²⁾ Courts have also refused to give effect to the acts of a recognized government which are contrary to the policy of the forum,⁵³⁾ which are penal,⁵⁴⁾ of a revenue character⁵⁵⁾ or political in nature.⁵⁶⁾

It will be seen from the above that practice concerning granting cognizance to the acts and laws of a recognized regime is greatly at variance. Because of this we can conclude with Sorensen that:

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- 48) Anglo-Iranian Oil Co. v. Jaffrate, I.L.R., 1953 p. 316. This can in fact be regarded as British practice. At the time Aden was a British Colony. See O'Connell, II. p. 805.
- 49) Ibid., p. 807.
- 50) Ibid., p. 808.
- 51) Wolff v. Oxholm (1817) 6 M. & S. 92; Frankfurter v. W.L. Exner Ltd. [1947] 1 Ch. 629.
- 52) Foreign Assistance Act, 1964, S. 301 (d)(4), 78 Stat. 1013. The Act has been held to be constitutional. Banco Nacional de Cuba v. Farr Whitlock & Co. (1967) 383 F 2d 166. See too First National City Bank v. Banco Nacional de Cuba (1972) (11) I.L.M., 1972, p. 811.
- 53) Chen, p. 168. See the approach of French, German and Swiss courts. O'Connell, II, pp. 807-808.
- 54) Chen, p. 168. See the decisions in Huntington v. Attrill [1893] A.C. 150; Banco de Vizcaya v. Don Alfonso de Bourbon y. Austria [1935] 1 K.B. 140; A/S Falinna Laevauhisus and Others v. Estonian State Steamship Line and Another (1947) 80 Ll. L.R. 99.
- 55) Chen. p. 168. See Municipal Council of Sydney v. Bull [1909] 1 K B. 7; In re Visser; H.M. The Queen of Holland (Married Woman) v. Drukker & Others [1928] 1 Ch. 877.
- 56) Chen. p. 168.

"In view of divergent national court decisions ... customary international law does not require a state to recognize the validity of the 'Acts of State' of a foreign state." 57)

It is therefore submitted that international law imposes no obligations here. It is thus left to each state to give effect to the acts and laws of other states as it sees fit, in other words, to regulate the position by means of its own Conflict of Laws system.⁵⁸⁾

We have seen before that South Africa continues to recognize the Government of Rhodesia as that of a dependency enjoying the same degree of limited international personality as it did before U.D.I.⁵⁹⁾ It follows from this that as far as international customary law is concerned,⁶⁰⁾ the acts of the Rhodesian Government and the laws of that country may be given the customary effect by South African courts,⁶¹⁾ but there is no international obligation on South Africa to see that its courts give any effect to such acts and laws.

We/...

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- 57) P.447. See too Akehurst, p. 71 and Greig, note (16) supra, p.112 who says that recognition of a foreign government does not in itself assure the application of a foreign country's laws.
- 58) Chen, p. 167 does not believe that there exists a general right of one state to have its laws applied in the courts of another state. The application of law is essentially a matter of private rather than public international law and the fact that the law emanates from a recognized regime makes no difference.
- 59) Supra, pp.370-375.
- 60) The position is different in relation to conventional law i.e. South Africa's obligations as a member state of the United Nations. See infra, pp.
- 61) As in S. v. Charalambous, 1970 (1) S.A. 599 (T).

We have also seen that countries other than South Africa recognize the United Kingdom Government as being the Government of Rhodesia. Naturally such countries can give cognizance to the acts and laws applied by the United Kingdom to Rhodesia,⁶²⁾ but there is no international obligation to give effect to such acts and laws.⁶³⁾ This remains a matter for the individual private international law system of the various states to regulate.

- (c) There is a right to jurisdictional immunities i.e. state immunity and diplomatic immunity for the representatives of the government. Certainly entities which are recognized de iure are entitled to sovereign immunity before the courts of recognizing states.⁶⁴⁾ There is an international law obligation to/...

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- 62) As in Shyu Jeng Shyong v. Esperdy, 294 F. Supp. 355. U.S. Dist. Ct., S.D.N.Y. and Ngai Chi Lam v. Esperdy, 411F. 2d 310 U.S. Ct. of Appeals, 2d Cir. So too various governments accepted the United Kingdom-appointed, London-based, Reserve Bank of Rhodesia under Sir Sydney Caine. The Times, 10th December, 1965, p. 19(b).
- 63) Thus, for example, the West German Government were under no international obligations in relation to the Rhodesian money printed in West Germany. Supra, p. 434. They would have been within their rights in delivering it to the London-based Reserve Bank of Rhodesia and equally to the Rhodesia-based Reserve Bank (as their courts in fact seemed willing to allow).
- 64) The Schooner Exchange v. McFaddon (1812) 7 Cranch. 116; Berizzi Brothers v. S.S. Pesaro (1926) 271 U.S. 562; The Cristina [1938] A.C. 485; The Parlement Belge, 5 P.D. 197; The Porto Alexandre [1920] P. 30; The Broadmayne [1916] P. 64; The Jupiter [1924] P. 236; The Maipo [D.C.] 259 F. 367; The Roseric [D.C.] 254 F.154; The Adriatic [C.C A.] 258 F. 902; United States v. Deutches Kalisyndikat Gesellschaft [N.Y.] 31F. 2d 199; Compania Mercantil Argentina v. United States Shipping Board 93 L.J.R. 1924, 816; Hassard v. United States of Mexico, 173 N.Y. 645; Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen C.C.A. 2d (1930) 43F. 2d 705; Oliver American Trading Co. v. Mexico, 5 F.2d 659 C.C A. 2; French Republic v. Inland Navigation Co. (D.C.) 263F. 410; Re Suarez [1917] Ch.131; Re Republic of Bolivia Exploration Syndicate Ltd. [1914] Ch. 139; In re the Tervaete [1922] P. 197, 203; De Haber v. Queen of Portugal, 1851, 17 Q.B. 171. In addition to the above English and American authorities, we may also quote the following French, German, Italian and South African cases. Lambège & Ponget v. Gouvernement Espagnol (Briggs, pp. 439-440); Von Hellfeld v. Russian Government (5) A.J.I.L., 1911, p. 490; De Howorth v. S.S. 'India', 1921 C.P.D. 451; Ex parte Sulman, 1942 C.P.D. 407; Parkin v. Government of the Republique Democratique du Congo and Another, 1971 (I) S.A. 259(W).

to accord such immunity.⁶⁵⁾ The extent of such immunity is however a matter of controversy.⁶⁶⁾ Those states which recognize the United Kingdom as the Government of Rhodesia would therefore be under an obligation to concede immunity to it in appropriate proceedings before their courts. The Rhodesian Government is not recognized de iure by any state, but South Africa, as we have seen, continues to treat it as the government of a dependency. We must therefore enquire into the question whether an entity which has been accorded a limited recognition is entitled to the customary immunities.

There is authority for the proposition that immunity should be extended to entities which are not fully sovereign. Thus immunity has been extended to entities recognized de facto.⁶⁷⁾ More in point however is the practice of extending immunity to dependent entities⁶⁸⁾ and to subordinate entities within independent states. In the latter connection, immunity has been extended to American States within the Union,⁶⁹⁾ to the states/...

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- 65) Akehurst, p. 71; Briggs. p. 442; Lauterpacht, p. 66; Schwarzenberger, Manual, pp. 102-103. Sed contra, Chen, p. 166 who says that the right of immunity is not based on recognition because non-recognized entities have been given it. With respect, it cannot be deduced that a recognized entity has no right to immunity from the fact that an unrecognized entity has been accorded such immunity without any obligation to accord it.
- 66) See Oppenheim, International Law, 8th ed., I, pp. 267-275 for a discussion of the limits within which such immunities must be accorded as a matter of international law. For a recent case see Isbrandtsen Tankers, Inc. v. President of India, 446 F. 2d 1198; 404 U.S. 985.
- 67) Brogeseo Ltd. v. J. Sagor & Co. (1912) 8 Ll. L.R. 388 at 394; The Arantzazu Mendi [1939] A.C. 256. This is criticized by Lauterpacht, pp. 279-294 but supported by Starke, pp. 157-158.
- 68) Mighell v. Sultan of Johore [1894] 1 Q.B. 149; Duff Development Co. v. Kelantan Government [1924] A.C. 797. In the latter case Lord Cave referred at 805 to the right of an independent state by international law to immunity from process.
- 69) Monaco v. Mississippi, 292 U.S. 313.

states of Australia,⁷⁰⁾ to political subdivisions of Portugal,⁷¹⁾ to Yucatan,⁷²⁾ to the States of Sao Paulo and Rio Grande da Sol, constituent states of the United States of Brazil⁷³⁾ and to Hawaii before statehood.⁷⁴⁾

From somewhat divergent practice it may be that the general law on this topic is unsettled.⁷⁵⁾ Thus it may be that no clear rules have as yet crystallized in terms of which an entity which is less than sovereign may claim the customary immunities. Even if this is the position there is nothing to prevent the accord of such immunities as a matter of discretion and without obligation.

On the other hand O'Connell would favour entitlement to immunity in certain cases. He says:

"The question whether a given political subdivision of a foreign State is entitled to immunity will depend upon proof that it is entrusted with a measure of national sovereign power The issue does not depend exactly on proof of constitutional distribution of powers as in a federation, for subordinate entities such as the more mature colonial territories may in fact have more international status than the members of a composite state. The test of whether or not a foreign government is impleaded is whether the entity sued is a subdivision of the state with delegated powers of a political as distinct from administrative character. 76)

If/...

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- 70) In re Patterson-MacDonald Shipbuilding Co., 9 Cir., 293 F.192.
- 71) De Simone v. Transportes Maritimos do Estado, 199 App. Div. 602, 191 N.Y.S. 864.
- 72) State of Yucatan v. Argumedo, 92 Misc. 547, 157 N.Y.S. 219.
- 73) Sullivan v. State of Sao Paulo, C.C A. (1941) 172 F 2d 355. In this case the court observed that immunities would not be extended to all foreign political subdivisions. French courts have refused to extend immunity to these states. O'Connell, II, p. 878.
- 74) Kawananakoa v. Polyblank, 205 U.S. 349, 353.
- 75) See Harvard Research in International Law, Competency of Courts in Regard to Foreign States, 1932, pp. 479-488; Sorensen, p. 427.
- 76) O'Connell, II, p. 877.

If O'Connell is correct here the Government of Rhodesia would be entitled to the usual immunities before South African courts since that government is recognized as the government of a dependency and undoubtedly exercises political as distinct from mere administrative functions.

- (d) The recognized government may be entitled to locus standi before the courts of the recognizing state.

It is an undoubted fact that a recognized entity invariably has locus standi to sue in the courts of the recognizing state.⁷⁷⁾ It is doubtful however whether an international law obligation to allow such an entity locus standi exists. To prove that public international law requires states to incorporate a particular rule in their municipal laws, it is not enough to show that that rule does in fact exist in their municipal laws. It is also necessary to show an opinio iuris, a conviction that public international law requires states to incorporate the rule in question in their municipal laws.⁷⁸⁾ Chen's conclusion, drawn from practice, is, that the right of a foreign power to sue is a matter of comity only. Recognition does not necessarily entitle it to sue.⁷⁹⁾

- (e) The recognized government is entitled to claim the property of the state situated in the jurisdiction of the recognizer.⁸⁰⁾

The question arises whether an entity which is not recognized _____ fully/...

77) O'Connell, I, p. 183, Starke, p. 160.

78) Akehurst, pp. 69-70.

79) Chen, p. 166.

80) Starke, p. 160; Oppenheim, I, p. 136; Haile Selassie v. Cable and Wireless Co. Ltd. (No.2) (1938) 54 T.L.R. 1087, [1939] Ch. 182.

fully - de iure - is entitled to make such claims. There is authority that a government which is recognized de facto cannot make such claims.⁸¹⁾ Can this principle be extended by analogy so as to exclude such claims by an entity which is recognized merely as the government of a dependency? It is submitted that the principle of exclusion cannot be so applied. The exclusion of such claims by governments recognized de facto is simply a crystallized legal consequence which is part of the content of the rules surrounding de facto recognition. The approach to the government of a dependency must, it is submitted, be different, and it must revolve around the extent of personality enjoyed by the dependency. If the dependency becomes entitled to some property situated in another jurisdiction in consequence of its legal personality, then there would appear to be no reason why the recognized government of that dependency should not be able to claim such property.

The submission therefore is that the Government of Rhodesia could claim Rhodesian assets situated in South Africa, e.g. the estimated six million pounds Rhodesian Foreign Assets in South Africa in December, 1965.⁸²⁾

(2) Municipal law status.

Having discussed its international law status, we now deal with the status of the Government of Rhodesia in the municipal law of other states and not with its status in Rhodesian law.⁸³⁾
As/...

81) See case, note 80) supra.

82) The Times, 22nd December, 1965, p. 8(g).

83) This was decided in R. v. Ndhlovu and Others, 1968 (4) S A. 515 (R., A.D.)

As we pointed out above, a recognized government can, as a matter of international law, claim certain benefits⁸⁴⁾ under the municipal law of other states. Other states naturally have a duty to ensure that their municipal law makes provision for the enjoyment of the relevant municipal law status.⁸⁵⁾ We have also seen that Rhodesia does not have a right to such benefits because of near-universal non-recognition,⁸⁶⁾ but in its relationship with South Africa, it may possess rights to certain benefits because of the limited recognition accorded to it by South Africa.⁸⁷⁾

There is of course no duty in international law to grant such benefits to an unrecognized government⁸⁸⁾ and there is therefore nothing to prevent any state which does not recognize the Rhodesian Government from denying it all benefits in municipal law.

It must also be understood however that as far as international customary law is concerned there is no duty to deny such municipal law benefits to an unrecognized government.⁸⁹⁾ It follows that the grant or denial of municipal law benefits and status to an unrecognized government is discretionary. It is a matter which international law/...

84) Supra, pp. 435 et seqq.

85) A state must bring its municipal law into line with its international obligations. Akehurst, p. 62; O'Connell, I, p.48; Schwarzenberger, Manual, pp. 48-49; Free Zones of Upper Savoy and the District of Gex case (1932) P.C.I.J. Ser. A/B, case no. 46, p. 167; Alabama case (1872) J.B. Moore, International Arbitrations, 1898, p. 653; Polish Nationals in Danzig case (1931) P.C.I.J. Ser. A/B, case no. 44, p. 24; Certain German Interests in Polish Upper Silesia (1926) P.C.I.J. Ser. A, case no. 7, p. 19; Affaire des reclamations francaises contre le Perou (1921) U.N. Rep., I, p. 219; Norwegian Claims case (1932) U.N. Rep., I, p. 307; Georges Pinson case (1928) U.N. Rep., V. pp. 327, 393.

86) Supra, pp. 430-432.

87) Supra, pp. 438, 440-442, 443.

88) Supra, pp. 430-432.

89) See dicta of Lord Reid in Carl-Zeiss Stiftung v. Rayner & Keeler [1967] 1 A.C. 853 at 907-908, 954. See too Greig, note (16) supra, p. 96.

law simply leaves to municipal law to determine. The following three concessions may therefore be made to an unrecognized government.

(a) The unrecognized government may be granted the privilege of suing in the courts of the non-recognizing state. Thus the Netherlands⁹⁰⁾ and Egypt⁹¹⁾ have allowed unrecognized governments to sue in their courts but the accord of this privilege is unusual in practice.⁹²⁾

(b) The unrecognized government might be given jurisdictional immunities in the courts of the non-recognizing state.⁹³⁾

Thus the courts of the United States have on many occasions granted such immunities.⁹⁴⁾ Again however the practice is in/...

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- 90) Exportschleb Ltd. v. Goudekot, Ann. Dig., 1935-1937, case no. 36.
- 91) Russian Trade Delegation in Turkey v. Levant Red Sea Coal Co., Ann. Dig., 1933-1934, case no. 35.
- 92) Greig, note 16) supra, p. 133 goes so far as to say that for a court to allow an unrecognized government to sue would seem to run counter to the executive policy of non-recognition. Dealing with the question whether subordinate entities should be allowed to sue when the government itself is unrecognized, he says (p.134) that a possible answer is that it should be allowed to sue if it can sue in its own name in its own municipal law system. He then suggests (p.144) that English courts could allow an unrecognized government to sue as long as it was suing in its own right and not as successor to a previous government. Once this right is accorded he says that the necessity of distinguishing between departments of the unrecognized government and government agencies with independent personality will vanish.
- 93) Chen, p. 166; Lauterpacht, pp. 149-150.
- 94) Underhill v. Hernandez (1897) 168 U.S. 250 at 252; Wulfsohn v. Russian Socialist Federated Soviet Republic (1923) 234 N.Y. 372; Ann. Dig., 1923-1924, case no. 16, p. 39; Nankivel et al v. Omsk All-Russian Government et al (1923) 237 N.Y. 150; Ann. Dig., 1923-1924, case no. 70; Volvodine v. Government of the Commander-in-Chief of the Armed Forces in the South of Russia, Ann. Dig., 1931-1932, case no. 25, p. 53; Banque de France v. Equitable Trust Co. of New York (1929) 33 F. 2 d. 202.

in no way general.⁹⁵⁾

- (c) In municipal law, effect may be given to the acts of, and laws operating under, an unrecognized regime.⁹⁶⁾ Thus as a matter of conflict of laws, judicial cognizance could be afforded to the acts of government, the orders of its courts⁹⁷⁾ and even to the entire legal system operating under the unrecognized regime.⁹⁸⁾ Thus Italy gives effect to the legal system of unrecognized entities applying a rule of de facto territoriality.⁹⁹⁾ This proposition may be expressed in another way. A state may give full effect to the legal system of an unrecognized entity. In such a situation, the state's system of conflict of laws is not dependent on international law recognition.

On the other hand, a state may deny all effect to the legal system of an unrecognized regime and to the acts of the regime. Here in effect it is applying a doctrine of judicial self-limitation¹⁰⁰⁾ and is, in effect, basing its system of conflict/...

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- 95) Greig, note 16) supra, p. 133 again asserts that the grant of immunity seems to run counter to executive policy of non-recognition, though he submits that in English law it might be specifically granted by the Foreign Office, under S.4 of the Diplomatic Privileges Act, 1964 (pp. 136, 138, 145).
- 96) Chen, p. 166; Greig, note (16) supra, p. 112.
- 97) When such effect is given, the courts of the non-recognizing state take cognizance of the legal acts or system of the unrecognized entity. They do not afford recognition (in the international law sense of the word) as only the executive is competent to do this. International law does not regulate the question of cognizance or non-cognizance of the acts of unrecognized regimes but leaves this[^] to municipal law. O'Connell, I, p. 166; Madzimbamuto v. Lardner-Burke N.O. & Another, N.O., 1968 (2) S.A. 284 (R.,A.D.) at 312.
- 98) Carl-Zeiss Stiftung v. Rayner & Keeler Ltd. [1967] 1 A.C. 853 at 906.
- 99) O'Connell, I, p. 181.
- 100) On this doctrine see supra, pp. 210-211.

conflict of laws on international law recognition by making the latter a prerequisite for the application of the foreign law in question. Thus English courts, in principle, make cognizance dependent on recognition.¹⁰¹⁾ On occasions however, English courts have appeared to deviate from this principle by way of exception or apparent exception. Thus in Wright v. Nutt¹⁰²⁾ the court applied the laws enacted by a non-recognized entity. However as the case was decided after recognition had been granted, the decision may be based on the retroactive effect of recognition and is thus only an apparent exception.¹⁰³⁾ In re Al Fin Corporation Patent¹⁰⁴⁾ it was held that North Korea was a state for the purposes of S. 24 (1) of the Patents Act, 1949, though not recognized by H.M. Government. This decision turned, however, on the construction of a particular statute. In Buck v. Attorney-General¹⁰⁵⁾ Diplock, L.J. suggested that an English court had no jurisdiction to pronounce on the validity of the law of a foreign sovereign state in its own territory. This has been criticized as too wide a proposition/...

101) See cases cited in note 9) *supra*. See too Dolder v. Bank of England (1805) 10 Ves. Jun. 284, 252; Dolder v. Lord Huntingfield (1805) 11 Ves. Jun. 283; Thomson v. Powles (1831) 9 L.J. (O.S.) Ch. 215; The Manilla (1808) Edw. 1; The Happy Couple, 1808 cited *ibid*; The Pelican (1809) Edw. (App.) iv; Carl-Zeiss Stiftung v. Rayner & Keeler Ltd. [1965] Ch. 596; P.L. Bushe-Fox, "Unrecognized States: Case in the Admiralty and Common Law Courts, 1805-26" (13) B.Y.I.L., 1932, p. 39; "The Court of Chancery and Recognition 1804-1831" (12) B.Y.I.L., 1931, p.63; Dickinson, "Les Gouvernements ou Etats non reconnus en droit anglais et américain" (4) Revue de droit international et de legislation comparée, 1923, p. 148.

102) (1788) 1 H.Bl. 136, 149.

103) See Chen, p. 158.

104) [1969] 3 All E.R. 396.

105) [1965] Ch. 745 at 770.

proposition. English courts have on many occasions made such investigations and have refused to give effect to such laws in England.¹⁰⁶⁾ In Carl-Zeiss Stiftung v. Rayner & Keeler Ltd.¹⁰⁷⁾ the House of Lords applied the laws of the East German regime, though it was unrecognized by the United Kingdom. They did attempt to bring the decision within the principle that cognizance depends on recognition by taking the attitude that it was possible to accept the laws of East Germany as those of a subordinate authority of the Soviet Union, which was recognized de iure.¹⁰⁸⁾ The Court of Appeal had of course adhered to the traditional principle.¹⁰⁹⁾

In general, civilian jurisdictions, with a few exceptions,¹¹⁰⁾ adhere to the principle of making cognizance dependent on recognition.¹¹¹⁾

It/...

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- 106) Ian Brownlie, "Decisions of British Courts during 1965-1966 involving questions of Public or Private International Law" (41) B.Y.I.L., 1965-1966, p. 432 at pp. 435-438 especially at p. 438.
- 107) [1966] 2 All E.R. 536; [1966] 3 W.L.R. 125; [1967] I.A.C. 853.
- 108) See however V.G.Merrills, "Recognition and Construction" (20) I.C.L.Q., 1971, p. 476 who regards the Carl-Zeiss case as carving out an exception to the general principle that the legislation of unrecognized entities should be disregarded.
- 109) [1965] Ch. 596. For suggestions as to how the English approach to this particular problem might be improved see Greig, note 16) supra, pp. 139, 140, 145. Greig says (p.133) that judicial cognizance of laws of unrecognized regimes is not unreasonable because it may not be in direct conflict with the diplomatic refusal to recognize. If it did so conflict, cognizance could be excluded on the grounds of public policy (p.145).
- 110) These include Italy, Germany, the Netherlands, Belgium, Switzerland, Egypt and Hungary.
- 111) O'Connell, II, p. 181. For French authorities see note 11) supra.

It is also possible for a state to give effect to the legal system of an unrecognized entity in certain circumstances but to refuse to apply it in other circumstances. Here limited cognizance is accorded.¹¹²⁾ This approach presents problems. Courts have to determine how far they can give cognizance without embarrassing the executive policy of non-recognition. Relativity is inevitable in such cases and such relativity is often at the expense of legal certainty in the conflict of laws system.¹¹³⁾

The courts of the United States at first refused to give effect to the laws of unrecognized regimes but from 1920 onwards the attitude began to change. The new trend was probably a logical extension of the doctrines under which the administrative acts of the confederates in the American Civil War had been accorded validity¹¹⁴⁾ and under which unrecognized governments might be allowed immunity.¹¹⁵⁾ At first the courts applied the Cardoza doctrine.¹¹⁶⁾ Under this, the courts would take cognizance of the acts of unrecognized entities as facts and they would then judge the validity of these facts in the light of the legal system of the recognized/...

112) H.R. Hahlo, "The Privy Council and the 'Gentle Revolution'" (86) S.A.L.J., 1969, p. 419 at p. 426.

113) O'Connell, I. p. 167.

114) Williams v. Bruffy (1877) 96 U.S. 176; Baldy v. Hunter (1898) 171 U.S. 388; Horn v. Lockhart, 17 Wallace, 570; Stevens v. Griffith, 111 U.S. 48; United States v. Insurance Companies (1874) 22 Wallace, 99; Thorington v. Smith (1868) 8 Wallace, 1; Texas v. White (1868) 7 Wallace, 700; Delmas v. Merchants' National Insurance Co. (1871) 14 Wallace, 661.

115) See cases cited note 94) supra.

116) Sokoloff v. National City Bank (1924) 293 N.Y. 158; Petrogradsky M.K. Bank v. The National City Bank of New York (1930) 253 N.Y. 23.

recognized entity.¹¹⁷⁾ Then the courts adopted a wider approach and would actually give effect to such acts of unrecognized regimes as conformed to "justice" or "common sense".¹¹⁸⁾ The next step went so far as to equate unrecognized governments with recognized governments in practice.¹¹⁹⁾ The courts then returned to a narrower approach and would give effect to acts of an unrecognized regime in order to avoid violence to fundamental principles of justice or American public policy.¹²⁰⁾ Finally, it was held that an executive policy of non-recognition bars cognizance,¹²¹⁾ but this is probably only the position in relation to laws of the unrecognized regime which attempt to affect property beyond the physical control of that regime.¹²²⁾ A distinction is being drawn between the intraterritorial and extraterritorial affects of such laws.

The/...

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- 117) O'Connell, I, p. 167 regards the Cardoza doctrine as a very subtle approach to the problem. A "Cardoza-like" approach was also applied by Beadle, C.J. and Jarvis, A.J.A. in Madzimbamuto's case, note 97) supra, at 352, 421-422. The context of application was, however, different in that the court was applying the approach to its own legal system and not to that of another state.
- 118) Russian Reinsurance Co. v. Stoddard (1925) 240 N.Y. 149.
- 119) Salimoff & Co. v. Standard Oil Co. of New York (1933) 262 N.Y. 220. In this case the court departed from the Cardoza doctrine. Salimoff was followed in The Denny (1942) 40 F. Supp. 92, 127 F. 2d 404.
- 120) A/S Merilaid & Co. v. Chase National Bank of the City of New York, 71 N.Y.S. 2d 377; Buxhoeveden v. Estonian State Bank (1943) 41 N.Y.S. 2d 752; In re Grauds Estate (1943) 41 N.Y.S. 2d 263.
- 121) The Maret (1944) 145F. 2d 431; Latvian State Cargo and Passenger S.S. Line v. Clark (1948) 80 F. Supp. 683; Latvian State Cargo and Passenger S.S. Line v. McGrath (1951) 188 F.2d 1000; Latvian State Cargo and Passenger S.S. Line v. U.S. (1953).
- 122) O'Connell, I, pp. 178-179.

The courts of the Netherlands¹²³⁾ and West Germany give limited effect to acts of unrecognized regimes.¹²⁴⁾ Swiss courts will in general take cognizance of such acts unless they offend against the public policy of the forum.¹²⁵⁾ Belgian courts have allowed such acts to effect personal status and the contracts of private individuals provided the acts do not offend against the public policy of the forum.¹²⁶⁾ Hungarian courts have been prepared to apply the marriage law of the unrecognized Soviet regime unless contrary to public policy¹²⁷⁾ while Egyptian courts have been prepared to allow the decrees of unrecognized regimes to affect private contracts.¹²⁸⁾

From all the above, we may conclude that there is a complete lack of uniformity and consistency in the decided cases emanating from various countries in relation to the affording of municipal law benefits to an unrecognized regime. That means that all of these practices are perfectly in accordance with international law which leaves a state free to decide whether or not to give effect to the acts and laws of an unrecognized regime in its municipal law, and if effect is to be given, the extent of such effect. We may conclude in the words of Justice Cardoza that:

"...juridically/...

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- 123) In Re Nix, I.L.R., 1951, case no. 69; In re Kruger, I.L.R., 1951, case no. 68; Exportchleb Ltd. v. Goudekot, Ann.Dig., 1935-1937, case no. 36, p. 117.
- 124) Dutch and German courts give effect to such acts on the grounds of necessity or ex utilitate publica. Hahlo, note 112) supra, p.426.
- 125) Hausner v. Banque Internationale de Commerce de Petrograd, B.G.E., 50, II, 507. Schinz v. High Court of Zurich, Ann. Dig., 1925-1926, case no. 23; In re Heritiers de Dame Pribiloff, ibid, 1931-1932, p. 58; Tcherniak v. Tcherniak, ibid, 1927-1928, case no. 39.
- 126) Pulenciks v. Augustovskis, I.L.R., 1951, case no. 20; N.D'Aivassoff v. De Raademaker, Ann. Dig., 1927-1928, case no. 46.
- 127) Klaudia K. v. B.F., Ann. Dig., 1925-1926, p. 32.
- 128) Charalambos Papadopoulos v. Monastery of Mount Sinai, Ann. Dig., 1927-1928, case no. 41. See Chen, pp. 164-165.

"... juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it" 129)

but

"... in practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations 129) of common sense and fairness." 130)

It follows from what we have said that when a state extends any of the above-mentioned municipal law benefits to an unrecognized regime it does so as a matter of courtesy only and not because it is obliged to do so by international law. It also follows that as a matter of customary international law, there is nothing to prevent the extension of these municipal law benefits to the unrecognized Government of Rhodesia and to the Rhodesian legal system. The conflict of laws systems of other states can regulate the latter as they please and such regulation is no concern of international law.

At this stage it is convenient to state our conclusions on all the matters so far discussed in a number of concise propositions.

- (a) Where a government is recognized the recognizing entity has an obligation in international law to afford it certain defined municipal law privileges.¹³¹⁾
- (b) Where a government is recognized, the recognizing entity has a discretion, as far as international law is concerned, to afford it privileges in municipal law over and above those which are obligatory.¹³²⁾

(c)/...

129) Italics supplied.

130) Sokoloff case, note 116) supra.

131) Supra, pp. 435 et seqq.

132) Supra, pp. 438, 442.

- (c) Where a government is unrecognized, the non-recognizing entity has no obligation in international law to afford it any privileges in municipal law.
- (d) Where a government is unrecognized, the non-recognizing entity has a discretion, as far as international customary law is concerned, to afford it municipal law privileges. The nature and extent of the privileges to be afforded are determined by the non-recognizing entity in its discretion.

It will be apparent from these propositions that where there is an obligation, international law prescribes certain rules of municipal law. On the other hand where there is a discretion, the matter is extra-legal from the point of view of international law and falls to be determined entirely by each municipal law system as it wishes. The logical outcome of this is that different municipal systems adopt different approaches to the problem and this accounts for the variety of practice from one system to another, all of which is perfectly legal from the point of view of international law.

The above then is the general position in international customary law. But at this point it also becomes relevant to consider the provisions of the Security Council Resolution of the 18th March, 1970,¹³³⁾ because the resolution in question appears to impose certain duties on member states of the United Nations in this connection. It would appear that the resolution creates an
exception/...

133) S. Res. 277 (1970).

exception to the rules which are ordinarily operative and are outlined above in that it creates duties not to extend certain municipal law benefits to Rhodesia thus taking such matters out of the sphere of the discretionary activity of states and into the sphere of international law compulsion.

It has already been submitted that duties not to recognize the Republic of Rhodesia and the Government of Rhodesia have been imposed in terms of the resolution.¹³⁴⁾ It is now necessary to see the further effects of the resolution, i.e. to what extent international law duties to deny municipal law benefits to the government have been imposed, assuming the government to be unrecognized. The relevant paragraph here is paragraph 3. The Security Council

"3. Calls upon Member States to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in Southern Rhodesia shall not be accorded any recognition, official or otherwise, including judicial notice by the competent organs of their State."

The first point to note is that member states of the United Nations have an international law duty to bring their municipal law into line with their obligations under the resolution and thus to deny certain municipal law benefits to Rhodesia.¹³⁵⁾ For the purpose of clarity it is intended to deal with the contents of the paragraph in its application to (a) acts of officials and institutions/...

134) Supra, pp. 312-313, 423-424.

135) S. Res. 277 (1970) is clearly a mandatory resolution taken under Chapter VII of the Charter. In the preamble it is reaffirmed "that the present situation in Southern Rhodesia constitutes a threat to international peace and security" and it is stated that the Council acts "under Chapter VII of the United Nations Charter."

institutions of the regime and (b) the legal system of Rhodesia operating under the regime.

(a) Recognition of acts of officials and institutions of the regime.

The officials and institutions of the regime would obviously include the Head of State, the Government, its departments and the individual Ministers, Parliament, the members thereof and members of the judiciary. But it would even extend to all subordinate officials and institutions of the regime, e.g. civil servants, commissions of enquiry, diplomatic representatives, the police, the armed forces, local authorities, statutory boards, etc. In fact all entities and individuals in a position of authority under the regime would appear to be covered.¹³⁶⁾ Prima facie there would appear to be an outright prohibition on all forms of recognition of the acts of such officials and institutions. Thus no effect should be given in the municipal law of other states either by way of judicial notice or otherwise to the following, inter alia: Acts of Parliament; Presidential Proclamations; all forms of delegated legislation; court orders and findings. In addition the Government of Rhodesia should not be allowed to sue in the courts of other states, should not be given sovereign immunity/...

136) In the context of international responsibility, the 'officials' of a state are deemed to include not only higher state authorities such as Heads of State, Ministers and Diplomatic Representatives but also minor or subordinate officers and employees. Akehurst, p. 112; Massey claim (1927) 4 R.I.A.A. 155; Way case (1928) ibid., 399; Quintilla case (1926) ibid., 102; Pugh case (1933) 3 R.I.A.A. 1448; Roper case (1927) 4 R.I.A.A. 145; Mallen case (1927) ibid., 173; Koch case (1908) ibid., 408; De Falcon case (1926) ibid., 104; Garcia and Garza case (1926) ibid., 119; Kling case (1930) ibid., 575; Langdon case (1933) 6 R.I.A.A. 325; Hague Codification Conference, Draft Articles 7, 8. It is submitted that the same wide meaning can be given to the concept of "official" within the meaning of paragraph 3 of S. Res. 277 (1970).

immunity, and diplomatic immunity should not be accorded to the acts of the representatives of the regime.

The prohibition appears to be all-embracing but it is not in fact as comprehensive as it appears at first sight to be.

The following restrictions must be mentioned.

- (i) The resolution in question is not retrospective.¹³⁷⁾ It can therefore be plausibly argued that states still have a discretion to afford cognizance in their municipal law to the acts of officials and institutions of the regime performed before the 18th March, 1970. Thus for instance it is submitted that effect could be given to a Rhodesian Act of Parliament or a Rhodesian Court Order made before the relevant date. There would of course be no obligation to give effect to such acts. It would be a matter of courtesy only. Thus for instance the rather discordant British practice in relation to official acts and court orders in Rhodesia made before 18th March, 1970, is irrelevant from the point of view of international law which leaves the United Kingdom to regulate such matters according to its own law. In Adams v. Adams (Attorney-General Intervening)¹³⁸⁾ the validity of a marriage contracted in Rhodesia on the 29th December, 1965 was accepted (or at least uncontested by the Attorney General.¹³⁹⁾
- The/...

137) Supra, pp.315-317.

138) [1970] 3 W.L.R. 934.

139) At 940B.

The Registrar-General of Births, Deaths and Marriages adopted the following practice in relation to divorce decrees granted.

- (A) He refused to recognize two decrees of divorce granted between 11th November, 1965 and the 13th September, 1968, on the ground that the judge who pronounced the decrees (Greenfield, J.) had been appointed after U.D.I.
- (B) He refused to recognize one decree of divorce granted after 13th September, 1968, by a judge appointed before U.D.I. on the ground that the judgments of the court would not be recognized as those of a lawful court since the Rhodesian Appellate Division decided that Rhodesian courts were sitting under the 1965 Constitution.¹⁴⁰⁾
- (C) He refused to recognize five divorce decrees pronounced after 13th September, 1968 by Macauley, J. and Greenfield, J. (both appointed after U.D.I.) on both of the above grounds.¹⁴¹⁾

The Principal Probate Registry adopted a similar practice in refusing to reseal Rhodesian grants of representation granted after 13th September, 1968.¹⁴²⁾

These/...

140) In R. v. Ndlovu, 1968 (4) S.A. 515 (R., A.D.)

141) See Adams case, note 138) supra, at 938D - 938E, 945A - 945B.

142) Practice Direction (Rhodesian Grants: Resealing) [1970]
1 W.L.R. 687.

These various administrative practices in no way bound the English courts.¹⁴³⁾ The court in Adams confirmed the practice of denying validity to the judgments of judicial officers appointed after U.D.I.¹⁴⁴⁾ while rejecting the validity of the practice of refusing to recognize a decree merely on the grounds that it was given after 13th September, 1968.¹⁴⁵⁾ On the other hand it could conceivably be argued that it is the affording of cognizance to acts after the relevant date - 18th March, 1970 - which is prohibited, regardless of when the act was actually performed. It is submitted however, that the former thesis that the resolution is not retrospective is preferable to this construction. To accept the latter would in effect be to invalidate retrospectively an act which was initially valid. In addition it could give rise to very anomalous results, e.g. A and B, both domiciled in Rhodesia have been divorced by order of the Rhodesian High Court on 1st February, 1970. A proceeds to State X and so does B. A wishes to marry C in State X on 1st March, 1970. The marriage can be contracted because State X may recognize the Rhodesian divorce order. On 1st April, B wishes to marry D also in State X. Unluckily for him he is told that the marriage is impossible because State X is now prohibited by the resolution of/...

143) Adams case, note 138) supra, at 945B.

144) At 948-954.

145) At 954-956. It would thus appear that as far as United Kingdom courts are concerned, Rhodesian courts are competent to give decrees - with one exception - where the judge was appointed after U.D.I. As time progresses this should cause increased difficulties. See "Rhodesia - The Legal Blockade", Editorial in (120) New Law Journal, 1970, p. 720 at pp. 721, 722.

of the Security Council from recognizing the Rhodesian divorce order. Therefore, he is still married in the law of State X and any attempt to marry D would be bigamous. The anomalous positions of A and B, the validity of the divorce order in A's case, the invalidity of the very same order in B's case indicates that the former thesis is the preferable one and that acts performed before 18th March, 1970, may still be recognized as a matter of courtesy.

(11) It can even be argued that acts performed after 18th March, 1970 by officials and institutions in Rhodesia could in certain specified cases be lawfully accorded cognizance in the municipal law of other states. Consider the position of judges and civil servants who were appointed to their respective positions before 11th November, 1965. After 11th November, 1965 such persons could be regarded as being "officials of the illegal regime", in that their position was provided for by the Constitution of 1965 establishing the regime.¹⁴⁶⁾ However, with the exception of the Cabinet¹⁴⁷⁾ and the Legislative Assembly,¹⁴⁸⁾ existing officials can also be regarded as/...

146) For the position of the High Court see 1965 Constitution, S.128; R. v. Ndlovu, 1968 (4) S A. 207 (R.); 1968 (4) S.A. 515 (R, A.D.). For the position of holders of public offices, the Legislative Assembly, the Governor's Council, the Constitutional Council and the Board of Trustees of Tribal Trust Land see respectively 1965 Constitution, S. 125, S.126, S.127, S.131, S.132. All these "officials", in office before 1965, were deemed to be duly appointed under the 1965 Constitution.

147) The Cabinet was dismissed from office by the Governor after U.D.I. See supra, p. 335.

148) The Legislative Assembly was prohibited from making laws by the S.3(I) of the Southern Rhodesian (Constitution) Order, 1965, S.I. 1952 of 1965.

as being officials of the "legal regime" in that they held office under the 1961 Constitution and in that on the Unilateral Declaration of Independence they were specifically requested to carry on with their normal duties by the Governor acting under the 1961 Constitution and by the British Government which had assumed control of Rhodesia by virtue of the Southern Rhodesia Act, 1965, and various Orders made under this Act.

On 11th November, 1965 the Governor, in a message to the people of Rhodesia, informed them that the Declaration of Independence was illegal and that the Prime Minister and his colleagues had ceased to hold office. The message called on the people to refrain from illegal acts furthering the objects of the illegal regime. He said:

"It is the duty of all citizens to maintain law and order in the country. This applies equally to the judiciary, the armed services, the police and the public service." 149)

The British Prime Minister, in a television broadcast on 17th November, 1965 called on African Civil Servants, Government employees and other Rhodesian loyalists to stay at their posts but do nothing to further the rebellion. They should continue the ordinary services and help to maintain law and order.¹⁵⁰⁾

In Adams v. Adams the court took the view that judges appointed to the High Court of Rhodesia before 11th November, 1965, were validly sitting under the 1961 Constitution/...

149) Adams case, note 138) supra, at 942.

150) The Times, 18th November, 1965, p. 10(f).

Constitution because they had not ceased to be judges in accordance with the machinery provided by the 1961 Constitution as amended by the Constitution Amendment Act, 1964. And this was so despite the fact that in Ndlovu's case¹⁵¹⁾ the Rhodesian court itself held that it was sitting under the 1965 Constitution. A mere declaration by a judge that he is not sitting under the 1961 Constitution does not satisfy the machinery and still less could a declaration by three judges of the Appellate Division in Ndlovu's case automatically change the legal status of other members of the judiciary.¹⁵²⁾

It is conceivable therefore that the acts of such officials might be accorded cognizance in the municipal law of other states because they can be regarded as officials acting on behalf of the British Government - the constitutional authority. However this thesis is subject to the following objection. It is true that initially these officials could be regarded as being in the above position but this is no longer the case. When Rhodesia became a Republic, the attitude of the British Government was, that while such officials could formerly be regarded as servants of the Crown - that is, officials of the "legal regime" in our terms - they could no longer be so regarded. Mr. Michael Stewart, Secretary of State for Foreign and Commonwealth Affairs, made the following statement in the House of Commons on 2nd March, 1970.

"...in/..."

151) Note 146) supra.

152) Note 138) supra, at 955-956.

"...in a number of cases members of the public services, including the courts, have joined the rebellion. In other cases members of the public services still believe that they could continue to function as they did before U.D.I. But this is not so and can no longer be seen in this light. The former governor's injunction has lapsed and those who continue to serve a regime which asserts illegally that Southern Rhodesia is a republic - like those appointed by the regime cannot be regarded as serving the Crown in Southern Rhodesia. This change in their Status must, in our view, have consequences for the functions they perform and for the validity of acts done in the performance of those functions: the effects of these matters on individuals will, however, fall to be considered by the courts in this country." 153)

Thus from the inception of the Rhodesian Republic the above officials are no longer regarded as being the servants of the "legal regime". They now exercise authority solely in their capacity as officials of the "illegal" regime. The conclusion from this is obvious. It now does not matter when a judge or a civil servant was appointed in Rhodesia. All his acts performed on or after the 18th March, 1970 must go unrecognized in other municipal legal systems.

It follows from the above that if British Courts were to follow the attitude expressed by the court in Adams v. Adams that cognizance could be taken of acts performed after 18th March, 1970 by Rhodesian judges appointed before U.D.I.¹⁵⁴⁾ this would be at variance with the international law obligations of the United Kingdom in terms of the resolution of the Security Council under discussion.¹⁵⁵⁾

It/...

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- 153) Hansard, 2nd March, 1970, col. 13. It would appear, however, as if British courts are prepared to give effect to the acts of a judge who has "joined the rebellion", if the judge was appointed before U D.I. Adams case, note 138) supra, at 955F-956B.
- 154) Adams v. Adams was decided on 31st July, 1970 after the Security Council resolution.
- 155) S. Res. 277 (1970).

It must however be stressed that the decision in Adams v. Adams itself did not conflict with the international obligations of the United Kingdom because the court refused to give effect to a decree of divorce granted on 9th April, 1970, in Rhodesia. The fact that the decision is in accordance with international law would, however, appear to be accidental for the rationes decidendi have no connection with the international law obligations of the United Kingdom under the resolution of the Security Council in question. The reasons for refusing to give effect to the decree of divorce were as follows:

(A) Macauley, J., the judge who pronounced the decree, had been appointed after U D.I. Therefore he was not a judge de iure of the High Court of Rhodesia.¹⁵⁶⁾ (B) Under the doctrine of 'necessity' no recognition could be accorded as the doctrine was a fiction which was not necessary in the instant case and any implied mandate might well contradict the real intention of the lawful sovereign.¹⁵⁷⁾ (C) The doctrine of recognition of the validity of the acts of a de facto judicial officer was not applicable in this case, as the circumstances giving rise to/...

156) Adams case, note 138) supra, at 948G-949B. For a judgment to be recognized by English courts it must be given by a court competent to pronounce it according to the English rules of private international law. The Rhodesian courts satisfied this requirement (947G-948A). It must also be given by a court which was competent to pronounce it in terms of its own municipal law (948A). The Rhodesian court, presided over by Macauley, J. was held not to meet this requirement. The Recognition of Divorces and Legal Separations Act, 1971, C.53, S.2 (b) now provides that the recognition of the validity of overseas divorces and legal separations in Great Britain depends upon the divorce or legal separation being "effective under the law of that country."

157) Adams v. Adams, note 138) supra, 951E-G.

to the legal defect were notorious, had even been declared to be illegal,¹⁵⁸⁾ and the doctrine could not in any event be applied in derogation of the rights of the sovereign.¹⁵⁹⁾

(b) Recognition of the legal system of Rhodesia.

The question here is whether it is still possible, in view of the Security Council Resolution,¹⁶⁰⁾ for the courts of other states to give effect to, and apply, Rhodesian law. The Resolution does not mention Rhodesian law as such but only "acts of officials and institutions of the illegal regime." The answer to the question posed would therefore appear to be that other municipal law systems may apply Rhodesian law unless the law is one which is created by the act of an official or institution of the "illegal" regime, performed after 18th March, 1970. Thus, it is submitted, that it would be perfectly in order to apply the rules of the Rhodesian legal system as they were on 18th March, 1970. But it would not be correct to give effect to Acts and delegated legislation passed, and court orders made, after the relevant date. Whether it would be correct to give effect to the law as reflected in binding judicial precedents given after the 18th March, 1970 presents something of a problem. It is submitted that effect could be given to such laws on the theory that the courts merely declare the existing law and do not create it. Applying
this/...

158) Madzimbamuto v. Lardner-Burke, [1969] I.A.C., 645; [1968] 3 W.L.R. 1229.

159) Adams case, note 138) supra, at 953F-954H.

160) S. Res. 277 (1970).

this jurisprudential theory the laws in question are deemed to have existed prior to the decision (which clarifies them).¹⁶¹⁾ As such they cannot be said to emanate from the "acts of an official of the illegal regime". In theory they pre-dated such acts.¹⁶²⁾ The position, it is submitted, is as follows. In so far as a judgment of a court given after 18th March, 1970 operates inter partes on the rights of the parties to a dispute, effect should not be given to it. In so far as it amounts to a general declaration or interpretation of the law as it was on 18th March, 1970 it may be given effect to as declaratory evidence of the state of that law.

SECTION VII

INDIVIDUAL RESPONSIBILITY OF MEMBERS OF THE RHODESIAN GOVERNMENT.

We have seen before that, in general, the conduct of the Rhodesian authorities cannot amount to a breach of international law committed by Rhodesia because Rhodesia may not possess a relevant international personality in this connection.¹⁾ It is now necessary to examine whether the members of the Rhodesian Government, as individual human beings, can bear international responsibility for their acts so that an allegation of a breach of international law could be maintained (assuming of course that

the/...

- 161) For discussion of this jurisprudential theory see Salmond, Jurisprudence, 12th ed., London, 1966, pp. 141, 183-188; Allen, Law in the Making, 7th ed., Oxford, 1954, pp. 302-311; Bodenheimer, Jurisprudence, Harvard, 1962, pp. 186-188, 382-386; Friedman, Legal Theory, 5th ed., London, 1967, pp. 438-439.
- 162) Of course, it is obvious that if the precedent in question interprets legislative acts, either of a primary or subordinate character, emanating from the regime after 18th March, 1970, no effect should be given to the law as reflected in such a decision because the decision is merely a concretization or application of a law which ultimately emanates from the "acts of an official" of the regime.
- 1) Supra, pp. 382 et seqq. The exceptional instances in which Rhodesia has an international personality, and thus can commit wrongs has also been described.

the conduct in question constituted objectively an infringement of a norm of international law). The present writer previously pointed out that contemporary international law had developed no further on the question of individual responsibility before that law than to concede that under international law individuals have a duty not to commit piracy, war crimes, crimes against peace, i.e. the waging of an illegal war,²⁾ and possibly crimes against humanity.³⁾ It is doubtful however if the so-called crimes against humanity are universally established international law crimes involving individual responsibility.⁴⁾ We can, however, probably/...

- 2) Quaere whether the present Government of Rhodesia could, as individuals, commit a crime against peace by commencing hostilities against some other state. Could the hostilities so commenced amount to a state of war, as defined by international law, in the absence of Rhodesian personality? If not, how could the individuals in question be responsible for the waging of an illegal war seeing that no state of war might exist at all! Quaere, further whether the use of armed force (not amounting to war) contrary to Article 2(4) of the Charter of the United Nations, would amount to a crime against peace by the individual responsible for it.
- 3) The writer, "Rhodesia and the United Nations: The Lawfulness of International Concern - A Qualification" (2) C.I.L.S.A., 1969, p.454 at pp. 456-457; Oppenheim, International Law, 8th ed. London, 1955, I, pp. 341-342; Gaius Ezejiolor, Protection of Human Rights under the Law, London, 1964, pp. 18-22. The latter however mentions other instances in which he regards the individual as having a duty under international law. According to him the individual has a duty not to breach a blockade because of the sanction to the ship and cargo (p.19) which may follow and a duty not to carry contraband, again because of the sanction to ship and cargo (p.20). With respect, these do not illustrate duties owing by individuals under the law of nations. There is nothing illegal about breaking a blockade or carrying contraband. The individual is at liberty to do so if he wishes. But if he does so, his state is not entitled to protest if other states assume jurisdiction over his ship or the cargo. Ezejiolor also says that when international law is incorporated into municipal law systems, duties may be imposed on individuals (pp.20-21). This is so, but, with respect, such duties are then municipal law duties.
- 4) Schwarzenberger, Manual, pp. 80-81. Ezejiolor, note (3) supra, pp. 18-19 says that they are not beyond doubt international crimes but may merely be ephemeral measures enacted by a victor against the vanquished. He says, and with respect correctly, that confirmation of such crimes by the General Assembly of the United Nations in 1946 would probably have the effect of estopping members of the United Nations from contesting the validity of these principles as rules of international law.

probably assert with some confidence that since the Genocide Convention of 1948, the crime of genocide is one established example of a crime against humanity.⁵⁾

Only in the above spheres of conduct is the individual a "duty-subject" of international law with the ability to commit delinquencies in his own capacity.⁶⁾ In fact when we are in the sphere of individual responsibility we are also in the sphere of international criminal law.⁷⁾ The sphere of responsibility here is very limited in extent.⁸⁾

It is clear that the activities of the members of the Rhodesian Government do not fall within any of these well-defined categories of individual responsibility. Their acts therefore do not infringe international law for the self-evident reason that, as individuals, they have no duty under international law not to commit such acts. The lack of international personality in the perpetrators of the conduct seems, to the present
_____writer/...

- 5) Schwarzenberger, Manual, pp. 80-81; Wolfgang Friedmann, "The Changing Dimensions of International Law", Essays on International Law from the Columbia Law Review, New York, 1965, p. 95 at p. 109; Ezejiofor, note 3) supra, p. 21.
- 6) Oppenheim, note 3) supra, p. 149.
- 7) Robert K. Woetzel, "International Criminal Law and Human Rights. The Sharp Edge of the Sword", Proceedings A.S.I.L., 1968, p. 117. Woetzel, however, asserts that most of the rights listed in the Universal Declaration are protected by international criminal law imposing individual responsibility. This assertion goes far beyond the established categories of individual responsibility (which are of course synonymous with established international crimes).
- 8) Friedmann, note 5) supra, p. 109, says that in the law of individual responsibility there have been rudimentary beginnings primarily as a result of the post-war trials of war criminals in Germany and Japan followed some years later by the Genocide Convention. For recent attempts to extend the sphere of individual responsibility by creating new international crimes, see the Organization of American States' Convention to Prevent and Punish Acts of Terrorism, 1971, Article 2 (see (10) I.L.M., 1971, p. 255); the Soviet Union - Guinea Draft Convention on the Suppression and Punishment of the Crime of Apartheid, 1971, Article 1 (see (11) I.L.M., 1972, p. 16); the International Law Commission's Draft Articles Concerning the Protection of Diplomats, 1972, Article 1 (see (11) I.L.M., 1972, p. 493); the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, Article 1 (see (10) I.L.M., 1971, p. 133).

writer, to be a conclusive answer to any allegation of infringement of international law by them as individuals.

The question of the municipal law responsibility of the individual members of the Rhodesian Cabinet who made the Unilateral Declaration of Independence has, of course, been debated. This question raises many complicated issues including the following: whether the members of the Cabinet have committed treason in English law;⁹⁾ whether, in this respect, a distinction should be drawn between those members of the Cabinet who possess both the citizenship of the United Kingdom and Colonies and that of Southern Rhodesia and those members who possess the latter citizenship only;¹⁰⁾ whether U.D.I. amounts to any other offence in English law, if it does not amount to treason;¹¹⁾ whether the law of treason in Rhodesia is the English law of treason or the Roman-Dutch;¹²⁾

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- 9) Louis Blom-Cooper & G.I.A.D. Draper maintain that U D.I. was an offence under the Treason Felony Act, 1848, 11 & 12 Vict. C.12, S.3. The Times, 25th November, 1965, p. 13 (e)(f)(g); 1st December, 1965, p. 16(g). O. Hood Phillips queries this. The Times, 30th November, 1965, p. 11 (e). See too Alan Wharam, "Treason in Rhodesia", Cambridge Law Journal, 1967, p. 189 at pp. 194, 213 who is of the view that U.D.I. is not treason under the Treason Act, 1351, 25 Edw. III, C. 2. because "constructive" treason within the meaning of that statute does not exist. Sed contra B.A. Hepple, P.O'Higgins, C.C Turpin, "Rhodesian Crisis - Criminal Liability", Criminal Law Review, 1966, p. 5 at p. 7. They also consider that U.D.I. was an offence under the Treason Felony Act, 1848, S.3.
- 10) Louis Blom-Cooper & G.I.A.D. Draper, The Times, 25th November, 1965, p. 13 (e)(f)(g); Hepple, O'Higgins, Turpin, note 9) supra, pp. 6-8.
- 11) Wharam, note 9) supra, p. 213 considers that U.D.I. might be a misdemeanour at Common Law in that it is an infringement of a statute for which no penalty is provided, viz. the Colonial Laws Validity Act, 1865 which here crystallizes the doctrine of the supremacy of the United Kingdom Parliament.
- 12) Hepple, O'Higgins, Turpin, note 9) supra, p. 9 and A.M.Honoré, The Times, 23rd November, 1965, p. 11(g) regard the Roman-Dutch Law as applying. Sed contra Louis Blom-Cooper and G.I.A.D. Draper, The Times, 25th November, 1965, p. 13 (e)(f)(g); F.G. Gardiner, "Notes on the Law of Treason" (18) S.A.L.J., 1901, p. 142 at p. 144.

if the Rhodesian law of treason is Roman-Dutch law, does U.D.I. amount to treason in that law;¹³⁾ if U.D.I. is not treason in Roman-Dutch law, could it amount to any other offence in that law?¹⁴⁾ These questions, and indeed the general question of the municipal law responsibility of the members of the Rhodesian government, fall outside the ambit of the present thesis which is concerned with questions of international law.

CHAPTER V/...

- 13) Would the requisites of High Treason, crimen perduellionis (see Joannes van der Linden, Institutes of Holland, translated Juta, Durban, 1904, p.202 be present in U.D.I.? Hepple, O'Higgins, Turpin, note 9) supra, p. 14 are of the view that U.D.I. amounts to perduellio.
- 14) Hepple, O'Higgins, Turpin, note 9) supra, p. 13 are of the view that U.D.I. also amounts to crimen laesae majestatis (as to which see Van der Linden, note 13) supra, pp. 202-203). Honoré is more cautious. The Times, 23rd November, 1965, p. 11(g). Hepple O'Higgins and Turpin, op.cit., p. 15 consider that U.D.I. amounted to the offence of unlawful assumption of the functions of government under S.2 (a) of the Preservation of Constitutional Government Act, 1963 (a Southern Rhodesia statute). They also consider (p.16) that various statements reported to have been made by Mr. Ian Smith after U.D.I. could be offences under S.44 of the Law and Order (Maintenance) Act (also a Southern Rhodesian statute, C.39), as exciting disaffection to the existing authority. The question of municipal law responsibility might also be relevant to the case of the three people executed in 1968 whom the Queen had pardoned on the advice of the British Government. See Dhlamini and Another v. Carter, N.O. and Another, N.O., 1968 (2) S A. 467 (R., A.D.). Chayes, 11, p. 1400 describes this incident incorrectly by alleging that "three Africans were executed as traitors by the Rhodesian Government". The cases were, however, concerned with, in the words of the court, "three brutal murders", each one of which "is a case of a most brutal and savage murder ... where it is inconceivable, that the trial judge would, in his confidential report to the Executive, have recommended that the law should not take its course". Per Beadle, C.J. in Dhlamini & Others v. Carter, N.O. & Another, 1968 (2) S A. 445 (R.,A.D.) at 448, 449. Of course, the totally unsavoury nature of the facts of the crimes (described succinctly ibid., 448-449) is irrelevant to the basic legal issue of municipal law responsibility for execution following a pardon.

CHAPTER V

THE PEOPLE OF RHODESIA.

SECTION I

PEOPLE AS BEARERS OF RIGHTS IN INTERNATIONAL LAW.

In using the phrase "the people of Rhodesia", the writer intends to indicate the population of Rhodesia as a whole, without discrimination, and each individual member thereof and not merely the electorate.¹⁾ We are therefore concerned with the international law position of human persons. As a general rule individual human beings may benefit from rules of international law in fact, but in law the legal rights to these benefits are vested in the state of which they happen to be nationals.²⁾ Thus in principle the individual is an object of international law and not a subject. As a rule he does not have rights and duties under international law. But exceptionally it happens that the individual has specific rights and duties under international law and it is correct to regard him as a limited international person in the particular context.³⁾ In some respects the individual has duties. These are of a very limited nature. They are usually treated under the topic of individual responsibility in international law and the instances in which the individual is a duty-subject of international law were enumerated in the last Chapter.⁴⁾ Occasionally too, and by way of exception, the individual

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- 1) Molteno, pp. 445-446 is of the view that "the Rhodesian people" would include all citizens of Rhodesia not under some natural disability - a wider concept than that of the electorate.
- 2) Akehurst, pp. 94-95; Schwarzenberger, Manual, pp. 80-81; Sorensen, pp. 470-471. An international organization may also have rights in relation to its employees. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949, I.C.J. Rep.174.
- 3) Akehurst, pp. 94-95; Schwarzenberger, Manual, p. 81; Sorensen, p. 471.
- 4) Supra, pp.465-468. See too Sorensen, pp. 514-518.

is a rights-subject in international law. This happens where rights are conferred directly upon him by virtue of the operation of a convention.⁵⁾ The principal example of such conferment of international law rights on the individual occurs under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.⁶⁾ Apart therefore from isolated cases, international law rights are not possessed by individuals.⁷⁾

In the case of Rhodesia, three types of alleged international law right may conceivably be vested in individual Rhodesians, groups of such individuals, or the people as a whole. These are:

- (1) the right to self-determination;
- (2) human rights;
- (3) rights vested in para-military forces operating in Rhodesia to certain standards of treatment.

In examining each of these "rights" it must first be determined whether the "right" exists as such in international law at all or whether it remains merely as an ideal. This is why the present writer previously used the term "alleged" rights. In addition the entity or entities against which these "rights" are available must be identified. For if any of these "rights" exist it must correlate with a duty to observe the right in some other international entity. The idea of a right of any kind is only conceivable in a right-duty nexus.⁸⁾

SECTION II/..

- 5) Akehurst, pp. 94-95.
- 6) Sections IV and V of the Convention contain procedural provisions for the enforcement of the rights bestowed by the Convention. Another example of a right bestowing Convention is the United Nations International Covenants on Human Rights, 1966. Further minor examples are cited by Sorensen, pp. 511-514.
- 7) Wolfgang Friedmann, "The Changing Dimensions of International Law", Essays on International Law from the Columbia Law Review, New York, 1965, p. 95 at pp. 108-109 points out that, as yet, the rights of the individual are fragmentary and uncertain in international law.
- 8) Salmond, Jurisprudence, 12th ed., London, 1966, p. 217; Wortley, Jurisprudence, New York, 1967, p. 288.

SECTION II

THE RIGHT OF SELF-DETERMINATION

Whether the people of Rhodesia have a right of self-determination or not must naturally depend on the existence of such a right in international law and its vesting in the people of Rhodesia as holders. To establish whether or not such a right exists it is necessary to examine the relevant international materials to see whether or not such a right has evolved or been created.

It would certainly appear to be clear that international customary law conceded no right of self-determination prior to the Second World War.¹⁾ Thus the Versailles Conference in 1919 gave short shift to views expressed on this topic.²⁾ Apart from the Mandates system, the League of Nations Covenant pays no attention to the matter.³⁾ The Commission of Jurists reporting on the Aaland Islands dispute supports the view that there was no such right.⁴⁾ The jurisprudence of the World Court confirms that minorities only had rights under treaties and no right of self-determination.⁵⁾ On the cession of the Danish West Indies, the United States made it clear that she would not concede the right of deciding on the proposed transfer to the local inhabitants and the United Kingdom did not regard self-determination in the Atlantic Charter as constituting a legal obligation.⁶⁾

Since/...

- 1) Obed Y. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations, The Hague, 1966, p. 164; L.C.Green, "Self-Determination and Settlement of the Arab-Israeli Conflict", Proceedings A.S.I.L., 1971, p.40; Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations, Oxford, 1963, p. 91.
- 2) Green, note 1) supra, p. 42.
- 3) Ibid. Green says that the Mandates' system can hardly be described as recognition of a right of self-determination.
- 4) Higgins, note 1) supra, p. 91; Asamoah, note 1) supra, p. 164.
- 5) Green, note 1) supra, p. 41.
- 6) Ibid., p. 42.

Since the Second World War, there has been growing support for a right of self-determination. We now examine the most important evidence in this connection.

- (1) Articles 1(2) and 55 of the Charter of the United Nations refer to the principle of self-determination in the context of the purposes or aims of the organization.

These Articles do not even attempt to create a right of self-determination. They refer to the principle of self-determination.⁷⁾

Further the delegates who participated at the San Francisco Conference in 1945 meant the term self-determination of "peoples" in the Charter to denote the self-determination of the nations who were members of the United Nations.⁸⁾ "Peoples", therefore, is synonymous with "nations". In effect this means that the "self-determination of peoples" is superfluous because it merely expresses the sovereignty and independence of the member states of the United Nations.⁹⁾

- (2) Article 73 of the Charter of the United Nations provides that members which have responsibilities for the administration of territories whose peoples have not attained a full measure of self-government have certain obligations including inter alia an obligation to develop self-government.

The/...

- 7) Robert P. Pace, "The United Nations and Self-Determination" (30) T.H. R-H.R., 1967, p. 124, p. 231 at pp. 124-125. Akehurst, p. 283 says the articles in question are so vague that it is doubtful if they create any legal obligation.
- 8) Green, note 1) supra, p. 43; Hans Kelsen, The Law of the United Nations, London, 1951, p. 52. Asamoah, note 1) supra, pp. 164-165 says that whatever the meaning attributed to the principle at San Francisco, subsequent practice of the United Nations has given life and blood to the principle. This subsequent practice of the United Nations and its implications are considered infra, pp. 474-467, 477 et seqq.
- 9) Kelsen, note 8) supra, p. 52 says that any other interpretation could conflict with the principle of non-intervention in Article 2(7)

The obligations which arise under Article 73 are fully discussed at a later stage.¹⁰⁾ At the moment, two questions are relevant to the discussion. (a) Does the obligation to develop self-government include an obligation to grant self-government? (b) Does the obligation to develop self-government correlate to a right vested in the people of a non-self-governing territory, i.e. do the latter have a correlative right of self-determination?

- (a) The Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960 says that immediate steps should be taken to transfer all powers to the peoples of territories which have not yet attained independence.¹¹⁾ It has been asserted that this Declaration is in the form of an authoritative interpretation by the General Assembly of Articles 1(2), 55 and 73 of the Charter.¹²⁾

With respect, it is submitted, that though the Assembly may interpret, its interpretations are not authoritative. They are not final and conclusive but are merely evidence in favour of a particular interpretation of the Charter, the accuracy of which may therefore be contested by states.¹³⁾ The evidential value of Assembly interpretation is thus subject to evaluation.

The/...

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- 10) Infra, pp657-659. The discussion takes place in the context of United Kingdom obligations under Chapter XI of the Charter as the possible administering authority in respect of Rhodesia.
- 11) A.Res. 1514 (XV) paragraph 5.
- 12) Brownlie, p. 484; Samuel A. Bleicher, "The Legal Significance of Re-citation of General Assembly Resolutions" (63) A.J.I.L., 1969, p. 444 at p. 475. Here we see this famous Declaration in one of its relevant aspects. We shall later see it in another role - as evidence in favour of a customary right of self-determination.
- 13) See discussion supra, pp. 98-100.

The Declaration, as we saw, asserts an obligation to grant independence (not merely self-government)¹⁴⁾ immediately. Indirectly this implies that mere control over non-self-governing territories is a breach of obligation, i.e. that the entire system of having dependent territories is in fact illegal in international law. But this cannot be the position. The Charter of the United Nations itself, in Chapters XI and XII makes provision for the existence of a system of non-self-governing territories and trust territories and imposes sundry obligations on member states controlling such territories.¹⁵⁾ It is inconceivable that in such circumstances, the possession of non-self-governing territories is illegal. In addition, the Declaration of the Assembly in question, by appearing to demand immediate independence, goes beyond the provisions of the Charter and even beyond the practice of the United Nations itself. In the practice of the United Nations proposals for the setting of "target dates" for independence have not been accepted.¹⁶⁾ There is therefore no obligation to grant immediate self-government. In fact, writers who favour a right of self-determination admit this but they try to infuse other content into the "right". Thus Bleicher says that when fifteen years had passed it was not unreasonable for the Assembly to conclude in the Declaration that colonial powers which showed no progress were not fully meeting their Charter obligations.¹⁷⁾

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- 14) For the distinction between independence and self-government see supra, pp. 91-93.
- 15) Asamoah, note 1) supra, p. 173.
- 16) Ibid., p. 172. Proposals by the Soviet Union to proclaim 1962 as the year of elimination of colonialism and to complete the implementation of the Declaration by the seventeenth session were rejected. See Higgins, note 1) supra, p. 103.
- 17) Note 12) supra, p. 474.

With respect, this argument assumes the existence of the very obligation which is in issue, the obligation to grant self-government. Bleicher then goes on to conclude that immediate implementation is not the crucial test of a principle of international law.¹⁸⁾ Higgins says that though self-determination has developed as an international legal right, the Assembly may not prescribe an exact time for the granting of independence to a particular territory, though it may urge that this occur speedily.¹⁹⁾

It would appear from the above that there is no obligation to grant independence or self-government immediately or at any particular time in the future. In fact, the content would appear to be so vague as to lack normative quality.²⁰⁾ It is therefore submitted that there is no such obligation.

- (b) We must now consider whether the obligation to develop self-government in Article 73 of the Charter correlates to a right vested in the people of a non-self-government territory. It would appear that these obligations are undertaken as member states of the United Nations and as such they are owed to other parties to the Convention in question - the Charter. As such the right to claim performance of such obligations rests in the other member states and not in the peoples of
non-self-governing/...

18) Note 12) supra, pp. 477-478.

19) Note 1) supra, p. 103.

20) Contrast the Trust agreement with Italy in relation to Somaliland. This agreement provided that independence would be granted by Italy within ten years. The agreement incorporated a precise obligation to grant independence in this particular instance. See Schwarzenberger, Manual, p. 74; Starke, p. 137.

non-self-governing territories.²¹⁾ These latter may merely benefit by virtue of the obligations but possess no rights in relation thereto because the Charter is res inter alios acta as far as they are concerned.²²⁾

It has been alleged by the representatives of the United States to the Security Council of the United Nations that the secession of Rhodesia (i.e. U.D.I.) constitutes a violation of the rights of the people of Rhodesia under Chapter XI of the Charter, i.e. under Article 73.²³⁾ In view of what we have said, this contention must be rejected for the following reasons:

(a)/...

- 21) The Charter gives no right to any entity, individual human being or group other than the states parties. Green, note 1) supra, p. 43. Similarly G.I.A.D Draper. "The Geneva Conventions 1949" (114) H.R., 1965, 1, p. 59 at p. 96 argues that rights under Article 3 of the above Conventions inhere in the states parties to the Conventions rather than the individuals who may benefit and Lindley, pp. 327, 333 argues that such duties as are owed in respect of native inhabitants (under Article 6 of the General Act of the Berlin Conference for example) are owed "to the other members of the International Family ... who ... had made reciprocal promises with regard to their own actions in relation thereto It does not result from this that International Law may bestow rights on individuals."
- 22) In theory it might be possible to construe Article 73 as a stipulation pour autrui conferring rights on a third party, viz. the people of a non-self-governing territory. Reparations for injuries Suffered in the Service of the United Nations Advisory Opinion, 1949, I.C.J. Rep. 179: Jurisdiction of the Courts of Danzig case, (1928) P.C.I.J., Ser. B., No. 15. Such a construction is unlikely here. (i) The language in every paragraph of the article would appear to be entirely directed to the assumption of obligations. Nowhere are the inhabitants of non-self-governing territories stated to have rights. The interests, well-being and progressive development of such peoples are merely recognized as guidelines for the fulfilment of obligations. This, in conjunction with the presumption against a stipulation pour autrui (see Certain German Interests in Polish Upper Silesia case (1926) P.C.I.J., Ser. A., No. 7, p. 78; Free Zones of Upper Savoy and the District of Gex case (1932) P.C.I.J., Ser. A/B, No. 46, p. 147) renders a construction of such a stipulation very unlikely. (ii) There is some authority for the proposition that the third party must accept the stipulation in its favour to obtain rights. Lord McNair, Law of Treaties, Oxford, 1961, pp. 312, 313. Akehurst, pp. 163-164; Sorensen, pp. 218-219; Free Zones case, supra. It is difficult to see how the people of a non-self-governing territory could make such an acceptance. They might not be a sufficiently cohesive political unit to be in a position to do so.
- 23) John W. Halderman, "Some Legal Aspects of Sanctions in the Rhodesian Case" (17) I.C.L.Q., 1968, p. 672 at p. 700.

- (a) There is no obligation to grant self-determination under Article 73 and hence no correlative right to self-determination.
- (b) Any obligations under Article 73 relating to the development of self-determination do not correlate with rights in the Rhodesian people but with rights in other member states of the United Nations.
- (c) Obligations to develop self-government under Article 73 only bind member states of the United Nations. Rhodesia has never been a member.
- (d) Rhodesia would, in any event, be incapable of bearing such obligations because its international personality is not so extensive as to embrace this sphere of activity.²⁴⁾
- (e) At the time U.D.I. was made, Southern Rhodesia was a self-governing colony. Chapter XI and Article 73 were therefore inapplicable to it.²⁵⁾

(3) The Universal Declaration of Human Rights, 1948.

The omission of any right of self-determination from this manifesto is evidence against the existence of such a right.²⁶⁾

(4) The International Covenants on Human Rights, 1966.

United Nations Human Rights Covenants were adopted and opened for signature on 16th December, 1966.²⁷⁾ They embody the rights of self-determination of all peoples. Article 1(1) of each Covenant provides:

"All/...

24) Supra, p. 382.

25) Supra, pp. 104-105. Since U.D.I. Rhodesia has probably ceased to be a self-governing territory - at least as far as the United Kingdom and the United Nations are concerned. Thus Article 73 may have become applicable since U.D.I. See discussion infra, pp. 595-596.

26) Green, note 1) supra, p. 45. Pace, note 7) supra, p. 130 says that though the right is not included it might be possible to imply it from the provisions of Articles 1, 2 and 21.

27) For text see (61) A.J.I.L., 1967, p. 861.

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural developments." 28)

The Covenants come into force three months after the deposit of the thirty fifth ratification.²⁹⁾ When they come into force they will embody a legal right of self-determination which will then need to be clothed with legal content.³⁰⁾

The Covenants, when they come into force, will only bind such states as have ratified them and will thus only create a right of self-determination vis-à-vis such states. Thus they do not help in establishing whether such a right presently exists. On the contrary! The fact that it was necessary to conclude a convention to provide for the existence of the right, that the convention in question is subject to ratification and that the number of states which have so far ratified it is minimal,³¹⁾ all seem to eliminate any value
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- 28) For a history of the opposition to the inclusion of a right of self-determination in the Covenants, see Pace, note 7) supra, at pp. 131-135, 233-240.
- 29) Article 27, International Covenant on Economic, Social and Cultural Rights: Article 49, International Covenant on Civil and Political Rights.
- 30) Since the provision is of a most general and vague nature, there will be great difficulty in establishing its precise content at the relevant time. Establishing the meaning of the terms "peoples", "freely" and "status" will cause difficulty - perhaps even to the extent of making one wonder whether a right such as that defined here has any proper place in instruments such as the Covenants. See Human Rights in National and International Law, edited by A.H. Robertson, Manchester, 1968, p. 290. It is interesting to note that at the meetings of the drafting Commission, the questions of proper definition and the meaning of "peoples" were posed but the majority of the Commission considered this delaying tactics! See Pace, note 7) supra, pp. 133, 233. Perhaps the present reluctance of states and delay in ratifying the Covenants is one of the results of this precipitate drafting and vague definition. It has even been argued that "peoples" within the meaning of Articles 1 may merely be "nations". Green, note 1) supra, pp. 45-46. If this is so the Covenants take us no further than the Charter of the United Nations, Articles 1(2), 55. They simply amount to a mutual affirmation of the sovereignty and independence of the parties to the Covenants.
- 31) See Green, note 1) supra, p. 46.

which the Covenants might have as declaratory evidence of the existence of such a right and to suggest that such a right does not exist in customary law.

(5) The Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960.

We previously discussed this Declaration in its role as a possible interpretation of Charter obligations under Articles 1(2), 55 and 73. Here we consider its evidential weight in establishing whether or not there is a right of self-determination in international law. The Declaration in question is a resolution of the General Assembly of the United Nations.³²⁾ In principle the resolutions of the Assembly amount to recommendations and do not impose binding legal obligations. The Assembly is not a legislative body.³³⁾ The Colonial Declaration is thus in essence a recommendation and has no inherent binding power.³⁴⁾

Though the Declarations of the General Assembly have no inherent binding power, they may nevertheless be evidence of customary international law. The elements of custom were previously considered.³⁵⁾ The formation of custom requires widespread and representative participation by states, including those states which are specially
affected/...

32) A. Res. 1514 (XV).

33) Article 10 of the Charter; Proceedings A.S.I.L., 1971 p. 52. J.A. de Yturriaga, "Non-Self-Governing Territories: The Law and Practice of the United Nations" (18) The Yearbook of World Affairs, 1964, p.178 at p. 209. He points out that the majority of scholars reach the conclusion that such resolutions are not legally binding and quotes the relevant authorities (p.210, footnote 6). There are however exceptional cases where such resolutions can bind e.g. decisions made under Articles 4, 5, 6, 16, 17, 19, 21, 22. See too Akehurst, pp. 256-257; Bleicher, note 12) supra, pp. 446-448.

34) De Yturriaga, note 33) supra, pp. 209, 210, 212. See too, R.Y.Jennings The Acquisition of Territory in International Law, Manchester, 1963, p.83 who describes A. Res. 1514 (XV) as an essentially political document, the "rights" in which do not amount to legal rights.

35) Supra, p. 160.

affected.³⁶⁾ The practice involved should also be extensive and virtually uniform,³⁷⁾ and the states involved in the practice must believe themselves to be applying a mandatory rule of international law.³⁸⁾ According to the World Court in its latest exposition of the subject two things are necessary - a settled practice and a belief inferred from the way the practice is conducted that it is obligatory.³⁹⁾ The resolutions of the General Assembly play a role in the above custom-forming process for they help to clarify the practice of states (and of international organizations) and the opinio juris both of which are essential in the formation of customary rules.⁴⁰⁾ Thus the Assembly can set forces in motion which ultimately result in the formation of a consensus on the part of the international community and which leads to the formation of custom.⁴¹⁾ Resolutions of the Assembly have moreover an inherent ability to express such consensus.⁴²⁾ In form they are ideal for the practical establishment of consensus. To the extent that certain states may have voted regularly for resolutions, this may amount to a practice on their part and may also indicate that they consider themselves obliged as a matter of international law to recognize the norms embodied in the resolution. The requisites for custom would then be present. It is doubtful however if such a practice could be imputed to a state which voted against the resolution, abstained from voting on it, or to non-member states of the United Nations.⁴³⁾

36) North Sea Continental Shelf cases, I.C.J. Rep.1969 at paragraph 73. Re-citation/...

37) Ibid., paragraph 74.

38) Ibid., paragraph 76 This is the opinio juris.

39) Ibid paragraph 77.

40) See in general Bleicher, note 12) supra pp 449-451.

41) Rupert Emerson, "Self-Determination" (65) A J.I.L. 1971 p.459 at p460.

42) Bleicher, note 12) supra, p. 451.

43) Green, note 1) supra, p. 45; Bleicher, note 12) supra, pp.446-448. Bleicher, op.cit., p. 451 says that states opposing a resolution will be protected from the application of the custom to them, assuming they had not by their previous acts, either within or outside the United Nations already accepted the custom.

Re-citation of resolutions is one particular factor (but only one) which may give that resolution special significance as evidence. Re-citation distinguishes the view of the community which has some continuity (and is therefore more likely to represent practice) from the mere "accident" of Assembly politics.⁴⁴⁾ It is even possible for a Declaration of the General Assembly to create "instant" custom. Here the position is that the Declaration in question is the only precedent from practice which supports the custom.⁴⁵⁾

The Colonial Declaration is the most cited resolution of the General Assembly. It has received more citations in other resolutions of the Assembly than any other resolution. It has also received the highest average citation per session of the General Assembly.⁴⁶⁾ Even so, it is still necessary to establish whether or not this Declaration correctly reflects international law, i.e. whether the right of self-determination which it postulates is, in fact, an established international law right. Our task here resolves itself into seeing whether the Declaration in question accords with the general practice of states and whether there is an opinio juris that the Declaration represents law. For if both of these factors are present, the Colonial Declaration does evidence a customary right of self-determination. We must now enquire into whether the Declaration accords with practice.

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44) Ibid., p. 453.

45) Anglo Iranian Oil Co. Ltd., v. SUPOR, I.L.R., 1955, 23 at 40-41. Akehurst, pp. 42-43 says this is possible where there is no other evidence against the alleged custom. For further discussion of such "pressure cooked", "instantaneous" or "spontaneous" custom, see Human Rights in National and International Law, note 30) supra, p. 325; C. Wilfred Jenks, A New World of Law?, Longmans, 1969, pp. 143-144.

46) Bleicher, note 12) supra, p. 456.

The practice of states here is of two kinds.

- (a) What states say. These are norms of international law alleged by states to exist as such. They might, for example, be embodied in resolutions at international organizations and conferences.
- (b) What states do. This consists in the actual conduct of states in relation to other states. It naturally includes both acts and omissions.⁴⁷⁾

Since the practice of states may be of two kinds, the question arises what is the relationship between these two species of practice. It is submitted that if there is no conflict between the two species in any case that a valid practice exists. Thus for instance there will be a valid practice:

- (a) Where a state's verbal pronouncements on the state of the law accord with the actual conduct of the state, i.e. where the state practices what it preaches;
- (b) Where a state pronounces on the state of the law but it has not yet had the opportunity to conduct itself in the particular sphere.⁴⁸⁾

Verbal statements alone may constitute valid practice. Here we may be, in effect, in the sphere of "instant" custom. Thus, for instance, states in general might declare prospectively a rule of international law/...

47) Akehurst, pp. 43-44; Rosalyn Higgins, "The United Nations and Law-making: The Political Organs", Proceedings A.S.I.L., 1970, p.37 at p. 47. There is however a substantial body of opinion which holds the view that practice consists in what states do not what they say. See dissenting opinion of Judge Read in the Anglo-Norwegian Fisheries case, I.C.J. Rep. 1951, 116, 191. Akehurst, p. 43.

48) Where there is no clear evidence of what states do one is entitled to rely on what they say. Akehurst, pp. 43-44; Higgins, note 47) supra, p.47.

law for a situation yet to arise. This might be done through the auspices of the General Assembly of the United Nations and the resolution would be the only evidence of a custom created for a field in which conduct had yet to take place.⁴⁹⁾ On the other hand, if there is a conflict between what states say and what they do, there will be no established practice and a custom cannot evolve.⁵⁰⁾ States cannot be allowed to blow hot and cold in the custom-forming process. Judge Van Wyk says:

"Applicants did not even attempt to show any practice by States in accordance with the alleged norm but relied on statements of states relating, not to the practice of those or other states, but to criticism of the respondent's policies".⁵¹⁾

What the learned judge is, in effect, saying is that a rule cannot be established merely on the basis of statements made by states in circumstances where the actual practice or conduct of states in the matter can be shown without difficulty, and which, if shown, would probably conflict with the alleged norm. Judge Tanaka, in the same case, took a different view. He considered that the attitude of Judge Van Wyk to be positivistic and was of the opinion that customary law developed through the collective processes of the United Nations could not be negated by the failure of some or even many nations to conform to the norms. Higgins, discussing the attitudes of both judges, is of the view, and with respect she is correct, that the idea that custom must rest not only on words and

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49) Akehurst, p.44. The best example of this is perhaps the Space Declaration, 1963 in which the Assembly clarified certain rules relative to the conduct of states in space. A.Res. 1962 (XVIII). See Human Rights in National and International Law, note 30 supra, p.325; Ian Brownlie, Basic Documents in International Law, Oxford, 1967, p.103.

50) Akehurst, pp. 43-44; Higgins, note 47) supra, pp. 47-48.

51) South West Africa case, I.C.J. Rep., 1966, at 169.

votes but on other manifestations of state behaviour is not positivistic and if national practices run counter to votes at the United Nations, this makes doubtful the claim that the resolutions of the Assembly are evidence of international customary law. She disagrees with the view that practice within the United Nations is paramount in the face of conflicting evidence.⁵²⁾ We may conclude that if there is no conduct constituting practice on a particular matter, then what states declare to be the legal position is a good enough practice to support custom. The declaration should of course have sufficient generality and embody an opinio juris. On the other hand, if there exists a practice which is contrary to the declaration, the declaration cannot, in itself, be sufficient evidence of custom. If practice denies a rule, then mere lip service cannot establish it.

Bearing the above principles in mind, we must now approach the Colonial Declaration to see whether it conforms to practice in the matter of self-determination. Here again we may draw a convenient distinction between what states say and what they do.

(a) What states say.

The question here is whether the verbal assertions of states support the existence of a right of self-determination. In 1951 the majority of the members of the United Nations decided to include a right of self-determination in the Covenants on Human Rights to be formulated.⁵³⁾ The following year the majority of Assembly members also favoured such a right.⁵⁴⁾

Eighty-nine/...

52) Note 47) supra, pp. 47-48.

53) A. Res. 545 (VI). This would not, however, amount to a declaration of the present existence of such a right.

54) A. Res. 637 (VII).

Eighty-nine states supported the Colonial Declaration itself by voting for it.⁵⁵⁾ The Colonial Declaration turned out afterwards to be the most cited resolution in the history of the Assembly.⁵⁶⁾ It also formed the basis for further resolutions.⁵⁷⁾

We may conclude that there is a substantial body of opinion in favour of the existence of a right of self-determination. Can this body of opinion be said to be general. Here it becomes relevant to examine attitudes which are adverse to such an opinion and to assess the importance of such attitudes. We must note initially that there were nine abstentions in voting on the Colonial Declaration itself.⁵⁸⁾ There were four on the resolution establishing the committee to implement the Colonial Declaration⁵⁹⁾ and there were twenty-seven on the resolution relating to self-determination for Southern Rhodesia/...

55) A. Res. 1514 (XV).

56) Bleicher, note 12) supra, p. 456.

57) Such as those reaffirming self-determination for Algeria (A.Res. 1724 (XVI)), Angola (A.Res. 1603 (XV)) and Southern Rhodesia (A.Res. 1747 (XVI), 1755 (XVII)), and forming a committee to implement the 1960 Declaration (A.Res. 1654 (XVI)). The latter was affirmed by ninety-seven states. The right of self-determination was also reaffirmed in A. Res. 2625 (XXV), The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 1970, adopted by the Assembly without a vote at the commemorative session of the United Nations' twenty-fifth anniversary. See (9) I.L.M., 1970, p.1292 at p. 1296.

58) Higgins, note 1) supra, p. 101 concludes that this resolution must be taken to represent the wishes and beliefs of the full membership of the United Nations because there was no opposition to it and the number of abstentions was very low. With respect, this assertion goes too far. The views in question will not be implied from abstention. See Green, note 1) supra, p. 45.

59) A. Res. 1654 (XVI).

Rhodesia which was, as we have seen, based on the Colonial Declaration.⁶⁰⁾ It is submitted that the nine abstentions cast on the Colonial Declaration do assume relevance and importance here. They indicate that the Colonial states in general do not support the existence of such a right. It is difficult to see how a general practice could arise in which the Colonial states did not participate for the following reasons:

- (i) Most of the Colonial states are important and influential members of the international community whose practice is relevant in determining the generality of custom.
- (ii) The Colonial states can be regarded as a block of states, the failure of which to participate in practice must detract from the generality of that practice.
- (iii) The Colonial states are the states principally affected by the right of self-determination. But a practice must include that of the affected powers if it is to be a basis for custom.⁶¹⁾

Apart from the above it is also profitable to examine views expressed by individual states on the existence of a right of self-determination. Thus when in 1951 the Assembly wished to embody self-determination in the proposed Covenants on Human Rights, the United Kingdom did not dispute the principle of self-determination/

60) A.Res. 1747 (XVI). There was also one vote against. Higgins, note 1) supra, p. 103, asserts that this resolution and A.Res. 1755 (XVII) clearly indicate that the great majority of member states of the United Nations believe that a legal right to self-determination exists. This would appear to be a correct deduction.

61) See supra, p. 160 where the general requisites of custom are outlined.

self-determination embodied in the Charter but asserted that it lacked clarity and as such serious consequences would result from attempts to transform it into a right.⁶²⁾ Before the Assembly on the Cyprus question, the United Kingdom alleged that the matter was one of domestic jurisdiction rather than self-determination, a view which received a certain amount of support at the time.⁶³⁾ It abstained on the Colonial Declaration and on several other resolutions relating to self-determination.⁶⁴⁾ It refused to participate in voting on the resolutions relating to Southern Rhodesia which it rejected as being invalid.⁶⁵⁾ France was prepared to admit the principle of self-determination as a political one but not as a right.⁶⁶⁾ It denied the applicability of a right of self-determination to Morocco, Tunisia and Algeria when the same was asserted by the General Assembly.⁶⁷⁾ It abstained from voting on the Colonial Declaration itself.⁶⁸⁾ Spain abstained on the Colonial Resolution and other resolutions.⁶⁹⁾ Portugal abstained on the Colonial Resolution.⁷⁰⁾ So did Belgium,
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62) Pace, note 7) supra, p. 131. The United Kingdom also objected to the proposal made in 1951 that the United Nations Commission on Human Rights should study how self-determination should be ensured. At the 7th Session of the Assembly, the United Kingdom asserted that it was a false premise that self-determination was a right. It was a universally applicable principle necessitating political treatment. Ibid., pp. 130, 135, 240.

63) Higgins, note 1) supra, p.97.

64) A. Res. 1573 (XV); A. Res. 1654 (XVI).

65) A. Res. 1747 (XVI); 1755 (XVII). See Higgins, note 1) supra, pp. 102-103.

66) Pace, note 7) supra, pp. 131, 135.

67) Higgins, note 1) supra, pp. 93-96.

68) And also on A.Res. 1654 (XVI).

69) A. Res. 1573 (XV); 1654 (XVI).

70) Also on A. Res. 1573 (XV).

The Dominican Republic and South Africa.⁷¹⁾ Australia considered self-determination to be a political principle and not a right.⁷²⁾ It abstained from voting on the Colonial Declaration. New Zealand considered self-determination to be political rather than legal.⁷³⁾ The Francophone states in Africa largely voted against the Assembly resolution of 1960 on the Algerian situation.⁷⁴⁾ The United States has displayed conflicting attitudes. In 1951 it objected to the Assembly recommending that the United Nations Commission on Human Rights should study how the right of self-determination should be ensured.⁷⁵⁾ It abstained on the Colonial Resolution but on the incorporation of a right of self-determination into the Covenants, it stated that the right of self-determination was a living reality expressed in the Charter of the United Nations and binding on all member states whether or not they ratified the Covenant.⁷⁶⁾

Not even the attitude of newly independent states supports a general right of self-determination. They tend to see the right as existing only in the context of decolonization and do not react to violations of the principle in other contexts.⁷⁷⁾ In some respects they would even go to the length of demanding decolonization where the same would conflict with the principle of self-determination, e.g. Gibraltar.⁷⁸⁾ Japan regards self-

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- 71) South Africa voted against A.Res. 1573 (XV); 1747 (XVI) and abstained on A.Res. 1654 (XVI).
- 72) Pace, note 7) supra, p. 131.
- 73) Ibid.
- 74) A. Res. 1573 (XV).
- 75) Pace, note 7) supra, p. 130.
- 76) Ibid., p. 131.
- 77) Akehurst, p. 34.
- 78) Ibid., pp. 283-284.

determination as a "principle" and not a "right".⁷⁹⁾ We may conclude from the above that though the majority of states have expressed views in favour of the existence of a right of self-determination, principally through the General Assembly of the United Nations, there is a substantial and influential body of dissensus on this. The body of dissensus is, it is submitted, sufficiently broad in scope and weighty enough to prevent the emergence of any general view or attitude on this matter.

(b) What states do.

We are here concerned with the conduct of states. The basic enquiry is whether the conduct of states in general observes or denies a right of self-determination.

When we examine the practice of the United Nations in the matter of self-determination we find that it has not been consistent. Thus the United Nations has ignored claims for self-determination in relation to Nigeria (Biafra), Sudan, Chad, Ethiopia, Tibet, Kurdistan, Formosa, Kuwait and Mauretania.⁸⁰⁾

There are several other instances where scant attention was paid in practice to the idea of self-determination, e.g. the division of India, the Union of Egypt and Syria, the evolution of the Republic of Indonesia, the disappearance of British Protectorates and their absorption into newly established Commonwealth countries even though the Protectorate might
_____ have/...

79) Karol N. Gess, "Permanent Sovereignty over Natural Resources" (13) I.C.L.Q., 1964, p. 398 at p. 414.

80) Ved P. Nanda, "Self-Determination in International Law" (66) A.J.I.L., 1972, p. 321 at pp. 326-327. In fact it would appear to confine self-determination to the Colonial context.

have preferred independence to being a minority ruled by a rival tribe.⁸¹⁾ The Organization of African Unity did not support the Biafran claim but strongly favoured a unified Nigeria.⁸²⁾

Some colonial states have only achieved minimal results in the process of granting self-determination.⁸³⁾

Finally, the practice of the two most influential members of the international community, the Soviet Union and the United States, seems to deny the existence of a right of self-determination despite high-sounding and idealistic statements made at the United Nations and elsewhere.

Thus the invasion of Czechoslovakia by the Soviet Union and its Allies in 1968 seems to confirm that the practice of this influential member of the international community does not concede an overall right to self-determination. The argument preferred is that a communist state is only entitled to self-determination within the limited confines of the communist system. It cannot freely determine any other form of political organization for itself.⁸⁴⁾

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81) Green, note 1) supra, pp. 40-41.

82) Nanda, note 80) supra, pp. 326-327.

83) Bleicher, note 12) supra, p. 477. Portugal to date refuses to move in this direction in relation to its overseas territories. Its practice clearly belies a right of self-determination. So too the activities of France in South-East Asia, Algeria, Morocco and Tunisia and the Netherlands in Indonesia clearly do not admit a right to self-determination.

84) See the writer, "Rhodesia and the United Nations; The Lawfulness of International Concern - a Qualification" (2) C.I.L.S.A., 1969 at p. 459. The Soviet attitude (the Breznev doctrine) is that it cannot allow the vital interests of socialism to be infringed in the Socialist Commonwealth, an attitude which is reminiscent of the old spheres of influence and which is the very antithesis of a right of self-determination. See Contemporary Practice of the U.S. in (63) A.J.I.L., 1969, pp. 569-570.

The invasion of the Dominican Republic by the United States in 1965 also denies a right of self-determination.⁸⁵⁾ The common factor in the latter two cases is that there is no overall right of self-determination for the allies of the super powers who are suspected of planning to change sides.⁸⁶⁾ The practice of the two super powers therefore goes so far as to deny a right of self-determination to states which are admittedly sovereign and independent. If these cannot have such a right, then a fortiori other non-sovereign entities cannot enjoy it. The principal evidence in favour of a right of self-determination is that several colonial countries have in fact granted independence to their possessions. However, the practice of decolonization, though impressive, was not based on a sense of legal obligation but was dictated by political expediency or necessity or convenience.⁸⁷⁾ Thus even if decolonization amounted to a general practice, the vital element opinio juris sive necessitatis would still be missing and thus prevent the formation of custom. We are now in a position to come to some general conclusions on the implications of practice.

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- 85) Akehurst, p. 21 in fact equates the invasion of the Dominican Republic with that of Czechoslovakia and, with respect, correctly. In the light of this, it is interesting to see the vehement criticism of Soviet action in Czechoslovakia by the United States. The fundamental right of self-determination, a right of all peoples everywhere and the duty of others to respect it, is stressed. The Soviet invasion of Czechoslovakia is a violation of this. See Contemporary Practice of the U.S. in (63) A.J.I.L., 1969, p. 328.
- 86) Akehurst, p. 21. The Breznev doctrine, the invasion of the Dominican Republic and the Monroe doctrine deny self-determination. See Stephen M. Schwebel, "The Breznev Doctrine Repealed and Peaceful Co-Existence Enacted" (66) A.J.I.L., 1972, p. 816 at pp. 817, 818. The Breznev doctrine and the Monroe doctrine have probably been repealed by the Declaration of Basic Principles of Mutual Relations, 1972, between the United States and the Soviet Union. Ibid., pp. 817-818. For text of this Declaration see (11) I.L.M., 1972, p.756.
- 87) Green, note 1) supra, p. 461.

- (i) Just as there is no general practice in relation to the views which states express in the matter of self-determination (what states say) so too there is no generally established practice on the part of states in the observance of self-determination (what states do).⁸⁸⁾
- (ii) In those instances where self-determination has been observed in practice, e.g. in the field of decolonization, the practice is unaccompanied by an opinio juris.
- (iii) The conduct of states in the matter of observing self-determination (what states do) often clashes with the views expressed by states on the existence of a right of self-determination (what states say). Two pertinent instances of this failure to practice what is preached are found in the practice of the United States and the Soviet Union. In the result there is no acceptable general practice in the matter of self-determination, upon which to base a customary right.

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88) Ibid. M.C. Bassouni, "Self-Determination' and the Palestinians", Proceedings A.S.I.L., 1971, p. 31 at p. 33 points out that the custom and usage of the member states of the World Community do not evidence self-determination. Higgins, note 1) supra, pp.101-102,103 points out that seventeen years of unanimous and consistent practice together with the Colonial Declaration have established a legal right of self-determination which is not essentially a domestic matter. With respect, practice (either in the sense of what states say or what they do) is neither unanimous nor consistent. Higgins is however probably correct in asserting that self-determination is not essentially a domestic matter. Self-Determination may certainly be a matter of international concern in that the United Nations and its organs may urge the observance of the principle of self-determination. But this is a very different thing from asserting that there is a duty to grant self-determination and a correlative right in certain popular entities to self-determination. See the writer, note 84) supra, p.458 Failure to grant self-determination in a particular case (e.g. Biafra, Bangladesh, Angola, Mozambique) might even constitute a threat to the peace such as would justify invocation of the powers of the Security Council under Chapter VII of the Charter but even this does not establish a right to self-determination. A threat to the peace is not necessarily unlawful (or a breach of the peace for that matter). Ibid., p. 455.

(iv) The Colonial Declaration does not therefore evidence custom. Thus it is not an accurate reflection of international law.⁸⁹⁾

(v) A right of self-determination is probably in nascendi. As we have seen there is a considerable body of practice which favours it. Should opposing practice wither away and an opinio juris develop, it is submitted that the right would have become established.⁹⁰⁾

Our overall submission then is that a right of self-determination does not at present exist. This thesis is further strengthened by the following arguments which will be considered in turn: (1) the balance of juristic opinion is against the existence of such a right; (2) there is difficulty in establishing the content of such a right; (3) it is difficult to establish the entities in which such a right would inhere.

(1) The balance of juristic opinion is against the existence of such a right.

Some jurists undoubtedly support the existence of the right, either generally or in some particular instances - usually the colonial context/...

89) De Yturriaga, note 33) supra, pp. 199, 200 says that it contains intemperances and legal inaccuracies and goes beyond the scope of obligations in the Charter. It is also used as a political weapon by anti-colonial powers who thus abuse their majority in the Assembly. Higgins, note 1) supra, p. 100 points to the undesirable aspects of the resolution.

90) Thus De Yturriaga, note 33) supra, p. 199 considers that the Colonial Declaration should be viewed in the perspective of an evolutionary process in the struggle between colonial and anti-colonial powers. Green, note 1) supra, p. 46 considers a right of self-determination may be in nascendi since 1966. John Carey, Proceedings A S.I.L., 1968, p. 105 says the right is undergoing an evolutionary process, though he would appear to apply the evolutionary process to the content rather than to the existence of the right.

context. These include Higgins,⁹¹⁾ Bassouni,⁹²⁾ Bleicher,⁹³⁾ Carey,⁹⁴⁾ and Ved Nanda.⁹⁵⁾ Other jurists admit the principle of self-determination.⁹⁶⁾

On the other hand the right has been denied by the following.

Bowett asserts that it is essentially a political right.⁹⁷⁾ Emerson is of the view that all people do not have the right of self-determination. They never had and they never will have it.⁹⁸⁾ Ramazani states that self-determination has gained considerable influence in the international community as a moral and not as a legal principle.⁹⁹⁾ Haight says that to recognize self-determination in an international instrument is to create something which does not exist.¹⁰⁰⁾ Green says the right was unknown in international customary law and there

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- 91) Note 1) supra, pp. 101-102, 103.
- 92) Note 88) supra, p. 33.
- 93) Note 12) supra, pp. 472, 474, 475, 477.
- 94) Proceedings A.S.I.L., 1968, p. 105.
- 95) Note 80) supra, at p. 336. See however the same writer in Proceedings A.S.I.L., 1966, p. 148 where he says that if self-determination is to be something more than a mere slogan, it is imperative that legal scholars provide adequate criteria for determination of the right.
- 96) See writers cited by Brownlie, p. 483. See too J.E.S.F., (34) M.L.R., 1971, p. 417; Brownlie, p. 484.
- 97) D.W.Bowett, "Self Determination and Political Rights in the Developing Countries", Proceedings A S.I.L., 1966, p. 129 at p. 131.
- 98) Rupert Emerson, "Self Determination", Proceedings A.S.I.L., 1966, p. 135 at p. 136. With respect, the statement that people will never enjoy such a right goes too far. As we have seen it may even be in nascendi at the moment and it will also exist to a limited and relative extent when the United Nations Covenants on Human Rights, 1966 come into force.
- 99) R.K. Ramazani, Proceedings, A.S.I.L., 1971, p. 51. R.Y.Jennings, The Acquisition of Territory in International Law, Manchester, 1963, p. 97 calls it a "quasi-legal idea" and a political principle not capable of sufficiently exact definition to amount to a legal doctrine and it is inexact to speak of a right of self-determination if by that is meant a legal right (p.78).
- 100) George W.Haight, "Human Rights Covenants", Proceedings A.S.I.L., 1968, p. 96 at p. 98.

is still no right of self-determination.¹⁰¹⁾ Pace¹⁰²⁾ and Gross¹⁰³⁾ also oppose the existence of the right. Schwarzenberger says that though the principle of national self-determination is a formative principle of great potency, it is not part and parcel of international customary law.¹⁰⁴⁾

- (2) Even if there was a right of self-determination, it would be difficult to establish its content.

If the right of self-determination should be conceded in principle, its content would be so vague that it would be difficult to apply as a norm of international law. It would have to be defined precisely or there would have to be clarification of its content. This inherent difficulty has at all times been realized. Thus in 1955, ECOSOC¹⁰⁵⁾ adopted a proposal to study the content of self-determination.¹⁰⁶⁾ At meetings of the Third Committee, the difficulty of translating the complex moral principle of self-determination into legal terms was discussed.¹⁰⁷⁾ The United Nations International Covenants on Human Rights, 1966 do not give us any definition of self-determination beyond stating that by virtue of the right peoples freely determine their political status and freely pursue their economic, social and cultural development.¹⁰⁸⁾ A definition is, in fact, almost a prerequisite to transform self-determination into

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101) Note 1) supra, pp. 40, 46.

102) Note 7) supra, p. 242.

103) (65) A.J.I.L., 1971, at p. 461. See too Akehurst, pp. 248, 283; O'Connell, 1, p. 312.

104) Manual, p. 74.

105) The Economic and Social Council of the United Nations.

106) Res. 586 D (XX); Pace, note 7) supra, p. 235.

107) Ibid.

108) The ideas expressed in the words "freely" and "status" cause difficulty here too. See Human Rights in National and International Law, note 30) supra, p. 290.

a right.¹⁰⁹⁾ Some writers have tried to clothe self-determination with a measure of content. Asamoah considers that the term comprises two elements:

- (a) the internal constitutional aspect involving the right of people to choose political institutions;
- (b) the international aspect involving a right to either independence or some form of self-government.¹¹⁰⁾

Higgins considers that self-determination is the right to exercise power or governmental control in a political unit.¹¹¹⁾ Brownlie is of the view that the ramifications of self-determination have not been worked out except in the context that Article 2(7) of the Charter of the United Nations does not prevent discussion and decision on matters pertaining to self-determination.¹¹²⁾ He then goes on to mention various aspects of self-determination.¹¹³⁾

With five exceptions, these aspects, when examined, merely reflect other established rules of international law. They are thus in fact superfluous and do not crystallize the content of a right of

self-determination/...

109) Pace, note 7) supra, p. 242; Ved Nanda at Proceedings A.S.I.L., 1966, p. 148.

110) Note 1) supra, p. 167. Higgins, note 1) supra, pp. 105-106 also refers to these two elements. The former she would call "self-determination" and the latter "independence". Independence is a narrower concept in that there may be forms of self-government other than independence as Asamoah points out. See too, supra, pp. 91-92.

111) Note 1) supra, pp. 104, 105. This power is exercised indirectly through the franchise on the basis of one man one vote (p. 105).

112) P. 484. This, it is submitted, is correct if one is using "decision" in the sense of a "recommendation". Such development, as previously pointed out, would not establish a right of self-determination. It merely establishes self-determination as a matter of international concern and thus within the competence of the political organs of the United Nations for the purposes of discussion and persuasion (but not intervention). See supra, pp. 474, 480-481. For the view that "discussion" and "recommendation" do not in any event amount to "intervention" within the meaning of Article 2(7), see Schwarzenberger, Manual, p. 282.

113) Pp. 484-485.

self-determination.¹¹⁴⁾ Thus state sovereignty, the equality of states, non-intervention and the prohibition of the use of force against states are aspects of self-determination. These rules are however rules which vest rights in sovereign states against other states. They are, therefore, essentially different from self-determination which is alleged to exist in peoples, i.e. groups of human beings as such which are distinguishable from the artificial entity - the state.¹¹⁵⁾ Another alleged aspect of self-determination is that if force is used to seize a territory in implementing the principle, title may more readily accrue by acquiescence and recognition than in cases of the unlawful seizure of territory.¹¹⁶⁾ This, it is submitted, takes the content of self-determination no further. It simply reaffirms the rule that, so far as international law is concerned, the inhabitants of a territory have liberty to revolt¹¹⁷⁾ and that their international status when they succeed depends on recognition (acquiescence being in substance simply recognition).¹¹⁸⁾ Another aspect of self-determination is that territory inhabited by peoples not organized as a state cannot be regarded/...

114) It may be that the traditional rules in question may be subsumed under a principle of self-determination but here the principle would, of course, add nothing to the content of the existing law. In fact, Brownlie says that the principle may inform and complement other principles of international law.

115) Of course, if one uses the term "people" as being synonymous with "state" (and this, as we have seen, is the probable meaning of the term when used in Articles 1(2) and 55 of the United Nations Charter - see supra, p. 473), then self-determination becomes synonymous with the sovereignty and independence of states and has no separate existence as a legal concept.

116) Brownlie, p. 485. The present writer takes unlawful seizure of territory to mean seizure by one state of the territory of another in contravention of the Article 2(4) of the United Nations Charter. He assumes that this is contrasted with seizure of the territory by the inhabitants of the territory themselves.

117) Supra, pp. 137-138.

118) Supra, p. 281.

regarded as terra nullius.¹¹⁹⁾ This again gives self-determination no new content. We have already seen how traditional international law does not even regard the territory of primitive peoples as res nullius.¹²⁰⁾

The four aspects of self-determination wherein Brownlie does add something to the content of self-determination other than what is already contained in other rules are as follows:

- (a) Self-determination embraces the equality of peoples within a state.¹²¹⁾ With respect, the idea of equality within the state is not a matter of self-determination of peoples but is in essence a matter which is relevant in the context of the enjoyment of individual human rights.¹²²⁾
- (b) Self-determination has been employed in the context of economic self-determination.¹²³⁾ It is doubtful, however, if economic self-determination has any real content in international customary law.¹²⁴⁾ The principal evidence in favour of such a right is the General Assembly Resolution on Permanent Sovereignty over Natural Resources, 1962.¹²⁵⁾ The Declaration, being a resolution of the General Assembly is only evidential and its value as evidence is considerably reduced/...

119) Brownlie, p. 485.

120) Supra, pp. 369-370.

121) P. 484.

122) Whether international law compels the observance of such human rights is discussed in the next section.

123) Ibid., p. 485.

124) Under Articles 1 and 2 of the International Covenant on Economic, Social and Cultural Rights, 1966, the idea of economic self-determination will have some content but this is a matter of conventional law and the convention is not, in any event, in force as yet.

125) A. Res. 1803 (XVII).

reduced by the fact that its provisions are contradictory in that while affirming sovereignty over natural resources it, at the same time, asserts that the exercise of such sovereignty is subject to international law. International law, however, protects the investment of the alien, though the degree of such protection is a matter of controversy.¹²⁶⁾

- (c) The principle may compensate for a partial lack of certain desiderata in the fields of statehood and recognition.¹²⁷⁾

The present writer interprets this to mean that certain amorphous groups of human persons can have rights in international law even though they do not constitute states or other recognized international persons, e.g. international organizations. The proposition however takes us no further. It poses the question of what the rights of such groups actually are. Until such rights are ascertained with precision, the idea of self-determination as used in this context has no content.

- (d) Self-determination may mean that intervention against a liberation movement may be unlawful.¹²⁸⁾ This does give us some possible content but in essence it is subsidiary to the principle of self-determination because even if it is freely admitted to exist,¹²⁹⁾ it still does not establish a duty for
the/...

126) For discussion see Brownlie, pp. 431-444.

127) Ibid., p.485.

128) Ibid.

129) For discussion on the conflicting views relating to the existence of such a rule see Akehurst, pp. 340-342. Brownlie couches the rule in cautious terms by stating that such intervention "may" be illegal.

the state denying self-determination to grant it and a correlative right to self-determination in the liberation movement against that state. The rule relates instead to the conduct of third states where a situation involving a struggle for liberation occurs.¹³⁰⁾

- (e) Assistance to a liberation movement may be lawful.¹³¹⁾ This is an extremely doubtful proposition as it would appear to conflict with one of the cardinal provisions of the United Nations Charter, viz. Article 2 (4).¹³²⁾ In any event, the rule is also of a "corollary" character¹³³⁾ in that even if it exists, it does not establish a right of self-determination or a duty to grant it. It is relevant to the conduct of third states only.

The right of self-determination has also been invoked as a basis for revolution, as a ground for cession, unification, affiliation of peoples to states and minorities rights.¹³⁴⁾ These associations do not however give self-determination any substantial content. The liberty to revolt has always existed in international law.¹³⁵⁾ This has however no connection with a right of self-determination.¹³⁶⁾

The liberty to revolt would exist whether or not the right of self-determination/...

130) Brownlie, p. 485 in fact describes the rule as a corollary to the principle of self-determination.

131) Ibid.

132) For discussion see Akehurst, pp. 337-340. See too A.Res. 2105(XX); 2131 (XX); 2625 (XXV). Brownlie again emphasizes the doubtful character of the rule when he says that such assistance "may" be lawful.

133) Brownlie, p. 485.

134) Bassiouni, note 88) supra, p. 33; Emerson, note 95) supra, p.135.

135) Supra, pp. 137-138.

136) Green, note 10) supra, p. 40.

determination exists. Further, one cannot deduce a right of self-determination from the fact that there is liberty to revolt for the state in which the revolt takes place is also at liberty to crush the rebellion.¹³⁷⁾ Claims for cession of territory, unification and affiliation of peoples to states are merely political claims and as such have no legal content.¹³⁸⁾ Finally, minorities' rights are relevant more in the context of human rights than self-determination.¹³⁹⁾ It is submitted in conclusion that if any content is to be given to self-determination, it must be in the sense in which Higgins (and Asamoah) attribute to it. However, her thesis must be regarded as being de lege ferenda, given the basic diversity as to the very existence of the principle as a legal norm, not to talk about its content.¹⁴⁰⁾ Brownlie's assertion that intervention by third states against a liberation movement may be prohibited, is a possible corollary to the concept.

- (3) Even if a right of self-determination is conceded in principle, it is difficult to establish the entities in which such a right inheres.

For the purposes of discussion here we shall assume that the content of the right of self-determination is that postulated by Higgins, viz. the right to exercise power or governmental control.

It/...

137) Akehurst, p. 72.

138) For instance the claim of the Republic of Ireland to Northern Ireland is merely a political claim, no matter how couched. Legally Northern Ireland is part of the United Kingdom. See Akehurst, pp. 194-195; R.Y.Jennings, The Acquisition of Territory in International Law, 1962, p. 73.

139) See note 122) supra. For discussion whether minorities can be the holders of a right of self-determination (assuming it to exist) see discussion infra, pp. 510-513.

140) In fact Higgins herself admits that the extent and scope of the right is open to some debate. Note 1) supra, p. 103.

It is apparent that such a right, if it exists, is vested in human beings who determine the method of government and not in an abstract entity such as the state itself. The right is the right of self-determination of peoples, and has been so described in the major instruments which evidence the existence of such a right.¹⁴¹⁾

Indeed, as we pointed out, if "peoples" were synonymous with "nations" here, self-determination could have no possible content as it would merely signify the independence and sovereignty of states.

If then the right of self-determination can only be vested in "peoples", it is necessary to investigate the concept of "people" and to isolate the group or groups which can be said to be "peoples" for the purpose of enjoying the right. The problem of definition is basic here¹⁴²⁾ and it has even been suggested that one must start by defining "people" before a right of self-determination can exist.¹⁴³⁾ The problem is a difficult one¹⁴⁴⁾ and yet scant attention seems to have been paid to it in the past.¹⁴⁵⁾ In the history of
the/...

141) Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960, Article 2; A. Res. 1514 (XV); International Covenants on Human Rights, 1966, Article 1; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 1970; A. Res. 2625 (XXV).

142) Asamoah, note (1), p. 171. Bowett, note 97) supra, p.131, and, Ramazani, note 99) supra, p. 52 see the problem as one of defining the "self".

143) Pace, note 7) supra, p. 242.

144) Human Rights in National and International Law, note 30) supra, p.290.

145) At meetings of the Commission for the purposes of drafting the Covenants on Human Rights, the question of the meaning of "peoples" was posed, but the majority of the Commission considered this to be delaying tactics. However, ECOSOC did adopt a proposal to study the concept. Pace, Note 7) supra, pp. 133, 233, 235. Bassouni, note 88) supra, discusses the concept but perhaps the best work done so far in this particular field has been by Higgins, note 1) supra, pp. 103-105. She would equate "people" with the majority in a political unit. Though Higgins' views have the merit of considerable precision, they are de lege ferenda. We shall refer to Higgins' ideas at the appropriate places in the course of this discussion.

In the history of the League of Nations and the United Nations, two particular but conflicting concepts of "people" seem to have been prominent at different times. In the first place in the aftermath of the First World War, "people" seemed to connote primarily an ethnic community defined by language or culture. Since the Second World War the ethnic consideration has not been regarded as being relevant. The primary consideration appears to be the existence of a political entity in the guise of a colonial territory.¹⁴⁶⁾

In the view of the present writer there are six entities (or groups) which might possibly qualify as bearers of a right of self-determination. We shall now examine each of these groups in turn to see where rights of self-determination have been advocated and to what extent.

(a) The people of a dependency as a whole or the majority of such people.

It is advocated that such a "people" would have a right to self-determination against the mother country. The peoples involved would probably be those of Trust Territories and other Non-Self-Governing territories.¹⁴⁷⁾ They must also constitute the majority within an accepted political unit. One must work with stable boundaries and only accord self-determination within them.¹⁴⁸⁾ The exception would appear to be the people
of/...

146) Rupert Emerson, "Self-Determination" (65) A.J.I.L., 1971, p. 459 at p. 463.

147) Asamoah, note 1) supra, p. 171 points out that these are the categories mentioned in Article 5 of the Colonial Declaration.

148) Higgins, note 1) supra, pp. 104-105. As Emerson, note 146) supra, p. 463 puts it there must be a political entity in the guise of a colonial territory. Higgins, op.cit., p. 105 actually concludes that self-determination would be applicable to situations such as that pertaining in Southern Rhodesia.

of an entity which upon attainment of independence would be a miniscule without economic or political viability.¹⁴⁹⁾ There are difficulties involved in applying the above concept of "people".

(1) It may be difficult in practice to distinguish the people of a non-self-governing territory from a minority in a metropolitan territory.¹⁵⁰⁾ This question arose in relation to Algeria where the attitude was first expressed that it was part of metropolitan France but at a later stage the emphasis shifted.¹⁵¹⁾ The problem has also been voiced in relation to Portuguese overseas possessions which are technically provinces of Portugal and thus part of the metropolitan territory.¹⁵²⁾ The problem arises because a state may declare an overseas possession to be part of its metropolitan territory even though the latter is composed of people of a different race who are often in organized opposition to metropolitan control. Higgins says that here the incorporation is arbitrary and at variance with common sense and the overseas possession remains non-self-governing.¹⁵³⁾ Thus if the possession is geographically separate and distinct ethnically or culturally/...

149) Bowett, note 97) supra, p. 131. See however Emerson, note 146) supra, p. 469 who says that small peoples should be entitled to the right as much as large peoples though this may amount to an absurdity. U.Thant said small peoples had the right but he would distinguish micro-states for the purpose of full membership of the United Nations.

150) See O'Connell, I, p.313.

151) Higgins, note 10) supra, pp. 96-97.

152) The idea that such territories are part of the metropolitan territory and thus not non-self-governing territories is only supported by Portugal and South Africa. Ibid., p.97.

153) Ibid.

culturally from the country administering it, it is non-self-governing.¹⁵⁴⁾ But even this, it is submitted, leaves a further difficulty, viz. what is the criterion which determines geographical separation.¹⁵⁵⁾

(ii) How small must a people be for exclusion of a right of self-determination in them? Where does one draw the limit here?

(b) The people of an independent state as a whole.

We may ask whether the people of a state as a whole have a right to self-determination in that other states must respect that right? Even if the answer to this question is yes, it does not take the matter of self-determination any further. For here we may identify the population as a whole with the state itself. The content of such a hypothetical right of self-determination would be precisely the same as that of the sovereign state to independence. The ordinary rules relating to non-intervention and respect for territorial integrity would in fact be applicable here.¹⁵⁶⁾ To introduce self-determination would therefore be superfluous.

(c)/...

154) Akehurst. p. 281.

155) For example, would the peoples of islands of a metropolitan territory or the peoples of the Soviet Republics in Asia or Eastern Europe, or those of Alaska or Hawaii be regarded as being geographically distinct (assuming of course that they are either culturally or ethnically distinct)?

156) Emerson, note 146) supra, p. 466; Higgins, note 1) supra, p. 105. See the instances quoted supra, pp. 491-492 where the Soviet Union and the United States by violating territorial integrity and the rules relating to non-intervention in effect denied self-determination to the peoples of Czechoslovakia and the Dominican Republic respectively.

(c) The majority of the population of an independent state.

We are here concerned with whether the majority of the population in an independent state may be the holders of a right of self-determination against their own state. Higgins' concept of "people" would appear to be wide enough to embrace them for the independent state in question is a political unit in which they are the majority. The right to self-determination therefore extends beyond the colonial context. However, as we have seen, Higgins also requires the right of self-determination to operate within political units - within stable boundaries. If this submission is correct, it has important consequences. It means that that while a majority may have the right to govern in a territory in proportion to their numbers,¹⁵⁷⁾ they can have no right of secession from that political unit.¹⁵⁸⁾ It has recently been argued however that the people of Bangladesh had a right to secede from Pakistan which right was in turn based on a right of self-determination.¹⁵⁹⁾ This is in fact an assertion that a majority in an independent state have not only the right to govern it but even to secede.¹⁶⁰⁾ Even if secession was in principle/...

157) Higgins, note 10) supra, p. 105.

158) Emerson, note 146) supra, p. 464.

159) Ved P. Nanda, "Self-Determination in International Law" (66) A.J.I.L., 1972, p. 321.

160) Prof. Nanda, note 159) supra, p. 328 summarizes his reasons for distinguishing the East Pakistan case. The first two of these special features in combination could conceivably give the situation the flavour of a colonial-type situation. Ibid., p.321. In actual fact it is now rather academic whether the people of Bangladesh had a right of self-determination or not. Whether or not they had such a right, they certainly had the liberty to revolt and as such the outcome of the revolution cannot be illegal in international law. If, however, one asserts that they had in theory a right to self-determination (and in consequence to secession) this would imply a duty in Pakistan to allow them to secede with the further consequence that Pakistani suppression of secession would be illegal. This however goes too far. Just as Bangladesh was at liberty to revolt so too Pakistan was at liberty to suppress the rebellion if it could. As events transpired, it was unable to do so but its attempt to do so was not in principle illegal. See Akehurst, p. 73. This means in effect that there was no right to self-determination in Bangladesh or no duty to concede it in Pakistan. Indian conduct in the situation raises, of course, entirely different issues involving intervention, violation of territorial integrity and aggression but these are not relevant to our present discussion.

principle a right inhering in majorities it would still be subject to the viability principle. This means that the means of achieving self-determination should not deprive an existing state of its economic basis.¹⁶¹⁾

We have now seen the assertion that the majority in an independent state may have a right of self-determination against that state and the limits which have been suggested to that right. It is extremely doubtful however if the practice of states supports such majorities as the bearers of the right in question. Such a right would mean that the creation of representative institutions (through which the majority could govern in proportion to their numbers) is a matter of international obligation for each independent state. But it is notorious that a large section of the international community (probably the majority) do not possess such institutions. In the words of Sir Alec Douglas-Home:

"If nations feel entitled to use, to invoke, mandatory sanctions because the constitution of a country falls short of the standards of democracy we require, we should be at war with half the world today" 162)

To which may be added the words of former Secretary of State,

Dean Acheson:

"The one man, one vote deduction from the Fourteenth Amendment is not recognized in international law, as our friend King Feisal of Saudi Arabia can testify." 163)

United Nations practice accepts military juntas as being compatible with self-determination thus not insisting on representative institutions/...

161) Bowett, note 97) supra, p. 131. Nanda, note 159) supra, p. 338 argues that the secession of East Pakistan would not undermine West Pakistan which does not depend on it for political stability or economic viability.

162) H.C. Deb., Vol. 737, Col. 1595 (1966).

163) Letter to the Washington Post, 11th December, 1966, reproduced in Chayes, 11, pp. 1379-1380.

institutions.¹⁶⁴⁾ It follows that independence and self-determination may be conflicting and incompatible concepts¹⁶⁵⁾ because an independent state may, as a matter of international law, deny self-determination to the majority of its population.¹⁶⁶⁾ It is in a position to do so because the rules relating to non-intervention and domestic jurisdiction in effect negate any possible right of self-determination in its people.¹⁶⁷⁾

There is however a substantial degree of practice which would appear to indicate that there is one exception to the above rules relating to non-intervention - intervention to eliminate racial discrimination and colonialism.¹⁶⁸⁾ This implies that apart from the peoples of non-self-governing territories, only racial majorities in independent states can be the holders of a right of self-determination against the state.¹⁶⁹⁾ No other majority in an independent state can have such a right. In effect this boils down to the proposition that an independent state only has an international obligation to concede self-determination to

- (i) the peoples of any territories dependent on it, and,
- (ii) racial majorities situated within it.

The above suggestions provoke the following observations.

(1)/...

164) Emerson, note 146) supra, p. 467.

165) Human Rights in National and International Law, note 30) supra, p.290.

166) Higgins, note 10) supra, p. 106.

167) Emerson, note 146) supra, p. 466 says non-intervention is a loftier principle than self-determination, takes precedence over it, and thus denies self-determination within established states.

168) Emerson, ibid., p. 467 says that just as non-intervention takes precedence over self-determination, so too, in turn, the elimination of colonialism and racial discrimination takes precedence over non-intervention.

169) Emerson, ibid., says that if a racial minority rules a racial majority that is regarded as a denial of self-determination.

(i) What is the meaning of racial majority or minority? Is a racial group for these purposes an ethnic group?

(ii) How would the suggestions work in practice where a pluralistic state contained more than two racial groups, none of which constitutes a majority?

(d) Minority groups residing in independent states.

These groups will normally be cultural entities residing within the state. Since majorities in independent states do not have a right of self-determination, a fortiori minorities do not have it. In practice this means that a minority can have no right to secede and that the state has no duty to permit such secession. Writers deny a right of self-determination to minorities.¹⁷⁰⁾

Unlike the practice in the inter-war years, the practice of the United Nations does not support a right of self-determination, and thus of secession, in minorities.¹⁷¹⁾ Thus claims for self-determination and secession in Nigeria, the Congo, Sudan, Chad, Ethiopia, Tibet, Kurdistan and Formosa have found no support in United Nations practice. The reason is that self-determination in such cases would upset the territorial integrity of the United Nations' own members.¹⁷²⁾

There/...

170) Ibid., p. 464; Higgins, p. 105 says the solution for the minority problem is not self-determination but the observance of the human rights of such groups. Emerson, note 146) supra, p. 472 even says "where there is such intermingling, no form of self-determination, short of mass migration can be invoked to satisfy such demands as the minority community may make for recognition of its separate entity and its human rights."

171) Statement of U. Thant, U.N. Monthly Chronicle, February, 1970, p. 36: Emerson, note 146) supra, p. 464. Bowett, note 97) supra, p. 135 says that minority rights are ignored in a way which would have seemed scarcely credible in Europe fifty years ago.

172) See Nanda, note 159) supra, pp. 326-327; Higgins, note 1) supra, pp. 104-105. Five states did however recognize Biafra.

There is one exception to the above. We have seen how there is considerable support in practice for a right of self-determination in the peoples of non-self-governing territories. In effect this means that secession is considered to be a right in the context of colonial dismemberment,¹⁷³⁾ subject of course to the requirement that it does not operate to establish miniscule states which are not viable economically or politically.¹⁷⁴⁾ The hypothetical right of self-determination has been chiefly supported in the colonial and neo-colonial context.¹⁷⁵⁾ But as the colonial era draws to a close, writers consider that there may be a chance that United Nations practice will turn its attention to self-determination in non-colonial contexts.¹⁷⁶⁾

Emerson says

"The demand for self-determination [in the colonial context] has no necessary implication of support for self-determination elsewhere and certainly not for what seems likely to be its next major incarnation in the clamour of peoples trapped in pluralistic states in which they have no dominant share to take charge of their own destinies." 177)

(e) Cultural groups or entities.

We are here concerned with the ethnic community defined by language or culture which resides in more than one state. Some attention was paid to such minorities in the inter-war period but practice since the Second World War would seem to deny
altogether/...

173) Emerson, note 146) supra, p. 465.

174) Bowett, note 97) supra, p. 131.

175) "Neo Colonial" is the term used by Akehurst, p. 283 to describe situations where there is racial discrimination against a majority.

176) Akehurst, p. 283.

177) Note 146) supra, p. 475. The process may have already started, though with reference to a majority, with Prof. Ved Nanda's claims in relation to East Pakistan. In fact, Nanda himself sees his thesis in this light - extending self-determination beyond the colonial context. Note 159) supra, p. 321.

altogether a right of self-determination in such entities.¹⁷⁸⁾
Thus, for instance, the Afro-Asian block, normally the strongest supporters of a right of self-determination in the colonial and neo-colonial context, have shown little sympathy to members of their own group who are reluctant to accept the colonial frontiers which they inherited.¹⁷⁹⁾ The reason of course is that given by Higgins.¹⁸⁰⁾ If self-determination exists at all, it must only operate within stable political boundaries. Dis-memberment of political units cannot be claimed as a right with the possible exception of colonial secession.

(f) Cultural groups which are also indigenous.

It has been recently asserted that self-determination is merely a principle but that it develops into a right in specific cases. This occurs when a people is prevented or seriously impeded from freely adhering to or exercising its values, beliefs and practices on the indigenous territory which it inhabits (or from which it has been removed) by another collectivity using coercive means.¹⁸¹⁾

These proposals give rise to difficulties. In the first place it may be asked who comprise the indigenous people of a given territory where successive migrations have occurred, the only distinguishing factor between them being that some occurred earlier in time than others? And once one introduces the time factor/...

178) Emerson, note 146) supra, pp. 463, 464.

179) Higgins, note 1) supra, p. 104. Thus such claims as those of Morocco in Mauretania, Iraq in Kuwait and Somalia in Kenya have found little favour.

180) Ibid., p.104:

181) Bassouni, note 88) supra, p. 33. He concludes at p. 39 that the Palestinians are a people whose right of self-determination has been violated.

factor where does one draw the line? Must one arbitrarily fix a specific time¹⁸²⁾ or must one apply a principle in the nature of qui prior est in tempore potior est in iure without time limit? In the second place, the content of the suggested right seems to be vague. It would appear to be a group right to cultural identity.¹⁸³⁾ In the third place, if the right in question is a right in the nature of one to cultural identity, it is not strictly speaking a right of self-determination (which is concerned with the exercise of power by the group) but some other species of human right.¹⁸⁴⁾

We are now in a position to state our conclusions on the possible holders of the right of self-determination, should it exist. It is clear that the right cannot conceivably be vested in all of the six groups which we have mentioned for to bestow a right of self-determination in such a liberal fashion would reduce international order to a fragmented chaos through the dismemberment of existing states.¹⁸⁵⁾ In fact, as will be seen from our discussion above, such practice as exists would only concede a right of self-determination

_____ in/...

- 182) See for example M A. Mahmoud, The Juridical Manifesto, The Hague, 1969, pp. 70-71 who, in effect, fixes a date by stating that it is the indigenous people at the time of colonization who count. Dr. Mahmoud is however discussing these ideas primarily in the context of statehood. See supra, pp. 167-168.
- 183) The group in question feels bound together by factors of some permanence. Its collective behaviour reveals that its members share certain value-orientated goals which they are desirous of implementing. Bassouni, note 88) supra, p. 32.
- 184) Bassouni, ibid., pp. 38-39 in fact admits that a guarantee of certain human rights might satisfy requirements here.
- 185) Higgins, note 1) supra, p. 104.

in the colonial and neo-colonial context.¹⁸⁶⁾ When we examine the practice in question we find that it is selective, discriminatory and even inconsistent for the following reasons.

- (a) There is no valid reason for distinguishing between majorities in a non-self-governing territory and majorities in a metropolitan country. If the former is entitled to self-determination (i.e. representative institution which enable it to govern) then why not the latter? Both majorities reside in stable political units. The problem of dismemberment of existing political units does not therefore arise in either case and so they should be treated similarly. Practice therefore discriminates here between groups which are "similar" for the purpose in question. The discrimination in question in fact leads to a further absurdity here. It means that in practice the right of self-determination is only available once. Once a former non-self-governing territory becomes independent, its people loses the right of self-determination.¹⁸⁷⁾ Where the majority of the population of a non-self-governing territory opt to become an independent state, the content of self-determination amounts to no more than one man, one vote (conceded by the colonial power) once.

Again/...

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- 186) Akehurst, p. 283; Charles W. Yost, Proceedings A.S.I.L., 1971, p. 52. Ved Nanda, note 159) supra, p. 321. The language of some resolutions suggests however that the right may exist in a somewhat wider context. A. Res. 545 (VI); 637 (VII); Asamoah, note 1) supra, p. 171. Higgins, note 1) supra, p. 104, would not appear to confine the right to colonial situations but would extend it so as to apply in all generally accepted political units. Higgins' proposals are of course de lege ferenda but, with respect, it is submitted that they are capable of forming a cohesive and, above all, consistent doctrine, something which cannot be said for the practice in these matters.
- 187) Bowett, note 97) supra, p. 135; Emerson, note 146) supra, p. 464. Practice supports this too. Once a territory becomes independent, the United Nations is completely unconcerned with preservation of self-determination in that nation. Military juntas and dictatorships pass unheeded.

Again it is submitted that there is no valid reason for distinguishing between the majority in a given territory before and after independence. If there is a right of self-determination before independence why does it not exist after independence? The population group will be precisely the same immediately before and immediately after independence. It will at all times reside in a stable political unit thus obviating the problem of state dismemberment. Practice here discriminates therefore not only between "similar" but actually between "identicals" for the purpose in question.

(b) In the neo-colonial context there is no valid reason for distinguishing between racial majorities in independent states and non racial majorities in such states. If the former can have a right of self-determination, why not the latter? Not only do both exist in stable political units but they even exist in the same species of political unit, the independent state. Thus again there is no problem of state dismemberment in either case. Both species of majority should be treated similarly. Practice here arbitrarily selects one kind of majority, the racial majority, for privileged treatment before the law and arbitrarily rejects the equally valid claims of other kinds of majorities.¹⁸⁸⁾

(c) Practice regards self-determination as operating in the colonial context but the very concept of colonialism is defined in a discriminatory manner. Colonialism, as
traditionally/...

188) The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, 1970, A. Res. 2625 (XXV), might be regarded as a tentative widening of the field here. But again selection of criteria has been arbitrary - creed and colour. Surely "colour" is superfluous here in that it is already incorporated in the wider concept of "race".

traditionally defined, is a political - economic relationship between a dominant Western nation and a subservient non-Western people.¹⁸⁹⁾

Again, however, there is no valid reason for distinguishing between peoples subject to Western powers and those subject to non-Western powers. If the former can have a right of self-determination why not the latter (assuming of course that both the peoples in question are similar in that they exist in stable political units)?

- (d) Practice in relation to colonialism is even inconsistent in that some colonials are deemed not to have the right of self-determination. Thus the majority of the population of Gibraltar - a British Colony and an undoubted stable political unit - expressed themselves in a referendum to be against union with Spain and in favour of continued association with Britain. Yet in 1968 the General Assembly of the United Nations called on the United Kingdom to enter negotiations with Spain with a view to terminating the colonial status. The reason why the Assembly disregarded the wishes of the majority of the population of Gibraltar was that they were the beneficiaries of colonialism. They had been brought into Gibraltar, had gradually replaced the original population and changed the cultural and social makeup of the society at Gibraltar.¹⁹⁰⁾ The Assembly then seemed to support the view that if the majority in a non-self-governing territory are the beneficiaries of colonialism they do not have a right of self-determination.¹⁹¹⁾ Even here however the

Assembly/...

189) Nanda, note 159) supra, p. 321.

190) See Akehurst, pp. 283-284.

191) Akehurst, p. 283 regards this as a worrying feature in that "decolonization" is treated as an end in itself, overriding the principle of self-determination.

Assembly has not been consistent. The majority in Fiji consisted of persons of Indian origin brought into the territory and eventually outnumbering the native population - undoubted beneficiaries of colonialism. Yet the General Assembly urged the grant of independence to a Fiji ruled by this majority.¹⁹²⁾

One wonders how to reconcile such inconsistency. Must one conclude that non-Western peoples who are the beneficiaries of colonialism have a right of self-determination while Western peoples, the beneficiaries of colonialism, do not have such a right? Or must one conclude that where the outnumbered minority in the non-self-governing territory form part of an ethnic group which constitutes the bulk of the population of an independent state abutting on the non-self-governing territory, that the majority in the latter, the beneficiaries of colonialism, have no right of self-determination, whilst in other cases they have such a right?

It will be apparent from all the above that practice relating to self-determination is indeed selective, discriminatory and inconsistent. When one considers such selectivity and inconsistency together with the general opposition of Western powers especially the colonial powers which are the powers concerned or affected, to the existence of a legal right of self-determination,¹⁹³⁾ one can only conclude that the practices in question are based on political expediency and show no consistent thread such as would found a valid customary rule. Were such practices applied consistently to
all/...

192) Human Rights in National and International Law, Note 30) supra, p. 290.

193) Supra, p. 487.

all political units, whether independent states or dependencies, whether the dominant power was Western or non-Western, whether the majority in an independent state was racial or otherwise and whether the majority in a non-self-governing territory were the beneficiaries of colonialism or not, we would then be in a position to discuss the possible birth of a customary right of self-determination evolving from consistent practice.¹⁹³⁾ Practice may in fact be about to liberate itself to some extent from the assertion of the right of self-determination in the colonial and neo-colonial contexts,¹⁹⁴⁾ but it has a long way to go before it sheds the vestiges of discrimination, selectivity, double standards, inconsistency and politics, all of which combine to make it essentially subjective and ad hoc and militate against the formation of any customary right of self-determination.

For all the reasons given, the writer's submission is that no right of self-determination has, as yet, evolved. The people of Rhodesia do not therefore have any such right. Nor does any section of the Rhodesian population have such a right.¹⁹⁵⁾ For completeness, but for the purposes of argument only, it will now be assumed hypothetically that the right of self-determination does exist in international law/...

194) The right of self-determination would then in fact be that which Higgins note 1) supra, proposes de lege ferenda. It would be desirable if the development of such a right of self-determination for majorities in stable political units should be paralleled by the development of certain human rights for the minorities living in such stable political units.

195) The organs of the United Nations, consistent with their usual practices in the colonial context, have, of course, asserted a right of self-determination for the people of Zimbabwe or Southern Rhodesia on many occasions. S. Res. 232 (1966); S. Res. 277 (1970); A. Res. 2022 (XX); A. Res. 2151 (XXI); A. Res. 2379 (XXIII); A. Res. 2383 (XXIII).

law and inheres in the people of Rhodesia. Such a hypothesis poses the question - against whom is this right available? Or put another way - what entity would be under an international law duty to accord self-determination to the people of Rhodesia? In this respect, it is submitted that the state of Rhodesia itself can have no such duty because the sphere of its limited international personality is not so extensive as to embrace such a relationship with its population.¹⁹⁶⁾ Primary international personality is vested in the United Kingdom whose sovereignty over Rhodesia most states continue to recognize.¹⁹⁷⁾ It follows that if a right to self-determination exists, the correlative duty to accord it must rest upon the United Kingdom because there is no other entity with the capacity to bear such a duty to the people of Rhodesia.

It has been contended that the Unilateral Declaration of Independence was illegal in international law because the seizure of independence took place contrary to the wishes of the indigenous population and as such was an infringement of the principle of self-determination.¹⁹⁸⁾ Even assuming that the factual allegation is correct, i.e. that the seizure was in fact contrary to the wishes of the indigenous population, the contention that there has been a violation of international law must be rejected on two grounds:

(a)/...

196) Supra, pp. 377 et seqq.

197) Supra, pp. 365-366.

198) McDougal & Reisman "Rhodesia and the United Nations; the Lawfulness of International Concern" (62) A.J.I.L., 1968, p. 1 at p. 11.

- (a) There is no legal right to self-determination and no legal duty to accord it. Denial of self-determination is therefore not a violation of international law.¹⁹⁹⁾
- (b) Even if there was such a right and such a duty, in the peculiar international personality position in which Rhodesia finds itself, the "right" would not be available against it, or the "duty" incumbent on it.

There is yet another important consequence which flows from the fact that an international law right to self-determination does not exist. It is that the Rhodesian authorities cannot rely on the existence of such a right in the claims which they make for an independent Rhodesia. Thus the idea of self-determination cannot in any way strengthen the legal position of the State of Rhodesia in international law.²⁰⁰⁾ The "right" is far too controversial, unaccepted and vague to be used by the Rhodesian authorities as a shield or by anyone else as a sword against them (or against the United Kingdom).²⁰¹⁾

SECTION II/...

- 199) Failure to grant self-determination might be a legitimate matter of international concern. It might even be a "threat to the peace" such as would justify Security Council action but in neither of these cases is it a breach of international law. See note 88) supra. McDougal & Reisman, note 198) supra, pp. 11-13, fall into a basic fallacy in reasoning here. From the fact that the United Nations may concern itself with, and even take action against Rhodesia (which premise is, with respect correct) they seem to draw the conclusion that Rhodesia must have committed an international tort by making U.D I. But this is a non sequitur. The lawfulness of United Nations action does not presuppose unlawful conduct on the part of the entity against which the conduct is taken. The Security Council may take action in situations in which there is a threat to the peace or a breach of the peace though there may be no element of wrongdoing. Higgins, note 1) supra, p. 174; The writer, "Rhodesia and the United Nations; the Lawfulness of International Concern; a Qualification" (2) C.I.L.S.A., 1969, p. 454 at p. 455.
- 200) Thus McDougal & Reisman, note 198) supra, pp. 17- 18, are correct when they allege that the right of self-determination cannot be invoked to support the Rhodesian authorities in their bid for independence.
- 201) See the writer, note 199) supra, pp. 459-460.

SECTION III

HUMAN RIGHTS

There are a number of possible categories of human rights to be examined here. (1) Conventional human rights provided for by the Charter of the United Nations. (2) Human rights provisions in the Universal Declaration of Human Rights. (3) Traditional human rights, the violation of which would have justified humanitarian intervention. (4) Conventional human rights created by the European Convention on Human Rights and Fundamental Freedoms, 1950. It has in fact been alleged that Rhodesian action has violated the first three categories of human rights mentioned, and, as a result, is wrongful in international law.¹⁾

If the rights in question do exist, they could be vested in individual human beings in Rhodesia, groups of such persons or even in the population as a whole. In connection with the various categories of rights three questions arise for examination. (a) Are the "rights" in question legal rights at all? Legal rights would here denote international law rights. (b) If the answer to the first question is in the affirmative, then what is the content of such rights? (c) If, again, the answer to the first question is in the affirmative, are the rights binding on Rhodesia, i.e. is Rhodesia the other party to the international obligation here and if not what other entity is?

(1) The Charter of the United Nations.

Article 55 of the Charter provides that the United Nations shall promote universal respect for, and observance of human rights without distinction. Article 56 provides that all members pledge themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Article 55.

It/...

1) McDougal & Reisman, "Rhodesia and the United Nations; The Lawfulness of International Concern" (62) A.J.I.L., 1968, p. 1 at pp.11-12.

It is a matter of long-standing controversy whether the above articles are legally obligatory. Green,²⁾ Gross,³⁾ Kelsen,⁴⁾ Schwarzenberger,⁵⁾ and Hudson⁶⁾ all maintain the view that the Charter imposes no legal obligations with respect to human rights. On the other hand Lauterpacht,⁷⁾ Jessup,⁸⁾ Ezejiiofar,⁹⁾ Wright,¹⁰⁾ Scelle,¹¹⁾ Sloan¹²⁾ and Guradze¹³⁾ allege that respect for human rights is obligatory under the Charter. The General Assembly of the United Nations has expressed similar views.¹⁴⁾ The World Court recently expressed itself in favour of this proposition when it held that:

"Under the Charter ... the former mandatory [South Africa] had pledged itself to observe and respect, in a territory having an international status, [South West Africa] human rights and fundamental freedoms...." 15)

In/...

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- 2) L.C.Green, "The Individual and his status in International Law" (1) Indian Journal of International Law, 1960-1961, p. 415 at p.423.
 - 3) Quoted by Rupert Emerson, "Self Determination" (65) A.J.I.L., 1971, p.459 at p.461.
 - 4) The Law of the United Nations, 1951, p.29.
 - 5) Power Politics, 1951, pp. 629-633.
 - 6) "Integrity of International Instruments" (42) A.J.I.L., 1948, pp.105-108.
 - 7) International Law and Human Rights, 1950, pp. 147-149.
 - 8) A Modern Law of Nations, 1948, p. 91.
 - 9) Protection of Human Rights under the Law, London, 1964, pp.59-60, ¶6.
 - 10) "National Courts and Human Rights - the Fujii Case" (45) A.J.I.L., 1951, p. 62 at p. 73.
 - 11) Yearbook of the International Law Commission, 1949, p. 169.
 - 12) "Human Rights, the United Nations and International Law" (20) Nordisk Tidsskrift for International Ret, 1950, pp.30-31.
 - 13) Der Stand der Menschenrechte im Völkerrecht, 1956, pp. 110-111.
 - 14) A. Res. 44(1); 265(111); 285(111).
 - 15) Namibia (South West Africa) Advisory Opinion, I.C J. Rep. 1971, paragraph 131. Egon Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter" (66) A.J.I.L., 1972, p. 337 at pp. 348-349 says that the judgment must not be interpreted as stating that the human rights provisions of the Charter must be confined to territories having an international status (such as South West Africa). At p. 350 he states "that the authority of the court is now clearly behind the interpretation of the human rights clauses of the Charter ... by Lauterpacht and others".

In endeavouring to establish whether the above Charter provisions are legally obligatory, it is necessary to see whether any concrete content can be given to the articles. For if not, the articles could not operate as norms of international law with binding legal force. Here there are two possibilities to be examined: (a) whether there is an obligation to observe any specific human right or rights; (b) if not, whether any other obligation can be deduced from the provisions.

(a) Obligations to observe specific human rights.

If any such obligations can be isolated, the provisions in question would have legal content. Basically the enquiry here is into the question whether Article 56 can be further concretized into instances of specific legal obligations. Certainly neither the article in question nor the Charter lists any human rights, as Green points out.¹⁶⁾ In this respect we must therefore examine the attempts which have been made to clothe the article in question with substance. Here it is alleged that the General Assembly can authoritatively interpret the content of Article 56 and that the Universal Declaration of Human Rights is in effect such an authoritative interpretation. Thus Article 56 would be further concretized in the norms of the Universal Declaration which would give its content. Lauterpacht considers the Universal Declaration to be an authoritative interpretation of the human rights provisions of the Charter.¹⁷⁾ The Montreal Statement of the Assembly for Human Rights of 27th March, 1968, expressed the opinion that:

"...the/...

16) Note 2) supra, p. 423.

17) "The Universal Declaration of Human Rights" (25) B.Y.I.L., 1948 p. 354 at pp. 464-465; McDougal & Reisman, note 1) supra, p. 12.

"... the Universal Declaration ... constitutes an authoritative interpretation of the Charter of the highest order" 18)

For reasons previously given, it was submitted that the General Assembly of the United Nations cannot authoritatively interpret the Charter.¹⁹⁾ Thus the Assembly cannot clothe the human rights provisions of the Charter with an authoritative content. It is submitted therefore that as the Charter does not mention any specific human right which must be observed and as the General Assembly cannot authoritatively fill in the lacuna here, the Charter imposes no obligation to observe any particular human right.

(b) Other obligations.

If one reads the terms of Article 56 one finds that the members of the United Nations "pledge themselves to take joint and separate action" in relation to promoting respect for the observance of human rights. Though respect for no specific human right is obligatory, there is, it is submitted, a minimum obligation to pursue the achievement of human rights in a reasonable manner. Drost summarizes the position admirably when he says:

"... it seems impossible to admit that these articles constitute legal norms, from which human rights under positive law can be derived. The text forbids such an interpretation/...

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- 18) See Louis B. Sohn, "United Nations Machinery for Implementing Human Rights" (62) A.J.I.L., 1968, p. 909.
- 19) Supra, pp. 98-100. Green, note 2) supra, p. 425 says the Assembly is a political body comprising politicians, who decide political questions for political reasons. It is not a court, nor are its members competent to interpret a complex legal document like the Charter. Ezejiogar, note 9) supra, p. 69 says that Assembly construction of the Charter cannot be decisive. He mentions various factors: political bias; that the representatives are politicians unlearned in the law and so not competent to undertake such juridical exercises.

interpretation. Admittedly, the Members have undertaken to act in conformity with the purposes of the Organization. They have legally committed themselves to a legislative program, national and international, of respect for human rights. However, this is something totally different from the assertion that the Charter has already created human rights under positive international law. It is merely wishful thinking to substitute the future for the present. Besides, the Charter does not define any of these rights and freedoms. If human rights form part of positive law under the Charter, what is their content? The Charter does not lay down any future law, let alone any present law. The Charter provisions do not even contain a list of guiding principles, it merely says that the Organization and its Members shall take concerted action on the subject in the future." 20)

The Articles therefore enshrine an overall obligation to pursue the achievement of human rights but no time is laid down for the achievement of the ideal nor is any specific right provided for.²¹⁾ However the member states of the United Nations have an obligation to interpret their Charter duties including those in Articles 55 and 56 in good faith.²²⁾ This must surely involve giving due consideration to the provisions in question and at least perhaps making some reasonable endeavours in the direction in question.²³⁾ It has been argued for instance that there is certainly an obligation on member states of the United Nations not to retrogress in the matter of respect for human rights.²⁴⁾

Even if it be conceded that these Charter duties with minimal content exist, it is submitted that they are not binding on Rhodesia for two reasons. In the first place, Rhodesia is not

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- 20) Human Rights as Legal Rights, Leyden, 1965, p. 29. See too Akehurst, p. 98.
- 21) The vagueness of the language probably leaves a wide discretion to states about the speed and means of carrying out their obligations. See Akehurst, p. 98. See however Philip Jessup, note 8) supra, p.91 who regards respect for human dignity and fundamental rights as already law, at least for members of the United Nations.
- 22) Schwarzenberger, Manual, p. 148.
- 23) See Lauterpacht, note 7) supra, p. 153.
- 24) Akehurst, pp. 98-99.

a member of the United Nations and as such is not obliged to observe the provisions of the Charter.²⁵⁾ In the second place, as pointed out before, Rhodesia only enjoys a limited international personality in relation to certain matters²⁶⁾ and this does not in any event extend to relations between the State of Rhodesia and its own population in the sphere of conduct in question, viz. the observance of human rights. The contention that Rhodesia has violated international law by failure to observe Articles 55 and 56 of the Charter must therefore be rejected.

The duties in question under Articles 55 and 56 of the Charter probably do not in any event correlate with rights in the peoples of member states. The correlative rights are probably vested in the other member states of the organization, the other parties to the treaty.²⁷⁾ The provisions in question seem to emphasize the undertakings of the individual member states (and of the organization as a whole) rather than the creation of rights in the populations of member states.

Finally/...

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- 25) Sorensen, p. 77; Akehurst, p. 163; Vienna Convention on the Law of Treaties, 1969, Article 35.
- 26) Supra, pp. 378-382.
- 27) L.C. Green, "Self-Determination and Settlement of the Arab-Israeli Conflict", Proceedings A.S.I.L., 1971, p. 40 at p. 43 says that there are grounds to argue that the Charter gives no right to any entity, individual human being or group - other than to the states parties. If this is so the position would be like that alleged by Lindley, p. 327 to exist in respect of Article 6 of the General Act of the Berlin Conference and by G.I.A.D. Draper, "The Geneva Conventions 1949" (114) I. H.R., 1965, p. 59 at p. 96 in respect of Article 3 of the said Conventions.

Finally, as the United Kingdom is a full international person whose full sovereignty over Rhodesia is near-universally recognized by other States²⁸⁾ and as it is a member state of the United Nations, it is conceivable that the United Kingdom might have international obligations under Articles 55 and 56 in relation to the people of Rhodesia.²⁹⁾ These will be discussed later when the position of the United Kingdom is considered.³⁰⁾

(2) The Universal Declaration of Human Rights.

Are the rights enshrined in this manifesto legal rights? It is sometimes asserted that they are. Thus the United Nations Conference on Human Rights at Teheran in 1968 passed a resolution proclaiming that the Universal Declaration constitutes an obligation for the members of the international community.³¹⁾ The General Assembly of the United Nations approved by acclamation a resolution endorsing the Proclamation of Teheran.³²⁾ The better view however would appear to be that the Declaration is not a manifesto of legal rights. Asamoah says it does not create legal obligations for states because its language and the surrounding circumstances show that it was not intended to have such an effect. It is not the fons et origo of legal rights and duties.³³⁾ Woetzel says that the Universal Declaration may be construed as declaratory and not binding.³⁴⁾ Lauterpacht is of the view that the Declaration may claim no legal authority/...

28) Supra, pp. 365-366.

29) Possible United Kingdom obligations in relation to the people of Rhodesia would not, it is submitted, be owed to the people in question but to other member states of the United Nations.

30) Infra, pp. 664 et seqq.

31) For text see (63) A.J.I.L., 1969, p. 674.

32) See ibid., pp. 577-578.

33) The Legal Significance of the Declarations of the General Assembly of the United Nations, The Hague, 1966, pp. 189, 190.

34) Proceedings A.S I.L., 1966, p. 149. This is a rather surprising statement as Woetzel alleges in the same place that intervention may be justified on the grounds of internal violations of human rights.

authority.³⁵⁾ Bleicher considers that it has had a seminal influence in the entire field of human rights but its direct legal significance is not so clear.³⁶⁾ It does not implement rights but calls upon states to pursue a pact designed to attain rights.³⁷⁾ Friedman describes the Declaration as an aspiration rather than a reality which may furnish the foundations for a future enforceable international bill of rights.³⁸⁾ Weiss is of the view that it does not entail legal commitments but although not legally binding its effect has been far-reaching.³⁹⁾ MacGibbon says the Declaration best describes its own status - a common standard of achievement.⁴⁰⁾ Martin warns against equating mere declarations with positive law.⁴¹⁾ Ezejiolor says that the Declaration did not contain legal obligations at inception; it has no legally binding character but it has had an effect; it is in essence a recommendation and it does not even bind those who voted for it because they made their intention not to be bound quite clear; it only has a political effect.⁴²⁾ Vasak says that the European Convention on Human Rights is not comparable with the Universal Declaration for it is difficult to put on the same level a simple recommendation and a legal instrument producing legal effects.⁴³⁾

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- 35) H. Lauterpacht, "The Universal Declaration of Human Rights" (25) B.Y.I.L., 1948, p. 354 at p. 376.
- 36) Samuel A. Bleicher, "The Legal Significance of Re-citation of General Assembly Resolutions" (63) A.J.I.L., 1969, p. 444 at p. 464.
- 37) Ibid., p. 465.
- 38) Wolfgang Friedman, "The Changing Dimensions of International Law", Essays on International Law from the Columbia Law Review, New York, 1965, p. 95, at p. 108.
- 39) See Human Rights in National and International Law, edited by A.H. Robertson, Manchester, 1968, p. 320.
- 40) Ibid., p. 325.
- 41) Ibid., p. 329.
- 42) Note 9) supra, pp. 86, 88, 89, 90.
- 43) Karel Vasak, "The European Convention of Human Rights beyond the Frontiers of Europe" (12) I.C.L.Q., 1963, p. 1206 at p. 1211.

It would appear to be clear that those states who supported the Declaration at its inception did not intend that it should impose binding legal obligations to observe the specific human rights mentioned.⁴⁴⁾ O'Connell says:

"As a legal document the Universal Declaration is of doubtful significance. Even its architects appear to have regarded it as no more than a statement of principles in the political realm, or at best enjoying no more legal authority than any other recommendation of the General Assembly."⁴⁵⁾

We must therefore conclude that the Universal Declaration did not create human rights of a legal nature. However, our enquiry must proceed further because even though the Declaration was not legally binding at its inception, it might, at some later stage, impose binding legal obligations to observe it. A general custom might have evolved from the practice of states whereby states in general accept its provisions, or some of them, as binding. We would then be able to talk about the formation of customary human rights, for the content of which we could look to the Universal Declaration. It has been alleged by Bleicher that by 1968 a body of customary law "may have developed around the Universal Declaration".⁴⁶⁾ It has crystallized into a custom that at least certain approaches to human rights are now unlawful.⁴⁷⁾ Sir Humphrey Waldock says that the Declaration is echoed in a variety of national and international instruments and this constant and widespread recognition of its principles clothes it with the character of customary law.⁴⁸⁾ Our enquiry then resolves itself into whether it can be said that the practice of states in general observes the precepts of the Universal Declaration as a matter of legal obligation.

Here/...

44) Akehurst, p. 100; Sorensen, p. 501; Schwarzenberger, Manual, p. 81.

45) II, p. 747.

46) Note 36) supra, p. 460.

47) Ibid., p. 465.

48) Note 39) supra, p. 325.

Here, as in the last Section of this Chapter, we must draw a distinction between (a) what states say and (b) what states do, both of which cumulatively amount to the practice of states for the purpose of establishing custom.⁴⁹⁾

(a) What states say.

What states say will usually be found in collective form in the resolutions of organs of international institutions. Such declamations are in fact part of the practice of states.⁵⁰⁾

When we examine the resolutions of the General Assembly we find that there are declarations affirming the obligatory character of the Universal Declaration. Thus the Montreal Statement of the Assembly for Human Rights of 27th March, 1968 expressed the general consensus of international experts that the Universal Declaration has over the years become a part of customary international law.⁵¹⁾ The intergovernmental Proclamation of Teheran of 13th May, 1968 emphasized that the

"Universal Declaration ... states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community." ⁵²⁾

The General Assembly of the United Nations approved by acclamation a resolution endorsing the Proclamation of Teheran. This was in fact the first major endorsement of the Universal Declaration by the Soviet Union and the newly independent countries.⁵³⁾

We/...

49) Supra, pp. 483-485.

50) Asamoah, note 33) supra, p. 243. The intention of the Assembly to create law for the state in passing such resolutions and the number of states voting for the resolution are factors which may add to or detract from the value of the practice in question. Ibid., p.244.

51) See Sohn, note 18) supra, p. 909.

52) Ibid. For text see (63) A.J.I.L., 1969, pp. 674-677.

53) See (63) A.J.I.L., 1969, p. 577.

We may thus conclude that there are important and substantial declarations on the level of organized international society affirming the legal character of the Universal Declaration.

(b) What states do.

The practice involved here may be the practice of individual states or collective practice represented by the practice of international organizations. As Sir Humphrey Waldock has pointed out, there is a substantial body of practice both national and international which accords with the Universal Declaration.⁵⁴⁾ It is certainly a fact that human rights are observed in the municipal law of several states and that at the international level there are instruments creating human rights.⁵⁵⁾ However the question remains whether the practices in question are general enough to establish customary rules.

When we examine the practice of the United Nations Organization we find that it has been prepared to consider, investigate and judge human rights situations on various occasions undeterred by the vagueness or generality of the ideas in question.⁵⁶⁾ Thus in 1949 E.C.O.S.O.C. dealt with the question of forced labour, as did I.L.O. in 1953. In 1949 the General Assembly considered Soviet measures aimed at preventing the Russian wives of aliens from leaving the Soviet Union. In 1959, 1961 and 1965 it considered the question of human rights in Tibet. Since 1946

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54) See note 48) supra.

55) The main examples are the United Nations Covenants on Human Rights, 1966 (not yet in force); the European Convention on Human Rights and Fundamental Freedoms, 1950; the American Convention on Human Rights, 1969.

56) The main instances where the United Nations has so acted are succinctly summarized by Egon Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter" (66) A.J.I.L., 1972, p. 337 at pp. 341-344. What follows is a summary of such action

question of human rights in South Africa has continually occupied the Assembly. From 1960 the Security Council has also considered such matters. In 1967 the Commission on Human Rights and E.C.O.S.O.C. concerned themselves with human rights questions in South Africa. In 1968 the Commission extended its operations to South West Africa, Southern Rhodesia and the Portuguese territories in Africa and in 1969 to Israel. In 1968 the General Assembly also concerned itself with the observance of human rights in the Israeli context.

When we examine the above practice critically we find, as John Carey points out,⁵⁷⁾ that the United Nations have refused to investigate complaints about breaches of human rights unless the country involved is a colonial country or South Africa.⁵⁸⁾ The United Nations will consider, investigate and judge human rights situations where there is a majority strong enough and wishing strongly enough to attempt to influence a particular development.⁵⁹⁾ In other words the underlying criterion for United Nations action in the field of human rights is simply the wishes of the majority in the Assembly. It is submitted that such a practice, based on no concrete principles or criteria other than the haphazard, ad hoc, discretionary and subjective desires of the majority for the time being, cannot be sufficient to establish a practice which is constant, uniform and general enough to give birth to a customary rule.

From/...

57) "The United Nation's Double Standard on Human Rights Complaints" (60) A.J.I.L., 1966, p. 792.

58) To which may be added Israel. Israel, South Africa and Southern Rhodesia are probably regarded as neo-colonial here thus making concern for human rights only relevant in the colonial and neo-colonial contexts.

59) Schwelb, note 56) supra, p. 341.

From the collective practice of states as exhibited in the forum of the United Nations, we now turn to the practice of individual groups of states. Here we shall merely refer to the practice of a number of influential groups of states, from whose practice it should be apparent that there is no generality in the matter of the observance of human rights.

In Eastern European countries human rights were not respected for a considerable period. They were indeed violated on a mass scale so that they appeared to be virtually non-existent. The law on paper (what states say) did not correspond to the law in practice (what states do). However, from 1961 on, there have been some efforts. Legal science in these countries has discovered the lack of any socialist doctrines on human rights and freedoms and first attempts have been made to develop the law so as to include certain basic rights for citizens.⁶⁰⁾ It appears however that the human rights to be offered will be different. Some law reform has already taken place to improve the legal position of the citizen and there is a tendency to eliminate terror.⁶¹⁾ Constitutional development shows signs that human rights are receiving growing emphasis.⁶²⁾ From the above we may conclude that there is a long way to go before human rights become established in Eastern practice. Even if they do become established they will probably be different in that stress will be on economic and social rights rather than on civil and political/...

60) János Tóth, note 39) supra, p. 300.

61) Ibid., p. 301.

62) Ibid., p. 302.

political rights. There will thus be no generality on the question of human rights as between West and East.

When the practice of developing countries is examined this shows a widespread disregard for human rights in practice.⁶³⁾

If we examine the Commonwealth we find that Constitutions vary greatly in their respective approaches to human rights. They range from no provisions, elaborate provisions, less elaborate provisions to non-justiciably affirmations.⁶⁴⁾

From the above we can conclude that serious violations of what are called fundamental human rights have occurred on a large scale.⁶⁵⁾ MacGibbon points out that world-wide state practice gainsays the conclusion that respect for the Universal Declaration is obligatory. Compliance with it has been sporadic and inconstant, often lacking any opinio juris.⁶⁶⁾ Martin states, and with respect correctly:

"We must not give up hoping that in due course the law governing human rights will catch up with the Universal Declaration" ⁶⁷⁾

Ermacora also points out that there is a vast gulf between the proclaimed objects of the Universal Declaration and the respect accorded them in the work of the United Nations and in the practice/...

63) For a useful summary of the more prominent infractions of human rights in the developing countries see Robert K. Woetzel, "Political Rights in Developing Countries", Proceedings A.S.I.L., 1966, pp. 141-147. Despite this Woetzel's view is that "grave violations of political and human rights are illegal from an international standpoint." (p.147).

64) See Judge J. Cremona, note 39) supra, p. 325.

65) John Hopkins, "International Law - Southern Rhodesia - United Nations - Security Council", Cambridge Law Journal, 1967, p.1 at p. 5.

66) Note 39) supra, p. 325.

67) Ibid., p. 329.

practice of member states.⁶⁸⁾ He then gives the reasons why the human rights in the Universal Declaration have not developed as legal rights.⁶⁹⁾ These are the following:

- (i) The world must wait until the national conscience of African states and other new states has been awakened. These are anxious to protect their newly-acquired sovereignty.
- (ii) Eastern and Western conceptions of human rights are fundamentally different. In Communist states, it is believed that there is no need to protect the individual against the community, since the community already protects the individual.⁷⁰⁾
- (iii) A world-wide differentiation is made between 'true human rights' and 'political human rights'.
- (iv) Politically responsible heads of delegations are usually not included in negotiations to establish universal rights.

From all the above we may conclude that there is practice in the form of declarations (what states say) which supports the existence of human rights as legal rights. However, in relation to the conduct of states (what states do), practice does not support a general observance of human rights as legal rights because/...

68) Ibid., p. 323.

69) Ibid., p. 324.

70) Judge Cremona, ibid., p. 326 also draws attention to this difficulty. He says that countries with common tendencies and ideologies are apt to form group conceptions of human rights coloured by ideology. He therefore suggests that the best way to implement human rights for the immediate future is in the direction of regional groupings. He doubts whether global implementation is possible. This of course is tantamount to an assertion that there is no generality here and hence there cannot be customary rules of a general character.

because disregard is too widespread. It now remains for us to assess the evidential value of the combined practices, i.e. what states say and what they do.

If what states say is in accord with what states do we may have a practice which is capable of giving birth to customary rules.⁷¹⁾

If there is no conduct on the part of states in a particular sphere, then mere declarations of states (what states say) may constitute a sufficient practice to formulate custom.⁷²⁾

If what states do is in conflict with what they say, the practice involved cannot support a customary rule.⁷³⁾ If states do not practice what they preach, then what they preach loses its value as evidence of custom. In this regard we may refer to the theories advanced by Falk. Falk would attribute a quasi-legislative force to resolutions of the General Assembly as a middle position between affirmation of true legislative status in the Assembly and a denial of its law-creating role and impact.⁷⁴⁾

It works as follows. If there is consensus on the part of the world community, then an Assembly resolution expressing that consensus may make law.⁷⁵⁾ Consensus is not present if a major power/...

71) See supra, p. 483.

72) Supra, pp.483,485. Here we may be in the limited sphere where "instant" or "pressure-cooked" custom is possible. See note 39) supra, p.325.

73) Supra, p. 485.

74) R.A.Falk, "On the Quasi-Legislative Competence of the General Assembly" (60) A.J.I.L., 1966, p. 782.

75) Ibid., p. 785. Falk says here that there is a trend from consent (important in law-creation by custom and convention) to consensus (general) in law-making.

power or an entire major group does not participate in the consensus. Apart from this the ordinary two-thirds majority in the Assembly is sufficient to express consensus.⁷⁶⁾

We may make three observations on Falk's theories.

- (i) As Onuf points out,⁷⁷⁾ Falk is here in fact asserting that the General Assembly has a true legislative power. It can legislate by consensus, which Falk defines. Falk is not steering a middle course.
- (ii) If the Assembly can so legislate, then Assembly legislation is in fact a new source of international law. As Onuf points out however, a new source of law should be created as such by an existing source. Thus the legitimacy of the new source must be provided for in a rule of law arising from an already legitimate source. So the Assembly's power to legislate would have to be established by convention or custom.⁷⁸⁾

(iii)/...

76) Ibid., pp. 787-788. Falk even goes further and introduces a variable consensus - the strongest approaching unanimity and the weaker consensus tolerating non-participation and even dissidence of a Great Power. The legislative impact is then reduced. This the present writer interprets to mean that in the case of weaker consensus excluding a Great Power, the Power involved will not be bound by the "legislation" but the latter will bind other states - a sort of "legislation" with relative geographical operation. It is inconceivable that Falk could have meant that the "legislation" was relatively binding, for a rule is either legally normative or it is not. It cannot be relative and there cannot be a middle course. It is true of course that the evidence in favour of the existence of a rule may be relatively strong or weak but a rule itself either exists or it does not (though it may be difficult to establish whether it so exists or not because of conflicting evidence.)

77) N.G. Onuf, "Professor Falk on the Quasi-Legislative Competence of the General Assembly" (64) A.J.I.L., 1970, p. 349 at p. 352.

78) Ibid., p. 354.

(iii) It is not true that the Assembly plays no role in law-creation. It does play such a role but its role must be seen in the context of the custom-forming process. It is submitted that the true role of the General Assembly in law-creation is the concretization of customary norms which are not at variance with the practice of states. Once however it departs from this role and attempts to confirm norms which conflict with practice, its pronouncements become of little value as evidence of customary rules.

We may also briefly refer to the theory of Bleicher that recitation of a declaration may give rise to a customary rule.⁷⁹⁾

This is certainly true but must be seen to be subject to two qualifications.

(i) Recitation of norms which are at variance with practice is as little evidence of customary law as the original citation or declaration.

(ii) The formation of customary rules in such cases is, as Bleicher admits, subject to the operation of the doctrine of persistent opposition by which a state opposing a resolution can be protected from the application of the custom to them, assuming they had not by their previous acts, either within or outside the United Nations, already accepted the custom.⁸⁰⁾

From all that we have said we may now come to some conclusions on the Universal Declaration of Human Rights. It is submitted that in
the/...

79) Note 36) supra, p. 463.

80) Ibid., p. 451.

the present context of world society in which there is such diversity of view as to meaning of human rights and in which there is such widespread disregard for human rights in the actual practice of states (as opposed to the lip service which they formally pay to the idea of human rights) that the stage has not yet been reached where the practice of states in general observes the precepts of the Universal Declaration. If that stage has not been reached, there are no binding rules of international law emanating from the Universal Declaration, and so no breach of international law is possible here by Rhodesia - or by any other state for that matter. Hence the allegation of McDougal & Reisman that Rhodesia has broken international law by violating the Universal Declaration⁸¹⁾ is legally unsound. Indeed the very words used by these learned authors seem to suggest that the Universal Declaration, in their view, does not yet impose legal obligations. In their own words, the Declaration is "increasingly authoritative".

It can be said too that if the Universal Declaration was legally binding there would be little need to provide for the conclusion or ratification of the United Nations Human Rights Covenants, 1966. Bleicher says that the completion of the International Covenants may indicate that states did not consider the Universal Declaration binding.⁸²⁾ MacGibbon says that it is difficult to reconcile a binding Universal Declaration with the protracted efforts to finalize the draft Covenants and to achieve their ratification.⁸³⁾

MacChesney/...

81) Note 1) supra, p. 12.

82) Note 36) supra, p. 465.

83) Note 39) supra, p. 325.

MacChesney discusses the possibility that the United States might not ratify the Covenants.⁸⁴⁾ If, however, the Universal Declaration reflected international customary law, such ratification would be largely unnecessary. Goldberg would make the following remark on the state of the law in this respect in the year preceding the opening of the Covenants for signature:

"The time is overdue for the adoption of a binding treaty on human rights to implement the Declaration." ⁸⁵⁾

The above arguments drawing attention to the superfluous nature of the Covenants in the event of the Declaration being already binding are not altogether correct. As Bleicher points out there are sufficient points of difference in both substance and implementing machinery to make the existence of overlapping obligations perfectly plausible.⁸⁶⁾ In the Covenants one finds a more extensive definition of rights, the provisions of certain enforcement measures of varying degrees of effectiveness, such as the obligation to report,⁸⁷⁾ the establishment of the Human Rights Committee,⁸⁸⁾ the right of a party to complain that another party is not fulfilling its obligations under the Covenants⁸⁹⁾ and the right of individual petition.⁹⁰⁾

It/...

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- 84) Brunson Mac Chesney, "Should the United States Ratify the Covenants? A Question of Merits, not of Constitutional Law" (62) A.J.I.L., 1968, pp. 912-917.
- 85) "The Need for a World Court on Human Rights" (11) Howard Law Journal, 1965, p. 621.
- 86) Note 36) supra, p. 465.
- 87) International Covenant on Economic, Social and Cultural Rights, Article 16; International Covenant on Civil and Political Rights, Article 40.
- 88) Ibid., Article 28.
- 89) Ibid., Article 41.
- 90) Optional Protocol to the International Covenant on Civil and Political Rights, Article 1.

It has also been alleged by Lauterpacht that the Universal Declaration may represent a general principle recognized in the laws of member states.⁹¹⁾ As such it could possibly acquire the force of law because Article 38 of the Statute of the World Court treats "the general principles of law recognized by civilized nations" as a source of international law. We have seen however the widespread disregard in practice of the precepts of the Universal Declaration. In the light of such disregard, it can scarcely be argued that the Universal Declaration constitutes a general principle of law at all.

We may conclude therefore that the people of Rhodesia (like the population of any other state) do not have the general rights enumerated in the Universal Declaration. Further even if they had such rights they would not be available against the State of Rhodesia because the personality of the latter⁹²⁾ is not extensive enough to embrace such a relationship with its population. Human Rights fall outside the sphere of operative Rhodesian personality.

We have now considered the existence of human rights in general under the Universal Declaration (and under the Charter of the United Nations). We must now descend from the general to the particular for even though human rights in general may not be established it is possible for a particular human right to be established. The particular right into which our enquiry will now be directed is the right not to be discriminated against on racial grounds. We must see here whether a norm of non-discrimination on racial grounds has established itself (a) under the Charter of the United Nations (b) under the Universal/...

91) Note 17) supra, p. 376.

92) Described supra, pp. 378-382.

Universal Declaration or (c) by practice. The norm of non-discrimination is particularly relevant in the Rhodesian context where the franchise is of such a restricted nature.⁹³⁾

(a) The norm of non-discrimination and the Charter of the United Nations.

Article 55 of the Charter provides that the United Nations shall promote respect for, and observance of human rights for all without distinction as to race. Article 56 provides that members pledge themselves to take action for the achievement of the purposes set forth in Article 55.

We previously discussed whether the above Articles created legal obligations for members to respect human rights and we concluded that they did not.⁹⁴⁾ We must now consider whether they create obligations not to discriminate racially. Most members of the United Nations and the General Assembly are convinced that apartheid conflicts with the Charter,⁹⁵⁾ and the practice of the United Nations is said to consistently uphold the illegality of racial discrimination under the Charter.⁹⁶⁾ If the power of organs to interpret the Charter has any significance, it is alleged that it has established the illegality of racial discrimination.⁹⁷⁾ Thus in so far as the Assembly Declaration on the Elimination of all Forms of Racial Discrimination 1963⁹⁸⁾ is concerned/...

93) Even the Smith-Douglas-Home proposals for a settlement, Cmd. R.R.46 - 1971 contain discriminatory provisions in that under it African representation eventually reaches merely parity with European representation even though Africans constitute the great majority of the population.

94) Supra, p. 524.

95) Asamoah, note 33) supra, pp. 209, 212.

96) Ibid., pp. 205, 213.

97) Ibid., p. 212.

98) A. Res. 1940 (XVIII).

concerned, it is contended that it expresses the general principle of the incompatibility of racial discrimination with Charter obligations.⁹⁹⁾

We may make a number of observations on the above.

(i) The Assembly, as we have seen, cannot authoritatively interpret the Charter.¹⁰⁰⁾ Thus its declarations on Charter obligations are not final and conclusive.

(ii) In so far as United Nations practice supports the existence of an obligation not to discriminate, this evidences the possible birth of a customary norm of non-discrimination.¹⁰¹⁾ It does not necessarily indicate that the Charter creates such a norm ipso facto.

(iii) It is unlikely that the Charter created obligations not to discriminate ipso facto. The reason is that the idea of non-discrimination is to operate in the field of human rights. But as we have seen, the Charter does not create any such human rights. Hence the Charter creates nothing for the principle of non-discrimination to operate upon. Under the Charter the principle has no content. Asamoah states that the absence of a definitive determination of the body of human rights reduces the efficiency of the principle.¹⁰²⁾

(b)/...

99) Asamoah, note 33) supra, p. 213. See too Advisory Opinion on South West Africa, note 15) supra, paragraph 130; Schwelb, note 15) supra, pp. 348-349.

100) Supra, pp. 98-100.

101) This possibility is discussed infra, pp. 544 et seqq.

102) Note 33) supra, p. 213.

(b) The norm of non-discrimination and the Universal Declaration.

Article 1 of the Declaration provides that all human beings are born free and equal in dignity and rights. Article 2 provides that everyone is entitled to all the rights and freedoms set forth in the Declaration without distinction inter alia as to race.

We have seen however that the Universal Declaration does not create legal obligations.¹⁰³⁾ Hence it cannot create a norm of non-discrimination here.

(c) The norm of non-discrimination and the practice of states.

We are here concerned to enquire whether a customary norm of non-discrimination has been established. We must therefore enquire into practice in this respect.

There is a very substantial body of practice which supports the existence of a norm of non-discrimination.

On the international level various conventions have been concluded which evidence a growing concern for the prohibition of racial discrimination. These include the Convention on the Elimination of all Forms of Racial Discrimination, 1965, the United Nations Covenants on Human Rights, 1966,¹⁰⁴⁾ the Convention on the non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 1968¹⁰⁵⁾ and the Draft Convention
on/...

103) Supra, p. 541.

104) See Article 2 of each of the Covenants.

105) Crimes against humanity within this Convention include inhuman acts resulting from the policy of apartheid. See F.C. Newman, "United Nations and Racial Discrimination, an Introductory Outline," Proceedings A.S.I.L., 1970, pp. 106-108.

on the Suppression and Punishment of the Crime of Apartheid, 1971.¹⁰⁶⁾

The conclusion of such conventions is in no way conclusive of course as to the existence of a customary norm. The most important of these conventions is undoubtedly the Convention on the Elimination of all Forms of Racial Discriminations, 1965, which became effective for the parties thereto in 1969. Schwelb states that this Convention is declaratory of existing law and its provisions therefore bind non-parties because they declare customary rules.¹⁰⁷⁾ The fact that the Convention permits reservations to be made to it must seriously detract from its value as a declaration of custom.¹⁰⁸⁾

The practice of the United Nations has consistently upheld the illegality of racial discrimination.¹⁰⁹⁾ There are the various declarations and pronouncements especially in relation to apartheid.¹¹⁰⁾ Apart from these specific pronouncements there are of course the general pronouncements of the Assembly contained in the Universal Declaration of Human Rights¹¹¹⁾ and in the Declaration on the Elimination of all Forms of Racial Discrimination, 1963.¹¹²⁾

The/...

106) A. Res. 2786. (XXVI). For text see (11) I.L.M., 1972, pp. 16-18.

107) Note 15) supra, p. 351.

108) See Egerton R. Richardson, "Will the Rapidly Accumulating Body of United Nations Law on Racial Discrimination truly be Effective?", Proceedings A.S I.L., 1970, p. 111. However Article 20, which permits reservations, does provide that reservations incompatible with the object and purpose of the Convention shall not be permitted.

109) Asamoah, note 33) supra, p. 205.

110) A. Res. 1178 (XII); 1248 (XIII); 1375 (XIV); 1598 (XV). See I. Brownlie, Basic Documents on Human Rights, Oxford, 1971, p.466; Newman, Note 105) supra, pp. 106-108.

111) Articles 1, 2 and 7.

112) A. Res. 1904 (XVIII).

The 1963 Declaration is obviously a very important manifestation of attitude or opinio juris on the part of states in general. As a resolution of the Assembly it cannot, however, create rights and obligations ¹¹¹⁾ per se. It is possible however that certain parts of it, the substantive parts as opposed to those creating procedural and implementing machinery, reflected international custom.¹¹²⁾

From all the above we can conclude that the general practice of states as evidenced in declarations made at the international level (what states say) supports the existence of a norm prohibiting racial discrimination. It is now necessary to examine whether what states say in this respect corresponds to what states do in practice, i.e. is it the general practice of states not to discriminate racially in their municipal legal systems?

This question was examined by Judge Tanaka in the South West Africa case 1966 and he found as follows:

"The question is whether a legal norm of non-discrimination and non-separation has come into existence in international society It is beyond all doubt that the presence of laws against racial discrimination and segregation in the municipal systems of virtually every State can be established by comparative law studies

"The principle of equality before the law ... is stipulated in the list of human rights recognized by the municipal system of virtually every State no matter whether the form of government be republican or monarchical and in spite of any differences in the degree of precision of the relevant provisions. This principle has become an integral part of the constitutions of most of the civilized countries of the world. Common law countries must be included. (According to Constitutions of Nations, 2nd edn. by Amos J. Peaslee, 1956, Vol. I, p. 7, about 73 per cent of the National constitutions contain clauses respecting equality.)

"The/...

111) Paul Weis, note 39) supra, p. 320; Asamoah, note 33) supra, pp. 104-105.

112) Ibid., pp. 205, 213.

"The manifestation of the recognition of this principle does not need to be limited to the act of legislation as indicated above; it may include the attitude of delegations of member states in cases of participation in resolutions, declarations, etc. against racial discrimination adopted by the organs of the League of Nations, the United Nations and other organizations which, as we have seen above, constitute an important element in the generation of customary international law." 113)

It has, however, been alleged that several instances of racial discrimination exist in the practice of states. The principal examples will now be examined to see if they are in substance sufficient to negate a norm of non-discrimination on racial grounds. It is not proposed to deal with instances of discrimination which are directed against aliens, e.g. discriminatory immigration policies. The norm of non-discrimination, if it exists, is only applicable in the state - citizen nexus. It is only the citizen who can enjoy the right not to be discriminated against on racial grounds by his own state.

In Basutoland no person, other than a native, was permitted to reside except in reserves.¹¹⁴⁾ The policy was not to allow any non-native to settle in the territory.¹¹⁵⁾ No European could own land or carry on business of any description in tribal territories.¹¹⁶⁾ In Swaziland native areas were set aside for the sole use and occupation of the Swazi people.¹¹⁷⁾ The same was the position in Northern Rhodesia.¹¹⁸⁾ In Canada reserves were created/...

113) Note 110) supra, pp. 470, 474.

114) Proclamation No. 46 of 1907, s.10; South West Africa Cases, Pleadings, Oral Arguments, Documents, I.C.J. 1966, 111, p. 258.

115) Ibid.

116) Ibid., p. 259.

117) Proclamation 39 of 1910; South West Africa Cases, note 114) supra, p. 260.

118) Crown Lands and Native Reserves Orders in Council, 1928-1960, s. 6; Laws of Northern Rhodesia, 1962, VIII, App. 5, p. 7; South West Africa Cases, note 114) supra, p. 261.

created for particular bands of Indians.¹¹⁹⁾ In the United States Indian reserves also exist.¹²⁰⁾

Some of the above policies applied in the past and have now been abandoned and new policies of non-differentiation in rights to land occupation adopted.¹²¹⁾

In every one of the above cases a privilege was created in favour of a group who were considered not to be able to protect themselves against exploitation. There is, of course, discrimination in favour of such groups (since they are placed in a privileged position) and in consequence there must be discrimination against other groups. There is however one important point which cannot, it is submitted, be overlooked in these cases. In each case the group creating the discriminatory provisions created them against themselves and in favour of another group. The element of discrimination becomes of no consequence because the victims of discrimination can be said to have consented to such discrimination by creating it. The group in favour of whom the discrimination operates cannot be said to suffer discrimination because they are in fact given privileges. The kind of discrimination which would fall within the ambit of the norm of non-discrimination on racial grounds would be adverse discrimination imposed without consent. We now consider examples of this latter type of discrimination.

In/...

119) Indian Act, 1886; South West Africa Cases, note 114) supra, p. 264.

120) Indian Reorganization Act, 1934; South West Africa Cases, note 114) supra, pp. 264-265.

121) Ibid., p. 266.

In the United States non-discrimination on grounds of race or colour or national origins has been enshrined in the 14th and 15th Amendments of the Constitution since 1870.¹²²⁾ The 15th Amendment was reinforced by the Civil Rights Act, 1957 and further Civil Rights Act, 1960. The United States Commission on Civil Rights Report (USCCRR) in 1961 found that the United States Department of Justice had acted with vigour in enforcing this legislation and had initiated and sustained a determined attack on racial discrimination in the franchise.¹²³⁾ Nevertheless, it reported that in one hundred counties in eight Southern states there was reason to believe that Negroes were prevented by outright discrimination or by fear of violence or economic reprisal from exercising the right to vote.¹²⁴⁾

The Supreme Court of the United States had determined since 1954 that separate schooling was illegal and a denial of equal protection. It also held that provisions of local or federal law permitting segregation were void. A large number of court decisions over the years enforced the requirement of desegregation.¹²⁵⁾ Yet USCCRR, 1961, reported that over two thousand out of some two thousand eight hundred school districts in the South had not yet begun to comply with the Constitution.¹²⁶⁾

In 1875 a law was enacted prohibiting jury exclusion on the grounds of race. Such exclusion was made a federal crime. Yet
USCCRR/...

122) South West Africa cases, Pleadings, Oral Arguments, Documents, I.C.J. 1966, V, p. 435.

123) Ibid., p. 438.

124) Ibid., p. 436.

125) Ibid., p. 439.

126) Ibid., p. 440.

USCCRR reported in 1961 that the practice of racial exclusion still existed, especially in the South.¹²⁷⁾

It should be clear from the above that the law of the United States is that racial discrimination is illegal whether in voting, education or jury exclusion; that the practice of the United States authorities is to enforce that law; that state or federal "laws" which so discriminate will be held void by the courts; that if there is discrimination by the authorities in an individual state, they act illegally and that if in some cases there is such de facto and illegal discrimination, the problem is simply one of law enforcement - the enforcement of the law and practice of the United States which does not countenance racial discrimination.

To summarize, it cannot, it is submitted, be said that practices in a state which are illegal under the laws of that state and which that state is consequently trying to stamp out but has, as yet, not completely succeeded, represent the practice of that state. In fact, the position is quite the contrary. The practice of the state is found in the municipal law which it endeavours to enforce. The conduct of a state in trying to suppress practices which are illegal in terms of its law, must surely represent the practice of that state.

From the above it should be apparent that what states do is in accordance with what they say. Not only do states assert the existence of a norm of non-discrimination in racial matters

(or/...

127) Ibid., p. 443.

(or a principle of equality) but in practice the vast majority of states observe the norm. Not only do states in general observe the norm but all the major powers do as well.¹²⁸⁾ All the requirements of custom are therefore present and it is submitted in the light of all the above practice that a customary norm of non-discrimination on the grounds of race has evolved. Judge Tanaka says (and with respect correctly):

"From what has been said above, we consider that the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law." 129)

Given then that there is a customary norm of non-discrimination on racial grounds two further questions arise. (i) What is the content of the norm? (ii) Against whom does the norm operate?

(i) Content of the norm.

The norm, it is submitted obliges those states who are bound by it not to discriminate racially in the enjoyment of civil and political rights as expressed in the Declaration
on/...

128) For the United States see the Bill of Rights, 1791, Article XIV, section I as now interpreted in Brown v. Board of Education of Topeka, 1954 and subsequent decisions. For France see Declaration of the Rights of Man and of the Citizen, 1789, Article 1. For the U.S.S.R. see the 1936 Constitution, Chapter X, Article 123. For the People's Republic of China see the 1954 Constitution, Chapter III, Article 85. For the United Kingdom see the Race Relations Act, 1965. For India see 1949 Constitution, Articles 14-17. For West Germany see the Basic Law, 1949, Article 3.

129) Note 110) supra, p. 467. The learned judge also considers the rule of non-discrimination on the grounds of race to be a "general principle of law recognized by civilized nations" within the meaning of Article 38 of the Statute of the World Court. Ibid., p. 470, 474-475. Judge Van Wyk takes issue with Judge Tanaka on the point relating to custom. He says that custom is not generated by what states say but by what they do. (1966 I.C.J. Rep. 169). This is certainly correct if it means that a custom which is not in accordance with what states do cannot evolve. However in the instant case of the norm of non-discrimination on racial grounds there is abundant evidence (as Judge Tanaka points out) that states do in practice observe the norm-Bleicher note 36) supra, p. 465 says that certain practices have crystallized into custom and one of these is the unlawfulness of discrimination.

on the Elimination of all Forms of Racial Discrimination,
1963.¹³⁰⁾

(ii) What entities must observe the norm?

The norm evolved is a norm of general customary international law since it has evolved from the practice of the vast majority of states including the more important powers.¹³¹⁾ Such custom will bind all states except those states who can rely on the doctrine of persistent opposition by showing that at all times during the formation of the custom they opposed it and did not participate in the practices which led to its formulation.¹³²⁾ There is however a rebuttable presumption that a state has accepted a general custom. Sorensen describes the operation of the doctrine as follows:

"...it would seem to be generally admitted that the persistent opposition of a state to a customary rule during the process of its formation can, in certain circumstances at least, render the rule inapplicable to that state. But such opposition may not necessarily prevent the recognition of the rule in question as a rule of general international law...the scope of the presumption of acceptance is: when a custom has duly crystallized no state can be allowed to rebut the

presumption/...

130) Asamoah, note 33) supra, pp. 212-213. This Declaration, adopted overwhelmingly by the Assembly is probably the most reliable concretization of the content of the norm in question.

131) The consent of all states is not required for the creation of custom. A few dissident states cannot obstruct the formation of custom. Judge Tanaka, note 110) supra, p. 465.

132) Anglo-Norwegian Fisheries case, 1951 I.C.J. Rep. 131.

presumption, or to contend that it does not accept what it has allowed to come into existence without protest." 133)

Granted then that the norm in question is generally binding, three further questions arise in the Rhodesian context.

(A) Does the norm bind Rhodesia?

It is submitted that the norm does not bind Rhodesia because of the lack of a relevant Rhodesian international personality. The personality of Rhodesia is not so extensive¹³⁴⁾ as to embrace a relationship under which it would have a duty to observe the norm in question in relation to its population.

(B) In what circumstances could the norm bind Rhodesia?

It is submitted that the norm would bind Rhodesia if it were fully recognized. It would then be a full international person and would have the capacity to bear the duty in question in international law. On recognition, Rhodesia would be a new full member of the international community. New members of the community must however accept all rules of general customary international/...

133) P. 137. See too Akehurst, pp. 49-50 and Bleicher, note 36) supra, p. 451. In all probability South Africa could rely on the doctrine of persistent opposition in relation to the newly-formed customary norm of non-discrimination on racial grounds. Thus while practically every other state is bound by the norm, South Africa is probably not. What South Africa could not do is to prevent by opposition the establishment of such a norm binding on other states in general. See note 131) supra. The norm of non-discrimination on racial grounds is probably then a rule of general customary law but is not a rule of universal customary law because it does not bind South Africa which is able to rely on the doctrine of persistent opposition. See too Department of Information (South Africa), Ethiopia and Liberia v. South Africa, Pretoria, 1966, p. 147.

134) The spheres in which Rhodesian personality exists are described supra, pp. 378-382.

international law existing at the time when they became such members.¹³⁵⁾

This would appear to be the better and more general view but there are jurists who favour a positivistic consensual basis for all rules of customary law and consider that a new state is not bound by existing rules without its acquiescence. Tacit consent to such rules is usually implied.¹³⁶⁾

In the case of Rhodesia, the general rules of customary law in question would include the rule relating to the norm of non-discrimination. Hence, if and when Rhodesia is recognized, it will have a duty to observe the norm in relation to its own population.

(C) Does the norm bind the United Kingdom?

Clearly the answer to this question is in the affirmative, for the United Kingdom cannot rely on the doctrine of persistent opposition, nor is there any indication that it wishes to do so. The United Kingdom would therefore be obliged to observe the norm in relation to the population of Rhodesia over whom it claims sovereignty, a claim which is recognized by practically all other states.¹³⁷⁾

We/...

135) Sorensen, pp. 137-138; Akehurst, p. 49; Starke, p. 27; O'Connell, I, p. 5.

136) G.I. Tunkin, Droit International Public, Problemes Theorique, (Translated) Paris 1965, pp. 80, 87; D. Anzilotti, Corso di Diritto Internazionale, 3rd Ed., 1928, I, p. 43.

137) The implications of this are considered infra, pp. 665-672. in the context of the international obligations of the United Kingdom in respect of Rhodesia.

We are now in a position to summarize the position of the people of Rhodesia here. They have a right in customary international law not to be discriminated against on racial grounds in the exercise of civil and political rights. This right is not available against the State of Rhodesia. It will be available against the State of Rhodesia when the latter becomes a full member of the international community on recognition. In the meantime the right is available against the United Kingdom.

(3) Traditional human rights.

It has been alleged that Rhodesia has violated traditional human rights which would justify humanitarian intervention and is thus in breach of international law.¹³⁸⁾ The correctness of this allegation depends on the existence of human rights vested in the individual in classical international law. It is highly doubtful whether the individual had any rights, not to mention human rights, in the traditional system of international law, though it is true that he might benefit indirectly through the operation of rules of international law.¹³⁹⁾

Any/...

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- 138) McDougal & Reisman, note 1) supra, p. 12. Woetzel says but not specifically in the Rhodesian context that intervention may be justified on the grounds of internal violations of human rights. See Proceedings A S.I.L., 1966, p. 149.
- 139) Schwarzenberger, Manual, p. 81; Sorensen, pp. 265-266; Akehurst, pp. 95-96. Even in modern international law, the rights of the individual are fragmentary and uncertain. Two places where they do exist is under the European Convention on Human Rights and Fundamental Freedoms and under the jurisprudence of the United Nations Administrative Tribunal. See Friedman, note 38) supra, pp. 108-109. To this we may add the customary right not to be discriminated against on racial grounds. Supra, pp. 550-553. It is also asserted at times that Articles 55 and 56 of the Charter of the United Nations create rights for the individual but this we have rejected. Supra, p. 524. See too Green, note 2) supra, p. 423. Ezejiiofor says that the effect of the Charter of the International Military Tribunal may be to give the individual a right to be protected against crimes against peace, war crimes and crimes against humanity. Note 9) supra, p. 18. This is a plausible argument.

Any rights in such matters were vested in his state.¹⁴⁰⁾ It is at this time that the right of intervention for humanitarian purposes first evolved. If a state was guilty of cruelties against, and persecution of, its nationals or foreign nationals, certain European powers claimed the right to resort to this type of intervention.¹⁴¹⁾ The right to intervene here does not however presuppose the existence of human rights under international law in the individuals persecuted. It does not even presuppose a breach of international law, i.e. an infringement of the rights of another state. There would only be an infringement of international law if the cruelties in question were directed against the nationals of a foreign state, in which event it would be the rights of that particular state that its nationals should be accorded a minimum standard of treatment by other states which would have been infringed.¹⁴²⁾

If a state perpetrated cruelties against its own nationals, there would not even be a breach of international law,¹⁴³⁾ but intervention by other states might occur.¹⁴⁴⁾ The right to intervene was not therefore dependent on a prior breach of the law.¹⁴⁵⁾ The position
therefore/...

140) Schwarzenberger, Manual, p. 81; Sorensen, pp. 265-266; Akehurst, pp. 95-96.

141) Sorensen, pp. 758-759; Brierly, pp. 291-292.

142) On the minimum standard of treatment see Akehurst, pp. 111-115; Schwarzenberger, Manual, pp. 105-106; Sorensen, pp. 483-485.

143) Akehurst, p. 111; Sorensen, p. 495. This was because "under customary international law no rule was clearer than that a state's treatment of its own nationals is a matter exclusively within the domestic jurisdiction of that state, i.e. is not controlled or regulated by international law. Brierly, p. 291.

144) On a number of occasions in the 19th century, the Great Powers intervened in the Ottoman Empire to prevent large-scale atrocities. Brierly, p. 291.

145) The position can in fact be compared with the position of the Security Council of the United Nations. The Security Council has the right to take action against a state even though the state concerned has committed no breach of international law. See the writer, "Rhodesia and the United Nations, the Lawfulness of International Concern - a Qualification" (2) C.I.L.S.A., 1969, p. 454 at pp. 455, 464.

therefore would appear to be that even if a case for humanitarian intervention might be made in the case of Rhodesia, this does not mean that the Rhodesian authorities have violated international law.¹⁴⁶⁾

We may now conclude with some further critical observations on the idea of traditional human rights and humanitarian intervention.

- (a) Even if it could be established that traditional human rights did form part and parcel of international law, Rhodesia would not be bound by them because its international personality is not so extensive as to embrace an obligation to observe such norms in relation to its population.
- (b) In any event the right to resort to humanitarian intervention would appear to be superfluous in the case of Rhodesia because intervention could find a justifiable legal basis in either (1) authorization by the Security Council of the United Nations acting under Chapter VII of the Charter (147) or (11) authorization by the United Kingdom whose sovereignty over Rhodesia is near-universally recognized.¹⁴⁸⁾
- (c) It is also doubted whether the doctrine of humanitarian intervention was ever fully acknowledged as a part of international law.¹⁴⁹⁾ Brierly says that this is doubtful in view of the strength of the principle in the traditional system of international law of the time, that a state's treatment of its own subjects was a matter of exclusively domestic jurisdiction.¹⁵⁰⁾

(d)/...

146) Ibid., p. 464.

147) Articles, 39, 41, 42.

148) Supra, pp. 365-366.

149) H. Lauterpacht "The Grotian Tradition in International Law" (23) B.Y.I.L., 1946, p. 1 at p. 46; Oppenheim, I, p. 279.

150) Pp. 291-292.

(d) Even if the doctrine of humanitarian intervention was once part of international law, it is no longer so because the use of force against the territorial integrity of a state is now prohibited by Article 2 (4) of the Charter of the United Nations.¹⁵¹⁾ Our conclusion from all the above must be that the people of Rhodesia do not enjoy "traditional human rights" and that Rhodesia has not violated such rights simply because such rights are non-existent. Neither is there a right of humanitarian intervention (except by consent or by authorization of the Security Council.)

(4) The European Convention on Human Rights and Fundamental Freedoms, 1950.

Under the above Convention International law human rights are created in individuals and these are available against parties to the Convention. The United Kingdom is a party to the Convention, Article 63 (1) of which provides:

"Any State may ... declare ... that the present Convention shall extend to all or any of the territories for whose international relations it is responsible."

The United Kingdom extended the Convention in question so as to apply to forty-two of its overseas territories.¹⁵²⁾ This, however, did not include all United Kingdom dependencies. Southern Rhodesia was not in the list. It has been suggested that the absence of Southern Rhodesia from the list in which its two neighbours, Northern Rhodesia and Nyasaland, appear, is explicable by the fact that Southern

Rhodesia/...

151) The General Assembly have also confirmed that intervention is now illegal. A. Res. 2131 (XX). The practice of the United Nations too rejected Belgium's right of intervention in the Congo in 1960. See Akehurst, p. 296; Sorensen, pp. 758-759.

152) For list see Karel Vasak, "The European Convention of Human Rights beyond the Frontiers of Europe" (12) I.C.L.Q., 1963, p. 1206 at p. 1210.

Rhodesia had internal self-government and as such its government ought to be consulted before any extension of the Convention to it.¹⁵³⁾

The Convention was only extended to the Kingdom of Tonga at the request of its government.¹⁵⁴⁾

The important point is that the Convention did not extend to Southern Rhodesia. Because of this the population of Rhodesia do not enjoy the rights in the Convention against the United Kingdom.

We are now in a position to summarize the position of the people of Rhodesia from the point of view of international law human rights. The people of Rhodesia, collectively and individually, have no rights under the Charter of the United Nations, the Universal Declaration of Human Rights, the European Convention on Human Rights and Fundamental Freedoms nor have they traditional human rights. They have a customary right not to be discriminated against on racial grounds. This right is available against the United Kingdom. It is not available against the State of Rhodesia but it will be available against the State of Rhodesia if and when the latter is recognized as a full member of the international community.¹⁵⁵⁾

SECTION IV/...

153) Ibid.

154) Ibid.

155) See however note 135) supra.

SECTION IV

PARA-MILITARY FORCES OPERATING IN RHODESIA.

It is general knowledge that certain military forces have been operating in Rhodesia since U.D.I. with the object of over-throwing the Government of Rhodesia.¹⁾ The modus operandi would appear to be infiltration from Zambia and further afield.²⁾ The forces in question have been called "freedom fighters" and "terrorists". However, in this thesis the neutral term "para-military forces" will be used to describe these bodies.³⁾

The primary questions which arise here are whether these forces enjoy any protection in international law and if so whether they have any resulting rights.

As the forces are operating only against the Rhodesian Government, the forces of that government and auxiliary South African forces in Rhodesia, protection and possible rights need only be discussed in the particular context of their availability against these particular entities. There

are/...

- 1) See A. Res. 2151 (XXI) paragraph 10; A. Res. 2383 (XXIII) paragraph 13. It would appear that Rhodesia has been "comparatively free" of such incursions over the past three years or so. See statement of Mr. Ian Smith on 4th December, 1972. The Cape Times, 5th December, 1972. But incursions started again on a large scale in early 1973 and resulted in Rhodesia closing the border with Zambia. See text of full statement of Mr. Smith in the Cape Times, 19th January, 1973.
- 2) In a television interview on 15th December, 1972, the Rhodesian Minister for Defence stated that in recent times there have even been incursions from Botswana and Mozambique into Rhodesia. See Cape Times, 16th December, 1972.
- 3) This terminology is used to avoid the semantic problem which Richard A Falk faced when writing "The Beirut Raid on the International Law of Retaliation" (63) A.J.I.L., 1970, p. 415, in the context of Arab-Israeli relations. It is interesting to note that the term is also used in International Conciliation, September, 1970, No. 579, p. 88 to describe the South African forces operating in Rhodesia. The term "terrorist" is in any event (as yet) meaningless in international law. See G. Schwarzenberger, "Terrorists, Hijackers, Guerrilleros and Mercenaries" (24) C.L.P., 1971, p. 257, at p. 258.

are three possible sources of international protection to discuss here (1) the traditional laws of war, the ius in bello; (2) the provisions of the Geneva Convention: 1949; (3) the minimum standard of treatment.

(1) The ius in bello.

The rules restraining conduct in combat come into play where there is a state of war⁴⁾ and where there is a state of insurgency or belligerency.⁵⁾

Obviously no state of war exists in the Rhodesian context. War is a contention between two or more states through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases. Thus a contention between armed individuals and a state is not war, e.g. the Jameson Raid in January, 1896 on the former Z.A.R. Contentions with insurgents and belligerents and civil wars are not necessarily wars in the international sense,⁶⁾ though attempts have recently been made by the General Assembly to treat all colonial armed conflicts as wars of liberation and international conflicts.⁷⁾ It remains however to be
seen/...

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- 4) Schwarzenberger, Manual, pp. 190-192; Schwarzenberger, II, p. 64; Oppenheim, II, pp. 201-202.
- 5) A civil war may thus become a war for the purposes of international law where the rebels have insurgent or belligerent status. They receive an international status and are treated as subjects of international law for some purposes. Akehurst, p. 340; Oppenheim, II, p. 209; Schwarzenberger, II, p. 675, 691; Schwarzenberger, Manual, p. 77; Sorensen, p. 287.
- 6) Oppenheim, II, pp. 202, 203-204. The existence of war is a fact, but a legally relevant fact. Schwarzenberger, II, p. 61. For criticism of the term "state of war" see ibid. and Schwarzenberger, Manual, pp. 190-191; Akehurst, p. 312.
- 7) A Res. 2548 (XXIV). See too A. Res. 2652 (XXV) which following previous resolutions, reaffirms the legitimacy of the armed struggle by indigenous liberation movements and calls on all states to render moral and material assistance to such movements. The former proposition is in fact superfluous, for there has always been liberty to revolt in international law (supra, pp. 137-138) while the latter proposition is of an extremely doubtful nature.

seen whether this attempt will be successful in benefiting the position of the participants.⁸⁾

It must now be enquired whether the para-military forces operating in Rhodesia have the status of insurgents or belligerents with the consequent protection of the ius in bello.⁹⁾ In this context the doctrinal dispute between the Constitutive and Declaratory theories of recognition again becomes relevant.

According to the Declaratory theory if the objective criteria of belligerency are present, the contesting parties are entitled to be treated as if they are engaged in a war waged by two states.¹⁰⁾

The criteria advanced for belligerency are as follows: (a) There must be a political organization sufficient in character, population and resources to constitute, if left to itself, a state. (b) There must be an armed conflict. This should be of a general rather than of a local character and the hostilities on each side should be conducted in accordance with the laws of war through organized armed forces acting under a responsible authority. (c) The rebel forces must be in actual occupation of a substantial portion of the national territory and there must be some probability of success.¹¹⁾

According to the Constitutive theory, the legal consequences of
the /...

8) See Schwarzenberger, note (3) supra, p. 277.

9) Where the forces in question have the status of belligerency, the customary law of war applies. This is more extensive than the protection afforded by the Geneva Convention, 1949, and where it exists it overtakes and supersedes the latter. See G.I.L.D. Draper, "The Geneva Conventions 1949". (114) H.R., I, 1965, p. 59 at p. 86.

10) Lauterpacht, p. 175; Chen, p. 7.

11) Lauterpacht, p. 176; Chen, p. 364; H. Kelsen, "Recognition in International Law -Theoretical Observations" (35) A.J.I.L., 1941 p. 605 at p. 616.

the international law of war only operate when the belligerents are recognized.¹²⁾ It is only by virtue of recognition that they enjoy an international law status. The constitutive approach to the above objective criteria of belligerency would be to regard recognition by outside states as being premature, an intervention and an illegal act against the state in question where the relevant objective criteria are not present.¹³⁾ Recognition by outside states would also be premature, and thus illegal, unless circumstances exist which render it necessary for outside states to define their attitude to the conflict.¹⁴⁾ In these cases there would thus be a duty not to recognize the rebels. It is submitted, however, that a duty not to recognize the belligerency of the para-military forces operating in Rhodesia would be inconceivable. The reason is that the duty could only be owed to the State of Rhodesia (against which the operations are directed) but Rhodesia does not have the necessary international personality to enjoy the right which would correlate with such a duty not to recognize.¹⁵⁾

In relation to belligerency the Constitutive theory is supported by Lauterpacht,¹⁶⁾ Raestad,¹⁷⁾ Anzilotti,¹⁸⁾ Le Normand¹⁹⁾

and/...

12) Chen, pp. 303-304.

13) Oppenheim, II, pp. 249-250; Schwarzenberger, Manual, p. 76; Schwarzenberger, II, pp. 675-676, 691; Lauterpacht, p. 176; Chen, p. 364; Alfred P. Rubin, "The Status of Rebels under the Geneva Conventions of 1949" (21) I C.L.Q., 1972, p. 472 at p. 482.

14) Lauterpacht, p. 176; Chen, p. 365.

15) Supra, pp. 378-382. It might however enjoy such a right against South Africa because of the limited recognition accorded to it and the consequential limited personality available against South Africa. Supra p. 379.

16) P. 370.

17) A. Raestad, "La reconnaissance internationale des nouveau états et des nouveaux Gouvernements" (17) Revue de Droit International et de Législation Comparée, 1936, p. 257 at p. 272.

18) D. Anzilotti, Cours de Droit International (Tr. Gidel) Paris, 1929, I, p. 169.

19) Pp. 235, 237.

and Schwarzenberger.²⁰⁾ Among the supporters of the Declaratory theory we find Chen²¹⁾ and Brierly.²²⁾ We have seen before that in the context of the creation of international personality, the Declaratory theory was more popular among writers than the Constitutive theory.²³⁾ Despite this, a preference was expressed by the present writer for the Constitutive theory after an analysis of the various arguments advanced in the context.²⁴⁾ In the context of belligerency the Constitutive theory, by way of contrast, would appear to be more popular.²⁵⁾ In fact some jurists who otherwise support the Declaratory theory are constitutivists in the context of belligerency. Thus Erich says that recognition of states and governments is declaratory but recognition of belligerents is constitutive.²⁶⁾

It is therefore submitted that the Constitutive theory is the correct theory here too. The arguments which we previously advanced²⁷⁾ are applicable here too and need not be repeated. There are however two arguments which support the Declaratory theory in the specific context of belligerency and hence these merit specific treatment here.

(a) Chen alleges that the Declaratory theory is a corollary of the right of rebellion.²⁸⁾

It/...

20) Note 3) supra, p. 275.

21) P.4.

22) "Règles Générales du Droit de la Paix" (58) H.R., 1936, IV, p.5 at p. 54.

23) Supra, p. 174.

24) Supra, p. 281.

25) Akehurst, pp. 340-341.

26) R. Erich, "La Naissance et la Reconnaissance des états", H.R., 1926, III, p. 431 at pp. 459-460, 461. For other examples see Chen, pp. 305, 306.

27) Supra, pp. 177-279.

28) P. 336.

It is of course true that there is liberty to revolt in international law. That law does not prohibit rebellion.²⁹⁾ It is, however, a non sequitur to argue that because rebels may revolt, they also have, of necessity, international personality. Even applying the Declaratory theory of recognition, the rebels might not meet the objective criteria of belligerency and thus have no rights and duties in international law. So even if we assume the correctness of the Declaratory theory, not every rebellion will have as a necessary corollary the status of belligerency for the rebels. And yet these rebels still have liberty to revolt.

- (b) It is also argued that in practice unrecognized rebels are given the benefits of the laws of war and that this supports the Declaratory theory.³⁰⁾

The answer to this is that rebels may be given such benefits for a variety of reasons but without any legal obligation to accord them such benefits. Lauterpacht says that in all probability the mutual observance of most rules of warfare will naturally follow for reasons of humanity, of fear of retaliation, of military convenience and for the conservation of military energy.³¹⁾ Rubin says that though the Vietcong main force units receive prisoner of war treatment, that to receive such treatment is not the same legally as being given prisoner of war status.³²⁾

We/...

29) Supra, pp. 137-138.

30) Chen, p. 34; Brierly, note 22) supra, p. 54.

31) P. 53.

32) Note 13) supra, p. 479.

We may also note that Lauterpacht postulates a duty to recognize in the context of belligerency.³³⁾ For the same reasons which we already gave and which are applicable mutatis mutandis here, it is submitted that such a duty does not exist and that recognition of belligerents remains in the discretion of governments.³⁴⁾

From the above we may conclude that the para-military forces operating in Rhodesia enjoy no protection under the ius in bello since they have not acquired any measure of recognition. There are however two further arguments which may be advanced to bolster this conclusion.

- (a) Even if one applies the Declaratory theory, the para-military forces in Rhodesia still enjoy no international status. According to the Declaratory theory, as we have seen, belligerents need not be recognized to enjoy status and international rights, but they must meet certain objective criteria amongst which is the requirement that they consolidate their control over certain areas of the country to such extent that rule by the government is ousted in such areas.³⁵⁾ Obviously this criterion is not met by the para-military forces nor is it likely that it will be met in the near future as the forces operate on a guerrilla basis.
- (b) Rhodesia might not even be in a position to extend this status to the para-military forces in view of the fact that it, itself, has/...

33) Pp. 240-246, 409.

34) See supra, pp. 285-295; Chen, p. 352; Joyce A.C. Gutteridge, "The Geneva Conventions of 1949" (26) B.Y.I.L., 1949, p. 294 at p. 301.

35) Lauterpacht, p. 176; Sorensen, pp. 264, 286.

has not been recognized as a full international person and so has not the power to recognize them.³⁶⁾ Rosalyn Higgins in fact pinpoints the reason for this. She draws attention to the unique circumstances pertaining in the territory of Rhodesia and points out that the traditional rules governing relations are set in a civil war context which presupposes the presence of the constitutional authority.³⁷⁾ What is unique about the Rhodesian situation is that there is not a straightforward armed conflict between rebels and a constitutional government which is internationally recognized. Here one has an armed conflict between what may be regarded as two "rebel" forces, neither of whom is internationally recognized - revolutionaries versus counter-revolutionaries. The revolutionaries simply do not have the capacity to recognize the counter-revolutionaries, thus internationalizing their mutual relations.

The overall conclusion is that the ius in bello has no application to the Rhodesian situation. The main results of this are as follows:

- (a) Rhodesia, South Africa and their respective forces need not observe the laws of war in their treatment of the para-military forces.

(b)/...

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- 36) Recognition of the forces as belligerents by powers other than Rhodesia would not give them the status of belligerency in their relationship with Rhodesia but it would give them status in their relationship with their recognizers. See Schwarzenberger, II, p.691; Oppenheim, II, p. 209; Sorensen, p. 288. Thus relativity of personality operates in the case of belligerents also. Finally we may note that South Africa could recognize the forces as belligerents thus bringing the ius in bello into operation in its relations with them. Whether such recognition would be premature is debateable in view of the fact that South Africa is not adopting a neutral attitude in the matter but is itself engaged in conflict with the forces.
 - 37) "International Law, Rhodesia, and the United Nations" (23) The World Today, p. 94 at p. 95.

- (b) The para-military forces in turn have no international law obligations to conduct themselves in accordance with the laws of war.

In other words the conduct of the opposing forces on both sides is extra-legal from the point of view of the ius in bello, it is unrestrained by the temperamenta and is a matter of exclusive domestic jurisdiction.³⁸⁾ The "rebels"³⁹⁾ are entitled to engage in such armed conflict and the "established authorities"⁴⁰⁾ are entitled to resist it and to attempt to suppress the opposing forces.⁴¹⁾

(2) The Geneva Conventions, 1949.

The above customary position, applying only in states of war and belligerency, has now been supplemented by the Geneva Conventions of 12th August, 1949. These Conventions are wider in scope of application than the customary ius in bello in that they apply to situations in which the latter is inapplicable. They are however more limited in the extent of protection they afford, in that they only prohibit some of the more blatant violations of civilized
conduct/...

- 38) Brierly, pp. 32-33; Akehurst, p. 346; Sorensen, p. 288; Schwarzenberger, II, pp. 679, 688.
- 39) For which we may read "counter revolutionaries" in the Rhodesian context.
- 40) For which we may read "revolutionaries" in the Rhodesian context.
- 41) A possible exception to this rule is the provision of paragraph 4 of A. Res. 1514 (XV) that "all armed action or repressive measures of all kinds directed against dependent peoples shall cease" It is arguable that this paragraph is evidence of a customary rule prohibiting the armed repression of peoples under colonial rule. However such a rule is not universally accepted. In particular it was not accepted by colonial powers which abstained from voting on the resolution. See Akehurst, p. 336. See too the extensive discussion supra, pp. 480 et seqq. on A. Res. 1514 (XV).

conduct. Where applicable, the Conventions impose binding legal obligations on the parties to observe their prescriptions.⁴²⁾ It is proposed to discuss the main provisions of the Conventions and then to apply them in the Rhodesian context. In discussing the provisions of the Conventions attention will be paid to (a) the beneficiaries under the Conventions and the scope of protection afforded to each of them and (b) the applicability of the Convention.

(a) Beneficiaries under the Conventions and scope of protection afforded to them.

For convenience we can describe three main categories of person enjoying protection under the Conventions.⁴³⁾

(i) Contestants who enjoy prisoner of war status.

Resistance movements must comply with Article 4 (2) to enjoy this status.⁴⁴⁾ This provides that they must be commanded by a person responsible for his subordinates, they must have a distinctive sign recognizable at a distance, they must carry their arms openly and must conduct their operations in accordance with the laws and customs of war.

Thus terrorists and guerrillas who wish to have this status must comply with the above conditions.⁴⁵⁾ It has been held that
even/...

42) Draper, note 9) supra, p. 96; Rubin, note 13) supra, p. 473; Schwarzenberger, Manual, p. 77.

43) The possible beneficiaries under Article 2 of the Conventions will not be discussed as this could not conceivably be of application in the Rhodesian context. See Rubin, note 13) supra, p. 479.

44) See the application of Article 4 (2) in Military Prosecutor v. Omar Mahmud Kassam et al., 1969 in (65) A.J.I.L., 1971, pp. 409-410.

45) Susan Elman, "Prisoners of War under the Geneva Convention" (18) I.C.L.Q., 1969, p. 178 at p. 183; Schwarzenberger, note 3) supra, pp. 263, 267.

even though the forces in question comply with Article 4(2) they are not entitled to Prisoner of War treatment where they are nationals of the capturing state,⁴⁶⁾ but the better view is that this is not correct. Article 4 contains no reference to nationality and there are precedents which say that nationality does not affect prisoner of war status. Thus the British Secretary of War considered that Irish prisoners should be treated as ordinary prisoners of war like their Boer comrades.⁴⁷⁾ It would appear that the other contracting parties to the Conventions may claim performance of the Convention even in relation to those who are nationals of the capturing state.⁴⁸⁾

(ii) Contestants who do not enjoy prisoner of war status.

If, as pointed out, the forces in question do not comply with Article 4 (2) they do not enjoy this status but they may still be entitled to the minimal protection afforded by Article 3 of the Convention.⁴⁹⁾

The relevant article provides that contestants who have laid down their arms shall be treated humanely and without discrimination. In particular murder, torture, mutilation, and taking of hostages and execution without trial by a duly constituted court affording proper judicial guarantees are prohibited.

It/...

46) The Public Prosecutor v. Oie Hee Koi and Associated Appeals [1968] 2 W.L.R. 715 at 727-728.

47) Elman, note 45) supra, pp. 180-182. For an American attitude see Re Ferrito (1946) 156 Fed. Rep. 2nd. 142.

48) Schwarzenberger, note 3) supra, p. 276.

49) Ibid., p. 263. In fact, it is to some extent doubtful whether irregular forces (i.e. guerrillas) who do comply with Article 4(2) benefit from the whole of the Convention (i.e. are entitled to prisoner of war treatment) or are merely entitled to the minimal protection afforded by Article 3. Ibid., p. 277.

It is thus apparent that not all the laws of warfare apply to contestants who fall within the 1949 Conventions. In fact in so far as those who do not comply with Article 4 (2) are concerned, they obtain certain fundamental rights only and these operate only on surrender, viz. to be placed hors de combat and to be treated humanely.⁵⁰⁾ Thus although a government may be obliged to treat rebels humanely when they surrender, it is entitled to try them for treason and for other offences under its municipal law and may even impose the death sentence. The only limitation is the provision relating to the judicial safeguards provided by the Convention.⁵¹⁾

(iii) Non-contestants.

Article 3 is in terms applicable to "persons taking no active part in hostilities" and these persons are deemed to include those "who have laid down their arms and those placed hors de combat by sickness, wounds detention or other cause."⁵²⁾ Thus non-contestants enjoy the minimal protection afforded by Article 3. They are entitled to humane treatment.

We have now seen the relevant categories of persons enjoying protection under the Conventions and the extent of that protection in each case. We may now add that recognition, which is necessary to confer the international status of belligerency,

is/...

50) Ibid., p. 276; Gutierrez, note (34) supra, p. 300.

51) Akehurst, p. 346; Oppenheim, II, p. 211.

52) See Draper, note 9) supra, p. 85.

is completely immaterial for the purpose of enjoying protection under the Geneva Conventions.⁵³⁾ Thus to enjoy protection none of the aforesaid categories need be recognized in any way.

Finally we may ask whether the enjoyment of protection under the Conventions is sufficient to create a limited international personality in the various categories of persons which we mentioned? Gutteridge says that the application of the Articles does not affect the legal status of the parties to the conflict.⁵⁴⁾ Schwarzenberger similarly says that guerrillas do not get an international law status under the Conventions. It is for the other contracting parties to insist on observance of the Convention by a particular party.⁵⁵⁾ Draper argues convincingly as follows. Does Article 3 have the effect of attributing a functional semi-personality upon an association of individuals operating as rebel groups? The entity is not a party to the Conventions, nor does it exist until there is a conflict. A possible solution is to consider that obligations devolve upon the whole population of the state concerned, so that any person taking part in an internal conflict runs the risk of violating Article 3. This would be an instance of international obligations inhering in individuals. It is however easier to discern the duties imposed on individuals by the force of Article 3 than the conferring of rights. The rights would seem to inhere

in/...

53) Gutteridge, note 34) supra, p. 301; Schwarzenberger, note 3) supra, pp. 267, 276.

54) Note 34) supra, p. 301. This must mean that no personality is created.

55) Note 3) supra, p. 276.

in the states parties to the Conventions.⁵⁶⁾ Finally, Article 3 itself provides that "each party to the conflict shall be bound to apply, as a minimum" the provisions of the Article and that the application of the Article "shall not affect the legal status of the parties to the conflict."

From the above, it would appear that the position is as follows:-

- (i) The Conventions create obligations for the states parties to them.
- (ii) The rights which correlate to these duties probably do not inhere in groups of protected persons but in the other states which are parties to the Conventions.
- (iii) The protected groups probably have duties as entities under the Convention.
- (iv) These duties are owed to the relevant state which is a party to the Convention and in which the conflict takes place.
- (v) From the above we can conclude that a certain personality does reside in the protected entities. They are duty-subjects of international law for the purposes of the Conventions but they are not rights - subjects in that they do not bear rights under the Conventions. In the light of this, it is submitted that the provisions of Article 3 which say that the legal status of the parties to the conflict is not affected must be understood to mean
that/...

56) Note 9) supra, p. 96.

that the Article in question does not confer belligerent status or prisoner of war status. Unless it is read in this way, it would conflict with its own provisions, in terms of which it does actually attempt to create a status, viz. the capacity to bear the duties enumerated in itself.

(vi) Apart from the limited personality of the protected entities, individual members of such entities and of the state in question may bear individual responsibility.⁵⁷⁾ To this extent the individuals in question would each be duty-subjects of international law with a limited degree of personality.

(b) Applicability of the Conventions.

Before the Convention can apply at all to protect the categories previously mentioned the following conditions must be present.

(i) There must be an armed conflict.⁵⁸⁾ The practical application of this criterion may pose difficulties for the degree of continuity, organization, level of force or success which must be involved is not precisely defined. The problem is that some arbitrary level must be established as the lower threshold of international concern.⁵⁹⁾ Rubin points out that:

"Not every passage of arms is regarded as a 'conflict'. Riots, emeutes, demonstrations and so forth are usually freely admitted by all not to involve article 3." 60)

(11)/...

57) On individual responsibility see supra, pp. 465-468.

58) Article 3; Draper, note 9) supra, p. 86.

59) Rubin, note 13) supra, p. 484.

60) Ibid.

- (ii) The armed conflict must not be of an international character.⁶¹⁾

Again there may be practical difficulty in establishing a dividing line here. Thus the conflict between North Vietnam, on the one hand, and South Vietnam and the United States, on the other hand, has been regarded as armed conflict of an international character to which Article 2 applies, while the conflict between the Vietcong, on the one hand, and South Vietnam and the United States, on the other hand, has been regarded as armed conflict not of an international character to which Article 3 applies.⁶²⁾

- (iii) The conflict must take place in the territory of a High Contracting Party.⁶³⁾ This requirement means that if a conflict occurs in a neighbouring territory, which is not a party to the Convention, or where the rebellion consists in skirmishes at sea, the rebels enjoy no protection under the Conventions whether the forces which oppose them are those of a Contracting Power or not.⁶⁴⁾

The above are the conditions for the applicability of protection under the Conventions. It is obvious that irregular forces would have grave practical difficulties in meeting the requirements for protection - especially the more stringent requirements for prisoner of war/...

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- 61) Article 3; Draper, note 9) supra, p. 86. Article 2 covers cases where the conflict is of an international character.
62) Rubin, note 13) supra, p. 479.
63) Article 3; Draper, note 9) supra, p. 85.
64) Draper, note 9) supra, p. 85; Rubin; note 13) supra, p. 483.

war protection.⁶⁵⁾ Because of this, and despite the clarity of the conditions in principle (if not in detail) various attempts have been made to extend the application of protection under the Conventions.

Thus there has been an attempt to give protection a limited extension to the fields where colonial and racial regimes operate. The International Conference on Human Rights adopted a resolution on 12th May, 1968 at Teheran that minority racist and colonial regimes should treat detained persons who struggle against them as prisoners of war or political prisoners under international law.⁶⁶⁾ This was followed in 1969 by a General Assembly resolution calling on South Africa to treat "freedom fighters" as prisoners of war in accordance with the provisions of the Geneva Conventions.⁶⁷⁾

Some writers even go so far as to postulate that all armed conflicts have the protection of the Conventions - a general extension.

In view of the clarity in principle of the Conventional provisions, such extensions must be rejected. Rubin says that

"... the incomplete coverage of the Conventions, as reflected in the actual language ... shifts legal arguments from matters of interpreting substantive humanitarian provisions to the threshold problem of applicability." 68)

"...the/..."

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- 65) The practical difficulties involved are discussed by Schwarzenberger, note 3) supra, pp. 273-275 while suggestions for improvement by way of extension of protection are made by Rubin, note 13) supra, pp. 494-495. See too Gaius Ezejiolor, Protection of Human Rights under the Law, London, 1964, p. 90.
- 66) See (63) A.J.I.L., 1969, pp. 680-681.
- 67) See International Conciliation, September, 1970, No. 579, p.111.
- 68) Note 13) supra, p. 494.

"...the drafters of the Conventions seem to have excluded a number of situations and armed conflicts from their reach. Nonetheless, presumably in their enthusiasm for humanitarianism, many publicists have declared that Articles 2 and 3 taken together cover all armed conflicts. That position has proven difficult to maintain...." 69)

Draper asserts, and with respect correctly, that if Article 3 does not apply there is no residuary protection.⁷⁰⁾

We are now in a position to summarize the application of the Conventions in the context of Rhodesia. Here a distinction must be drawn between the legal position of Rhodesia (and the members of its forces and population), South Africa (and the members of its forces serving in Rhodesia) and the para-military forces.

(a) Position of Rhodesia.

Rhodesia would not appear to be bound by the rules in the Conventions for three reasons. In the first place, its international personality is not so extensive as to impose duties on it here. Again, as in so many previous instances, its personality is not wide enough to embrace a relationship involving the para-military forces.⁷¹⁾ In the second place, Rhodesia is not a party to the Conventions so even if it had the requisite international personality, it would still not be bound by them.⁷²⁾ In the third place, since Rhodesia is
not/...

69) Ibid., p. 483.

70) Note 9) supra, p. 86.

71) Supra, pp. 377-382.

72) The question of state succession by Rhodesia to the Conventions which have been ratified by the United Kingdom (Schwarzenberger II, p.793) forms part of the general question of succession to treaties by Rhodesia in the event of her claim to independence being validated in international law by recognition. This is discussed infra, pp.736-753. It is interesting to note that the General Assembly called upon the United Kingdom to ensure the application of the Geneva Conventions relative to the treatment of prisoners of war to the conflict in Rhodesia. See A. Res. 2383 (XXIII) paragraph 13.

not a party to the Conventions, the conflict in question does not take place in the territory of a High Contracting Party within the meaning of Article 3.

Neither individual persons in Rhodesia nor individual members of the Rhodesian forces have duties under the Convention because the conflict does not take place in the territory of a High Contracting Party.

(b) Position of South Africa.

South Africa is a party to the Conventions.⁷³⁾ The Conventions do not however bind South Africa or members of its forces in Rhodesia because the conflict does not take place in the territory of a High Contracting Party as required by Article 3. Thus, though South Africa would be bound to apply the Conventional rules to conflicts in South Africa, it is submitted that it is not bound to do so in Rhodesia.

(c) Position of the para-military forces.

For the same reason neither the forces as an entity nor the individual members thereof are bound to apply the rules in the conflict against Rhodesian and South African forces.

The overall conclusion is that the relationship arising out of the conflict between the para-military forces, on the one hand, and Rhodesia and South Africa, on the other hand, is in no way governed
by/...

73) It became a party in 1952. See Schwarzenberger, II, p. 793. The Geneva Conventions were published in May 1968 in the Gazette, G.N. No. R.749, 750, 751, 752 all in G.G.E. No. 2064, 3rd May, 1968 (Reg. Gaz. No. 953). Since South Africa acceded to the Conventions in 1952 publication was presumably for general information only although this was not made clear. C.J.R. Dugard "United Nations, Rhodesia and South Africa", Annual Survey of South African Law, 1968, p. 56 at pp. 58, 59.

by the 1949 Conventions which are inapplicable. Thus conduct on both sides may be arbitrary and unrestrained and neither may complain of a breach of the Conventions.

(3) The minimum standard of treatment.

It is conceivable that there might be obligations in relation to the treatment of individual members of the para-military forces under the rules relating to the according of minimum standards of treatment to aliens. Thus Schwarzenberger points out that even a terrorist who is an alien is entitled to minimum treatment which consists of a fair trial and the prohibition of torture and degrading treatment.⁷⁴⁾ The obligations, such as they are would not be owed to the para-military forces themselves but to the states of which members of the forces happen to be nationals. In the light of the above we can distinguish the position of Rhodesia from that of South Africa.

(a) Position of Rhodesia.

In relation to members of the para-military forces who are South African citizens, Rhodesia would owe South Africa an obligation to accord these members minimum treatment. Rhodesia has a limited international personality available against South Africa and this would extend to the sphere of the international protection of citizens.⁷⁵⁾ In relation to alien members of the para-military forces who are nationals of states other than South Africa, Rhodesia would owe no duties because it has no relevant international personality in relation to such states of nationality.

(b)/...

74) Note 3 supra, p. 259.

75) Supra, p. 379. ; infra, pp. 588-590.

(b) Position of South Africa.

In relation to alien members of the para-military forces whether they are nationals of Rhodesia or some other state, South Africa would owe the minimum obligations. In the ordinary course of events it owes such obligations to other states which it recognizes fully. It owes similar obligations to Rhodesia even though it has only accorded a limited recognition to the latter, because the limited personality flowing from such limited recognition is extensive enough to embrace the protective principle.⁷⁶⁾

SECTION V.

THE RIGHT TO PROTECT THE PEOPLE OF RHODESIA INTERNATIONALLY.

The question to be answered here is whether the United Kingdom or Rhodesia is entitled to protect individual Rhodesians diplomatically against breaches of international law by other states. Before attempting to answer this question it is helpful to describe the general rules which apply to the institution of diplomatic protection.

The general rule is that the state of nationality of the individual concerned has the right to protect him diplomatically¹⁾ against breaches of international law by third states.²⁾ Before the state can exercise the right of diplomatic protection, nationality must exist at the time the
individual/...

76) Supra, .p. 379. infra, pp.588-590.

1) Akehurst, p. 111; Sorensen, pp. 472, 573; Schwarzenberger, Manual, p. 141; Mavrommatis Palestine Concessions (Jurisdiction) case (1924) Ser. A, No. 2, p. 12; Panevezys-Saldutiskis Railway case (1939) Ser. A/B No. 76, p. 16.

2) Akehurst, p. 111; Sorensen, p. 578. Chorzow Factory Case, P.C.I.J. Ser. A, No. 17, pp. 27-28; Interhandel (Preliminary Objections) case (1959) I.C J. Rep. 27.

individual suffered loss or damage,³⁾ must continue to exist until the making of the claim⁴⁾ and perhaps even until the date of an arbitral award if there is one⁵⁾ or until the end of the arbitral proceedings if there are any.⁶⁾

Nationality is a matter of municipal law.⁷⁾ Therefore the right of a state to protect an individual depends primarily on municipal law. However if there is no real connection between a state and the individual upon whom it bestows its nationality through its municipal law, other states need not concede an international law right to protect the individual enjoying such a municipal law citizenship.⁸⁾ Should however the right to protect be recognized in such a case, it will be valid against the recognizing state.⁹⁾ Because nationality is primarily a matter of municipal law, two or more states may confer nationality on the same individual and the result may be dual or multiple nationality. This in turn presents two separate problems.

- (1) Which state of nationality has the international law right to protect the individual against third states?

(2)/...

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- 3) Corvaia case (1903) 10 R.I.A.A., 609; Rhodope Forest claim (1933) 3 R.I.A.A. 1406 at 1421; Panevezys-Saldutiskis Railway case (1939), P.C.I.J. Ser. A/B, No. 76, pp. 16-17; Basis of Discussion, replies and Basis of Discussion, No. 28. Vol. III, pp. 140-145.
- 4) Stevenson case (1903) 9 R.I.A.A., 494 at 502-506;
Marinat case (1905) 10 R.I.A.A., 55 at 76;
Massiani case (1905) 10 R.I.A.A., 159 at 183;
Brignone case (1904) 10 R.I.A.A., 542 at 551;
Milliani case (1904) 10 R.I.A.A., 584 at 591;
Giacopini case (1904) 10 R.I.A.A., 594 at 596;
Poggioli case (1904) 10 R.I.A.A., 669 at 687.
- 5) Eschauzier case (1931) 5 R.I.A.A. 207 at 209; Teller Mexican Claims Commission, p. 97n.
- 6) Spanish Zone of Morocco case (2) R.I.A.A., 617 at 706.
- 7) Sorensen, pp. 473, 476; Akehurst, p. 107.
- 8) Akehurst, pp. 125-126; Sorensen, pp. 173-174; Nottebohm case, 1955 I.C.J. Rep. 4., Schwarzenberger, Manual, p. 142.
- 9) Schwarzenberger, Manual, p. 69.

- (2) Do the states of nationality have an international law right to protect the individual concerned against each other?
- (1) There are two views on this matter.
- (a) The more orthodox view is that both or all of the states concerned may exercise a right of diplomatic protection.¹⁰⁾
- (b) The view is also expressed that only the state of the master or active or overriding nationality has the right of diplomatic protection.¹¹⁾
- (2) Again there are two views on this question.
- (a) The orthodox view is that neither state has a right to protect the individual concerned against the other state of nationality.¹²⁾
- (b) It is also sometimes argued that the state of master nationality can protect the individual against the other national state.¹³⁾

The/...

- 10) Akehurst, p. 124; Sorensen, p. 478; Article 3, Convention on Conflict of Nationality Laws, 1930, 179 L.N.T.S., 89; Salem case, Ann. Dig., 1931-1932, p. 188. However conflict of laws problems arising out of dual nationality is solved by the criterion of the effective nationality. Ibid., Article 5.
- 11) Yearbook of the International Law Commission, 1958, Vol. II, pp. 66-67. The state of the master nationality is the state with which the individual has the closer ties. Akehurst, p. 124. For the factors which are of assistance in determining the master nationality see Article 5 of the Convention on the Conflict of Nationality Laws, 1930 and the Mergé claim (1955) 14 R.I.A.A. 236.
- 12) Akehurst, pp. 124-125; Sorensen, p. 478; Article 4, Convention on Conflict of Nationality Laws, 1930, 179 L.N.T.S., 89; Salem case (1932) R.I.A.A. 1161; Reparation for Injuries case, 1949 I.C.J. Rep. pp. 174, 186; British Practice in International Law, 1963, p. 120; R.Y. Jennings, "The Commonwealth and International Law" (30) B.Y.I.L., 1953, p. 320 at p. 347. The Mergé claim, note 11) supra, states that this is a universally recognized and constantly applied rule and yet it subordinates it to the rule of effective nationality.
- 13) Mergé claim, note 11) supra.

The above principles must now be applied in the Rhodesian context where relevant. Where a conflict of viewpoints exists, the orthodox view will be preferred. This approach finds additional support in the fact that the United Kingdom adheres to the orthodox views.¹⁴⁾

Historically, as we have seen, both Southern Rhodesia and the Federation of Rhodesia and Nyasaland had its own citizenship and nationals of those entities were not citizens of the United Kingdom and Colonies, only the latter being United Kingdom nationals for the purpose of international law.¹⁵⁾ The limited international personality of Southern Rhodesia (and of the Federation where relevant) was therefore extensive enough to confer an international law right of diplomatic protection of its citizens.¹⁶⁾

- (1) The right of diplomatic protection against states other than South Africa.

In this respect Southern Rhodesia (and the Federation) were in the same position as independent Commonwealth countries which would of course have had an undoubted right of diplomatic protection being full international persons for all purposes.¹⁷⁾

On/...

- 14) Akehurst, p. 124; British Practice in International Law, 1963, p.120.
- 15) Supra, pp.88, 118-119. Citizens of the Federation and of Southern Rhodesia were of course British subjects, and as such the United Kingdom might have had a right of protection in respect of them. See supra, pp. 118-119.
- 16) Supra, pp.88,118-119; Jennings note 12) supra, p. 346. Sometimes however, it happened that under specific Treaties, rights of protection were given to the United Kingdom. Thus under the United Kingdom - Muscat and Oman Treaty, 1951, U.N.T.S.,149/247 the United Kingdom retained until January, 1962 extraterritorial jurisdiction over British Nationals in independent Muscat and Oman. British Nationals were defined by the Treaty as United Kingdom citizens, Southern Rhodesia citizens and British-Protected persons not being Moslems. See J.E.S Fawcett, The British Commonwealth in International Law, 1963, p. 117.
- 17) Supra, p. 119. The right of protection existed not only against foreign states and republics in the Commonwealth but even against monarchies in the Commonwealth as the common status of British subject was no bar to protection inter se. See Jennings, note 12) supra, pp. 346-348. For a contrary view see Palley, p. 737.

On independence the nationality laws continued in Rhodesia.¹⁸⁾ The position now was that an independent Rhodesia in terms of its domestic law conferred its nationality on certain individuals.¹⁹⁾ Great Britain, as we have seen, assumed complete sovereignty over Rhodesia²⁰⁾ and by legislation gave its citizenship (i.e. that of the United Kingdom and Colonies) to certain Rhodesians who did not possess it before.²¹⁾ It is also possible that Rhodesians might enjoy the nationality of some third state.²²⁾ The question in all these cases is where the right of diplomatic protection lies. Here, it is submitted, a distinction must be drawn between the right to protect the individuals in question against South Africa and against states other than South Africa. A right of diplomatic protection assumes international personality in the protecting entity. If, therefore, a state is unrecognized by another state, it is incapable of having a right to protect its citizens against the latter. To put it another way, the nationality of an unrecognized state cannot have an international status.

Thus/...

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- 18) Constitution of Rhodesia, 1965, s. 123.
- 19) The relevant citizenship law was the Citizenship of Southern Rhodesia and British Nationality Act, No. 63 of 1963 which was later amended by the Citizenship of Rhodesia and British Nationality Amendment Act, No. 25 of 1967. For comment on the latter see W.P. Kirkman, "The Rhodesian Referendum - the significance of June 20, 1969" (45) International Affairs, 1969, p. 648 at p. 653.
- 20) Supra, pp. 335-338.
- 21) The Southern Rhodesia (British Nationality Act, 1948) Order, 1965 makes it possible for loyal citizens of Rhodesia to obtain the citizenship of the United Kingdom and Colonies. Such persons were however subjected to United Kingdom immigration control by the Southern Rhodesia (Commonwealth Immigrants Act, 1962) Order, 1965.
- 22) There was nothing in the citizenship laws of Southern Rhodesia to prevent citizens of that country from having dual or even multiple nationality. Palley, pp. 564-565. Naturally too a citizen of Southern Rhodesia might also be a citizen of the United Kingdom and Colonies. Supra, p. 119. It is estimated that half of the members of the Southern Rhodesian cabinet which declared independence enjoyed the citizenship of the United Kingdom and Colonies as well as that of Southern Rhodesia. The Times, 16th November, 1965, p. 8 (g).

Thus English courts have held that a British subject could only acquire United States nationality under the Treaty of 1783 - which was in effect British recognition of United States independence.²³⁾

French courts held that since France had not recognized the independence of the Ukraine, a treaty should not be applied to a native of the Ukraine.²⁴⁾ The French Government ignored Soviet decrees depriving Russians of nationality because France had not recognized the Soviet Government. France continued to treat the Russians as nationals under the old law.²⁵⁾

United States courts have given effect to recognition of state as being decisive in cases of nationality.²⁶⁾ Citizenship is of a recognized state.²⁷⁾

Since the German annexation of Danzig in 1939 was not recognized and since no peace treaty has been concluded, the Free City still exists in law and thus academically if not in practice a Danzig passport should be a valid travel document. The Baltic States, Estonia, Latvia and Lithuania, whose annexation by Russia was not recognized by Western Powers are in a similar position. Here however the matter is of practical as opposed to academic importance because passports issued by representatives of the republics continue to be recognized by those countries which do not recognize the 1940
Soviet/...

23) Doe d. Thomas v. Acklam (1824) 2 B.& C. 779. See too Murray v. Parkes [1942] 2 K.B. 123.

24) TsourkOnienko v. Battier (1923) quoted by Chen, p. 151.

25) Chen, p. 152.

26) KolundiJa v. Hanna Ore Mining Co. (1923) 155 Minn. 176. But it is not finally decisive. Garvin v. Diamond Coal and Coke Co. (1923) 278 Pa. 469.

27) Land Oberoesterreich v. Guda, 2 Cir., 109 F. 2nd 635, 637, Klausner v. Levy, 83 F. Supp. 599, 600 (E.D. Va. 1949).

Soviet annexation.²⁸⁾ The problem of the Baltic Republics has also arisen in relation to Germany. In 1951 the West German official attitude was that the annexation by the Soviet Union had not been recognized either by the Federal Republic or by the Third Reich. Hence there was no change in the citizenship of these republics and Latvian citizenship continued to be in force. However German courts held that the incorporation of Latvia by the Soviet Union had in fact been recognized by the Third Reich by Treaty dated 10th January, 1941, concerning the German-Soviet frontier.²⁹⁾

We can conclude from the above that an unrecognized state has no right to protect its citizens against a non-recognizer. Chen says:

"Since the relation between a national and his state is one of allegiance and protection it is difficult to see the purpose of pretending the existence of a nationality where neither allegiance nor protection could be claimed, or was admitted."³⁰⁾

We must now apply the above conclusion to Rhodesia. Rhodesia as we have seen, has not been recognized by states other than South Africa.³¹⁾

It therefore does not possess an international personality such as would enable it to exercise a right of diplomatic protection over its citizens against such states.³²⁾

Since Rhodesia itself has no right of diplomatic protection in such cases, the question arises as to where the right of diplomatic protection does lie. Here we must, it is submitted, distinguish between (a) citizens of Rhodesia and (b) citizens of Rhodesia who possess the nationality of a third state.

(a)/...

28) See Daniel C. Turack "Passports issued by some non-state Entities" (43) B.Y.I.L., 1968-1969, p. 209 at p. 212.

29) See Whiteman, II, p. 654.

30) P. 152.

31) Supra, pp. 338-365. Even in the case of South Africa the recognition accorded is limited. Supra, pp. 370-372.

32) Supra, pp. 377-382.

(a) Citizens of Rhodesia.

We have seen that the states in question recognize the complete sovereignty of the United Kingdom over Rhodesia.³³⁾ These must therefore be deemed to have accorded a right of diplomatic protection over Southern Rhodesian citizens to the United Kingdom.³⁴⁾ Thus the right of diplomatic protection exists whether or not the individuals in question are also citizens of the United Kingdom and Colonies.³⁵⁾ A claim to a right of diplomatic protection is also consistent with the conduct of the United Kingdom itself. The latter has claimed complete executive authority in and over Southern Rhodesia.³⁶⁾ It has amended the laws relating to citizenship.³⁷⁾ It has made provision for dealing with passports issued by Rhodesia after U.D.I., which can be dealt with as though they were the property of the United Kingdom itself, and of which possession can accordingly be taken by authorized persons in the United Kingdom.³⁸⁾ It has actually confirmed that Southern Rhodesians outside their country can claim the protection of the United Kingdom.³⁹⁾ It

is/...

33) Supra, pp. 365-366.

34) Schwarzenberger, Manual, p. 142. Thus for instance the attitude of the United Nations High Commissioner for Refugees (U.N.H.C.R.) was that Southern Rhodesians were strictly speaking ineligible for U.N.H.C.R. protection since they enjoyed the protection of the United Kingdom S/9853/Add.1. Annex III p.2.

35) It would therefore appear that it was unnecessary for the purpose of protection for the United Kingdom to enact the Southern Rhodesia (British Nationality Act, 1948) Order, 1965 which made provision for Southern Rhodesians to obtain citizenship of the United Kingdom and Colonies.

36) Southern Rhodesia (Constitution) Order, 1965, s.4 (1)(a).

37) Southern Rhodesia (British Nationality Act, 1948) Order, 1965.

38) Southern Rhodesia (Property in Passports) Order, 1965. See too A.A. le Roux, "British Sanctions Legislation" (9) Rhodesia L.J., 1969, p. 40 at pp. 53-54.

39) S/9853/Add. 1. Annex III, p.2.

is therefore submitted that the United Kingdom has the sole right to protect Southern Rhodesians in the case under discussion.

(b) Citizens of Rhodesia who possess the nationality of a third state.

Here again it does not matter whether or not the individual in question possesses in addition the nationality of the United Kingdom. Applying the orthodox doctrine both the United Kingdom and the third state in question would have a right of diplomatic protection.⁴⁰⁾

The United Kingdom and the third state would not however be in a position to protect the individual in question against each other.⁴¹⁾ If however no genuine link existed between the individual and the third state, the United Kingdom would be in a position to protect the individual against the third state in question.⁴²⁾

(2) The right of diplomatic protection against South Africa.

Here it is submitted it is necessary to distinguish between the following categories of Rhodesian citizens.

(a) Those persons who possess only Rhodesian citizenship.

As we have previously seen South Africa continues to recognize the limited international personality vested in Southern Rhodesia as at the 11th November, 1965.⁴³⁾ This personality was extensive
enough/...

40) If, however, no genuine connection exists between the individual and the third state whose nationality he enjoys, a right of diplomatic protection need not be accorded to the third state. Supra, p. 581. infra, pp. 589-590.

41) Supra, pp. 582-583.

42) See generally Akehurst, pp. 125-126; infra, pp. 589-590.

43) Supra, pp. 370-372.

enough to include a right of diplomatic protection over citizens.⁴⁴⁾
It follows therefore that Rhodesia continues to have this right
against South Africa.

- (b) Those persons who possess the nationality of both Rhodesia and the United Kingdom and Colonies. 45)

For reasons given immediately above, Rhodesia must be deemed to have a right to protect these persons against South Africa.⁴⁶⁾
Whether or not South Africa is bound to concede an additional right to protect the individuals in question to the United Kingdom depends upon whether there is also a substantial link between the individual in question and the state of nationality, the United Kingdom. Obviously in the case of those persons who have citizenship of the United Kingdom and Colonies by virtue of the operation of the ius soli, ius sanguinis or naturalization after a number of years residence,⁴⁷⁾ a genuine link will be present⁴⁸⁾ and South Africa must concede an additional right to protect to the United Kingdom. In the case of those who are citizens by virtue of the Southern Rhodesia (British Nationality Act, 1948) Order, 1965, a genuine link may not be present within the meaning of the Nottebohm case⁴⁹⁾ and South Africa/...

44) Supra, pp.88, 118-119.

45) It was estimated for instance that half the members of the Southern Rhodesian Cabinet who made U.D.I. were in this position. The Times, 16th November, 1965, p. 8 (g).

46) Rhodesian nationality is based on standard methods of acquiring nationality, the ius soli, ius sanguinis, adoption, registration after two years residence and naturalization after four years residence. See Palley, p. 565. All of these are genuine links within the meaning of the Nottebohm case, I C.J. Rep., 1955, 4.

47) Under the British Nationality Act, 1948, s. 4,5,10.

48) Akehurst, pp. 107-108, 126; Schwarzenberger, Manual, pp.141,143-144.

49) I.C.J. Rep. 1955, 4. According to the Nottebohm case there must be strong and effective factual ties between the individual and the state which grants him nationality for the latter to protect him. Nationality must be an exact juridical expression of the social fact of a connection.

Africa might refuse to concede a right of diplomatic protection in the United Kingdom.

- (c) Those persons who possess the nationality of Rhodesia and a third state (other than the United Kingdom and South Africa).

The position is precisely the same as in (b) above and a right of protection in the third state against South Africa depends upon the existence of a genuine link within the meaning of the Nottebohm case.

- (d) Those persons who possess the citizenship of Rhodesia, the United Kingdom and a third state (or states) other than South Africa.

This is a case of multiple nationality. The position as stated in (b) above applies mutatis mutandis here. Whether there is a dual or a multiple right of diplomatic protection again depends upon the existence of a link within the meaning of the Nottebohm case between the individual and the particular state which seeks to protect him.

- (e) Those persons who possess the citizenship of both Rhodesia and South Africa (whether or not they possess the citizenship of some third state or states also).

It is obvious that Rhodesia cannot protect these persons against South Africa⁵⁰⁾ unless there was no genuine link between South Africa and the individual in question.⁵¹⁾

Before/...

50) Akehurst, pp. 125-126; supra, pp. 582-583.

51) Supra, pp. 581, 588-590.

Before completing this section on the right of diplomatic protection two further points may be mentioned.

- (a) If any state should recognize Rhodesia, the position in relation to the right of diplomatic protection against that state would be the same as that pertaining to the right of diplomatic protection against South Africa, which has just been discussed.
- (b) The position relating to the protection of corporations registered or incorporated in Rhodesia is similar to the protection of Rhodesian nationals which has just been discussed. Thus Rhodesia would have a right of diplomatic protection against South Africa, and the United Kingdom against third states.⁵²⁾ It is not however clear whether the rule in the Nottebohm case which requires a genuine link between an individual and the state of nationality for a right of diplomatic protection should extend by analogy to a company incorporated or registered in a state.⁵³⁾

Chapter VI/...

- 52) It now seems reasonably clear that, with certain exceptions, it is only the state of incorporation or registration of the company that is entitled to exercise diplomatic protection. Barcelona Traction case, I.C.J. Rep., 1970, 3. See too David Harris, "The Protection of Companies in International law in the Light of the Nottebohm Case" (18) I.C.L.Q., 1969, p. 275; Mervyn Jones, "Claims on behalf of Nationals who are shareholders in Foreign Companies" (26) B.Y.I.L., 1949, p. 225; Algot Bagge, "Intervention on the Ground of Damage caused to Nationals, with particular reference to exhaustion of local remedies and the rights of Shareholders" (34) B.Y.I.L., 1958, p. 162. In the case of states other than South Africa which do not recognize Rhodesia, the state of incorporation must be deemed to be the United Kingdom and Colonies (which includes Rhodesia) and that is why the United Kingdom could exercise a right of diplomatic protection in respect of companies incorporated in Rhodesia against such states.
- 53) In the Barcelona Traction case, note 52) supra, it was unnecessary to deal with this point because the right of the state of incorporation (Canada) to protect had been recognized. See ibid., paragraphs 70-73.

CHAPTER VI

THE UNITED KINGDOM.

SECTION I

STATUS OF THE UNITED KINGDOM IN RELATION TO THE TERRITORY OF RHODESIA.

We have already described the very limited degree of international personality which Rhodesia possesses.¹⁾ We have also seen how all states except South Africa recognize the international law claims of the United Kingdom to Rhodesia²⁾ and that even South Africa does not go so far as to recognize the competing Rhodesian claim to independence.³⁾ It follows from this that apart from the very limited spheres within which Rhodesia enjoys personality, the United Kingdom enjoys personality in respect of Rhodesia. We might say that the United Kingdom has the residue of international personality and because Rhodesian personality is so limited, the degree of personality in the United Kingdom is very substantial indeed. It is the primary international person in relation to the territory in question. The main consequences of this are as follows.

- 1) Other states owe the United Kingdom a duty not to infringe international law in relation to the territory.

Thus for instance, invasion of Rhodesian territory by the forces
_____ of/...

- 1) Supra, pp. 378-382 . J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p. 113 says U.D.I. was without international effect. This is certainly true in the sense that U.D.I. alone cannot account for any limited personality which Rhodesia does happen to possess.
- 2) Supra, pp. 365-366.
- 3) Supra, pp. 367-372.

of another state or by irregular forces operating from another state would prima facie constitute aggression and would be an international tort against the United Kingdom. If the tortfeasor was a member of the United Nations, it would also infringe Article 2 (4) of the Charter in that such an invasion would constitute the use of force against the territorial integrity of the United Kingdom and Colonies.⁴⁾

In this connection a further question arises. It is common knowledge that since the imposition of oil sanctions against Rhodesia, the latter has obtained supplies of oil from South Africa.⁵⁾ It is also common knowledge that since 1967 South African police have been present in Rhodesia for the purpose of combatting armed infiltration.⁶⁾ It has been argued that there is a duty not to support unrecognized governments and hence the supplying of oil to Rhodesia was a wrong to the United Kingdom.

"It /...

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- 4) See however G. Schwarzenberger, "Terrorists, Hijackers, Guerrilleros and Mercenaries" (24) C.L.P., 1971, p. 257 at p. 278 who says, and with respect, probably correctly, "So long as Rhodesia is not recognized as a subject of international law, the only country against which a breach of the rule of territorial inviolability has been committed is the United Kingdom, and the United Kingdom may be though to have waived its right of international complaint on this score." (Italics supplied.)
- 5) See for example The Times, 14th February, 1966, p. 8(f); 16th February, 1966, p. 10(b); 19th February, 1966, p. 8(g); 20th February, 1966, p. 10(f); 2nd March, 1966, p. 11(a). The attitude of the South African Government, expressed by the Prime Minister, Dr. Verwoerd, was, that if petrol companies or traders wished to supply fuel to Rhodesia the Government would not interfere. The Times, 26th January, 1966, p. 10(f). In fact, with the imposition of oil sanctions by the United Kingdom, public sympathy in South Africa for Rhodesia resulted in the mushroom growth of voluntary aid organizations such as the Petrol for Rhodesia Fund and the Friends of Rhodesia Association. The Times, 16th February, 1966, p. 10(b).
- 6) See the writer, "Does South Africa Recognize Rhodesian Independence?" (86) S.A.L.J., 1969, p. 438.

"It can be argued that the sending of oil to the Smith regime, contrary to the express wishes of the constitutional authority was an international wrong done to the United Kingdom, "as" nations are under a general legal obligation not to support unrecognized governments." 7)

"Where a rebel regime has not been recognized, to grant it aid is an interference in the domestic affairs of the mother country, and an international wrong. Rhodesia has been granted recognition by no country." 8)

We may make two observations on the above contentions.

- (a) As far as supplying oil to Rhodesia and trading with Rhodesia is concerned, it is doubtful if these amount to international torts by South Africa against the United Kingdom. The reason is that in principle a state is not responsible for the activities and conduct of private citizens.⁹⁾ This particular observation is not, of course, relevant to the sending of South African police to Rhodesia, as there the South African Government itself is directly involved.
- (b) It is doubtful if any of the above activities can be violation of the rights of the United Kingdom by South Africa since South Africa does not recognize the international law claim

to/...

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- 7) Rosalyn Higgins, "International Law, Rhodesia and the United Nations" (23) The World Today, 1967, p. 94 at p. 96.
- 8) Ibid., p. 104. The United States has also expressed the view that it is the right of a government to ask of all foreign powers that the latter shall take no steps which might tend to encourage the revolutionary movement of the seceding states or increase the danger of disaffection in those which still remain loyal. Lauterpacht, p. 21.
- 9) The extent of state responsibility for the acts of private individuals is discussed infra, pp. 598 et seqq. in the context of United Kingdom responsibility. One of the clearest examples of this principle is that neutral nationals may associate themselves more closely with a belligerent without thereby involving the international responsibility of their home state. See Schwarzenberger, II, p. 550.

to complete sovereignty over Rhodesia which the United Kingdom made after U.D.I. As we have seen South Africa continues to recognize the status quo ante U.D.I.¹⁰⁾

We may therefore conclude that the supplying of oil to Rhodesia, trading with Rhodesia and the furnishing of forces to assist Rhodesia is not a violation of United Kingdom territorial sovereignty by South Africa.¹¹⁾

- 2) Southern Rhodesia is now a non-self-governing territory within the meaning of Chapter XI of the United Nations Charter. From the inception of the United Nations, the United Kingdom constantly argued that the Charter provisions in Chapter XI did not apply to Southern Rhodesia because the colony was self-governing. This standpoint was disputed before the organs of the United Nations.¹²⁾ Whatever the merits of the conflicting arguments in this respect, it is submitted that the events which occurred on and after 11th November, 1965, have reduced the controversy here to a matter of academic and historical significance only. The reason is as follows. After U.D.I. the United Kingdom passed legislation, the effect of which was to remove all the competences of the erstwhile Government of Southern Rhodesia and at the same time to vest sole and exclusive governmental capacities in itself.¹³⁾ In other words, legally

the/...

10) Supra, pp. 370-372.

11) The question whether these activities amount to a violation of South Africa's duties as a member state of the United Nations under Article 25 of the Charter is an entirely different one falling outside the ambit of this thesis which is concerned with matters related to status.

12) The matter is discussed supra, pp. 91-105.

13) Southern Rhodesia Act, 1965, s. 1,2; Southern Rhodesia (Constitution) Order, 1965, s. 2,3,4,6; supra, pp. 335-338.

the United Kingdom took direct constitutional control of the rebellious and formerly self-governing colony. The vast majority of member states of the United Nations agreed with this step.¹⁴⁾ It can therefore be stated that as far as the United Kingdom and the vast majority of states in the United Nations are concerned Rhodesia is now a non-self-governing territory. The British Prime Minister, Mr. Harold Wilson admitted as much when he said that before U.D.I. Britain did not participate in United Nations votes on Rhodesia because it was an internal situation and Rhodesia was a self-governing country. However with U.D.I. the position changed entirely.¹⁵⁾ J.E.S.Fawcett summarizes the position when he says that U.D.I. had as a consequence that either Rhodesia became an independent state or ceased to be a self-governing colony with United Kingdom control established in full.¹⁶⁾ The result is that the United Kingdom cannot now deny that the provisions of the Charter relating to non-self-governing territories are applicable to Rhodesia. Because of this, certain obligations in relation to Rhodesia now rest on the United Kingdom.¹⁷⁾

- (3) The United Kingdom is capable of bearing international responsibility for various activities taking place in Rhodesia.¹⁸⁾

SECTION II/...

- 14) Resolutions have been passed by overwhelming majorities in the General Assembly of the United Nations. These resolutions refer to the United Kingdom as the "administering power". See A. Res. 2024 (XX); A. Res. 2151 (XXI); A. Res. 2383 (XXIII).
- 15) The Times, 24th November, 1965, p. 16 (e).
- 16) Note 1) supra, pp. 110, 113. Southern Rhodesia did in fact become independent but its independent status has not been legally recognized Supra, pp. 169, 338, 365. Recognition of post U.D.I. United Kingdom claims does mean however that its status as a non-self-governing colony is legally recognized. South Africa would appear to be the exception. Supra, pp. 370-372.
- 17) These are discussed infra, pp. 657-660, 672 et seq., when the obligations of the United Kingdom are discussed.
- 18) This is discussed in the following Section II.

SECTION II.

RESPONSIBILITY OF THE UNITED KINGDOM.

In this section we deal with the international responsibility of the United Kingdom to other states for acts committed in Rhodesia. If we might borrow a municipal law term, we might say that here we are concerned with the vicarious liability of the United Kingdom for conduct taking place in Rhodesia, and not with the direct obligations of the United Kingdom itself owed in relation to Rhodesia.¹⁾ From the fact that British sovereignty over Rhodesia is near-universally recognized, it follows that the United Kingdom may bear responsibility for infringement of norms of international law in the territory²⁾ and in fact it would appear that the United Kingdom admits such responsibility, in principle at least.³⁾

In the case of Rhodesia, the responsibility of the United Kingdom is largely hypothetical and only assumes a practical form in the case of detentions, restrictions and deportations of aliens and also in relation to the default in the payment of interest due on Southern Rhodesian loans

where/...

- 1) These latter liabilities are dealt with in the section on the obligations of the United Kingdom. The question of the liability of the United Kingdom for the Kariba loan interest and redemption charges due to the I.B.R.D. is, it is submitted, a case of direct liability since the United Kingdom itself guaranteed the repayment of the loan in the event of Rhodesian default. See The Times, 6th December, 1965, p.10 (f) (g); 9th December, 1965, p. 10 (b)(c); 10th December, 1965, p.19 (b).
- 2) See J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p. 110 who says that with U.D.I. the United Kingdom responsibility and control were established in full.
- 3) Thus on 12th November, 1965, Mr. Michael Stewart, Foreign Secretary, asserted British responsibility before the Security Council of the United Nations. See Chayes, II, p. 1340. Mr. Harold Wilson, the Prime Minister, made a similar assertion before the General Assembly on 16th December, 1965. See The Times, 17th December, 1965, p.10 (b). These statements had in mind, in all probability, not only the responsibilities of the United Kingdom but also its obligations in relation to Rhodesia.

where the stockholders in question are aliens.⁴⁾

Before considering the precise extent of United Kingdom responsibility for activities in Rhodesia, it is helpful to outline briefly the principles governing international responsibility in general. The United Kingdom relationship with Rhodesia may then be judged from the standpoint of these principles. There are in essence two such principles.

The first is that a state is internationally responsible for the acts of its organs and all subordinate authorities.⁵⁾ This is so whether the wrongful act of the organ or official in question was authorized by the state or not.⁶⁾ The basis of state responsibility here might be authorization of the act in question⁷⁾ or alternately the official position of the tortfeasor coupled with state control over him.⁸⁾

The/...

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- 4) See Michael Akehurst, "State Responsibility for the Wrongful Acts of Rebels - An aspect of the Southern Rhodesian problem" (43) B.Y.I.L., 1968-1969, p. 49 at p. 50; The Times, 6th December, 1965, p.10 (f)(g); 19th December, 1965, p. 10 (b)(c); 15th December, 1965, pp.4 (g),10(c); 29th January, 1966, p. 7(f).
 - 5) There is no distinction here between organs of state and higher officials on the one hand and subordinate officials on the other hand. See Sorensen, pp. 546-547. However lesser reparation is likely to be adequate in the case of torts committed by subordinate officials. See Schwarzenberger, Manual, p.178.
 - 6) For discussion see Sorensen, pp. 548-550.
 - 7) Akehurst, note 4), supra, pp. 63-64.
 - 8) The former is known as the "status" test while the latter is known as the "control" test. The cases do not distinguish between them as they led to the same result. But they can lead to different results as in the case of Rhodesia where a person might be in an official position recognized as such by the United Kingdom and yet not subject to the factual control of the United Kingdom. See Akehurst, note 4) supra, pp. 62-63. Here the United Kingdom might have responsibility without power. See R.H. Christie, "Practical Jurisprudence in Rhodesia" (2) C.I.L.S.A., 1969, at p. 218; W.P.Kirkman, "The Rhodesian Referendum - the significance of June 20, 1969" (45) International Affairs, 1969, p. 648. Akehurst, note 4) supra, p. 63 submits, and with respect correctly, that where the "control" test leads to different results from the "status" test, that the former is decisive. If this is so there will not be responsibility without power because responsibility flows from power (control) - unless of course it rests on the alternative basis of authorization. Thus it is submitted that the twin bases of state responsibility for official acts are control and authorisation.

The second principle is that states are not responsible for the acts of private individuals (which include revolutionaries).⁹⁾ The reason is that the persons involved do not have status as officials and as such the state does not control them. Lack of status and lack of control excludes state responsibility.¹⁰⁾ There are however certain exceptions where a state is responsible for the acts of private individuals. These are the following:

- 1) If the authorities in the state have not shown due diligence in preventing injuries to aliens by private individuals, the state is responsible.¹¹⁾ Here the authorities have control and can be expected to exercise it to prevent injury and loss.
- 2) A fortiori a state will be responsible where it has authorized the conduct in question, either expressly or impliedly. There is not merely negligence on the part of the authorities but intent in relation to the injury.¹²⁾
- 3) The state may be responsible for routine acts of local administration performed by revolutionaries in areas under the control of those revolutionaries.¹³⁾

Apart / ...

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- 9) Schwarzenberger, Manual, pp. 177-179; Sorensen, pp. 558-564; Oppenheim, International Law, 8th ed., London 1955, p. 366.
 - 10) Akehurst, note 4) supra, p. 62; A.A. le Roux, "British Sanctions Legislation" (9) Rhodesia L.J., 1969, p. 40 at pp. 59,65,69-71, 74. Thus since revolutionaries are men who have gone temporarily beyond the powers of the authorities, the state is in principle not responsible for their acts. Sorensen, pp. 562-563.
 - 11) Home Missionary Society case (1920) 6 R.I.A.A., 42 at 44; Spanish Zone of Morocco claims (1925) 2 R.I.A.A., 617 at 642; Sambiaggio case (1903) 10 R.I.A.A., 499; Solis case (1928) 4 R.I.A.A., 358; Aroa Mines case (1903) 9 R.I.A.A., 402; Kummerov case (1903) 10 R.I.A.A., 369; Henriques case (1903) R.I.A.A., 713.
 - 12) Thus, for instance, if a government promotes or encourages a trade boycott by private persons contrary to a treaty of commerce, the state will be responsible. See Schwarzenberger, Manual, pp. 177-178.
 - 13) Ibid., p. 179.

Apart from the third exception, it would appear that the responsibility of a state for injuries caused by private individuals is based on fault - intention or negligence on the part of the authorities. Responsibility for the acts of private individuals is relative¹⁴⁾ and a state is not the insurer of the lives and property of aliens.¹⁵⁾

There are two other general propositions, both of which are relevant in the Rhodesian context, which should be mentioned at the outset. Both concern the role of recognition in the context of responsibility.

- 1) The mere refusal of a state which faces a revolution to recognize the revolutionaries does not mean that it is responsible for their acts.¹⁶⁾ Thus it cannot be deduced that the United Kingdom is responsible for the acts of the Rhodesian authorities from the mere fact that it refuses to recognize them. Non-recognition is irrelevant.
- 2) A state which faces a revolution bears no responsibility for the acts of the revolutionaries to a state which recognizes the latter. Recognition by other states removes the responsibility of the state facing the revolution. This rule usually finds its application where revolutionaries are recognized as insurgents or belligerents.¹⁷⁾ It is submitted however that it could also be applied to other species of limited recognition accorded to the revolutionaries.

In/...

14) Oppenheim, note (9) supra, p. 365.

15) Home Missionary Society case (1920) 6 R.I.A.A., 42 at 44.

16) Lauterpacht, p. 249.

17) Whiteman, II, p. 648.

In the Rhodesian context this would mean that the United Kingdom bears no responsibility for the acts of the Rhodesian authorities to South Africa. The reason is that South Africa accords a limited recognition to these authorities, continuing to recognize them as the government of a self-governing colony¹⁸⁾ with a limited international personality¹⁹⁾ and thus responsibility.²⁰⁾

We have now seen the general principles governing responsibility. We must now describe the factual events which have occurred in Rhodesia and which are relevant to the application of these principles in the Rhodesian situation. After U.D.I. the Cabinet was dismissed by the Governor²¹⁾ and then the Legislative Assembly was prohibited from making laws.²²⁾ Other officials including the judiciary, the armed services, the police and the public service were requested by the Governor and the British Government to carry on their normal duties and to assist in maintaining law and order.²³⁾ This mandate to carry on in the service of the Crown was withdrawn after Rhodesia proclaimed itself a republic on 2nd March, 1970.²⁴⁾ In the light of these events, it is submitted that for the purposes of establishing United Kingdom responsibility for activities in Rhodesia, a distinction can be drawn between the following groups :-

1)/...

18) Supra, pp. 370-372.

19) Supra, pp. 378-382.

20) In the case of dependent states, the protecting power is responsible to the extent to which the international personality of the subordinate unit has ceased to exist. Schwarzenberger, Manual, p. 178. In the case of Rhodesia, the personality of the subordinate unit (Rhodesia) has not ceased to exist in its relationship with South Africa because of the limited recognition still afforded to it.

21) Supra, pp. 335; Akehurst, note 4) supra, p. 61.

22) Southern Rhodesia (Constitution) Order 1965, s. 3(1); Akehurst, note 4) supra, p. 61.

23) Supra, pp.459-461 ; Akehurst, note 4) supra, p. 61.

24) Supra, p. 462.

(1) Those officials authorized to carry on their duties up to 2nd March, 1970 (hereinafter called the 'authorized' officials); (2) those officials who were removed from their functions by the Governor or United Kingdom after U.D.I., those appointed by the Government of Rhodesia after U.D.I. and all officials in Rhodesia since the 2nd March, 1970 (hereinafter called the 'rebel' officials); (3) the para-military forces; (4) the South African forces in Rhodesia.

(1) Responsibility for acts of the 'authorized' officials.

This would include acts performed up to 2nd March, 1970 by the Governor and by members of the judiciary, the armed services, the police and the public service who were in office on 11th November, 1965.

Since the United Kingdom confirmed the above officials in their positions, these must be regarded as being officials in the United Kingdom Governmental structure created for Rhodesia after U.D.I. In principle therefore, the United Kingdom can bear international responsibility for the acts of the 'authorized' officials. The basis of such United Kingdom liability would be either status and control or authorization.²⁵⁾ Each of these shall now be examined.

In the case of the 'authorized' officials it is clear that they enjoy status as far as the United Kingdom is concerned. It is equally clear however that the United Kingdom has no factual control over them. Because of this, it is submitted that the United Kingdom does not bear responsibility for their acts on the basis of status and control.²⁶⁾

The/...

25) Supra, p. 598.

26) It is a case of responsibility without power, a term somewhat inaccurately used by Christie, note 8) supra, p. 218 and Kirkman, note 8) supra, p. 648.

The alternative basis of liability is authorization. The United Kingdom confirmed the officials in their positions and directed them to maintain law and order. It is submitted that the United Kingdom is therefore responsible for the acts of such persons on the basis of authorization.²⁷⁾

A further question now arises. What if the 'authorized' officials accept the authority of the "rebel" government?²⁸⁾ Does the United Kingdom still remain liable for their acts since it did not dismiss them? It is submitted that a distinction must be drawn between two kinds of conduct.

- (a) Conduct on the part of 'authorized' officials which furthers the purposes of the rebellion and as such falls outside the normal duties of the persons concerned.

It is submitted that the United Kingdom bears no responsibility for such acts because it neither controls the officials in question nor has it authorized them to conduct themselves in such a fashion. Thus there is no basis for responsibility.²⁹⁾

- (b) Conduct which forms part of the normal duties of the 'authorized' officials and is not directed at furthering the "rebellion".

It is submitted that the United Kingdom bears responsibility for such conduct on the basis of authorization. Even when
'authorized' / ...

27) See Akehurst, note 4) supra, p. 64.

28) In fact all holders of authority in Rhodesia, except the Governor, Sir Humphrey Gibbs, accepted the authority of the rebel government in the course of time. Ibid., p. 61. Even the courts eventually accepted it as a de iure government. R. v. Ndllovu and Others, 1968 (4) S.A. 207 (R); 1968 (4) S.A. 515 (R., A.D.).

29) Akehurst, note 4) supra, p. 63 arrives at a similar conclusion on the basis of lack of control by the United Kingdom.

'authorized' officials defected, they were not dismissed and the authorization was not withdrawn.³⁰⁾

(2) Responsibility for acts of 'rebel' officials.

These would include the Government and Parliament of Rhodesia after U.D.I.; officials appointed after U.D.I. and all officials and official bodies in Rhodesia after 2nd March, 1970. The United Kingdom does not regard these as having any official position in Rhodesia. Other states except South Africa recognize the claims of the United Kingdom.³¹⁾ Hence as far as other states are concerned, these officials enjoy no status and cannot be regarded as being part of the United Kingdom administration in Rhodesia.

From the above an important conclusion may be drawn. As far as the vast majority of other states are concerned, the 'rebel' officials are merely private individuals. The general principle is that a state is not responsible for the acts of private individuals³²⁾ and hence the United Kingdom is not in principle responsible for the acts of the 'rebel' officials. As we have seen, there are three exceptions to this principle³³⁾ and each of these exceptions must be discussed in the Rhodesian context.

(a)/...

30) Akehurst note 4) supra, p. 64 considers that the United Kingdom has ratified the acts of these in advance. He is also of the view that the United Kingdom bears responsibility for such acts because it is estopped from arguing that the persons in question are under its control. Apart altogether from questions of control and authorization, it is submitted that the United Kingdom would be responsible for such acts. We have seen that a state is responsible for the routine administrative acts of rebels performed in an area under its control. Supra, p. 599. A fortiori, it is submitted that a state is responsible for the routine administrative acts of 'authorized' officials in an area where they operate but in which the state itself does not exercise control.

31) Supra, pp. 365-366.

32) Supra, p. 599.

33) Supra, p. 599.

- (a) A state is responsible for routine administrative acts performed by rebels in an area under their control.

It is submitted that under this rule, the United Kingdom would be responsible for routine administrative acts performed by 'rebel' officials in Rhodesia.

- (b) Responsibility on the basis of authorization.

A state will be liable for all acts of rebels which it ratifies expressly or impliedly.³⁴⁾ Normally the ratification will not be present during the currency of a rebellion but will only arise when a settlement is eventually concluded and the acts of the rebels are retrospectively ratified and condoned.³⁵⁾

Akehurst, however, convincingly argues that such authorization did take place during the currency of the Rhodesian "rebellion" and that there was even a ratification in advance of the acts concerned³⁶⁾ - what we might call a ratification or authorization by anticipation. Akehurst's starting point is the dismissal of the cabinet, the forbidding of the legislature to legislate and the instructions to all other officials to carry out their normal duties.³⁷⁾ He then goes on to say that people holding subordinate positions cannot perform their normal duties unless they give effect to some sort of legislation and ministerial instructions. But the only legislature and executive in Rhodesia were the illegal ones. Consequently by assuming
_____ responsibility/...

34) Akehurst, note 4) supra, p. 61.

35) Ibid.

36) Ibid.

37) Ibid., pp. 61, 63, 64.

responsibility for acts done by holders of subordinate official posts in so far as those acts form part of their normal duties the United Kingdom must also be deemed to have accepted responsibility for similar acts on the part of superior bodies whom the holders of subordinate posts could be expected to obey.³⁸⁾ The conclusion from this would appear to be that just as the United Kingdom is responsible for the acts of 'authorized' officials carrying out their normal duties, its responsibility does not cease merely because such acts are performed on the instructions of 'rebel' ministers.³⁹⁾

(c) Responsibility based on negligence.

We have already seen that if a state has not shown due diligence in preventing injury to aliens by private individuals, it is responsible.⁴⁰⁾ In the Rhodesian context, three types of negligence on the part of the United Kingdom may be of relevance:

(i) negligence in preventing the Rhodesian rebellion; (ii) negligence in suppressing the Rhodesian rebellion; (iii) negligence in protecting rights of aliens and other states in relation to Rhodesia.

(i) Negligence in preventing the rebellion.

There is a presumption that the lawful authorities have
not/...

38) Ibid., pp. 64-65.

39) Akehurst, note 4) supra, pp. 65, 66 points out that even though the Privy Council ruled that the dismissed ministers have no power this makes no difference to United Kingdom responsibility. The fact that an official's act may be illegal in municipal law does not mean that the international responsibility of the state therefor is not engaged.

40) Supra, p. 599.

not been negligent in this respect and the onus of displacing it is heavy.⁴¹⁾ Akehurst submits however that the special facts of the Rhodesian situation make it unlikely that the United Kingdom can rely on this presumption that states will fiercely resist secession.⁴²⁾ The special facts are that Rhodesia is geographically far from the United Kingdom, was close to full independence, the real dispute was not between Rhodesia and Britain but between the races in Rhodesia and the United Kingdom might have sympathies with kith and kin in Rhodesia.⁴³⁾ Akehurst then discusses whether the United Kingdom was negligent in not preventing U.D.I. as follows. It might be argued that the United Kingdom was to blame because it allowed the situation to develop to U.D.I. It allowed the white population to have strong motives for U.D.I. and the means to carry U.D.I. out. In the latter connection they had internal self-government and physical power.⁴⁴⁾ Akehurst submits however, and with respect correctly, that the grant of self-government cannot be regarded as negligence. It would make the United States responsible for the acts of the Confederacy, the member states of which had also been allowed the machinery of government but there are many decisions holding that the United States was not responsible for such acts.⁴⁵⁾

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41) Akehurst, note 4) supra, p. 50.

42) Ibid., pp. 50-51.

43) Ibid., p. 51.

44) Ibid.

45) Ibid.

It might also be argued that the reverter of the armed forces to Southern Rhodesia after the dissolution of the Federation of Rhodesia and Nyasaland was negligence in that it allowed Southern Rhodesia the physical power to achieve U.D.I.⁴⁶⁾ Akehurst's view is that no action by the United Kingdom can be labelled as negligence unless at the time of the action or inaction there was a reasonable possibility that a U.D.I. would occur. At the time of the reverter of the forces there was no such suggestion.⁴⁷⁾ It might also be argued that the United Kingdom, by fore-swearing the use of force in the event of a U.D.I. by Southern Rhodesia, was negligent and thus responsible for U.D.I. It is doubtful however if there was a causal nexus between the conduct of the United Kingdom here and the Rhodesian U.D.I. If the British Government intended to use force to prevent a U.D.I., they would have had to move troops to Zambia. The reaction to this would probably be U.D.I. and perhaps also a pre-emptive strike by the Rhodesian R.A.F. against bases in Zambia before the British military build-up became operational.⁴⁸⁾ Finally, if the British Government tried to dismiss Mr. Smith and his government, revoke the 1961 Constitution, legislate for Southern Rhodesia without consent or instruct the Governor to ignore the advice of his Ministers this would probably precipitate U.D.I.⁴⁹⁾ So too no doubt would any attempt/...

46) Ibid., p. 52.

47) Ibid., pp. 51-52.

48) Ibid., p. 52.

49) Ibid.

attempt to impose sanctions on Southern Rhodesia. It is therefore submitted that the United Kingdom was not negligent in failing to prevent the Rhodesian "rebellion" and is thus not responsible under this particular head.

(ii) Negligence in suppressing the rebellion.

Akehurst also discusses whether such negligence in suppressing the Rhodesian rebellion is present on the part of the United Kingdom. It can be inferred from certain authorities that failure to use military force could be interpreted as negligence in suppressing a rebellion but delay in doing so is not negligence as it could be due to the strength of the rebels and not the passivity of the Government.⁵⁰⁾ A state cannot however be expected to take unreasonable military risks in suppressing a rebellion and military action in Rhodesia would present unprecedented problems. It is land-locked, thousands of miles from British territory or bases and military intervention would necessitate prior establishment of forward bases in Zambia or other neighbouring territory which might provoke a pre-emptive strike by Rhodesia before the build-up was operational.⁵¹⁾ In the case of suppressing a rebellion by military action, a state has a discretion to attack the rebels in one place rather than another.⁵²⁾ Akehurst submits that this

principle/...

50) Ibid., p. 53. Of course if a state does use force to suppress a rebellion, it will not be responsible. Lauterpacht, pp. 248-249.

51) Akehurst, note 4) supra, p. 54.

52) Ibid.

principle should be extended by allowing the state a discretion to end a rebellion by non-military means rather than by military means.⁵³⁾ The discretion would have to be exercised in good faith so that if the dominant motive was something other than a genuine belief in the possibility of ending the rebellion more effectively by non-military means, such as secret sympathy for rebels or reluctance to alienate sectors of its own public opinion which are sympathetic to the rebels, then it is responsible.⁵⁴⁾ To bolster his thesis that a state is not under a duty to use military force in suppressing a rebellion, Akehurst advances the following argument. All the cases which require the use of such military force were pre-1914 cases and since then international law has sought to banish war and the use of force. It is not consistent with this trend to hold that a state is under a duty to unleash the even greater horrors of civil war when threatened by a rebellion.⁵⁵⁾

To the present writer it would appear that since the basic enquiry is whether or not there has been negligence, the vital question should be - is it reasonable to expect a state to use military force to suppress a rebellion in all the circumstances of the particular case.⁵⁶⁾ If the infringement of alien rights is minimal or non-existent,

it/...

53) Ibid.

54) Ibid.

55) Ibid., p. 55.

56) Chen, p. 406 says that a government evades responsibility if it has exercised due diligence in the suppression of an insurrection.

it would certainly not be reasonable to expect a state to engage in armed conflict to protect them. If the logistical difficulties involved in suppressing the rebellion by military force were great or practically insuperable, it would not be reasonable to expect a state to undertake such activities even though the infringement of alien rights was grave and substantial. In the case of Rhodesia the logistical difficulties are great and the infringement of alien rights minimal almost to the point of being at the moment hypothetical.⁵⁷⁾ In the circumstances, it is submitted, that the United Kingdom has not been negligent in failing to suppress the rebellion.

(iii) Negligence in protecting the rights of aliens and of other states in relation to Rhodesia. 58)

The entire question of responsibility for activities in Rhodesia is inseparably connected with the infringement of the rights of aliens and of other states. If there is no such infringement the United Kingdom cannot be responsible because there is nothing for which it can be held responsible. It therefore follows that the two questions we

just/...

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- 57) The only practical case of infringement is failure to pay interest on Rhodesian loans to aliens. Supra, pp. 597-598. It would not be reasonable to expect the United Kingdom to remedy this. We might here draw an analogy with the first attempt to limit the use of force by states, the Hague Convention II, 1907, the Porter Convention. This prohibited reprisals involving the use of force for the purpose of recovering contract debts unless the debtor state refused arbitration or refused to carry out an arbitral award.
- 58) The terminology used by the present writer is in fact a little inappropriate here. In all these cases, juristically speaking it is the rights of other states which are transgressed. In the case of injury or damage to an alien, the right of another state is infringed by unlawful interference with one of its objects, its citizen. See Schwarzenberger, Manual, pp. 80-81.

just discussed - negligence in preventing the rebellion and negligence in suppressing the rebellion are only in fact legally relevant if there have been such infringements and these are attributable to the negligence in question.⁵⁹⁾ Thus there can be no responsibility for mere negligence in abstracto in preventing or suppressing the rebellion where there is no infringement of rights.

The basic questions discussed under (i) and (ii) therefore were, whether in the event of infringement of alien rights and the rights of other states, the United Kingdom might reasonably be expected to have prevented the "rebellion" or to suppress it in its entirety (if necessary by the use of military force). In the present section, by way of contrast, the enquiry is into the question whether the United Kingdom might reasonably be expected to protect individual rights of aliens and rights of other states, where these are threatened or infringed, even if the United Kingdom might not be expected to go so far as to suppress the entire "rebellion" to protect the rights in question. The crisp question is whether in these cases the United Kingdom is expected to adopt measures for protecting such rights which fall short of eliminating the rebellion and if so what these might be.

In determining this question, it is appropriate to emphasize that the principle of negligence is the governing factor/...

59) Akehurst, note 4) supra, p. 50 admits as much when, apart from a few specific instances, the principle one of which is the Rhodesian loans, he discusses the responsibility of the United Kingdom as a hypothetical question.

factor. Unless the United Kingdom can be shown to have been negligent in protecting the rights in question it will not be responsible. It is clear that liability is a fault liability,⁶⁰⁾ a liability for negligence in permitting subjects of foreign states to suffer injuries at the hands of rebels.⁶¹⁾ The negligence consists in failing to exercise due diligence in preventing the acts in question.⁶²⁾ To avoid being negligent, a state must use effective available methods of protecting the rights involved.⁶³⁾ What are effective available means in any case would naturally depend upon the surrounding circumstances. Thus lack of control over the "rebels" affects responsibility because it may mean that there are no effective available means of protecting the rights in question.⁶⁴⁾ This is particularly important in the Rhodesian context where the character and extent of the "rebellion" is an important factor bearing on the question of the power of the United Kingdom to give protection.⁶⁵⁾ The "rebels" are in complete control of the territory, the United Kingdom is five thousand miles away and logistical difficulties are great. In the circumstances, the effective available means of protection would be extremely limited.

The submission from the above is that the United Kingdom would only be responsible where it has failed to take steps
which/...

60) Lauterpacht, p. 248 and cases quoted there.

61) Akehurst, note 4) supra, p. 48 and authorities cited there.

62) Sorensen, p. 563 and cases cited there.

63) Whiteman, II, p. 648.

64) Lauterpacht, p. 248; Le Roux, note 10) supra, pp. 59, 65, 69-71, 74.

65) See Whiteman, II, p. 648.

Which in the circumstances it might reasonably be expected to take to prevent or remedy the acts of the 'rebels'. The degree of diligence in protecting rights expected of the United Kingdom would vary according to the individual circumstances. Thus in relation to a serious transgression of a norm of international law, a higher degree of diligence and as a result more activity on the part of the United Kingdom could reasonably be expected. On the other hand, if the infringement was a minor one, the United Kingdom might be altogether excused from acting because the effort required to redress the particular matter would be out of all proportion to the seriousness of the transgression. Here no action could reasonably be expected and due diligence in the particular circumstances would require no action.

It follows that the international responsibility of the United Kingdom depends to a very great extent upon, and cannot be divorced from the seriousness of the individual acts of the 'rebel' officials in Rhodesia. Thus, for example, if Rhodesia should invade a neighbouring state without provocation, it is possible that the use of force by the United Kingdom to prevent or redress such invasion, might reasonably be expected. On the other hand, in the case of such minor infringements as the temporary detention of the person of an alien without cause, due diligence would probably require no action on the part of the United Kingdom. If the property of aliens in Rhodesia was confiscated, it would not be reasonable to expect the United Kingdom to remedy the matter by the use/...

use of force. It might however be reasonable to expect the United Kingdom to seize Rhodesian assets within its actual jurisdiction and to make compensation therefrom by way of redress.⁶⁶⁾

The question of deprivation of assets brings up the question of United Kingdom responsibility for the Rhodesian loans and the Rhodesian Public Debt which must now be discussed. We may distinguish between responsibility for loans raised after U.D.I. by the 'rebel' officials and those raised before U.D.I.

(A) Loans raised after U.D.I.

The United Kingdom would not be obliged to honour loans raised by the 'rebel' officials. It has specifically asserted that it would not be responsible for such loans. Others must therefore be deemed to be aware of this and will have no recourse against the United Kingdom. Thus when the Rhodesian Government proposed to raise money both at home and abroad by means of "independence bonds", the British stated that anyone who contracted with, or lent money to, the Rhodesian regime did so at their own risk, as the regime had no authority. The lawful government would not be bound by such transactions even when
constitutional/...

66) For example both London and Salisbury were in agreement that the London-based Reserve Bank of Rhodesia established by the United Kingdom under Sir Sydney Caine had taken over nine million pounds of Rhodesian assets. The Times, 17th December, 1965, p. 10 (e).

constitutional rule was restored to Rhodesia.⁶⁷⁾

Thus, not only does the United Kingdom deny inter-national law responsibility for such loans made by aliens, but it also denies municipal law responsibility for them, both to citizens and to aliens, in the event of constitutional rule being reimposed.

(B) Loans raised before U.D.I.

The Rhodesian Government paid interest which fell due on 21st November, 1965 but defaulted on 3rd December, 1965 in retaliation against the Reserve Bank of Rhodesia Order, 1965 which appointed United Kingdom nominees to run the Reserve Bank.⁶⁸⁾ The statement of the Prime Minister, Mr. Ian Smith, was as follows:

"As Britain has now seized Rhodesia's London Reserves and imposed trade and financial sanctions of the greatest severity upon Rhodesia, I must make it clear to the people of Britain and to the world at large that it is quite obviously impossible for Rhodesia, much as she desires, to meet her debt obligations in London and to the World Bank, to make the necessary payments. In consequence I regret to say that all our good friends who subscribed to Rhodesian loans will have to look to the British Government for redress." 69)

The question which arises is whether the United Kingdom is vicariously responsible for the failure of the 'rebel' officials to transfer funds to London to meet these/...

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- 67) The Times, 31st January, 1966, p. 10(a). See too the 10 Million dollar 5% loan floated on 16th January, 1973, redeemable in 1979. Cape Times, 4th January, 1973. This was fully subscribed. Cape Times, 17th January, 1973.
- 68) Akehurst, note 4) supra, p. 69; The Times, 6th December, 1965, p. 10, (f) (g); 9th December, 1965, p. 10 (b)(c).
- 69) The Times, 6th December, 1965, p. 10 (f)(g).

these obligations.⁷⁰⁾ In relation to failure to transfer funds to pay interest due to United Kingdom citizens, the United Kingdom cannot be internationally responsible.⁷¹⁾ In relation to failure to transfer funds to pay interest due to aliens, Akehurst submits that there is no responsibility. He argues that the withholding of funds was done for rebellious purposes, not in the course of the officials' ordinary duties, but in violation of such duties. Hence there was no ratification of the acts of the 'rebel' officials in preventing the transfer of funds and thus no liability on the basis of ratification.⁷²⁾ It is also difficult to see how the United Kingdom could be responsible for failure to transfer such funds on the basis of negligence or lack of due diligence.

(3) Responsibility for the acts of the para-military forces.

The question is whether the United Kingdom is responsible for acts on the part of these forces which interfere with the persons or property of aliens in Rhodesia. The para-military forces are of course private individuals as far as the United Kingdom is concerned and the general principle of non-liability for the acts of private persons applies subject to the usual exceptions.⁷³⁾ In short, the
same/...

70) Whether the United Kingdom is directly responsible for such payments in its own capacity as the recognized government of Rhodesia is discussed infra, pp. 652-657 in the context of the obligations of the United Kingdom.

71) Payment of interest, rents, dividends, profits and capital from Rhodesia to British nationals was in fact specifically blocked. The Times, 9th December, 1965, p. 10(b)(c).

72) Akehurst, note 4) supra, p. 70.

73) Supra, p. 599.

same rules apply mutatis mutandis here as apply to the question of United Kingdom responsibility for the acts of the 'rebel' officials. We make the following brief observations:

- (a) The United Kingdom would be responsible for routine administrative acts performed by these forces in areas under their control. The question is however hypothetical at the moment as the forces operate on a guerrilla basis and do not control any specific area of the territory.⁷⁴⁾ The position of the para-military forces thus differs from that of the 'rebel' officials who do control territory, and even the entire territory, and who can thus perform routine administrative acts for which the United Kingdom would bear responsibility.⁷⁵⁾
- (b) It is unlikely that the United Kingdom would be liable on the basis of authorization⁷⁶⁾ as it would be extremely difficult to impute any form of authorization, express or implied, from it to the para-military forces.
- (c) It is also difficult to see how the United Kingdom could be responsible on the basis of negligence⁷⁷⁾ as it is difficult to visualize any steps which the United Kingdom might reasonably be expected to take in relation to the activities of the para-military forces.⁷⁸⁾

We/...

74) Cape Argus, 26th December, 1972.

75) Supra, .p. 599.

76) Supra, .p. 598.

77) Supra, op. 599.

78) Formal Protest to neighbouring states affording bases to the para-military forces might perhaps be an exception here.

We may thus conclude that in practice, the responsibility of the United Kingdom for the acts of para-military forces in Rhodesia is virtually non-existent.

(4) Responsibility for the acts of South African forces in Rhodesia.

The United Kingdom naturally cannot be responsible for acts of these forces which are injurious to aliens as the forces in question are not those of the United Kingdom itself. Thus the principle of responsibility for the acts of organs or subordinate authorities⁷⁹⁾ cannot apply. Neither can the principles which establish state responsibility in exceptional cases for the acts of private individuals⁸⁰⁾ apply, because members of the forces in question are not private individuals but subordinate authorities of a fully-recognized state. Thus the United Kingdom is not responsible for their acts. South Africa would, of course, be responsible for such acts on the principle that a state is responsible for the acts of its organs and subordinate authorities.

SECTION III

COMPETENCES OF THE UNITED KINGDOM

In this section we consider not only the competence of the United Kingdom to act against Rhodesia, but also its competence to perform actions against third states in relation to Rhodesia and its competence to grant independence to Rhodesia.

(1)/...

79) Supra, p.598.

80) Supra, p. 599.

(1) Competence to act against Rhodesia.

We can distinguish between acts directed against Rhodesia which objectively do not infringe international law and acts which would be objectively illegal in international law if committed against a third state.

(a) Acts which are objectively legal in international law.

Naturally the United Kingdom may take any action against Rhodesia which does not objectively infringe a norm of international law. It does not matter whether such action is designed to coerce Rhodesia into returning to constitutional rule,¹⁾ or is aimed at the exercise of governmental and administrative capacity in Rhodesia by the United Kingdom as the recognized government of Rhodesia.²⁾ The coercive and administrative measures which have been taken by the United Kingdom extend to the fields of exchange control, assumption of legislative power, withdrawal of preferences and sugar quotas, impounding of passports, immigration, nationality, extradition facilities, assumption of control of the Reserve Bank, prohibition of exports and imports and the extension of economic sanctions to its dependencies.³⁾ To describe in outline such

measures/...

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- 1) MacDonald, J.A. held that the imposition of such coercive measures by the United Kingdom against Rhodesia together with the subsequent approach to the United Nations were unconstitutional. Madzimbamuto v. Lardner-Burke & Another, 1968 (2) S.A. 284 (R., A.D.) at 414. This is criticized, and with respect correctly, by Molteni, pp.442-443. It is submitted therefore that the coercive measures in question were legal both in constitutional law and in international law, though we are only concerned with the latter.
 - 2) Supra, pp. 365-366.
 - 3) A.A. le Roux "British Sanctions Legislation" (9) Rhodesia L.J., 1969, p. 40 at pp. 44-45.

measures,⁴⁾ all of which are legal from the point of view of international law, we shall adopt a fourfold division: (i) economic measures; (ii) financial measures; (iii) political measures; (iv) constitutional measures.

(1) Economic measures.

Immediately after U.D.I. the United Kingdom banned the export of arms (including spares) ammunition and aircraft to Rhodesia,⁵⁾ suspended the latter from the Commonwealth preference area so that Rhodesian goods no longer received special treatment on entering Britain,⁶⁾ and placed an embargo on the import of sugar and tobacco from Rhodesia which accounted for 70% of Rhodesian exports to the United Kingdom.⁷⁾ These measures were followed by the banning of the passage of arms from South Africa to Rhodesia through Bechuanaland (then a British Protectorate⁸⁾),
the/...

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- 4) The measures were implemented by the United Kingdom by means of an Act of Parliament, Statutory Instruments, Orders, Directions, Regulations and Licences. For a list of these see ibid., pp. 41-43. For a chronological list of the same according to dates of effectiveness see ibid., pp. 44-45. For a discussion of the details of the various measures see ibid., pp. 49-80.
- 5) The Times, 12th November, 1965, p. 12 (a)(e).
- 6) The Times, 12th November, 1965, p. 12(a); Southern Rhodesia (Withdrawal of Commonwealth Preference) Order, 1965.
- 7) The Times, 12th November, 1965, p. 12(a). Legislation was not necessary to impose the bans as statutory powers existed under the Import, Export and Customs Powers (Defence) Act, 1939. The Southern Rhodesia (Commonwealth Sugar Agreement) Order, 1965 relieved the Minister of Agriculture, Fisheries and Food from his obligation under the agreement in question to take an annual quota of sugar from Southern Rhodesia and cancelled the current contract under which the Sugar Board had agreed to buy sugar from Southern Rhodesia in pursuance of the Agreement. See Le Roux, note 3) supra, p. 53.
- 8) The Times, 16th November, 1965, p. 7(c).

the cancellation of shotgun export licences to Rhodesia⁹⁾ and cancellation of the delivery of archery bows to Rhodesia.¹⁰⁾ Then followed an embargo on Rhodesian exports of asbestos, copper and copper products, iron and steel, ores and concentrates of antimony, chromium, lithium and tantalum, maize, meat and edible meat products and a range of other foodstuffs.

At this stage the embargoed items accounted for over 95% of Rhodesia's exports to Britain so that Rhodesia's best market had virtually ceased to buy from her.¹¹⁾ Then followed the imposition of an oil embargo. The import of oil and oil products into the territory was prohibited. British nationals were prohibited from supplying oil or oil products for Rhodesian use.¹²⁾ The Norwegian Tanker, the Staberg,...

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- 9) Ibid., 24th November, 1965, p. 12(d). Later the concession to a passenger leaving Britain to take one or two shotguns and 1000 cartridges as part of his personal effects without an export licence was disallowed in the case of those going to Rhodesia. Ibid., 24th November, 1965, p. 12(d).
- 10) Ibid., 27th November, 1965, p. 7(b).
- 11) Ibid., 2nd December, 1965, p. 8(f)(g). Southern Rhodesia (Prohibited Exports and Imports) Order, 1966. The Order provided that prohibited products could be specified in further Orders. Under the Order no person could contract or carry out any contract for exportation or import of any specified product. Nor might any person make or carry out any contract of sale of any specified product which he intended or had reason to believe that another person intended to export or import into Southern Rhodesia. The Order made void all such contracts, and transfers in pursuance of such contracts, and operated retrospectively. It was reinforced by criminal sanctions. Companies and the management personnel of the same could also be guilty of offences under the Order. Offences could be committed outside the United Kingdom. See in general The Times, 22nd January, 1966, p. 7(f).
- 12) Ibid., 18th December, 1965, p. 6(a); Southern Rhodesia (Carriage of Petroleum) Order, 1965.

The Staberg, under Charter to the Shell Oil Co., and carrying 16,000 tons of oil for Rhodesia, left Beira on instructions from London to proceed to Mombasa.¹³⁾

Finally a complete trade embargo was placed on all goods from Rhodesia thus cutting off the residual 5% of British imports. A 100% ban on exports to Rhodesia was imposed but humanitarian supplies were excluded from the ban.¹⁴⁾

All the above economic sanctions were originally imposed on a voluntary basis by the United Kingdom. There was no obligation to impose them. Later however the sanctions became a matter of international obligation as a result of decisions of the Security Council of the United Nations.¹⁵⁾

(ii) Financial Measures

British aid and exports of United Kingdom capital to Rhodesia were prohibited and Rhodesia was removed from the sterling area.¹⁶⁾ The United Kingdom Export Credit Guarantee Department was to give no further cover to Rhodesia¹⁷⁾ which was excluded from borrowing on the London Market.¹⁸⁾ Special exchange control restrictions were/...

13) The Times, 20th December, 1965, p. 6(f). Half of the oil was for Zambia. Ibid., 21st December, 1965, p. 8(a).

14) Ibid., 31st January, 1966, p. 10(a); Export of Goods (Control) (Amendment) Order, 1966.

15) S. Res. 221 (1966); 232 (1966); 253 (1968).

16) The Times, 12th November, 1965, p. 12(a).

17) Ibid.

18) This measure did not need legislation as machinery existed under the Control of Borrowing Order, 1958. See The Times, 13th November, 1965, p. 6(f).

were applied.¹⁹⁾ Residents of Britain travelling to Rhodesia were restricted to a travel allowance of two hundred and fifty pounds.²⁰⁾ Shortly afterwards such travel was only allowed for official and business purposes and applications for allowances had to be referred to the Bank of England.²¹⁾ Cash gifts by British residents to Rhodesia were restricted to fifty pounds and a special application was necessary to the Bank of England.²²⁾ The Postal Order and Money Order services to Rhodesia were cancelled²³⁾ and many types of remittances to Rhodesia for contractual payments were disallowed, including the transfer of funds by British Insurance Companies to meet claims in Rhodesia.²⁴⁾ Finally, remittances in general to Rhodesia were prohibited with certain specific exceptions concerning mainly remittances of pensions and remittances to charities.²⁵⁾

All the above financial measures were originally of a voluntary nature as the United Kingdom was under no international obligation to impose them. But as a result of Security Council action, these sanctions became obligatory with certain well-defined exceptions.²⁶⁾

(iii)/...

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- 19) Again no new legislation was required as machinery existed under the Exchange Control Act, 1947 and the Emergency Laws (re-enactment and repeals) Act, 1964. See The Times, 12th November, 1965, p. 12(a); 13th November, 1965, p. 6(f).
- 20) Ibid., 24th November, 1965, p. 12 (d).
- 21) Ibid., 2nd December, 1965, p. 12(c).
- 22) Ibid., 24th November, 1965, p. 12(d).
- 23) Ibid., 26th November, 1965, p. 8(c).
- 24) Ibid., 17th December, 1965, p. 16(c).
- 25) The Times, 3rd December, 1965, p. 18(d); 8th December, 1965, p.8 (a)(d); 19th January, 1966, p. 10 (f).
- 26) See S. Res. 253 (1968) paragraph 4.

(iii) Political measures.

In the political field we may mention the following by way of example. The British High Commissioner and his diplomatic staff were withdrawn from Salisbury and the Southern Rhodesian High Commissioner in London was asked to leave.²⁷⁾ Surrender of fugitive offenders to Rhodesia was discontinued²⁸⁾ Immigration control was imposed on Rhodesians.²⁹⁾ Travel restrictions in relation to Rhodesia were also imposed on Britons.³⁰⁾

Again originally voluntary, many political measures became legally obligatory as a result of Security Council action.³¹⁾

(iv) Constitutional measures.

In relation to the economic, financial and political measures already discussed, the international law position of the United Kingdom does not differ in principle from that of any other state which decided to institute such measures against Rhodesia. But in relation to the constitutional measures against Rhodesia, the United Kingdom is in a unique position. No other state except the United Kingdom is in a position to institute such measures. The reason for this is that United Kingdom sovereignty over Rhodesia is/...

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- 27) The Times, 12th November, 1965, p. 12(a); 13th November, 1965, p. 8(b).
28) The Times, 17th November, 1965, p. 9(a); Southern Rhodesia (Fugitive Offenders Act, 1881) Order, 1965.
29) The Times, 17th November, 1965, p. 9 (a)(b); Southern Rhodesia (Commonwealth Immigrants Act, 1962) Order, 1965.
30) The Times, 2nd December, 1965, p. 12(c).
31) S. Res. 253 (1968).

is near-universally recognized. No other state is recognized³²⁾ as having complete (or any) sovereignty over Rhodesia and so it is only the United Kingdom which is competent to institute such measures.

The constitutional measures involved here are measures aimed at the exercise of governmental and administrative functions as the recognized government of Rhodesia, though indirectly some of those measures may be coercive in nature in that they are intended to persuade the Rhodesians to return to constitutional rule.

Thus, as we have seen, the United Kingdom dismissed the Government of Southern Rhodesia on U.D.I.³³⁾ Power was vested in the Secretary of State for Commonwealth Relations to exercise the executive authority in Rhodesia.³⁴⁾ Power was vested in Her Majesty in Council to make laws for the peace, order and good government of Rhodesia.³⁵⁾ The 1965 Constitution was declared void and it was provided that the Legislative Assembly in Rhodesia could make no laws.³⁶⁾ Britain refused to accept as valid passports issued or renewed by the Rhodesian Government³⁷⁾ and provided for the confiscation of such passports.³⁸⁾ The British Foreign Office/...

32) See discussion of recognition of the State and Government of Rhodesia supra, pp. 365-366, 424-425.

33) The Times, 12th November, 1965, p.12(a). Copies of the Governor's Proclamation dismissing the Cabinet were passed from hand to hand. The Times, 13th November, 1965, p. 10(b).

34) Southern Rhodesia (Constitution) Order, 1965, S.4(1).

35) Ibid., S.3(1)(c).

36) Ibid., S.2, 3(1)(a).

37) The Times, 12th November, 1965, p. 12(a).

38) Southern Rhodesia (Property in Passports) Order, 1965. See too Le Roux, note 3) supra, pp. 53-54.

Office regarded itself as the sole authority to issue visas for Rhodesia and it would reserve the right to refuse entry to the United Kingdom to persons who sought visas from the Rhodesian Government.³⁹⁾

In pursuance of the above legislative power claimed by the United Kingdom, it has on occasion enacted laws for Southern Rhodesia. These include the following. It has altered the nationality laws by enabling Southern Rhodesians to obtain citizenship of the United Kingdom and Colonies.⁴⁰⁾ It amended the Reserve Bank of Rhodesia Act, 1964 by dismissing the Governor and Directors of the Bank and appointing new London-based Directors under the Governorship of Sir Sydney Caine.⁴¹⁾ The United Kingdom also prohibited the importation of oil products into Rhodesia.⁴²⁾ It made the selling of Rhodesian chrome illegal so that a purchaser would necessarily be a party to an illegal transaction.⁴³⁾ It
declared/...

39) The Times, 18th December, 1965, p. 5(e)

40) Southern Rhodesia (British Nationality Act, 1948) Order, 1965. See too Le Roux, note 3) supra, p. 54.

41) Reserve Bank of Rhodesia Order, 1965. The purpose of this order was to enable the London-based Directors of the Bank to obtain control of Rhodesian assets abroad. Both London and Salisbury were in agreement that Sir Sydney's Board took over nine million pounds of Rhodesian assets. The Times, 17th December, 1965, p.10(e). The Reserve Bank Order was reinforced by a further order, the Southern Rhodesia (Bank Assets) Order, 1965 which enabled the British Government to obtain information about assets held by banks in the United Kingdom on behalf of Rhodesian banks - whether the Reserve Bank of Rhodesia or not. See The Times, 15th December, 1965, p.4(e)(g).

42) Southern Rhodesia (Carriage of Petroleum) Order, 1965.

43) The Times, 21st January, 1966, p.9(g). Similar measures were introduced prohibiting the export of tobacco and sugar from Rhodesia and the sale of tobacco and sugar in Rhodesia with a view to its being exported. Such contracts of sale are void and any purchase price paid cannot be recovered. Ibid., 8th February, 1966, p.8(b); 18th March, 1966, pp. 10(f)(g), 12(a).

declared all contracts relating to the exportation or importation of any prohibited product void retrospectively.⁴⁴⁾

In many of the above instances, the United Kingdom is making law for Rhodesia which it (the United Kingdom) would have recognized by other states as the municipal law of Rhodesia.⁴⁵⁾

The basis of United Kingdom authority to take constitutional measures, such as those outlined above, in relation to Rhodesia is its claim to be the sovereign authority over Rhodesia both in constitutional and international law.⁴⁶⁾ Whether or not its constitutional claims are correct, the taking of the above measures cannot be illegal in international law for the simple reason that the United Kingdom does not recognize Rhodesia.⁴⁷⁾ Any dispute about these measures is at most a constitutional matter between the United Kingdom and Rhodesia⁴⁸⁾ and is no concern of international law as Rhodesia has no effective international personality against the United Kingdom.

(b)/...

44) The Times, 22nd January, 1966, p.7(f).

45) In this it would appear to have achieved some measure of success. Thus the State Department in Washington stated that it would accept the authority of the London-based Board of Directors of the Reserve Bank of Rhodesia under Sir Sydney Caine. The Times, 10th December, 1965, p. 19(b). The United States, France, and Italy advised their citizens to comply with the British Order prohibiting the importation of oil into Rhodesia. The Times, 21st December, 1965, p.4 (b).

46) The United Kingdom is the near-universally recognized sovereign over Rhodesia in international law. Supra, pp. 365-366. For a synopsis of the constitutional position see supra, pp. 335-338.

47) Supra, p. 339.

48) The Times, 17th December, 1965, p. 10(b); Sammut v. Strickland [1938] A.C. 678 at 697. J.E.S. Fawcett, "Treaty Relations of British Overseas Territories" (26) B.Y.I.L. 1949, p. 86 at pp. 89-90. See too further authorities quoted ibid., pp. 90-91.

(b) Acts which are objectively infringements of norms of international law.

The United Kingdom has not recognized Rhodesia. The latter therefore has no effective personality against it and no international relationship exists between the two. Hence acts which would normally be infringements of international law may be performed by the United Kingdom against Rhodesia without any international tort being committed. Thus the suspension of the Ottawa Agreement, 1932, governing Britain's trade relations with Rhodesia cannot be illegal.⁴⁹⁾ The diversion of a tanker⁵⁰⁾ carrying oil which had been paid for by Rhodesia was not illegal. To take an extreme example, not even armed invasion of Rhodesia by the United Kingdom would be an international tort against the former.⁵¹⁾ The United Kingdom could take such action unilaterally. It would not require any form of authorization from the Security Council of the United Nations, or any other body. In this, the United Kingdom is in a different position from that of other states. In international law no other state could legally invade Rhodesia without the authorization of the United Kingdom or the Security Council of the United Nations. The

reason/...

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- 49) The Times, 12th November, 1965, p. 12(a). Apart altogether from lack of Rhodesian personality, there is yet another reason why the suspension of the agreement is not illegal in international law. The Agreement in question is in all probability not a treaty since the intention to create international obligations would normally be excluded by the operation of the inter se doctrine operating between members of the Commonwealth, and certainly so in 1932 when the doctrine was stronger. On the inter se doctrine see infra, pp. 722-728.
- 50) The Times, 20th December, 1965, p. 6(f). This diversion took place before S.Res. 221 (1966).
- 51) The British Prime Minister, Mr. Wilson, was therefore correct in international law when he asked how it could possibly be an act of war to send British troops to British territory. The Times, 2nd December, 1965, p.12(c). There was a possibility that such an armed invasion might have taken place if Rhodesia had cut off the power supply from Kariba to the Zambian copperbelt. Ibid., p. 8(f)(g).

reason is that United Kingdom sovereignty over Rhodesia is recognized by practically every other state. Hence invasion without proper justification would be an infringement of United Kingdom territorial sovereignty.

(2) Special competences against third states in relation to Rhodesia.

Naturally the United Kingdom has the competence to do all things against other states which are objectively lawful in international law, e.g. repel an invasion of Rhodesia by the forces of some other state. Conversely the United Kingdom has no competence to disregard international law in its treatment of another state in relation to Rhodesia, e.g. it would be illegal for the United Kingdom to use Rhodesian territory as a basis for launching an armed attack against some other state.

There are however, three special cases which merit discussion because in these cases the United Kingdom has special competence, by way of exception, to take action against other states which would prima facie appear to be a violation of international law. These special competences were created by authorization of the Security Council of the United Nations acting under Chapter VII of the Charter. The competences in question are: (a) competence to conduct the 'Beira Blockade'; (b) competence to arrest and detain the Joanna V.; (c) competence to rescind certain agreements.

(a) Competence to conduct the 'Beira Blockade'.

On 20th November, 1955, the Security Council of the United Nations passed a resolution in which it

"8./...

- "8. Calls upon all states to refrain from any action which would assist and encourage the illegal régime, and, in particular, to desist from providing it with arms, equipment and military material, and to do their utmost in order to break off economic relations with Southern Rhodesia, including an embargo on oil and petroleum products;
9. Calls upon the Government of the United Kingdom to enforce urgently and with vigour all the measures it has announced as well as those mentioned in paragraph 8 above." 52)

Pursuant to the petroleum embargo, the United Kingdom commenced a patrol of the Mozambique Channel with the object of persuading ships bringing oil for Rhodesia to Beira, not to do so. Thus unconfirmed reports state that a Liberian oil tanker intending to discharge oil at Beira was intercepted and persuaded to change course by two long-range British bombers and a British warship.⁵³⁾ On 15th March, 1966, the Malagasy Republic agreed to give Britain air facilities to support the oil embargo. Permission was granted on condition that use of the facilities should be limited to the application of the oil embargo. Britain gave the necessary assurance.⁵⁴⁾ The first of a task force of R.A.F. aircraft arrived at Majunga on 16th March, 1966 to maintain surveillance over shipping approaching the Mozambique coast.⁵⁵⁾ The Ark Royal and her escorts interrogated a considerable number of ships while patrolling the Mozambique Channel.⁵⁶⁾ The number accosted was estimated at between fifty and a hundred.

The/...

52) S. Res. 217 (1965).

53) The Times, 28th January, 1966, p.12(g).

54) The Times, 16th March, 1966, p.12(a).

55) Ibid., 17th March, 1966, p. 10(g).

56) Ibid.

The South African Transporter and the British Saldura, which was under Charter to SAFMARINE were approached by a British frigate between Beira and Durban and asked for their identity. The Company stated that this was normal international practice between naval and merchant ships on the High Seas,⁵⁷⁾ and denied a Durban report that the ships had been "buzzed" by low-flying aircraft.⁵⁸⁾ On 18th March, 1966 the Swedish Consul in Beira protested to the British Consul about the "buzzing" of a Swedish tanker, the Madeleine, but no protest was received from the Swedish Government.⁵⁹⁾ The British Government denied all "buzzing". Aircraft or naval vessels approached to identify merchant ships but did not simulate mock attacks to divert such ships.⁶⁰⁾ Naval vessels and aircraft had instructions to navigate or fly past the stern to read the name of the ship and the port of registration.⁶¹⁾ The London Ministry of Defence denied boarding South African ships. The British role was solely to identify ships in the Beira area.⁶²⁾ Dr. Verwoerd, the South African Prime Minister, said that he hoped ships flying the South African flag would not disclose their cargoes if asked to do so. He said Britain was patrolling apparently to make contact with ships and find out what cargoes they carried. This, he said, was not in accordance with international usage.⁶³⁾

In/...

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- 57) Such action is in accordance with international law which allows men-of-war a Right of Flag Verification to establish the identity of merchant ships on the High Seas. If a doubt remains the ship in question may even be boarded and searched. See Schwarzenberger, Manual, p. 136.
- 58) The Times, 17th March, 1966, p.10(f).
- 59) Ibid., 19th March, 1966, p.8(g). 60) Ibid., 22nd March, 1966, p.10(g).
- 61) Ibid., 19th March, 1966, p. 8(g). 62) Ibid., 21st March, 1966, p.10(f).
- 63) Ibid., 23rd March, 1966, p.10(g) It is submitted that the Royal Navy would not act wrongfully if they merely requested a foreign ship to disclose its cargo for it is difficult to see this as interference with shipping. If, however, the ship in question refused to disclose its cargo, the Royal Navy could take no further action without committing an international tort.

In early April, 1966 the Joanna V declined to obey a request from a British frigate, the Plymouth, to change destination and put into Beira fully laden with crude oil from the Persian Gulf.⁶⁴⁾ Another Greek tanker, the Manuela, was sighted by British aircraft approaching the Mozambique Channel, six hundred miles from Beira and believed to be carrying 16,000 tons of Iranian crude oil destined for Rhodesia.⁶⁵⁾ The basic rule of the law of the sea is, that in time of peace the vessels of a particular country may not seize or otherwise forcibly interfere with the ships of other nations on the High Seas.⁶⁶⁾ Such interference may also amount to the use of force contrary to the provisions of Article 2(4) of the Charter of the United Nations.⁶⁷⁾ It is apparent then that if the Joanna V and the Manuela insisted on breaking the embargo by supplying oil to Rhodesia, there was no lawful way in which the United Kingdom could unilaterally⁶⁸⁾ prevent this.⁶⁹⁾ To remedy this and to permit the United Kingdom to take unilateral action against foreign shipping, the matter was referred to the Security Council of the United Nations which/...

64) Chayes, II, p.1357.

65) Ibid.

66) Akehurst, p. 223; Chayes, II, p.1366; Geneva Convention on the High Seas, 1958, Article 2.

67) Akehurst, pp. 313-314; Sorensen, pp. 745-746. See too, J.E.S.Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p.103 at p.119. Fawcett would possibly regard such action as 'armed force' even where minimal but he is discussing such 'armed force' in the context of Article 42 of the Charter and not with reference to Article 2(4).

68) Bilateral action might however be a possibility. With the consent of the flag-state, the Royal Navy might take action. Such interference by consent would be lawful.

69) Fawcett, note 67) supra, p.119 submits, and with respect correctly, that trading with an illegal regime is not unlawful intervention such as would entitle the lawful government to take counter-action in the form of interference with shipping on the high seas. Note however that France did do this during the Algerian war of independence. See Chayes, II, p. 1368.

which passed a resolution calling upon the Government of the United Kingdom

"to prevent by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia..." 70)

The powers of the Security Council under Chapter VII of the Charter are treaty powers which bind the parties to the treaty, the members of the United Nations. Thus when the Council acts it may create exceptions to the law which would otherwise be applicable, but only as between member states of the United Nations.⁷¹⁾ As a result of the resolution, member states of the United Nations are liable to have their shipping interfered with by the United Kingdom in accordance with the above authorization and cannot protest at such treatment. In the absence of such authorization interference would be illegal. On the High Seas, it would constitute an infringement of the freedom of the seas.⁷²⁾ If it took place in Portuguese territorial waters, it would constitute both an infringement of Portuguese territorial sovereignty and a tort against the flag-state of any ship which was interfered with in such a way.⁷³⁾

The resolution in question permits these "prima facie illegalities"⁷⁴⁾ and it would appear to have been necessary to call
in/...

70) S. Res. 221 (1966).

71) Fawcett, note 67) supra, p. 120 says specifically that the powers of the Security Council under Chapter VII may be among the treaty powers envisaged in the exception to the High Seas Convention, Article 22.

72) Akehurst, pp. 223, 227, 263; Sorensen, pp. 316, 336; Geneva Convention on the High Seas, 1958, Article 2.

73) Akehurst, p. 210; Sorensen, pp. 316, 336. Such action could not fall within the confines of the right of innocent passage the only exception to exclusive sovereignty over the territorial sea. Akehurst, pp. 210-211; Sorensen, pp. 336-337.

74) Akehurst, p. 263; C.J.R. Dugard, "United Nations Resolutions on Apartheid" (83) S.A.L.J., 1966, p. 44 at p. 57.

in aid the powers of the Security Council to create an exception justifying such action.⁷⁵⁾ It is therefore submitted that the United Kingdom needs such authorization to act within the law despite the statement of Ambassador Morozov of the Soviet Union which would appear to dispense with the necessity for such justification.⁷⁶⁾ The statements made by Lord Caradon for the United Kingdom and Ambassador Goldberg for the United States would appear to reflect international law more correctly. The former said:

"I therefore ask the Council now, by adopting the draft resolution I propose, to enable the United Kingdom to carry out without fear of illegality the responsibilities which in the Rhodesian situation are ours." 77)

Ambassador Goldberg said:

"I should like to say to this Council that what the United Kingdom is asking for in terms of substance is not by any means inconsequential. On the contrary, it is one of the gravest and most far reaching proposals that has been made to this Council.... The question of intercepting vessels on the High Seas, the question of arresting and detaining them, is a matter that has a long history in the field of international law. Indeed if we refer to history, my own country once went to war with Great Britain on the question of arresting and detaining

vessels /...

75) Rosalyn Higgins, "International Law, Rhodesia and the United Nations" (23) The World Today, 1967, p. 94 at p. 96; Fawcett, note 67) supra, p. 117. Note, however, that though John W. Halderman "Some Legal Aspects of Sanctions in the Rhodesian case" (17) I.C.L.Q., 1968, p. 672 at p. 687 considers that S. Res. 221 (1966) justifies interference with ships on the High Seas; he says that it is unnecessary because this was permitted by the earlier S. Res. 217 (1965). This is a doubtful proposition. The latter resolution was only a recommendation. Higgins, op.cit., p. 96; John Hopkins, "International Law - Southern Rhodesia - United Nations - Security Council", Cambridge Law Journal, 1967, p. 1 at pp. 2-3. It is very much open to question whether a mere recommendation can render an otherwise unlawful act lawful. See Fawcett, note 67) supra, p. 121; Leo Gross, "Voting in the Security Council; Abstention in the Post-1965 Amendment Phase and its impact on Article 25 of the Charter" (62) A.J.I.L., 1968, p. 315 at p. 334. For discussion of this, see Dugard, note 74) supra, pp. 57-59.

76) Chayes, II, p. 1363.

77) Ibid., p. 1359.

vessels on the High Seas. We are asked in the Security Council, and it should be a matter of deep consideration and concern for all of us, to put our sanction upon what will be a rule of international law - that when this Council acts vessels on the High Seas can be arrested and detained in the interest of the international law which we will be making here today, if we adopt the draft resolution as I hope we will do. It is not an easy decision for my Government to give its support to a resolution of this character, both in the light of our history and traditions and in the light of all the far-reaching implications that such a step as we are asked to take may envisage." 78)

It is submitted, that for the sake of accuracy, three qualifications must be made to Ambassador Goldberg's statement.

(i) When the Council acts, it is only the ships of member states of the United Nations which may be so arrested and detained. Article 2(6) of the Charter is res inter alios acta as far as non-members are concerned.

(ii) The Security Council, in passing S. Res. 221 (1966) was not creating law. The competence to authorize the action in question is inherent in the Charter of the United Nations⁷⁹⁾ and has existed since the inception of the Organization.

(iii) Ambassador Goldberg does not go far enough. Not only may vessels on the High Seas be intercepted, arrested[^] and detained when the Council acts, but also vessels within territorial waters, provided that the waters in question are those of a member state of the United Nations and that the violation of such waters is clearly authorized by the Council.⁸⁰⁾

S. Res./...

78) Ibid., p. 1362.

79) Articles 25, 39, 41, 42.

80) As it would appear to be under S. Res. 221 (1966).

S. Res. 221 (1966) therefore authorizes the United Kingdom to conduct the 'Beira Blockade'. It only remains for us to examine whether the Security Council, in passing this resolution, exercised its powers under Chapter VII of the Charter property.⁸¹⁾ For if not, the Resolution cannot create the necessary competence to conduct the 'blockade'. In this respect three questions arise for discussion, two of which may be dealt with very briefly. Firstly, have the necessary formalities been complied with by the Council? Secondly, has the necessary determination been made under Article 39 of the Charter? Thirdly, can the resolution be brought within the terms of the Charter itself?

(i) Formalities.

Article 27 (3) of the Charter of the United Nations required the concurring votes of the five permanent members of the Security Council for the taking of decisions. France and the Soviet Union abstained on S.Res. 221 (1966). The point has become of academic interest since 29th May, 1968 because S.Res. 221 (1966) has been affirmed in a resolution of that date and in subsequent resolutions in which all the permanent members of the Council concurred.⁸²⁾

(ii) Determination under Article 39.

A determination of a threat to the peace is a condition precedent/...

81) Fawcett, note 67) supra, p. 120.

82) S. Res. 253 (1968); S. Res. 277 (1970); S.Res. 288 (1970). In any event, S. Res. 221 (1966) was probably initially valid in itself as the Charter had probably been revised de facto by practice so as to permit the passing of Security Council resolutions where a permanent member abstains. See Schwarzenberger, Manual, pp. 167-168. For a discussion of this question see Gross, note 75) supra, p. 315 et seqq.

precedent to the taking of important measures under Chapter VII, both by the Security Council itself and by United Nations members. The determination of a threat to the peace under Article 39 is conclusive as far as members are concerned because under the Charter they have made such determinations the exclusive function of the Security Council. This has some of the characteristics of a judicial decision in that it is definitive of a factual situation and must be accepted by member states, including interested parties.⁸³⁾

In relation to the 'Beira Blockade', the Security Council

"Considering that such supplies (of oil) will afford great assistance and encouragement to the illegal regime in Southern Rhodesia, thereby enabling it to remain longer in being.

1. Determines that the resulting situation constitutes a threat to the peace."⁸⁴⁾

There has thus been a determination of an existing threat to the peace⁸⁵⁾ as required by Article 39 and the powers bestowed by Articles 41 and 42 may thus be exercised.

(iii) Charter basis of the resolution.

Fawcett says that there is some doubt as to whether the powers/...

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- 83) See Fawcett, note 67) supra, pp. 116-117. What matters therefore is not the existence of a threat to the peace but a determination that there is a threat to the peace by the Council. Fawcett goes on to point out that the judicial analogy should not be taken too far by requiring all the conditions of the judicial process (as suggested by Portugal) viz. reasons to be given, an advisory opinion to be sought. Ibid., p. 117.
- 84) S.Res. 221 (1966).
- 85) Higgins, note 75) supra, p. 96, points out however that it is not clear if the "resulting situation" deemed to be a threat, means the situation if the oil had flowed along the pipeline, or the situation arising from the possibility that it might so flow, whether it occurred or not.

powers of the Council were properly exercised in relation to the provisions of Chapter VII of the Charter⁸⁶⁾ and he examines the various provisions of Chapter VII to see whether S.Res. 221 (1966) can be based on any of these provisions.⁸⁷⁾ The following are the possible bases.

(A) Article 41.

Fawcett considers that as the resolution authorizes the use of force to prevent ships from reaching Beira, it probably does not fall under Article 41 which deals with 'Measures not involving the use of armed force'.⁸⁸⁾

(B) Article 42.

Fawcett considers that it is difficult to provide a basis for the action in Article 42 because the Security Council has not tested the efficacy of measures taken under Article 41.⁸⁹⁾ The reason is, that it is a condition precedent to the taking of measures involving the use of armed force under Article 42 that the Council should "consider that measures provided for in Article 41 (i.e. those not involving the use of armed force) would be inadequate or have proved to be inadequate".

(C)/...

86) Ibid., p. 120; See too Hopkins, note 75) supra, p.3.

87) Fawcett, note 67) supra, pp. 118-121.

88) Ibid., p. 119. However, he qualifies this by saying the armed force envisaged in Article 41, and applicable under Article 42, might have to be of a certain intensity and scale, which naval action against ships (he is in fact dealing with naval action against the Manuela) did not reach. If this were so, Article 41 could provide a basis. Hopkins, note 75) supra, p. 3 considers that Article 41 cannot provide a basis.

89) Fawcett, note 67) supra, p. 120.

(C) Article 40.

This article provides for the taking of provisional measures deemed necessary or desirable. Fawcett again considers that this article cannot provide a basis for S.Res. 221 (1966) because the provisional measures contemplated by Article 40 are not measures taken by the Security Council itself but are measures recommended by the Security Council to the parties to the conflict (or potential conflict).⁹⁰⁾

(D) Article 39.

Under this Article, the Security Council can make recommendations. Fawcett, however, points out, and with respect correctly, that if S.Res. 221 (1966) is to be regarded as a recommendation, it is difficult to see how it can authorize the commission of an act which would otherwise be unlawful.⁹¹⁾ Hence, if S.Res. 221 (1966) is merely a recommendation under Article 39, it cannot create a competence in the United Kingdom to divert shipping from Beira.

In the light of the above difficulties, Fawcett submits that in the selection of a Charter basis for naval action, the choice lies between Articles 39 and 42 but that there are serious difficulties with either and the conclusion may perhaps be that the competence in question is anomalous and outside the Charter.⁹²⁾

It/...

90) Ibid.

91) Ibid., pp. 120-121.

92) Ibid., p. 121.

It is submitted, that though there may be difficulties in placing the competence delegated to the United Kingdom either under Article 41 or under Article 42, there should be no difficulty in finding a legal basis for the competence in the combined provisions, if both Articles are read together. Let us examine the content of the competence. It is "to prevent by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia". Clearly the Council had in mind two types of activity by the United Kingdom: (A) the use of force to prevent shipping arriving at Beira where necessary; (B) the use of measures not involving the use of force to prevent ships arriving at Beira, where these measures would be effective.

Obviously, the latter kind of activity can fall fairly and squarely under Article 41. It is submitted too that the former type of activity can find a legal basis in Article 42. The Council authorized the use of force without mentioning Article 42. However as Article 42 is the only Article in Chapter VII which authorizes the Security Council to utilize force, the Council must, of necessity, have been acting under its powers in Article 42. It is clear too, that in authorizing force, the Council had in mind circumstances in which the measures authorized under Article 41 would be inadequate to prevent shipping reaching Beira. For the Council only authorized force if necessary. Where it is necessary for the United Kingdom to use force to prevent ships reaching Beira, it

is obvious that measures not involving the use of armed force authorized by Article 41 are inadequate. Hence the necessary precondition that the Security Council must have considered such measures to be inadequate is present. Indeed it is inherent in the authorization to use force if necessary. The above submissions that the Council, in authorizing force, acted under Article 42 and that the conditions stipulated by the latter article were present; that in the result the authorization to use force has a legal basis in Article 42, find support in the presumption that the resolutions of international organizations are valid both from a material and formal point of view.⁹³⁾

The overall conclusion is that the competences of the United Kingdom in the conduct of the 'Beira Blockade' are firmly based on Articles 41 and 42 of the Charter and have been validly created by S.Res. 221 (1966).

In the exercise of its competence, the United Kingdom took various measures which will now be briefly described.

H.M.S. Berwick intercepted the tanker, Manuela, on the High Seas and informed the Master that 'in view of the United Nations resolutions, the tanker could not be allowed to proceed to Beira, and that the British Government had authority if necessary to use force to prevent this'. The master demurring, a naval armed party was put on board and remained until the master agreed to change course for Laurengo Marques. The Manuela actually sailed for Durban
and/...

93) See Gross, note 75) supra, p. 325. See too the presumption in favour of law-abidingness and regularity of acts. Schwarzenberger, I, pp. 120, 429, 647.

and the Berwick accompanied her south for a day. South Africa did not permit the Manuela to discharge her oil at Durban.⁹⁴⁾ The actions of the Royal Navy here can be justified on two grounds. (i) The flag-state of the Manuela, Greece, consented to such action. The Under-Secretary for Foreign Affairs of Greece upheld the British action, and asserted that Greece "always respected and honoured decisions of the United Nations".⁹⁵⁾ (ii) The United Kingdom was authorized by S.Res. 221 (1966) to take such action and Greece is a member state of the United Nations. Relying on this ground, the United Kingdom could take action whether or not the Greek Government consented but would have to act strictly within the terms of the authorization. Thus, the Manuela should have been "reasonably believed to be carrying oil destined for Rhodesia" if the United Kingdom is to rely on this second ground of justification. In 1967 four shots were fired across the bow of a French tanker, the Artois. Not until clearance had been obtained from London was the Artois permitted to proceed to Beira.⁹⁶⁾ France, the flag-state, does not appear to have consented to such interference but for reasons just given, the action is justified by the authorization of the Security Council as France is a member state of the United Nations.

The above instances are mainly of historical interest today.

However, the 'Beira Blockade' continues. In carrying out the _____ blockade/...

94) Fawcett, note 67) supra, p. 118; Chayes, 11, p. 1364.

95) Chayes, 11, p. 1364.

96) Ibid.

blockade, the Royal Navy continues its patrols of the Mozambique Channel. It has developed a clearance system for "innocent vessels" which regularly deliver oil for Mozambique. Vessels whose names are not on the list are stopped.⁹⁷⁾ It is submitted that this action is reasonably within the authorization of the Security Council to prevent oil arriving at Beira for Rhodesia. However, in the final analysis, the individual circumstances pertaining at the time of any particular interception is decisive as to the legality of action taken. If these circumstances create a reasonable belief that the ship is carrying oil to Beira for Rhodesia, such action as is necessary to prevent that is justified. On receiving a reasonable explanation from an intercepted ship, what was formerly a 'reasonable belief' might no longer be so, and in such circumstances the Royal Navy would be obliged to desist from interfering with the ship in question.

We are now in a position to summarize the competence of the United Kingdom to conduct the 'Beira Blockade'. This we shall do by considering the characteristics of the authorization of the Security Council.

(1) The authorization is qualified.

It is not a blanket authorization. Action may only be taken in certain circumstances, viz. on the approach of a vessel reasonably believed to be carrying oil to Beira for Rhodesia. Further, force may only be used to prevent such a ship reaching Beira where necessary.

(ii)/...

97) Ibid.

(ii) The authorization is preventive.

It is an authorization to prevent certain ships reaching Beira. It does not authorize interference with ships which have left Beira and which might perhaps have broken the blockade and thus succeeded in depositing oil at Beira for Rhodesia.⁹⁸⁾ Interference with such ships could only take place with the consent of the flag-state.

(iii) The authorization is permissive but not obligatory.

The Security Council has called upon the United Kingdom to take action. Hence not only is the United Kingdom competent to maintain the 'blockade' but prima facie it would even appear to have an obligation to do so, as the language used is mandatory.⁹⁹⁾ Prima facie there would appear to be a decision by the Security Council under Chapter VII which is binding on the United Kingdom in terms of Article 25. There is however one vital factor which renders what is an apparently obligatory decision not binding. S.Res. 221 (1966) calls upon the United Kingdom to use force. However, before any member of the United Nations is obliged to use force in pursuance of collective security measures directed by the Security Council, the provisions of
Article 44/...

98) It is true that paragraph 5 of S. Res. 221 (1966) does "empower the United Kingdom to arrest and detain the tanker known as the Joanna V upon her departure from Beira in the event her oil cargo is discharged there". But this authorization does not extend to other ships and is now only of historical interest. The legal issues connected with the Joanna V will shortly be discussed.

99) For a discussion of mandatory language in Security Council resolutions imposing obligations see the writer, "Rhodesia; A Duty not to Recognize?" (33) T.H.R.-H.R. 1970, pp. 158, 159, 163-164; Akehurst, p. 262.

Article 44 must be complied with as a precondition. But the provisions of Article 44 cannot be complied with unless an agreement such as is envisaged by Article 43 has been concluded. No such agreement has been concluded and hence the United Kingdom is not obliged to observe the decision of the Council calling upon it to use force.¹⁰⁰⁾

Since the 'Beira Blockade' is not obligatory for the United Kingdom, the latter could discontinue it at any stage without breach of its obligations as a member state of the United Nations.

(iv) The authorization is exclusive.

Only the United Kingdom has been authorized to interfere with foreign shipping.¹⁰¹⁾ No other state may do so. Customary rules continue to bind other states.

(v) The authorization is relative.

The United Kingdom cannot take action against the ships of non-members of the United Nations.¹⁰²⁾ Should the Royal Navy wish to interfere with such ships, the consent of the flag-state would be required.

(vi)/...

100) See Halderman, note 75) supra, p. 687 who says that S.Res. 221 (1966), though not obligatory in the absence of an Article 43 agreement, does justify interference with ships.

101) See Higgins, note 75) supra, p.96.

102) It is true that Article 2(6) provides that the Organization shall ensure that non-members act in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security. It can, however, be cogently argued that even Article 2 (6) itself is res inter alios acta as far as non-members are concerned. See Sorensen, p. 77, 79; the writer, "Rhodesia and the United Nations: the Lawfulness of International Concern - a Qualification" (2) C.I.L.S.A., 1969, p. 454 at pp.460-461.

(vi) The authorization is not one to conduct a blockade.

The 'Beira Blockade' is not a blockade in the strict sense at all because it is not directed against the coastal state involved. No goods for Portugal are being stopped.¹⁰³⁾

(vii) The authorization is unique in a number of ways.

It is unique in expressly authorizing the use of force by a state outside its jurisdiction,¹⁰⁴⁾ a use of force which would otherwise be unlawful.¹⁰⁵⁾ Interception on the High Seas has traditionally been limited to wartime but the Security Council may authorize a variety of measures which states may only exercise in wartime and this is such a case.¹⁰⁶⁾

(b) Competence to arrest and detain the Joanna V.

On April 5th, 1966 the Joanna V put into Beira fully laden with crude oil from the Persian Gulf. Her master had declined on the previous day to obey a request from the British frigate Plymouth to change his destination. The Joanna V was a Greek tanker. It is submitted that the action taken by the Royal Navy on 4th April, 1966 was quite legitimate. A mere 'request' to a merchant ship to alter direction cannot be construed as interference, for it does not interfere with freedom of navigation.¹⁰⁷⁾

The/...

103) See Higgins, note 75) supra, pp. 96-97.

104) Not only may such force be used outside jurisdiction on the High Seas but it may also be used within the territorial waters of other member states of the United Nations, supra, p. 637.

105) Fawcett, note 67) supra, p. 118.

106) Higgins, note 75) supra, p. 97.

107) Oppenheim, 1, p.542.

The Joanna V had been instructed by the Greek Government not to discharge oil for Rhodesia.¹⁰⁸⁾ While anchored at Beira, she was deprived of her Greek registration on the grounds that she had violated the Royal Decree which barred Greek ships from carrying oil to Rhodesia.¹⁰⁹⁾ On such deprivation Greece would cease to have a legal interest in the events which occurred to the Joanna V. It was no longer the flag-state and would have no right of diplomatic protection.¹¹⁰⁾ The ship was thereupon re-commissioned as Panamanian¹¹¹⁾ but before the Joanna V left Beira and within one week of her Panamanian registration, this latter registration was also withdrawn.¹¹²⁾ On the 9th April, 1966 as we have seen, the Security Council passed S.Res. 221 (1966). Paragraph 5 of this resolution empowered the United Kingdom

"to arrest and detain the tanker known as the Joanna V upon her departure from Beira in the event her oil cargo is discharged there."

The Joanna V left Beira without discharging oil, so that the condition for action against her did not arise.¹¹³⁾ The competence to arrest and detain the Joanna V is only of historic interest/...

108) Higgins, note 75) supra, p. 96.

109) Chayes, II, p. 1357. See too Higgins, note 75) supra, p. 96; Fawcett, note 67) supra, p. 118. Note that the latter says that it was the Manuela whose registration was cancelled, but it was the Joanna V.

110) See Akehurst, p. 222.

111) Chayes, II, p. 1357.

112) Ibid., p. 1364. Thus the question of Panamanian protection never arose but had it done so it would have raised the interesting question of the right of a flag-state to protect a ship where the flag is a "flag of convenience". See Geneva High Seas Convention, 1958, Article 5; M.S. McDougal, "The Maintenance of Public Order at Sea and the Nationality of Ships" (54) A.J.I.L., 1960, p. 25 at pp. 36-40; La Belgique et le droit de la mer, Louvain & Brussels, 1969, pp. 16-28.

113) Fawcett, note 67) supra, p. 118.

interest now as it was a special competence created for one specific instance in time only.¹¹⁴⁾

(c) Competence to rescind certain agreements.

The United Kingdom has been requested by the Security Council to rescind or withdraw any existing agreements on the basis of which foreign consular, trade and other representation may at present be maintained in or with Rhodesia.¹¹⁵⁾ This, it is submitted, authorizes, but does not compel the United Kingdom to unilaterally terminate such agreements. In international law, the unilateral termination of a treaty, apart from certain specific instances,¹¹⁶⁾ is an international tort.¹¹⁷⁾ The provision is therefore interesting because it increases the competence of the United Kingdom by allowing it to commit what would otherwise be a tort by the renunciation of a valid treaty. The other party to the treaty must be a member state of the United/...

114) Had the Royal Navy arrested and detained the Joanna V, its action could be justified on two grounds. (i) Authorization of the Security Council under S.Res. 221 (1966) could provide justification. Here it would be necessary that the Joanna V should have discharged her cargo of oil at Beira. (ii) Arrest and detention could be justified on the ground that when the Joanna V lost her registration she was not under the protection of any state. Higgins, note 75) supra, p.96 says that when the Greek Government withdrew its flag from the Joanna V, it was indicating to the world that the ship no longer benefited from its legal protection. Fawcett, note 67) supra, pp. 118-119 says, however, that such a ship is not res nullius and that the owners or charterers of a ship or its cargo could invoke the protection of their own state of nationality.

115) S. Res. 277 (1970) paragraph 10.

116) Material breach of a treaty gives the other party the option of terminating unilaterally. Sorensen, p. 226; Akehurst, p. 176; Vienna Convention on the Law of Treaties, 1969, Article 60 (1). Under the latter, Articles 61, 62, supervening impossibility of performance and fundamental change of circumstances (rebus sic stantibus) give such options in certain cases. In customary law, the existence of a unilateral right of termination in both these cases was controversial. See Akehurst, pp. 178-179; Sorensen, p. 234.

117) Akehurst, p. 173; Sorensen, p. 226; Vienna Convention on the Law of Treaties, 1969, Article 42(2).

United Nations. As such the latter must submit to the exercise of this competence bestowed by the Security Council in a valid and binding manner pursuant to Chapter VII of the Charter of the United Nations.¹¹⁸⁾

(3) Competence to grant independence to Rhodesia.

As far as international law is concerned, there can be no doubt that a mother state is competent to grant independence to a colony or other dependency or to a part of the territory.¹¹⁹⁾ There can be no doubt that the United Kingdom claims to be such a mother state exercising sovereignty over Rhodesia.¹²⁰⁾ This claim to sovereignty over Rhodesia is recognized by practically all other states.¹²¹⁾ It cannot/...

118) In S. Res. 277 (1970) the Security Council specifically acts under Chapter VII of the Charter. Article 25 of the Charter provides that members agree to accept and carry out the decisions of the Council in accordance with the Charter.

119) O'Connell, I, p. 351. For several examples of such grants see White-man, II, pp. 133-239. Fawcett, note 67) supra, p. 105 says that the grant of independence is an exercise of sovereign power. The mother state can even grant independence to the colony without its consent and attach constitutional provisions to the grant of independence to which the government of the colony objected. He says however that perhaps the latter is not possible if the matters in question fall within the legislative competence of the colony which is protected by a convention in statutory form. But if the convention has not been reduced to statutory form, then the mother state may take such action. This probably represents the constitutional position. But if we view the matter from the point of view of international law, we must make the following observation. Should a mother state grant independence to a colony, then whether the independence constitution bestowed met the approval of the government of the colony or not, there would be nothing to prevent the colony from afterwards altering the constitution, either constitutionally or by unconstitutional means. In the absence of a specific treaty provision between mother state and ex-colony guaranteeing the constitution (as in the case of Cyprus - see Akehurst, p. 274) there is little the mother state could legally do about such alterations.

120) Supra, pp. 335-338.

121) Supra, pp. 365-366. We previously submitted that all states except South Africa recognized the claim of the United Kingdom to complete sovereignty. Supra, pp. 365-366. We submitted that South Africa recognized the position as it was immediately before U.D.I., viz. a division of personality between the United Kingdom and Rhodesia, with primary personality in the former and a limited personality in the latter. Supra, pp. 370-372. From this we may conclude that South Africa at least recognizes the United Kingdom as the only other state with an interest in the territory and which could, therefore, pave the way for making Rhodesian personality complete by a grant of independence.

cannot, therefore, be doubted that the United Kingdom has the competence to grant independence to Rhodesia.¹²²⁾ Were such a grant to be made, other states need not necessarily recognize Rhodesian independence.¹²³⁾

Finally, the United Kingdom would also have the competence to abandon the territory of Rhodesia and thus lose little to it by dereliction. This would require actual abandonment and an intention to give up sovereignty - abandonment sine spe redcundi.¹²⁴⁾ While the first requirement for dereliction is probably present since the United Kingdom has no physical presence or control in Rhodesia, the second requirement, the intention to abandon, is certainly not present.

SECTION IV

SPECIAL OBLIGATIONS OF THE UNITED KINGDOM.

In addition to the obligations which every member state of the United Nations owes in relation to Rhodesia,¹⁾ the United Kingdom also has individual or special obligations. It is not proposed to discuss the former category of general obligations because they do not appear to relate to the status of the territory, but rather to the general obligations of member/...

122) See for example the attitude of the Commonwealth Prime Ministers, who, while acknowledging that the Rhodesian problem was one of wide concern to Africa, the Commonwealth and the world, nevertheless reaffirmed that the authority and responsibility for guiding Rhodesia to independence rested with Britain. The Times, 13th January, 1966, p.7(b). Though the United Kingdom has the competence to grant independence it also has obligations in relation to the exercise of its powers here. These obligations are discussed in the next Section on the obligations of the United Kingdom..

123) There is no duty to recognize. Supra, pp. 285-295.

124) Oppenheim, I, pp. 530-531.

1) See S.Res. 221 (1966); S.Res. 232 (1966); S.Res. 253 (1968); S.Res. 277 (1970) in so far as they contain directions to the member states of the organization in general..

member states of the United Nations.²⁾ The special individual obligations which rest upon the United Kingdom do merit discussion in the context of status because of the fact that the United Kingdom is generally recognized as having sovereign authority over Rhodesia.³⁾

It is proposed to deal with the special obligations of the United Kingdom in the following categories: (1) obligations in respect of Rhodesian loans and public debt; (2) obligations as a member state of the United Nations; (3) obligations as a member state of the British Commonwealth of Nations.

(1) Obligations in respect of Rhodesian loans and public debt.

We saw previously that after U.D.I. the Rhodesian Government defaulted in paying interest on Southern Rhodesian loans. We also examined the vicarious responsibility of the United Kingdom for such default on the part of the Rhodesian Government and we concluded that the United Kingdom was not responsible. Here we enquire whether the United Kingdom has an obligation to pay such sums to aliens, not on the basis of vicarious responsibility, but in its own capacity as the recognized government of Rhodesia.⁴⁾

The/...

- 2) The duty not to recognize would appear to be exceptional here. It is a general duty incumbent on all members of the United Nations and yet it is vitally concerned with the question of status. Thus it has been discussed supra, pp. 295-333.
- 3) Supra, pp. 365-366.
- 4) Since South Africa continues to recognize the Government of Rhodesia as the Government of a dependency with limited international personality (supra, pp. 370-372) it follows that the United Kingdom is not the Government of Rhodesia as far as South Africa is concerned. Thus the United Kingdom cannot have an obligation to pay any such sums to bondholders who are South African citizens. South Africa would have to look to the Government of Rhodesia. Neither, of course, could the United Kingdom have an international law obligation to pay its own nationals. Any possible obligation here would be a matter of municipal law only.

The United Kingdom repudiated responsibility for payment of interest on Rhodesian loans⁵⁾ and on the Rhodesian public debt.⁶⁾ Mr. Arthur Bottomley said that even though the Southern Rhodesia Act, 1965 gave power to direct the payment of interest on Rhodesian public debt, the Government of the United Kingdom, though it had the power to make laws for Rhodesia and to exercise executive power, had not assumed the Government of that country and had not in any way succeeded either to the assets or to the liabilities of the Government of Southern Rhodesia. He continued:

"It is not for the British Government to intervene in a situation where interest payments of Rhodesian public debt in this country have been stopped as a result of the illegal actions of Mr. Smith and his colleagues in November." 7)

We must now examine whether the above repudiation of responsibility reflects the international law position.

The general principle is that a state is liable for loans and other contracts entered into by the central government, but it is not liable for loans and other contracts entered into by its political subdivisions.⁸⁾ One of the exceptions is where the subdivision is under the close control of the Central Government.⁹⁾ Akehurst applies these principles in the Rhodesian context and argues as follows:

S. 4(1) of the Southern Rhodesia (Constitution) Order, 1965 gives executive authority over Rhodesia to a United Kingdom Secretary of State. It is arguable that this places Rhodesia under such close control/...

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- 5) See Michael Akehurst, "State Responsibility for the Wrongful Acts of Rebels - An Aspect of the Southern Rhodesian Problem" (43) B.Y.I.L., 1968-1969, p. 49 at p.66.
 - 6) The Times, 15th December, 1965, p. 4(g).
 - 7) Ibid.
 - 8) Akehurst, note 5) supra, pp. 66-67 and authorities cited there.
 - 9) Akehurst, note 5) supra, p. 68 and authorities there cited.

control as to make the United Kingdom liable in international law for Southern Rhodesian contracts. The fact that the United Kingdom has made little attempt to exercise powers is irrelevant. It is legal control, and not its actual exercise, which counts.¹⁰⁾ Nor does it matter that the Order appears to be a brutum fulmen in Rhodesia. The United Kingdom cannot claim the powers in the Order and at the same time disclaim the responsibilities which accompany such powers.¹¹⁾ Akehurst then is of the view that the United Kingdom falls within the exception to the principle and is prima facie responsible on the basis of close control. It is submitted however, that the case for United Kingdom responsibility is even stronger than stated by Akehurst. By virtue of the Order in question, the United Kingdom must be taken to be the Government of Rhodesia and as such liable. The distinction between central government and political subdivision must fall away when the former abolishes the latter and assumes its position and powers. In other words this is not merely a case of close control by a central government over a political subdivision - this is a case of identification of the superior and subordinate body. A fortiori there is liability.¹²⁾ Added to the above is the fact that the/...

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- 10) Akehurst, note 5) supra, p. 68. See too the adverse comment of the Rhodesian Finance Minister, Mr. John Wrathall, on the British statement that the United Kingdom Government did not have the necessary authority in Rhodesian law for payment to be made on interest due on the Rhodesian public debt issued in London. The Times, 29th January, 1966, p. 7(f). It is indeed difficult to understand such an attitude in view of the comprehensive and all-embracing powers abrogated by the British Government under legislation passed after U.D.I. See supra, pp. 335-338.
- 11) Akehurst, note 5) supra, p. 68. See too the statement of Mr. Ian MacLeod. "If we say the Smith regime is illegal - and of course it is, we cannot go on to say it is only illegal for certain purposes when it happens to suit us". He was referring to the British Government's attitude that it had not assumed liability for payment of the stock interest. The Times, 15th December, 1965, p. 10(b).
- 12) See, for instance, the pertinent question posed by Mr. Reginald Paget. "Who is the customer of the Reserve Bank? Is it the Government of Rhodesia, and are not we the Government of Rhodesia?", The Times, 15th December, 1965, p. 10(c).

the United Kingdom actually took over control of Rhodesian assets situated abroad and thus even had some means at its disposal to discharge the obligations.¹³⁾

It is therefore submitted that the United Kingdom is responsible in international law for payment of sums due on the Southern Rhodesian loans. It is directly liable in its capacity as the Government of Rhodesia. The reasons advanced by the United Kingdom Government in repudiating liability must be rejected as a matter of international law.¹⁴⁾

In the light of the general liability of the United Kingdom, the question previously discussed, viz. whether the United Kingdom is liable for acts of the 'rebels' in preventing money being remitted to London to pay the interest, becomes superfluous.¹⁵⁾

Akehurst, while asserting United Kingdom liability as a matter of international law in principle, goes on to say that when the details surrounding the loans in question are examined, it transpires, after all, that the United Kingdom is not liable. He argues as follows.

Though liable in principle, to find out whether the United Kingdom is liable in fact for the loans, we must examine the terms of the loans, including section 19 of the Colonial Stock Act, 1877 and sections 9 and 10 of the General Loans Act, 1963, the latter being a Southern Rhodesian statute.¹⁶⁾ Under these, the United Kingdom

is/...

13) The Times, 17th December, 1965, p. 10(e)

14) See Akehurst, note 5) supra, p. 66.

15) Supra, pp. 615-617.

16) Akehurst, note 5) supra, pp. 68-69.

is not obliged to pay interest out of Southern Rhodesian Government assets which do not form part of the Consolidated Revenue Fund, and still less out of assets of the Rhodesian Reserve Bank, as the latter has a separate personality from the Rhodesian Government under the Reserve Bank of Rhodesia, Act, No. 24 of 1964. Its liability is limited to the amount of assets belonging to the Consolidated Revenue Fund which is under the control of the United Kingdom and this includes assets situated in third states which recognize British sovereignty over Rhodesia.¹⁷⁾

Three observations may be made on the above argument.

- (a) The above is, without doubt, a correct description of the extent of United Kingdom liability in the pre-U.D.I. era. It is a description of the terms under which the loans were originally made. Under these terms the Government of Southern Rhodesia was of course liable for the loans, but the United Kingdom had a certain limited and subsidiary liability for them also. These terms must continue to operate as long as the relationship between the Government of Southern Rhodesia and that of the United Kingdom continued as it was when the loans were made.
- (b) When U.D.I. occurred, the position altered materially. The Government of Southern Rhodesia, the body primarily liable on the loans, was abolished by the United Kingdom. Under the Order in question, the United Kingdom itself then became the Government of Rhodesia. In the light of these events, it is submitted that the post-U.D.I. liability of the United Kingdom is the same as that of the Government of Southern Rhodesia

before/...

17) Ibid., p. 69.

before U.D.I. and is materially different from the liability of the United Kingdom itself in the pre-U.D.I. era. Put another way, the Government of the United Kingdom succeeded to the liability of the Government of Southern Rhodesia when it, itself, became the Government of Rhodesia.

- (c) Stockholders became entitled to look to the United Kingdom when the latter, by its own acts, abolished the primary debtor and stood in its shoes. By taking the action in question, the United Kingdom would, in effect, be depriving stockholders of their rights against the subordinate entity by abolishing the latter. But the United Kingdom cannot plead the provisions of its own municipal law as a justification in international law for depriving aliens of their property.¹⁸⁾

(2) Obligations of the United Kingdom as a member state of the United Nations.

Here it is proposed to deal with the following obligations: (a) obligations under Article 73(e) of the Charter; (b) obligations under Article 74; (c) obligations to end repression; (d) obligations to consider recommendations in good faith; (e) obligations relating to the grant of independence to Rhodesia.

The last category of obligations is the most important. At the appropriate stage, it will be further classified and analysed.

(a) Obligations under Article 73(e) of the Charter.

Article 73 is part of Chapter XI of the Charter. This Chapter is applicable to non-self-governing territories

and/...

18) See Akehurst, pp. 62, 74; Schwarzenburger, Manual, pp. 48-49.

and imposes obligations on member states of the United Nations responsible for such.¹⁹⁾ From the inception of the United Nations, it has been the view of the United Kingdom that the Charter provisions here did not apply to Southern Rhodesia, because the Colony was regarded as being self-governing.²⁰⁾ This standpoint was disputed from 1960 onwards before the organs of the United Nations.²¹⁾ Whatever the merits of the conflicting arguments in this respect,²²⁾ it is submitted that the events which occurred after 11th November, 1965 have reduced the controversy to a matter of academic significance only. The reason is as follows. After 11th November, 1965 the United Kingdom passed legislation, the effect of which was to remove all the competences of the erstwhile Government of Rhodesia and at the same time to vest sole and exclusive governmental capacities in itself.²³⁾ Legally the United Kingdom took direct constitutional control of the formerly self-governing colony. The vast majority of member states of the United Nations, and even the organs of the latter, agreed with this step.²⁴⁾ It may, therefore, be stated that in so far as the United Kingdom and the majority of states in the United Nations are concerned,

Rhodesia/...

19) See J.A. de Yturriaga, "Non-Self-Governing Territories: The Law and Practice of the United Nations" (18) The Yearbook of World Affairs, 1964, p. 178 at p. 183; H. Kelsen, The Law of the United Nations, London, 1951, pp. 553-554.

20) Supra, pp. 102-104.

21) Supra, pp. 95-98.

22) The matter is actually discussed supra, pp. 91-105.

23) Supra, pp. 335-338.

24) Supra, pp. 365-366 S. Res. 217 (1965); S. Res. 253 (1968); S. Res. 277 (1970); A. Res. 2151(XXI); A. Res. 2379(XXIII); 2383(XXIII).

Rhodesia is now a non-self-governing territory.²⁵⁾ The consequence is that the United Kingdom cannot now dispute that the provisions of Chapter XI are applicable to Rhodesia.

Under Article 73(e), members undertake

"to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible...."

There is therefore an obligation on the United Kingdom to submit the required information relating to Rhodesia.

(b) Obligations under Article 74 of the Charter.

Article 74 is also part of Chapter XI relating to non-self-governing territories and it therefore binds the United Kingdom in relation to Rhodesia. It provides:

"Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic and commercial matters."

Article /...

25) J.E S. Fawcett "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at pp. 110, 113 says that U.D.I. had as a consequence that either Rhodesia became an independent state or ceased to be a self-governing colony so that United Kingdom responsibility and control were established in full. He favours the latter. U.D.I. deprived it of self-governing status so that the United Kingdom Government and Parliament alone had lawful authority and S. Res. 216 (1965) and 217 (1965) recognized this. Hence it would appear that the British Prime Minister, Mr. Harold Wilson was correct when he stated that Britain did not participate in U.N. votes on Southern Rhodesia before U.D.I. because it was an internal situation and Southern Rhodesia was a self-governing country. With U.D.I. the position changed entirely. The Times, 24th November, 1965, p. 16(e).

Article 74 is however so vague and general that it does not impose any obligation which is not covered by other provisions of the Charter.²⁶⁾

(c) Obligation to end repressive measures occurring in Rhodesia.

It would appear that an obligation exists in terms of a resolution passed under Chapter VII of the Charter in which the Security Council

"Condemns all measures of political repression, including arrests, detentions, trials and executions which violate fundamental freedoms and rights of the people of Southern Rhodesia, and calls upon the Government of the United Kingdom to take all possible measures to put an end to such actions." 27)

This provision probably obliges the United Kingdom to do everything possible to put an end to such actions as it could reasonably and in good faith be expected to do in the particular circumstances.²⁸⁾

(d) Obligation to consider recommendations in good faith.

Recommendations can emanate from the General Assembly of the United Nations, the Security Council when acting under Chapter VI of the Charter and from the Security Council acting under Chapter VII/...

26) See Kelsen, note 19) supra, pp. 557, 564.

27) S. Res. 253 (1968) paragraph 1. In January, 1966 the Rhodesian Government announced that there were some 350 restrictees and between 20 and 30 detainees. Joshua Nkomo and the Rev. Ndabaningi Sithole were among the restricted Africans.

28) It is submitted that the problem here is precisely the same as that concerning United Kingdom responsibility for the acts of the Rhodesian authorities discussed supra, pp. 611-615. Applying the principles discussed there mutatis mutandis, it is submitted that the United Kingdom would only be in breach of its obligations if it failed to exercise due diligence to prevent the acts in question.

Chapter VII when the language of the resolution is precatory rather than mandatory.²⁹⁾ There is an obligation to consider such recommendations in good faith.³⁰⁾

As far as the United Kingdom is concerned, a variety of such recommendations has been specially directed to it. We shall here mention recommendations which do not concern the grant of independence to Rhodesia.³¹⁾ The United Kingdom has obligations to consider the following matters in good faith; to use force to end the Rhodesian rebellion; to ensure the immediate expulsion of all South African armed forces, including the police, from Southern Rhodesia and to prevent all armed assistance to the Rhodesian regime; to ensure the immediate release of all African nationalists in prison and detention and to prevent assassination of African nationalists in Rhodesia; to ensure the application of the Geneva Convention Relative to the Treatment of Prisoners of War of 12th August, 1949 to the conflict in Rhodesia; to report to the Special Committee on the situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples on its actions in the implementation of A. Res. 2383 (XXIII);³²⁾ to give maximum assistance to the
committee/...

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- 29) See Discussion by the writer, in "Rhodesia: A Duty not to Recognize?" (33) T.H.R.-H.R., 1970, p. 152 at pp. 158, 159, 160, 163-164. See too C.J.R. Dugard, "The Legal Effect of United Nations Resolutions on Apartheid" (83) S.A.L.J., 1966, p. 44 at pp. 47-49.
- 30) See Dugard, note 29) supra, pp. 50-52, 54-56; R.Y. Jennings, The Acquisition of Territory in International Law, Manchester, 1963, pp. 83, 84.
- 31) Those recommendations which do concern the grant of independence to Rhodesia are considered infra, pp. 663-664.
- 32) A. Res. 2383 (XXIII) paragraphs 5, 10, 12, 13, 16. See too A. Res. 2151 (XXI) paragraphs 8, 9.

committee established by S.Res. 253 (1968) and to provide the committee with any information which it may receive in order that the measures envisaged in S.Res. 232 (1966), S.Res.253 (1968) and S.Res. 277 (1970) may be rendered fully effective;³³⁾ to rescind or withdraw any existing agreements on the basis of which foreign consular, trade and other representation may at present be maintained in or with Rhodesia;³⁴⁾ to take prompt and effective measures to prevent any supplies, including oil and petroleum products from reaching Rhodesia;³⁵⁾ to comply with the decision of the Security Council on 2nd December, 1971 to invite Mr. Joshua Nkomo and the Rev. Ndabaningi Sithole to appear before the Council to express their views concerning the future status of the territory.³⁶⁾

(e) Obligations relating to the grant of independence to Rhodesia.

We saw, in Section III of this Chapter, that the United Kingdom has the competence to grant independence to Rhodesia. As far as international customary law is concerned, there is no restriction on the power to grant such independence, and it is possible for a mother state to establish a newly independent state in which a minority government prevails.³⁷⁾ In customary law, the United Kingdom could therefore grant independence to Rhodesia/...

33) S. Res. 253 (1968) paragraph 21; S.Res. 277 (1970) paragraph 22.

34) S. Res. 277 (1970) paragraph 10.

35) A. Res. 2151 (XXI) paragraph 7.

36) A. Res. 2877 (XXVI) paragraph 4.

37) The South African State could be said to have been formed in this way chiefly through the instrumentality of the South Africa Act, 1909 and the Statute of Westminster, 1931. In fact, the British Prime Minister, Mr. Wilson, pointed out to Mr. Smith that in the whole history of British decolonization and progress to independence, perhaps with the single exception of South Africa, successive British Governments had agreed to independence only on the basis of majority rule, no matter how defined. The Times, 9th October, 1965, p.10(b).

Rhodesia on any terms it wished without infringing any international obligations. The competence to grant independence has however been modified by conventional obligations binding the United Kingdom by virtue of the Charter of the United Nations. The nature and extent of these obligations will now be examined. For convenience it is proposed to approach the subject as follows: (i) obligations to consider in good faith recommendations relating to independence; (ii) obligations under Article 55 (c); (iii) obligations under Article 73; (iv) obligations based on binding United Nations resolutions; (v) the possibility of fulfilling these obligations as affecting such obligations.

(1) Obligations to consider in good faith recommendations relating to the grant of independence to Rhodesia.

We have previously discussed recommendations other than those relating to independence which the United Kingdom should consider in good faith. Now we mention those recommendations which concern the question of Rhodesian independence. The United Kingdom is obliged to consider the following matters in good faith: not to grant independence to Rhodesia unless it is preceded by the establishment of a government based on free elections by universal adult suffrage and on majority rule;³⁸⁾ not to grant independence to Rhodesia on the basis of the "proposals for a settlement" agreed between the United Kingdom and Southern Rhodesia in 1971;³⁹⁾ to enter into consultations with the representatives of political parties favouring majority rule;⁴⁰⁾

not/...

38) A. Res. 2379 (XXIII) paragraph 1; A. Res. 2769 (XXVI) paragraph 1; A. Res. 2877 (XXVI) paragraph 2.

39) A. Res. 2877 (XXVI) paragraph 1. For text of the proposals see Cmd. R.R. 46-1971; Cmd. 4835; (11) I.L.M., 1972, pp. 185-205.

40) A. Res. 2383 (XXIII) paragraph 6.

not to reach a settlement without taking into account in particular the views of political parties favouring majority rule;⁴¹⁾ to work out a settlement with the fullest participation of all nationalist leaders representing the majority of the people, such settlement to be endorsed freely by the people.⁴²⁾

(ii) Obligations under Article 55(c) of the Charter.

We previously discussed this article and we concluded that it does not establish any particular human right. The most that can be said is that the member states of the United Nations have committed themselves to a human rights program but without specified content.⁴³⁾

We may thus conclude that the United Kingdom in effecting a Rhodesian Settlement would not be obliged, under the Charter, to ensure any individual human right. The most that can be said is that it should make a genuine attempt, in good faith, to ensure in an independent Rhodesia what it considers to be appropriate human rights. The decision must be that of the United Kingdom itself and as long as it acts in good faith, it would, it is submitted, be difficult to reproach it with a breach of Article 55(c).

We/...

41) S. Res. 253 (1968) paragraph 17.

42) A. Res. 2769 (XXVI) paragraph 2.

43) Supra, pp. 524-526. In addition, whatever legal obligations may be imposed by Article 55 on member states, it would appear to be clear that the Article in question confers no international law rights on individuals. See Akehurst, p. 99. In countries where the Charter forms part of municipal law, it has been held that Article 55 is too imprecise to confer any rights on individuals - not even rights in municipal law. Fujii v. State of California, I.L.R. Vol. 19, 1952, p.312. Thus whatever the obligations of the United Kingdom might be under Article 55, the people of Rhodesia do not enjoy rights against the United Kingdom under the Article.

We also submitted earlier that a norm of non-discrimination on racial grounds had evolved as a particular human right in international customary law.⁴⁴⁾ This norm is binding on states in general⁴⁵⁾ and so the United Kingdom would be bound by it. In these circumstances, it is submitted, that the United Kingdom would be under an obligation to ensure that in granting independence to Rhodesia, the Constitution of an independent Rhodesia, should not contain racially discriminatory provisions. In the light of this obligation we shall now assess the effect of hypothetical grants of independence on the basis of the following: (A) the Constitution of Rhodesia, 1965; (B) the Tiger Proposals; (C) the Fearless Proposals; (D) the Constitution of Rhodesia, 1969; (E) the Anglo-Rhodesian Proposals for a Settlement, 1971.

(A) Independence on the basis of the Constitution of Rhodesia, 1965.

As far as the franchise was concerned, there was discrimination on the grounds of age, citizenship, residence, language, literacy, income, ownership of immovable property, education and in favour of the holders of certain offices.⁴⁶⁾ Though the operation of these provisions served, in practice, to disenfranchise the majority of Africans or to place

- them/...

44) Supra, pp. 551-552.

45) South Africa is probably not bound by the norm because of the operation of the doctrine of persistent opposition. See supra, p. 553.

46) Constitution of Rhodesia, 1965, S. 15 (2), (3), (4) and Second Schedule.

them on the "B" roll of voters, there was no substantial racial discrimination as such⁴⁷⁾ and nothing prevented members of any race from acquiring one or more of the necessary qualifications for full enfranchisement on the "A" roll.

Section 76 (1)(2) provide that no written law should contain a provision which was discriminatory on the ground of race, tribe, colour or creed. However, this provision was subject to certain exceptions whereby discrimination was allowed in specified cases mentioned in Section 76 (3)(4). Section 77 provided protection against discriminatory executive action except in pursuance of the application of any legislation which was itself permitted to discriminate. Tribal Trust land was reserved for the sole and exclusive use and occupation of tribesmen.⁴⁸⁾ The Land Apportionment Act restricted the ownership and occupation of certain lands to specified classes of persons.⁴⁹⁾

It is, therefore, submitted that if the United Kingdom endeavoured to grant independence to Rhodesia on the basis of the 1965 Constitution, it should concern itself with obtaining the abolition or at least
gradual/...

47) It is true that there were a few minor instances of racial discrimination. These were, however, insubstantial and operated in favour of Africans. Chiefs, Headmen and Heads of Kraals were enfranchised as such. Ibid., Second Schedule, S.6.

48) Ibid. S.102, 105.

49) Chapter 257. The Constitution of 1965, S. 112 virtually entrenched this discriminatory legislation by providing that bills which discriminated more than Chapter 257 could not be passed by ordinary legislation.

gradual removal of the provisions of S. 76(3)(4), 102, 105, 112 and the Land Apportionment Act.⁵⁰⁾

(B) The Tiger Proposals.

The Tiger Proposals recommend a Legislative Assembly with 33 "A" Roll seats, 17 "B" Roll seats and 17 Reserved European seats. As with the 1965 Constitution, neither the franchise on the "A" Roll nor that on the "B" Roll discriminated on the ground of race. The 17 Reserved European seats were to be elected by a European Electorate. A Senate was also recommended. This comprised 12 European seats elected by Europeans on the "A" Roll, 8 African seats elected by Africans on the "A" and "B" Rolls voting together and 6 Chiefs.⁵¹⁾

As far as racial discrimination was concerned, a Royal Commission was to be set up to make recommendations, in particular in relation to the Land Apportionment Act and pre-1961 discriminatory legislation. A Standing Commission was to keep the problems of racial discrimination under regular review.⁵²⁾

The reservation of European seats in the Legislative Assembly and of both European and African seats in
the/...

50) Though in practice, the setting aside of Tribal Trust Lands for the exclusive use of tribesmen does not really prejudice by discrimination, in theory there is little to distinguish it from the Land Apportionment Act. Under both, the ownership and occupation of certain lands, by certain races, may be prohibited.

51) Rhodesia-Documents relating to Proposals for a Settlement, 1966, Cmnd. 3171, p.87.

52) Ibid., p. 89.

the Senate is clearly discriminatory on the grounds of race. As such it is to be doubted whether the United Kingdom would fulfil its obligations were it to be a party to an independence constitution containing such provisions. The provisions designed at removing and alleviating existing instances of racial discrimination,⁵³⁾ are, it is submitted, reasonable efforts made by the United Kingdom to fulfil its obligations in this respect.

(C) The Fearless Proposals.

The Proposals, in so far as racial discrimination is concerned, were substantially the same as the Tiger Proposals.⁵⁴⁾ The above comments are therefore apposite here too.⁵⁵⁾

(D) Independence on the basis of the Constitution of Rhodesia, 1969.

This constitution provides for a Senate of 23, 10 of which shall be Europeans, elected by an electoral college consisting of the European members of the House of Assembly, 10 African Chiefs, 5 from Matabeleland, 5 from Mashonaland, elected by an electoral college of Chiefs, and 3 presidential nominees. The
House/...

53) Ibid.

54) Rhodesia - Report on the Discussions held on board H.M.S. Fearless, October, 1968, Cmd. 3793, pp. 7-8, 9-10.

55) For points of difference between Britain and Rhodesia arising out of the Proposals see Rhodesia - Report on Exchanges with the Régime since the Talks held in Salisbury in November, 1968, Cmd. 4065, p.17 et seqq.

House of Assembly is to consist of the following:

50 European members elected by European Roll

Constituencies; 16 African members, 8 of which are elected by African Roll Constituencies, 4 in Matabeleland and 4 in Mashonaland, and 8 of which are elected by electoral colleges of Chiefs, 4 in Matabeleland and 4 in Mashonaland.⁵⁶⁾ There is further provision for increasing African representation in multiples of two in proportion to the amount of tax assessed on the African population. This is to continue till the Africans have 50 representatives and thus obtain parity with the Europeans.⁵⁷⁾

Electoral Law and the Law relating to Tribal Trust Land is entrenched.⁵⁸⁾ The Declaration of Rights does provide for non-discrimination on the grounds of race, tribe, political opinion, colour or creed.⁵⁹⁾ But this is subject to certain exceptions in which discrimination is permitted.⁶⁰⁾ It is further provided that no court shall enquire into or pronounce upon the validity of any law on the ground that it is inconsistent with the Declaration of Rights.⁶¹⁾

Again, it is submitted, that the United Kingdom should not be a party to an independence constitution which
contains/...

56) Constitution of Rhodesia, 1969, S.18 (2).

57) Ibid., S.18 (4).

58) Ibid., S.80.

59) Ibid., Second Schedule, paragraph 10.

60) Ibid., Second Schedule, paragraph 10(3).

61) Ibid., S.84.

contains the above kind of discrimination in relation to the franchise. It should also endeavour to obtain the abolition or gradual removal of the other discriminatory provisions.

(E) The Anglo-Rhodesian Proposals for a Settlement, 1971.

The Constitution of Rhodesia, 1969, subject to certain modifications, is the basis of the proposals.⁶²⁾ The Africans thus start with 16 seats in the Legislative Assembly, the Europeans with 50. The Africans are to be elected by Africans on an African Higher Roll and the Europeans are to be elected by Europeans on a European Higher Roll.⁶³⁾ The qualifications for both rolls are the same and discrimination is on the basis of means and education, not race.⁶⁴⁾ Provision is made for increases in African representation as the number of African voters on the Higher Roll increases. African representation bears the same ratio to European representation as the number of voters on the African Higher Roll bears to the number of voters on the European Roll.⁶⁵⁾ So far there cannot be said to be racial discrimination. However, provision is only made for African Representation to increase to parity with European representation.⁶⁶⁾ Thus, although/...

62) Anglo-Rhodesian Relations - Proposals for a Settlement, Cmd. R.R. 46-1971, p. 1.

63) Ibid., p.2.

64) Ibid., p.10.

65) Ibid., p.2.

66) Ibid.

although the number of Africans on the Higher Roll might far surpass the numbers on the European Roll, African Representation does not increase. The only way of increasing African Representation after parity is by the creation of ten common roll seats elected by the Africans on the Higher Roll. But this provision must be acceptable to the people of Rhodesia. Any alternative arrangements must similarly require general support.⁶⁷⁾ Thus it would appear that the European population might be in a position to block post-parity increases in African representation.

Again, it is submitted, that the United Kingdom should not be a party to an independence constitution, which, though not discriminating immediately against Africans on the grounds of race, could ultimately so discriminate.

The/...

67) Ibid., p. 4. The Proposals for a Settlement use the terms "people of Rhodesia" and "general support" without defining what is meant by either term. It is therefore submitted that "acceptable to the people of Rhodesia" means acceptable to a majority in each of the racial groups in Rhodesia. This was the approach of the Pearce Commission to the problem of testing the acceptability of the Proposals themselves to the people of Rhodesia as a whole. They found the Proposals to be acceptable to the great majority of Europeans but that the majority of Africans rejected the Proposals and that therefore "the people of Rhodesia as a whole" did not regard the Proposals as acceptable. See Cmd. 4964, p. 112. The term "general support" used in Cmd. R.R. 46 - 1971, p. 4 is probably a synonym for "acceptable to the people of Rhodesia" used in the same paragraph. It is therefore submitted that "general support" also means support by a majority in each of the racial groups.

The Declaration of Rights prohibits racial discrimination by written law and by executive action,⁶⁸⁾ but as in the case of previous declarations, it is subject to certain exceptions where discrimination is permitted.⁶⁹⁾

Again, it is submitted that the United Kingdom should endeavour to obtain the removal or gradual elimination of such provisions. There are other provisions of the Proposals which, it is submitted, are in accordance with the obligations of the United Kingdom in the matter of racial discrimination. These include: the establishment of an independent commission set up to examine racial discrimination and recommend ways of making progress to end it;⁷⁰⁾ the provision that vacancies in the Rhodesian Public Service be filled according to criteria of merit and suitability regardless of race.⁷¹⁾

(iii) Obligations under Article 73 of the Charter of the United Nations.

We must now examine the provisions of this Article which are relevant to the granting of independence. There would appear to be three relevant obligations in Article 73.⁷²⁾
(A)/...

68) Paragraph 11(1)(2); Proposals, note 62) supra, pp. 30-31.

69) Ibid., pp. 31-33.

70) Ibid., pp. 6-7. For terms of reference of the Commission see ibid., p.37.

71) Ibid., p. 9.

72) That Chapter XI and Article 73 contain obligations for member states appears reasonably clear. See J.A. de Yturriaga, "Non Self-Governing Territories: the Law and Practice of the United Nations" (18) The Yearbook of World Affairs, 1964, p. 178 at p. 183. We saw supra, pp. 595-596 that the United Kingdom must be regarded as an administering power since U.D.I. and that Chapter XI is therefore applicable.

- (A) There is an obligation to promote to the utmost the wellbeing of the inhabitants of the territory, this obligation being based on recognition of the principle that the interests of the inhabitants of the territory are paramount.
- (B) There is an obligation to ensure the political and social advancement of the people, their just treatment and their protection against abuses.
- (C) There is an obligation to develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

Article 73 is formulated in rather vague terms⁷³⁾ and it is thus extremely difficult to define the content of the obligations in (A) and (B) above.⁷⁴⁾ Opinion might conceivably vary on such matters and there would appear to be no body which is capable of authoritatively defining such content.⁷⁵⁾ In the circumstances, perhaps the most that can be said, is that the power concerned should strive to fulfil the dictates of the article in good faith and to the best of its ability
in/...

73) H. Kelsen, The Law of the United Nations, London, 1951, p. 557.

74) For example, "just treatment" is almost without value in view of the uncertainty of the meaning of "justice". "Protection against abuses" is in no way defined. The United States did, however, express certain views on the latter concept. See ibid., p. 558.

75) Ibid., p. 557.

in the circumstances. Applying this to the Rhodesian situation it can be said that the United Kingdom, in granting independence to Rhodesia, should be guided by the above principles. However, the concretization of the obligation must be left to the United Kingdom as the administering power,⁷⁶⁾ subject only to the requirement that it should act in good faith in fulfilling its obligations.⁷⁷⁾

The third obligation, (C) above, deserves more careful consideration. It is the obligation to develop self-government.⁷⁸⁾ It is not an obligation to grant self-government.⁷⁹⁾ The United Kingdom does not therefore have to grant independence to Rhodesia but any independence which it does choose to grant should embrace the principle of self-government.

It must therefore be asked what precisely this principle embraces. It would appear that the term self-government is not synonymous with the idea of
independence/...

76) Ibid.

77) Treaty obligations should be interpreted and applied reasonably and in good faith. For a discussion of the application of this ius aequum in the context of treaties see Schwarzenberger, I, pp. 447-453.

78) The obligation to develop self-government is the same as the obligation 'to take due account of political aspirations' and 'to assist... in the progressive development of free political institutions' because political aspirations of peoples are always directed towards self-government, which is also the tendency in any free political institution. See Kelsen, note 73) supra, p. 558.

79) There is no right of self-determination in international law. Supra, pp. 519-520 Jennings, note 30) supra, p. 81 says that the obligation to develop self-government falls short of establishing a clear obligation to develop it to the point of separate independence. The degree of self-government varies according to the particular circumstances and stages of development.

independence.⁸⁰⁾ This is scarcely relevant in the present context as any eventual settlement of the Rhodesian question must almost certainly embody the formal grant of independence to Rhodesia (or Zimbabwe!) by Britain. The only practical problem is the terms upon which that independence is granted and more particularly whether an independence constitution should incorporate the notion of a majority rule. The pertinent question therefore is, whether or not an independence granted on terms other than majority rule can be "self-government" within the meaning of Article 73 of the Charter. Nowhere in Article 73 is it mentioned that there can only be "self-government" if there is majority rule. The article, it is submitted, leaves a certain discretion to the administering power in deciding: (A) the appropriate time to grant self-government; (B) the terms upon which self-government is granted. Whether, and to what extent, the particular circumstances allow the development of self-government, depends in the first place on an arbitrary decision by the administering government.⁸¹⁾ Resolutions by the General Assembly of the United Nations are at most recommendations to member-states to grant self-government.⁸²⁾

It/...

80) Supra, pp. 91-93.

81) Kelsen, note 73) supra, p. 558.

82) Ibid. It is true, of course, that in the past the Assembly has attempted to dictate both the appropriate time for the grant of independence (see A.Res. 1514 (XV) paragraphs 3, 5) and the actual terms of self-government (see A.Res. 1747 (XVI) and supra, pp. 95-96 all of which concern Rhodesia). Rosalyn Higgins, The Development of International Law through the Political Organs of the United Nations, Oxford, 1963, p. 103 says however that the Assembly may not prescribe an exact time for the granting of independence to a territory, though it may urge that this occur speedily. Note further that a Soviet Amendment to fix a time limit for granting independence to non-self-governing territories was rejected by the Assembly. See Akehurst, p.282. See too Jennings, note 30) supra, pp. 83-85.

It is, of course, with the terms upon which self-government might be granted that we are here concerned. The administering power is allowed to take "the particular circumstances of each territory and its peoples and their varying stages of advancement" into consideration when it develops (and presumably grants) self-government.⁸³⁾ The Article could not be more appropriate to the Rhodesian situation with its diversity in population. The particular circumstances in Rhodesia could therefore be validly taken into account by the United Kingdom in settling the terms of eventual Rhodesian independence. The "six principles" insisted upon by the United Kingdom in negotiations with Rhodesia can be construed as an attempt to grant a genuine self-government to Rhodesia which would be in accordance with the obligations of the United Kingdom under Article 73.⁸⁴⁾

The six principles, if enshrined in an independence constitution, would, it is submitted, be a proper discharge of the United Kingdom's duties in the matter of developing self-government when all the circumstances of the Rhodesian situation are taken into consideration/...

83) Ibid., p. 81. Kelsen, note 73) supra, p. 558 says that the value of the obligations of the administering authority is rendered highly problematical by the qualification 'according to the particular circumstances'.

84) Originally there were five principles. For details see supra, pp. 34-58. The Labour Government of Mr. Harold Wilson added a sixth principle, viz. that it would be necessary to ensure that, regardless of race, there was no oppression of majority by minority or of minority by majority. See Chayes, II, p. 1373. This sixth principle was later abandoned by the Conservative Government which was of the view that it added nothing to the other five. See International Conciliation, No. 584, September, 1971, p. 178.

consideration. It is difficult to see how the United Kingdom could discharge its duties without insisting on at least four of these principles.⁸⁵⁾ They seem to be indispensable if any form of self-government is to develop which would grant a genuine measure of self-government to the majority and at the same time ensure the minority against oppression.

We shall now proceed to examine the six principles individually for the purpose of establishing whether independence granted on the basis of the following would be in accordance with the various principles: 1965 Constitution; Tiger Proposals; Fearless Proposals; 1969 Constitution; Anglo-Rhodesian Proposals for a Settlement, 1971.⁸⁶⁾

(A) The principle and intention of Unimpeded progress to majority rule.

Under the 1965 Constitution of Rhodesia there were fifty "A" Roll and fifteen "B" Roll seats in Parliament.⁸⁷⁾ The qualifications for enrolment on both Rolls were objective and there was nothing to prevent the/...

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- 85) It would be possible to exclude the sixth principle. See note 84) supra. Perhaps it might also be possible to exclude the third principle, that there would have to be immediate improvement in the political status of the African population, but it is difficult to see how, in good faith, any of the remaining four principles could be overlooked.
- 86) The General Assembly and the Security Council of the United Nations are of the opinion that the post U.D.I. regime in Rhodesia, whether under the 1965 or 1969 Constitution of Rhodesia, does not amount to self-government. A. Res. 2012 (XV) paragraph 2, 3; A Res. 2022 (XX) paragraphs 1, 3; A. Res. 2382 (XXIII) paragraph 6; S. Res. 232 (1966) paragraph 4; S. Res. 253 (1968) paragraph 2; S. Res. 277 (1970) paragraph 4. The view has also been expressed that neither the Fearless nor the Tiger proposals are in accordance with the six principles. See Leo S. Baron, "The Rhodesian Saga" (1) Zambia Law Journal, 1969, pp. 36-64.
- 87) Constitution of Rhodesia, 1965, S. 42, 43.

the majority from obtaining "A" Roll qualifications in due course.⁸⁸⁾ At that stage there would naturally be majority rule. Thus, it is submitted, that independence on the 1965 Constitution would enshrine this principle.

Here we must note two arguments put forward by Baron.⁸⁹⁾ Baron is of the view that the 1961 Constitution did not enshrine the principle for two reasons, both of which apply also to the 1965 Constitution. In the first place, the principle is not observed because there is a provision for the raising of the income qualification for enrolment from time to time. With respect, this reasoning is unconvincing. The Officer Administering the Government could vary by Proclamation qualifications for the franchise which were expressed in terms of money according to the ascertained increase or decrease in the purchasing power of money in Rhodesia.⁹⁰⁾ The power to vary is thus tied to an objective standard and simply takes account of the inflation, or deflation, of money. It is no impediment to the advance of majority rule. It is true, of course, that if the qualifications took no account of inflation, then progress to majority rule would be hastened. In the second place, Baron says that the system of cross-voting impedes progress to majority

rule./...

88) Ibid., Second Schedule.

89) Baron, note 86) supra, pp. 45-46.

90) Constitution of Rhodesia, 1965, S. 15(3)

rule.⁹¹⁾ Again the reasoning is, with respect, unconvincing. Cross-voting simply tied the majority to representation in fifteen seats as long as they only possessed "B" Roll qualifications. But there was nothing to prevent the majority acquiring "A" Roll qualifications,⁹²⁾ thus increasing their representation until eventually there was majority rule.

The Tiger and Fearless proposals were in principle much the same as the 1965 Constitution as far as majority rule was concerned. Thus the Tiger Proposals recommended a Legislative Assembly with thirty three "A" Roll seats, seventeen "B" Roll seats and seventeen Reserved European seats. The Senate was to be composed of twelve European seats, eight elected African seats and six Chiefs.⁹³⁾ The Fearless Proposals were identical.⁹⁴⁾ Thus there was nothing to prevent the majority obtaining "A" Roll qualifications, at which stage there would be majority rule. It is, therefore, submitted that both the Tiger and Fearless Proposals respect the principle of unimpeded progress towards majority rule.

We must again observe that Baron considers that the Tiger and Fearless Proposals are not in accordance

with/...

91) For the provision relating to the application of the system of cross-voting see ibid., Second Schedule, paragraph 10.

92) Ibid., paragraphs 5, 6, 8.

93) Cmnd. 3171, p. 87.

94) Cmnd. 3793, pp. 7-8.

with the principle for two reasons.⁹⁵⁾ In the first place, progress to majority rule would be slower than under the 1961 Constitution since one has seventeen Reserved European Seats in place of seventeen "A" Roll seats. That may be so, but, with respect, the 1961 Constitution is not a yardstick for measuring the rate of progress to majority rule. The principle is "unimpeded progress" and nothing is said as to the appropriate rate for such progress. In the second place, Baron argues that the principle is infringed in the Senate because the twelve Europeans and six Chiefs constitute a majority and under the proposals would continue to do so. With respect, this argument overlooks the fact that the Senate has a review power over legislation and not a veto.⁹⁶⁾ Thus the institution of the Senate -even if entirely composed of European seats, would not hinder progress to majority rule.

Let us now consider independence on the basis of the 1969 Constitution of Rhodesia.⁹⁷⁾ The Senate comprises ten elected Europeans, ten members elected by the Chiefs and three presidential nominees.⁹⁸⁾ Though the Africans have no elected representatives here, it is submitted that the composition of the Senate does not/...

95) Baron, note 86) supra, p. 49.

96) Cmnd. 3171, p. 89; Cmnd. 3793, p. 9.

97) The 1969 Constitution was preceded by the Whaley Commission and by proposals published by the Rhodesian Front. The findings of the former were based on the principle of substantial racial parity and non-domination by ethnic groups. For a summary of the findings see (17) I.C.L.Q., 1968, pp. 1047-1048. The Rhodesian Front proposed the establishment of a Republic, three Provincial Assemblies (for the Matabele, Mshona and Europeans) below a multi-racial National Assembly. See ibid., p. 1048.

98) Constitution of Rhodesia, 1969, S. 13.

not impede progress to majority rule. The reason is that the Senate has a "delaying" function, rather than a veto in relation to legislation.⁹⁹⁾

We have already dealt with the position relating to the House of Assembly.¹⁰⁰⁾ It is composed of fifty European Roll seats and sixteen African Roll seats. There is provision for African Representation to increase in accordance with income tax assessed until the Africans reach parity with the Europeans.¹⁰¹⁾

There is no provision for further African representation and thus progress to majority rule is not only impeded at parity but is actually stopped there.¹⁰²⁾ The submission therefore is that independence on the basis of the 1969 Constitution would not be in accordance with the principle of unimpeded progress to majority rule.¹⁰³⁾

Finally, we must consider independence on the basis of the Anglo-Rhodesian Proposals for a Settlement, 1971.¹⁰⁴⁾ As we have seen, the proposals follow the 1969 Constitution but with certain modifications.¹⁰⁵⁾ As under the 1969 Constitution, the Europeans are to have fifty seats and the Africans sixteen in the House of Assembly.

The/...

99) Ibid., S. 42.

100) Supra, p. 669.

101) Constitution of Rhodesia, 1969, S. 18.

102) In fact, African representation is expressly limited to parity. Ibid., S. 18(4)(e).

103) See comments in International Conciliation, No. 584, September, 1971, p. 180.

104) Cmd. R.R. 46 - 1971; (11) I.L.M., 1972, pp. 185-205.

105) Cmd. R.R. 46 - 1971, p. 1.

The latter are now, however, elected by an African Higher Roll. There is provision for increasing the number of African seats as the number of voters on the African Higher Roll increases. Such increases continue until the Africans reach parity with the Europeans.¹⁰⁶⁾ Within a stipulated time after the attainment of parity, an independent commission is to be appointed to ascertain whether the creation of ten Common Roll seats would be acceptable to the people of Rhodesia.¹⁰⁷⁾ These ten Common Roll seats would ensure majority rule as soon as the number of Africans on the Higher Roll was greater than that of the Europeans on the European Roll.¹⁰⁸⁾ It must now be asked whether these provisions ensure unimpeded progress towards majority rule. It is submitted that they do not. It is true that the attainment of majority rule is possible under these provisions. It might even be probable. But it is not guaranteed because the minority may presumably arrest the progress to majority rule by finding the creation of Common Roll seats unacceptable to them. In that event, the people of Rhodesia could not be said to be in favour of the creation of Common Roll seats. The net position therefore is that the proposals do not guarantee unimpeded progress to majority rule for the simple reason that after parity has been attained by the majority, the minority are then in a position to impede any further progress to majority rule.

The/...

106) Ibid., p. 2.

107) Ibid., p. 4.

108) The reason is that the Common Roll would consist of voters on the European Roll and the African Higher Roll. Ibid.

The composition of the Senate under the proposals would be the same as under the 1969 Constitution.¹⁰⁹⁾

Since the Senate only has power to delay and not to veto, its composition is immaterial in the context of progress to majority rule.

(B) There would have to be guarantees against retrogressive amendment of the constitution.

Under the 1965 Constitution there were fifty "A" Roll and fifteen "B" Roll seats.¹¹⁰⁾ In practice all the "A" Roll seats were returned by European voters as there were few Africans who possessed "A" Roll qualifications. In practice the fifteen "B" Roll seats were elected by Africans, many of whom had the necessary "B" Roll qualifications. Legislation varying voting qualifications or interfering with the voting rolls could be effected by a two-thirds majority of the total membership of Parliament, namely forty six.¹¹¹⁾ It is therefore apparent that the Europeans could, in practice, vary the voting qualifications by legislation, until such time as the Africans were in a position to return five "A" Roll seats. By varying the voting qualifications the Europeans could delay the attainment of majority rule or even make such attainment impossible.¹¹²⁾ Thus it is submitted, that the 1965 Constitution/...

109) Ibid., p. 5.

110) Constitution of Rhodesia, 1965, S. 42, 43.

111) Ibid., S. 15(1)(2), 116(2), 117(2). An exception is contained in S. 15(3). See note 90) supra.

112) This actually happened when the 1965 Constitution was repealed and replaced by the 1969 Constitution.

Constitution did not contain guarantees against retrogressive amendment. The Africans had no "blocking" vote.

We may now consider the Tiger and Fearless proposals in the light of the second principle. The proposals were substantially the same in this regard and may be considered together. The specially entrenched provisions were only to be amended by a vote of at least three-quarters of the total membership of both Houses.¹¹³⁾ The total membership of both Houses was to be ninety three.¹¹⁴⁾ so that the affirmation of seventy members was necessary to amend the provisions in question. Since the Africans were to have twenty five elected seats, viz. seventeen "B" Roll seats in the Legislative Assembly and eight seats in the Senate elected by Africans on the "A" and "B" Rolls voting together,¹¹⁵⁾ it follows that the Africans were to have just over a "blocking" quarter. It is submitted that this was a sufficient guarantee against retrogressive amendment of the Constitution.

Baron, however, seems to consider that this was not sufficient. He points out that two elected African members might sell out, die or be disqualified.¹¹⁶⁾

With/...

113) Cmnd. 3171, p. 88; Cmnd. 3793, p. 9.

114) Cmnd. 3171, p. 87; Cmnd. 3793, pp. 7-8.

115) Cmnd. 3171, p. 87; Cmnd. 3793, pp. 7-8.

116) Baron, note 86) supra, p. 50.

With respect, the death or disqualification of African members poses no problem. Even if all twenty five elected African Members were to die or be disqualified, this would not facilitate the amendment of the entrenched provisions because the members of the Legislature other than African elected members could still only muster sixty-eight votes, two short of the required seventy for such amendments. Baron's point about two elected Africans selling out is more substantial, for this could result in the necessary seventy votes for constitutional amendment being mustered. However, it is difficult to see how one can make provision to meet a contingency resulting from the fact that an elected member of Parliament cannot be trusted to carry out his mandate. The second principle is concerned with the existence of constitutional machinery to prevent retrogressive amendment. That machinery exists in the Tiger and Fearless Proposals. If the machinery is not utilized at some future date (through dishonesty or otherwise) that is beside the point. The task of the British Government is simply to see that the machinery is there. It need not concern itself with an entirely hypothetical non-user of the machinery at some future date.

The submission that the Tiger and Fearless Proposals contain sufficient guarantees against retrogressive amendment is bolstered by the following two factors. In the first place, six Chiefs were to be members of

the /...

the Senate.¹¹⁷⁾ This would mean that there would be a minimum of thirty one Africans in both Houses, twenty five elected and six Chiefs. In the second place, there was to be an appeal against amendments of the specially entrenched clauses on specified grounds including the ground that the amendment unjustly discriminates between the races.¹¹⁸⁾

We now examine the 1969 Constitution. It would appear that it contains no adequate guarantee against retrogressive amendments. Constitutional amendments including even amendment of those provisions which are entrenched can be achieved in the last analysis by two thirds of the membership of the House of Assembly and a majority of the members of the Senate.¹¹⁹⁾ Since the total membership of the House is sixty six and since this includes only sixteen African seats, there will be no effective guarantee against retrogressive amendment until such time as African membership of the House has increased to twenty-six.

Finally, we examine the Anglo-Rhodesian Proposals for a Settlement, 1971. These, it would appear, certainly did meet the second principle. Amendments of the specially entrenched provisions of the Constitution¹²⁰⁾ were to receive an affirmative vote in each House of not/...

117) Cmd. 3171, p. 87; Cmd. 3793, p. 8.

118) Cmd. 3171, p. 88; Cmd. 3793, p. 9.

119) Constitution of Rhodesia, 1969, S. 78, 80.

120) Cmd. R.R. 46 - 1971, p. 6.

not less than two-thirds of the total membership of the House and in addition the affirmative votes of a majority of the total African membership of the House of Assembly.¹²¹⁾ This was certainly a strong guarantee against retrogressive amendment.

(C) Immediate improvement to the political status of the African population.

We have seen before that strictly speaking compliance with this requirement might not be obligatory for the United Kingdom,¹²²⁾ but we shall nevertheless examine the various proposals in the context of the principle.

Baron argues in the context of the third principle that the status of an opposition is not improved merely by an increase in its numbers. It can be argued that the character of the opposition changes if it becomes able to prevent constitutional changes where it was previously unable to do so.¹²³⁾ This argument is more appropriate in the context of the second principle relating to guarantees against retrogressive amendment of the Constitution. The third principle requires improvement in the political status of the
----- African/...

121) Ibid., p. 5. In addition the Rhodesian Government gave an assurance that they would not support any amendments of specially entrenched provisions relating to the House of Assembly or the Electoral Act until the first two African Higher Roll seats had been filled or until three years had elapsed, whichever was the sooner. Ibid. It is submitted that this undertaking takes the matter of guarantee against retrogressive amendment no further. It would probably, however, constitute an international obligation for Rhodesia, had the settlement in question materialized.

122) See note 85) supra.

123) Baron, note 86) supra, p. 41.

African population. It does not require alteration (for the better) of the character of the African opposition, though it is true that this latter would certainly constitute improvement in the political status of the population. There are, however, a variety of other ways of improving the political status of the population, any one or more of which might be utilized to comply with the principle, e.g. widening the franchise for Africans in various ways or increasing the number of African representatives. It can scarcely be doubted that the latter constitutes an improvement in the political status of the population even if it does not amount to an alteration of the character of the opposition.

The 1965 Constitution does not increase the number of seats held by Africans. There are fifty "A" Roll and fifteen "B" Roll seats¹²⁴⁾ just as there were under the 1961 Constitution.¹²⁵⁾ The qualifications for enfranchisement under the 1965 Constitution were almost identical to those previously applicable.¹²⁶⁾ Thus independence granted on the basis of the 1965 Constitution would not represent an immediate improvement in the political status of the African population.

We must now consider the Tiger and Fearless Proposals which in this respect are identical and so may be considered /....

124) Constitution of Rhodesia, 1965, S.42.

125) Southern Rhodesia Constitution, 1961, S. 7, 37.

126) Constitution of Rhodesia, 1965, Second Schedule. For details of previously applicable qualifications, see Palley, pp. 418-419.

considered together. When analysed the net position would be as follows. The Africans lose the right to acquire the franchise in seventeen "A" Roll constituencies in the Legislative Assembly because of the creation of seventeen Reserved European Seats.¹²⁷⁾

Against that they gain two more "B" Roll seats in the Assembly.¹²⁸⁾ They also acquired eight elected seats and six seats to be occupied by Chiefs in the Senate.

Against this is the creation of twelve European seats in the Senate.¹²⁹⁾ The Africans also gain a blocking

quarter in relation to the amendment of the specially entrenched provisions.¹³⁰⁾ Finally, the "B" Roll

franchise is extended to include all Africans over 30 who satisfy citizenship and residence qualifications.¹³¹⁾

Baron is of the view that these provisions do not amount to advances.¹³²⁾ While it would be difficult to label them as retrogressive, it would perhaps be equally difficult to label them as advances.

Baron is also of the view that the delimitation proposals in Tiger and Fearless are retrogressive and against the third principle.¹³³⁾ The objective of delimitation is to divide the "A" Roll constituencies in such a manner that the proportion of these with a majority/...

127) Baron, note 86) supra, p. 51 puts this concisely by saying that there are only thirty three open "A" Roll seats.

128) Cmnd. 3171, p. 87; Cmnd. 3793, p. 7.

129) Cmnd. 3171, p. 87; Cmnd. 3793, p. 8.

130) Cmnd. 3171, p. 88; Cmnd. 3793, p. 9.

131) Cmnd. 3171, p. 87; Cmnd. 3793, p. 8.

132) Note 86) supra, p. 51.

133) Ibid., p. 52.

majority of African voters is the same as the proportion of African voters on the "A" Roll for the country as a whole.¹³⁴⁾ With respect, it cannot be said that this is retrogressive, but equally it cannot be said to be an advance. It could work out to the benefit or detriment of the African voters depending on circumstances. If, in the ordinary course of events, the Africans on the "A" Roll were underrepresented, delimitation would operate in their favour. If they happened to be overrepresented, it would operate to their detriment.

It would appear to be clear that independence on the basis of the 1969 Constitution would not represent an immediate improvement in the status of the African population. In the first place, there are fifty European Roll seats,¹³⁵⁾ whereas under the 1965 Constitution there were none and under Tiger and Fearless only seventeen reserved European seats were proposed. In the second place, the "A" Roll, existing under the 1965 Constitution, the 1961 Constitution before it, and also proposed in both Tiger and Fearless is removed.¹³⁶⁾ In effect, this means that the franchise of Africans on the "A" Roll is removed and these people no longer have any say in the election of fifty members of the House of Assembly. In the third place, African representation on the "B" Roll remains static at/...

134) Cmd. 3171, p. 88; Cmd. 3793, p. 8.

135) Constitution of Rhodesia, 1969, S. 18(2)(a).

136) Ibid., S. 89.

at sixteen,¹³⁷⁾ the same number of seats as on the "B" Roll under the 1965 and 1961 Constitutions. In the fourth place, a Senate is created in which there are no directly elected Africans and in which the African Chiefs are in a minority.¹³⁸⁾

Finally, we consider the Anglo-Rhodesian Proposals for a Settlement, 1971. It is submitted that these do not constitute an immediate improvement in the political status of the African population, even when compared with the 1969 Constitution.¹³⁹⁾ In the first place, the Senate remains precisely the same as under the 1969 Constitution. In the second place, the composition of the House of Assembly remains the same as under the 1969 Constitution - fifty European seats and sixteen African seats.¹⁴⁰⁾ In the third place, the sixteen African seats are now to be elected by an African Higher Roll, the qualifications for which are to be the same as those for the European Roll.¹⁴¹⁾ This in effect means that Africans on the lower roll will no longer vote for the return of these sixteen members of the House.

(D) Progress towards ending racial discrimination.

Previously we discussed the obligations of the United Kingdom in relation to the norm of non-discrimination on

the/...

137) Ibid., S. 18(2)(b).

138) Ibid., S. 13(2).

139) Cmd. R.R. 46 - 1971, p. 5.

140) Ibid., p. 2.

141) Ibid.

the grounds of race.¹⁴²⁾ The idea of achieving progress in the elimination of racial discrimination is in effect a facet of that overall norm. We need not therefore repeat what we have already said. It is applicable here too. We might however draw a distinction between the creation of new forms of racial discrimination and the elimination of existing forms. It is submitted that the United Kingdom could not in good faith be a party to the creation of new forms of racial discrimination in Rhodesia. On the other hand, the obligations incumbent on the United Kingdom in relation to forms of racial discrimination already existing in Rhodesia would not be so onerous. This principle would not require it to effect the immediate abolition of existing instances of racial discrimination. It would rather require the United Kingdom to make efforts directed towards the gradual elimination and ultimate abolition of such discrimination.

In this connection it is interesting to note that Baron regarded the 1961 Constitution as infringing the fourth principle because it only provided for the abolition of future discriminatory measures while leaving those which already existed unaffected.¹⁴³⁾ With respect, the principle does not call for the abolition of such discrimination but merely for progress in bringing it to an end. The same remarks are applicable

to/...

142) Supra, pp. 665-672.

143) Note 86) supra, p. 46.

to Baron's submission that the Tiger and Fearless Proposals offend the fourth principle because the Commissions to be set up in both cases did not have powers but were only to study and recommend ways of eliminating racial discrimination. Further, while the Commission proposed in Tiger was a Royal Commission, that in Fearless was not so because the Rhodesian Government were to appoint the members and merely consulted the British Government.¹⁴⁴⁾ The Commissions in question represent a reasonable attempt to eliminate existing discrimination.

One final observation may be appropriate. It is submitted, that the onus of ensuring the gradual removal and abolition of existing discrimination is perhaps slightly heavier on the United Kingdom in the case of discrimination introduced in Rhodesia after U.D.I.¹⁴⁵⁾ then in the case of that which ante-dated U.D.I.

(E) The British Government would need to be satisfied that any basis proposed for independence would be acceptable to the people of Rhodesia as a whole.

Obviously this principle is of an entirely different nature to the preceding four principles which deal with the actual content of the various proposals.

This/...

144) Ibid., p. 53; Cmnd. 3171, p. 89; Cmnd. 3793, pp. 9-10.

145) For examples of some post-U.D.I. discriminatory measures see W.P. Kirkman, "The Rhodesian Referendum - the Significance of June 20, 1969" (45) International Affairs, 1969, p. 648 at p. 653.

This principle is not aimed at the content of proposals but at ensuring that the proposal, regardless of its detailed content, is acceptable to the people as a whole. Thus we need only concern ourselves with the means for testing acceptability. In testing acceptability, it would be necessary to ascertain the views of persons of all races in Rhodesia. Certainly this could be achieved by means of a referendum conducted on the principle of universal adult suffrage.¹⁴⁶⁾ The question arises whether any other method of ascertaining the views of the people would suffice. Certainly, if any other method of ascertaining the views of the people would suffice. Certainly, if any method other than a referendum of ascertaining the view of the people were utilized, the United Kingdom would have to be satisfied in good faith, that the views ascertained in such a way did, in fact, represent the will and desire of the people of Rhodesia as a whole.

Baron considers that only a referendum or the election of representatives to negotiate are appropriate democratic means of testing acceptability. In either case, he says, the voting should be on the principle of universal adult suffrage.¹⁴⁷⁾ Thus he argues that the Royal Commission proposed in Tiger and Fearless to test acceptability is not an appropriate means.¹⁴⁸⁾

Normal/...

146) Or by a series of referenda among the various population groups in Rhodesia also on the basis of adult suffrage.

147) Note 86) supra, p. 47.

148) Ibid., p. 46.

Normal political activities would not, in fact, be allowed during the testing of opinion and further there would not be complete immunity for witnesses.¹⁴⁹⁾ Presumably the same objections would be levelled at the commission to test acceptability proposed by the Anglo-Rhodesian Proposals for a Settlement, 1971.¹⁵⁰⁾ This is so even though the latter specifically provided that normal political activities would be permitted provided they were conducted in a peaceful and democratic manner and that there would be immunity for witnesses.¹⁵¹⁾ The Fearless proposals contained like provisions¹⁵²⁾ and the Tiger proposals provided that normal political activities would be permitted.¹⁵³⁾

It would appear that the Report of the Pearce Commission belies such objection.¹⁵⁴⁾ The Commission agreed with the Attorney-General of Rhodesia on the question of "Immunity of witnesses".¹⁵⁵⁾ On the question of "normal political activities", the Commission held that the Government and people of Rhodesia had "behaved extremely well in circumstances that were, to put it mildly, very difficult and provoking".¹⁵⁶⁾ It came to the ultimate conclusion that the majority of Africans rejected the proposals/...

149) Ibid., p. 55.

150) Cmd. R.R. 46-1971.

151) Ibid., p. 1.

152) Cmd. 3793, p. 10.

153) Cmd. 3171, pp. 89-90.

154) Cmd. 4964.

155) Ibid., pp. 31-32.

156) Ibid., p. 33.

proposals.¹⁵⁷⁾ It is submitted that a Commission such as the Pearce Commission, which made such an investigation extending over a period of two months of all facets of the question of acceptability, has proved itself to be an appropriate means of testing the acceptability of the proposals and that the United Kingdom could rely upon such a test in good faith.

Finally, the consultation of Chiefs and Headmen as a method of ascertaining the views of the African population would not appear to be appropriate, because the United Kingdom is not satisfied that the attitude of the Chiefs reflects the views of the people. Thus, were it to rely on such consultation, it would not act in good faith.¹⁵⁸⁾

- (F) The necessity of ensuring that, regardless of race, there was no oppression of majority by minority or of minority by majority.

It would appear that this sixth principle, first introduced by the British Prime Minister in January, 1966¹⁵⁹⁾ is in fact superfluous. Any content which it might possibly have is already covered by the norm of non-discrimination¹⁶⁰⁾ on racial grounds and the principles calling for progress towards ending racial discrimination. /...

157) Ibid., p. 112.

158) For discussion of this method of consultation see supra, pp. 49-50, 52.

159) Chayes, II, p. 1373.

160) Supra, pp. 665-672.

tion.¹⁶¹⁾ As such, the principle need not be discussed and in any event it was later abandoned by the British Conservative Government.¹⁶²⁾

Finally, we may note the views of Baron on this sixth principle. He argues that it is untenable that the rights of the minority should be specially protected. The rights of all should be protected as individual rights.¹⁶³⁾ It is submitted that Baron here correctly stresses the essence of the matter, viz. that this is a question of protecting human rights without discrimination. Baron also holds the view that both the Tiger and Fearless Proposals run counter to the sixth principle in that they perpetuate oppression of the majority by the minority.¹⁶⁴⁾ With respect, it is submitted that this is not so. The proposals recommend the special¹⁶⁵⁾ entrenchment of human rights in a Declaration of Rights. The special entrenchment meant that the majority were to have a blocking vote in relation to the alteration of the Declaration. The Declaration was to be judicially enforceable¹⁶⁶⁾ and finally, both Proposals, if implemented, would have lead to majority rule ultimately.¹⁶⁷⁾

(iv)...

161) Supra, pp. 691-693.

162) International Conciliation, No. 584, September, 1971, p. 178.

163) Note 86) supra, p. 42.

164) Ibid., p. 56.

165) Cmnd. 3171, p. 88; Cmnd. 3793, p. 9.

166) Cmnd. 3171, p. 88; Cmnd. 3793, p. 9.

167) Cmnd. 3171, p. 87; Cmnd. 3793, pp. 7-8.

(iv) Obligations of the United Kingdom in relation to Rhodesian independence under binding United Nations resolutions.

Resolutions relating to the terms upon which the United Kingdom ought or ought not to grant independence to Rhodesia have been passed by both the General Assembly and the Security Council of the United Nations. With regard to the resolutions of the General Assembly¹⁶⁸⁾ and to those of the Security Council passed under Chapter VI of the Charter,¹⁶⁹⁾ the United Kingdom only has obligations to consider the relevant terms of these resolutions in good faith.¹⁷⁰⁾ It need not give effect to them. Resolutions touching upon this particular matter have also been passed under Chapter VII of the Charter by the Security Council.¹⁷¹⁾ These are of course capable of imposing binding legal obligations on member states to observe them. To ascertain whether such obligations have been imposed, it is necessary to examine the relevant terms of the resolutions.

"The Security Council...

"Affirming the primary responsibility of the Government of the United Kingdom to enable the people of Southern Rhodesia to achieve self-determination and independence, and in particular their responsibility for dealing with the prevailing situation,...

"2. /...

168) A. Res. 2012(XX), paragraphs 3, 4; A. Res. 2022 (XX) paragraph 8; A. Res. 2151 (XXI) paragraph 3; A. Res. 2379 (XXIII) paragraph 1; A. Res. 2383 (XXIII) paragraphs 3, 6; A. Res. 2796 (XXVI) paragraph 1, 2.

169) S. Res. 217 (1965) paragraph 7. This was not a Chapter VII resolution. There was no determination of the existence of a threat to the peace. See J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p. 115; John Hopkins, "International Law - Southern Rhodesia - United Nations - Security Council", Cambridge Law Journal, 1967, p. 1 at p. 2. The latter even goes so far as to doubt the Charter basis of this resolution (p. 3.).

170) Discussed supra, pp. 660 -662.

171) S. Res. 253 (1963); S. Res. 277 (1970).

"2. Calls upon the United Kingdom as the administering Power in the discharge of its responsibility to take urgently all effective measures to bring to an end the rebellion in Southern Rhodesia and enable the people to secure the enjoyment of their rights as set forth in the Charter of the United Nations and in conformity with the objectives of General Assembly Resolution 1514 (XV);...

"17. Considers that the United Kingdom as the administering Power should ensure that no settlement is reached without taking into account the views of the people of Southern Rhodesia and, in particular, the political parties favouring majority rule and that it is acceptable to the people of Southern Rhodesia as a whole...." (172)

"The Security Council...

4. Reaffirms the primary responsibility of the Government of the United Kingdom for enabling the people of Zimbabwe to exercise their right to self-determination and independence, in accordance with the Charter of the United Nations and in conformity with General Assembly resolution 1514 (XV), and urges that Government to discharge fully its responsibility." (173)

It would appear that the latter resolution adds nothing to any obligations which may be enshrined in the former. It is simply repetitive of some of the provisions of the former. It is therefore only necessary to consider the terms of the former resolution.

The affirmation in the first paragraph quoted above simply confirms the direct Charter obligations of the United Kingdom in the matter of self-determination.¹⁷⁴⁾ It is submitted that it does not take the matter any further by imposing new obligations which did not exist before. In other words the paragraph is declaratory in nature.

Paragraph /...

172) S. Res. 277 (1970); 253 (1968).

173) S. Res. 277 (1970).

174) Discussed supra, pp. 672-677.

Paragraph 17 above will next be considered. Since this paragraph commences with the word "considers", it merely expresses the opinion of the Security Council on an appropriate course of conduct which the United Kingdom might be expected to take. But it does not attempt to impose obligations in terms of the paragraph. It is not a directive issued to the United Kingdom. The term "considers" should be contrasted with the term used in paragraph 2 quoted above, namely "calls upon", which, in the writer's submission, does indicate clearly and unequivocally, that it was the intention of the Security Council to impose binding legal obligations by issuing a directive under Chapter VII to the United Kingdom, a member state. This, in fact, introduces paragraph 2 itself which, it is submitted, is binding on the United Kingdom.

The obligations which paragraph 2 embodies may be summarized under two headings: (A) Independence should be granted to Rhodesia in accordance with the Declaration of the Granting of Independence to Colonial Countries and Peoples. (B) the United Kingdom should adopt means which are effective to achieve this end. Each of these obligations will now be considered.

(A) The Declaration on the Granting of Independence to Colonial Countries and Peoples does not in itself embody an obligation to grant independence or self-determination.¹⁷⁵⁾ This point is, however, academic
_____ in /...

175) See discussion supra p. 474 where the right of self-determination was rejected.

in the present context because the terms of the Declaration have been incorporated into a binding resolution passed by the Security Council. The result is that the United Kingdom is bound by the Declaration in its treatment of the Rhodesian question. There has been, so to speak, an "incorporation by reference" of the terms of the Declaration.

It must now be ascertained how, precisely, the Declaration binds the United Kingdom and, more specifically, should the United Kingdom grant independence in accordance with the one man, one vote principle. In the writer's view only one paragraph of the Declaration is relevant to this question of the terms of an independence to be granted. It reads as follows:

"5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories, which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, in order to enable them to enjoy complete independence and freedom".

The obligations under this paragraph may be summarized as follows: 1. the United Kingdom should ascertain the freely expressed will and desire of the people of the territory; 2. any independence granted should be in accordance with that freely expressed will; 3. in addition, any independence granted should not be contained in a constitution which distinguishes on the ground of race, creed or colour; 4. such independence should be granted immediately; 5. such independence should be granted without condition or reservation/...

reservation. These various obligations will now be considered in turn.

1. This requirement corresponds to the fifth principle insisted on by the United Kingdom in all negotiations with Rhodesia.¹⁷⁶⁾ It follows therefore that compliance with the fifth principle would satisfy the obligations of the United Kingdom. We previously submitted that there would be compliance with the fifth principle if the United Kingdom ascertained the views of the people of Rhodesia as a whole by referendum or by means of a commission such as the Pearce Commission, but that in any event, the United Kingdom would have to be satisfied in good faith, that the views ascertained did, in fact, represent the will and desire of the people of Rhodesia as a whole.¹⁷⁷⁾ The same arguments apply mutatis mutandis here.
2. That independence should be in accordance with the freely expressed will of the people does not need elaboration.
3. The independence constitution should not contain provisions which are discriminatory on the grounds of race, colour or creed. In so far as race and colour are concerned the obligations of the United Kingdom would correspond to its obligations under the/...

176) Supra, pp.693-694.

177) Supra, p. 694.

the norm of non-discrimination on racial grounds which we previously discussed.¹⁷⁸⁾ Obligations here go further however by prohibiting discrimination on the grounds of creed. As no ground other than race, colour and creed is mentioned, it is submitted that an independence constitution could conceivably discriminate on some other ground or grounds, e.g. education, property, income. Thus, for instance, an independence constitution embodying a franchise such as that contained in the Constitution of Southern Rhodesia, 1961¹⁷⁹⁾ or the Constitution of Rhodesia, 1965¹⁸⁰⁾ would be in accordance with the obligations of the United Kingdom. On the other hand, the franchise in the Constitution of Rhodesia, 1969 and the respective franchises in the Fearless, Tiger and Anglo-Rhodesian Proposals for a Settlement, 1971, are all racially discriminatory.¹⁸¹⁾ Thus, it is submitted, a constitution containing such provisions would not be in accordance with the obligations of the United Kingdom. Since discrimination on grounds other than race, colour or creed is permissible, it follows that neither majority rule nor a franchise based on universal adult suffrage is required/...

178) Supra, pp.550-553.

179) Supra, p. 17.

180) Supra, pp.665-666.

181) Supra, pp. 667-670.

required.¹⁸²⁾ If, however, there are discriminatory provisions in an independence constitution, it must be stressed that they would have to comply with the last requirement, i.e. be acceptable to the people of Rhodesia.

4. Independence should be granted immediately.¹⁸³⁾
5. The requirement that independence should be granted without condition or reservation would not be difficult to discharge and does not need extensive comment. The condition or reservation here referred to is presumably one which is contained in some stipulation in favour of the mother-country or perhaps some third state and which is imposed at the time of the grant of independence as part and parcel of that grant. It would presumably not refer to constitutional conditions imposed on the new state from its inception but would rather have an international law significance.¹⁸⁴⁾

(B)/...

182) The United Kingdom itself would also appear to take the view that majority rule is not obligatory. In November, 1970 it vetoed a Security Council resolution calling on it not to grant independence to Rhodesia without the fulfillment of majority rule. See John Dugard, "United Nations, Rhodesia and South Africa", Annual Survey of South African Law, 1970, p. 73.at p. 74.

183) This obligation raises the question of relative impossibility of performance. As such, the discussion infra, pp. 714-718 on the possibility of fulfilling obligations as affecting such obligations is applicable here.

184) Perhaps examples of such conditions and reservations are to be seen in the terms of the Treaty of Guarantee relating to the position of Cyprus (August 16th, 1960, 382 U.N.T.S.,3). By virtue of Article 1 of the Treaty, Cyprus undertook to maintain its territorial integrity as well as respect for its Constitution. It undertook not to form a union with any other state. Under Article 2, Greece, Turkey and the United Kingdom guaranteed the aforesaid position.

(B) The United Kingdom should adopt means which are effective in order to achieve an independence for Rhodesia which is in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples.

We have already seen that the United Kingdom has taken various measures aimed at coercing Rhodesia into an acceptable settlement.¹⁸⁵⁾ These measures have been supported by a most comprehensive sanctions campaign conducted by the United Nations¹⁸⁶⁾ which is aimed at suppressing the secession.¹⁸⁷⁾ The United Kingdom has also on many occasions attempted to bring about an appropriate settlement by negotiations with the Rhodesian Government.¹⁸⁸⁾ All these actions, sanctions and negotiations have proved to be ineffective in bringing about an appropriate settlement.¹⁸⁹⁾ Thus the combined efforts of/...

185) *Supra*, pp. 620-631.

186) Mandatory sanctions were imposed by S.Res. 216(1966); 232(1966); 253(1968); 277(1970); 314(1972). Selective sanctions were first imposed by S.Res. 232(1966). Comprehensive mandatory sanctions have existed since S.Res. 253(1968). These sanctions have had a serious effect on the Rhodesian economy as will be apparent from statistics on Rhodesian trade. Rhodesian exports to other countries have declined substantially. See S/9844/Add.3, Annex 1, pp. 1-4. The same is the position with Rhodesian imports. See S/9844/Add.3, Annex II, pp. 1-3. For a further breakdown of Rhodesian exports and imports into individual commodities see S/9844/Add. 3, Annex III, pp. 1-125. For replies given by various states on measures taken in implementing United Nations sanctions see S/9853, Annex II, pp.1-56.

187) See John W. Halderman, "Some Legal Aspects of Sanctions in the Rhodesian Case" (17) *I.C.L.Q.*, 1968, p. 672 at p. 699.

188) For records of the principal negotiations both before U.D.I. and after it see Cmnd. 2807, Cmnd. 3171, Cmnd. 3793, Cmnd. 4065; Cmnd. 4835.

189) Negotiations actually succeeded to the extent that the parties were able to achieve agreement in 1971. See Anglo-Rhodesian Proposals for a Settlement, 1971, Cmd. R.R. 46-1971, Cmnd. 4835. However, the agreement fell away when it was found to be unacceptable to the people of Rhodesia. Cmnd. 4964. Further, it was previously submitted that the agreement in question was not an "appropriate settlement" because it did not guarantee unimpeded progress to majority rule (*supra*, pp. 681-682) though it would appear that the United Kingdom Government did consider that the agreement satisfied this requirement. Cmnd. 4835. At other times, negotiations between the United Kingdom and Rhodesia seemed to come close to success, e.g. the Tiger talks. See Chayes, II, pp. 1373-1374.

of the United Kingdom and the international community in general fail to deter Rhodesia and force it into an appropriate settlement with the United Kingdom.¹⁹⁰⁾ One of the reasons for this is that while economic pressures militate for a settlement, the policies pursued by the Rhodesian Government make such a settlement difficult to achieve.¹⁹¹⁾ In any event, sanctions are in many ways defective as a means of forcing a settlement on a recalcitrant state. The Taubenfelds have drawn attention to some of these defects.¹⁹²⁾ They examine the effectiveness of sanctions in general and are sceptical about the success of economic measures.¹⁹³⁾ These are psychologically dangerous in that they unify the sanctioned state and divide opinion elsewhere. Further, international opprobrium does not render the sanctions more effective. This would have had an effect before the imposition of sanctions so that on the institution of sanctions it would cease to be a relevant factor.¹⁹⁴⁾ They conclude that the field for sanctions is a highly restricted one. The sanctioned state must be highly dependent on aid or trade from the sanctionists; it must lack alternatives and be unprepared for sanctions. It must be weaker or less prepared for sanctions than its victim.¹⁹⁵⁾

The/...

190) See International Conciliation, September, 1970, No.579, p.86.

191) Ibid., September, 1971, No. 584, p. 179.

192) Rita Falk Taubenfeld and Howard J. Taubenfeld, "The 'Economic Weapon': the League and the United Nations", Proceedings A.S.I.L., 1964, p.183.

193) Ibid., p. 205.

194) Ibid., p. 204.

195) Ibid., p. 205.

The obligation to adopt means which are effective in bringing about an independence which is in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples is a treaty obligation which is ultimately based on the Charter of the United Nations.¹⁹⁶⁾ Treaty obligations are not however ius strictum but ius aequum.¹⁹⁷⁾ This, in effect, means that such obligations must be interpreted and performed in good faith. The obligation to use "effective means" must therefore be interpreted in good faith. The means which the United Kingdom has used already have not been "effective" and yet there is little more which the United Kingdom could do short of using force to bring about an appropriate solution.¹⁹⁸⁾ The United Kingdom has however renounced the use of force as a means of achieving a constitutional settlement.¹⁹⁹⁾ The question therefore arises whether the United/...

196) Article 25. This obliges members of the Organization to carry out decisions of the Security Council. S.Res. 253 (1968) paragraph 2 is such a decision and the United Kingdom therefore has a Charter obligation to carry it out.

197) See Schwarzenberger, I, pp. 447-453.

198) Thus it has been asserted that the provisions of S.Res. 277 (1970) are essentially symbolic because they do not intensify economic sanctions beyond the level at which they were already under S.Res. 253 (1968) and that there is an air of unreality in calling upon the United Kingdom to take various measures as if it were still in control. See International Conciliation, September, 1970, No.579 at pp.87, 89.

199) For statements of Mr. Harold Wilson, the British Prime Minister, and Mr. Michael Stewart, the Foreign Secretary to this effect see The Times, 18th November, 1965, pp. 10(g), 12 (b); 23rd November, 1965, p.14 (c); 2nd December, 1965, p. 9(a)(c)(d); 22nd December, 1965, p.3(c); 31st December, 1965 p.9(a). The two cases in which the British might have contemplated the use of force were (i) at the request of the Governor, Sir Humphrey Gibbs, and (ii) if Rhodesia turned off the Kariba power supply to Zambia. The Times, 13th November, 1965, p. 7(a); 2nd December, 1965, pp. 8 f)(g) 9(a) (c)(d); 22nd December, 1965, p. 3(d).

United Kingdom might be expected to use force to achieve an appropriate settlement, i.e. whether "effective means" includes the use of force. As the obligation to adopt effective means is a treaty obligation, the pertinent question is whether, in good faith, the United Kingdom might be expected to bring about the desired result by the use of force as an effective means.

Baron is of the view that the sanctions imposed by Britain are "mini-measures".²⁰⁰⁾ He doubts the bona fides of the United Kingdom in adopting such measures²⁰¹⁾ and making the proposals in Tiger and Fearless to reduce the number of open "A" Roll seats from fifty to thirty-three.²⁰²⁾ Finally, he alleges that Britain does not act in good faith because it is only looking to find a means of persuading the world community to accept a favourable commission report, in which event there would be a sell out.²⁰³⁾ He considers that sanctions are not likely to succeed and that police measures remain the only sensible means both in the short and long term.²⁰⁴⁾

Baron's view therefore is that the United Kingdom can be expected in good faith to take police measures, i.e. to/...

200) Note 86) supra, p. 37.

201) Ibid.

202) Ibid., p. 51.

203) Ibid., p. 56.

204) Ibid., p. 57.

i.e. to use force against Rhodesia. It is submitted, however, that the answer to this question is not so simple and must depend upon the circumstances of the case. The relevant facts must be evaluated and balanced and any assessment of the situation must be, to a certain extent, a matter of difficulty and uncertainty. The following factors would perhaps be relevant in arriving at a conclusion on the matter; the burden which such a resort to force would place on the economy of the United Kingdom;²⁰⁵⁾ the possibility of obtaining assistance, financial or otherwise, from other members of the United Nations; the logistical difficulties involved;²⁰⁶⁾ the possible adverse effects of such action on relationships with other members of the United Nations;²⁰⁷⁾ whether the United Kingdom might be expected to lay waste a part of its dominions and in the end result probably cause more physical harm than any possible harm which might have/...

205) It was estimated that the cost of the Rhodesian crisis to the United Kingdom would be sixty to eighty million pounds per annum. The Times, 12th March, 1966, p.9(c). Naturally this does not take into account the use of force which was not contemplated. The estimate was also made before the imposition of United Nations mandatory sanctions and the 'Beira Blockade'. S. Res.216(1966); 232(1966); 253(1968). In addition, the British economy has suffered two devaluations since the estimate.

206) These would probably be intensified because South Africa and Portugal would almost certainly be unwilling to co-operate in such a venture. From a strategic and logistical point of view, Zambia is therefore the only possible base. President Kaunda in fact indicated that though Zambia was economically vulnerable, it was prepared to act as a base for such a venture. See The Times, 15th November, 1965, p. 15(b). Zambia is no longer as vulnerable as it was in 1965. See Cape Times, 17th January, 1973.

207) Baron, note 86) supra, p. 37 alludes here to the importance to Britain of South Africa as a trading partner.

have befallen had it remained inactive;²⁰⁸⁾ the probabilities of success;²⁰⁹⁾ the probabilities of a timely success. In the last analysis, one must ask whether the desired result can only be achieved at a disproportionate cost, taking into consideration the human suffering,²¹⁰⁾ human lives, financial implications and deterioration in human and international relations which would probably result from such an endeavour. If the cost was disproportionate, then, in good faith, the United Kingdom might not be obliged to use force.²¹¹⁾

There/...

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- 208) See for instance the statement of Mr. Pieter van der Byl, Rhodesian Minister of Information, that Rhodesia would not hesitate to carry out a scorched earth policy if Britain sent troops in. The Times, 27th January, 1966, p. 10(f). If this included the destruction of Kariba, this would have untold consequences, not only for Rhodesia, but also for Zambia. Even the cutting off of Kariba power to Zambia for more than a few days would cause Zambian mines to flood and set back the mining industry by a decade. The mining industry is the lifeblood of Zambia's economy. See Cape Times, 16th January, 1973.
- 209) If the British Government were to move troops to Zambia for the purpose of launching an attack on Rhodesia, this would probably result in a pre-emptive strike by Rhodesia before the British military build-up became operational. See Michael Akehurst, "State Responsibility for the Wrongful Acts of Rebels - An Aspect of the Southern Rhodesian Problem" (43) B.Y.I.L., 1968-1969, p.49 at p. 52.
- 210) This was one of the reasons advanced by Mr. Michael Stewart, the Foreign Secretary, for the United Kingdom's refusal to use force. He said "... an attempt to impose a constitutional solution by military force in Southern Rhodesia not only would involve misery for millions of innocent people but would thrust into a still more distant future the right and just solution to this problem." See Chayes, II, p.1341.
- 211) That the United Kingdom is subjectively in good faith in refusing to use force to achieve an appropriate settlement appears from statements of Mr. Michael Stewart, the Foreign Secretary, to the Security Council on 12th November, 1965. See Chayes, II, pp.1341, 1342. The United States would appear to accept Britain's bona fides in the matter. See speech of Ambassador Goldberg before the Security Council. Chayes, II, pp.1361-1362. Reflections have also been cast upon Britain's bona fides. See for example the speeches of Mr. Kironde (Uganda) and Ambassador Morozov (Soviet Union). Ibid., pp. 1360-1361, 1362-1363. See too Baron, note 86) supra, pp. 37, 51, 56.

There are other reasons too why the "effective measures" contemplated by S.Res. 253(1968) do not include an obligation to use force to bring about an appropriate settlement.

1. The United Kingdom has persistently opposed the use of force in relation to Rhodesia.²¹²⁾ By refusing to veto S.Res. 253 (1968) it might be deduced that in the view of the United Kingdom, the resolution was not so extensive as to contemplate the use of force. Mr. George Thomson, the Commonwealth Secretary, speaking in the House of Commons said that he thought this resolution was a considerable achievement and the British Government had made it clear throughout that the use of force could not be contemplated. There was nothing in the resolution which conflicted with the Government's decision on this point. The main effect of the provisions would be to make sanctions more comprehensive.²¹³⁾ Again, in answer to a question, he stated:

"I think that the hon.Gentleman must have overlooked what I said at the beginning, that this long debate in the international community of the United Nations began with a proposition for the use of force. That proposition has been dropped as a result of painstaking diplomacy. This Resolution is an attempt to find a peaceful solution to the Rhodesian problem". 214)

This/...

212) See Note 199) supra.

213) Parliamentary Debates (H.C.) Vol. 765, No. 129, Col. 2136.

214) Ibid., Col. 2139.

This consistent attitude was maintained later in 1970 when Britain vetoed a Security Council resolution calling upon it to use force.²¹⁵⁾

In view of all the above, it is submitted that it would be contrary to good faith to interpret S.Res. 253 (1968) as imposing an obligation on the United Kingdom to use force and this is especially the case when one considers that neither the resolution in question nor subsequent Security Council resolutions in the Rhodesian matter contain any reference to the use of force.

2. Before any member of the United Nations is obliged to use force in pursuance of collective security measures directed by the Security Council, there must be compliance with the provisions of Article 44 as a precondition. The provisions of Article 44 cannot, however, be observed unless an agreement such as is envisaged by Article 43 has been concluded. No such agreement has been concluded by the United Kingdom and hence the United Kingdom could not be obliged to use force to implement S.Res. 253 (1968) even if the latter resolution specifically called upon it to use force, which, of course, is not the case.

The/...

215) See Die Burger, 19th March, 1970. It is interesting to note that the United States also vetoed this resolution, the only Security Council resolution which the United States has ever vetoed. Finally it would have been unnecessary to introduce such a resolution into the Security Council at all, if the United Kingdom was already obliged to use force by virtue of S.Res. 253 (1968).

The position is precisely similar to that pertaining to the 'Beira Blockade', which was previously discussed.²¹⁶⁾

Just as the United Kingdom is not obliged to use force to implement the 'Beira Blockade' under S. Res. 221 (1966) so too it is not obliged to implement S.Res. 253 (1968) by the use of force - for precisely the same reason.

We may now summarize the principal obligations of the United Kingdom arising out of S Res. 253 (1968). By permitting the resolution to be passed by the Security Council, the United Kingdom has allowed itself to be manoeuvred into a situation where its position in international law would appear to be as follows:

- (A) Any independence granted should reflect the desires of the population as a whole.
- (B) Any independence granted should not discriminate on the grounds of race, colour or creed, though conceivably it might discriminate on other grounds if this reflected the wishes of the population.
- (C) The obligation to use effective measures in bringing about an appropriate independence is probably not so extensive as to include an obligation to use force to bring about the result.

(v)/...

216) Supra, pp. 646-647.

- (v) The possibility of fulfilling obligations as effecting such obligations.

We have just described the obligations which rest upon the United Kingdom in relation to the granting of independence to Rhodesia. Perhaps, however, the United Kingdom has not been and is not in a position to obtain an appropriate settlement of the Rhodesian situation. It may not have the power and bargaining ability to achieve such a result.²¹⁷⁾ If this is so, the question arises whether the United Kingdom could discharge its obligations by granting independence simply on the best terms which it could conclude in the circumstances even though such terms might fall short of the standards enshrined in the obligations previously discussed.²¹⁸⁾ The United Kingdom might possibly be able to rely on the doctrine of relative impossibility of performance of treaty obligations and so this possibility must now be examined.

The obligations which the United Kingdom owes in relation to Rhodesian independence arise under the Charter of the United Nations.²¹⁹⁾ Treaty obligations are however ius aequum and not ius strictum.²²⁰⁾ They impose relative duties and not absolute/...

217) See the discussion of the ineffectiveness of United Kingdom authority in Rhodesia (supra, pp. 154-157) and the failure of sanctions to deter Rhodesia (supra, pp. 297-301).

218) Terms, for instance, like those in the Anglo-Rhodesian Proposals for a Settlement, Cmd. R.R. 46-1971.

219) The obligations arising under the norm of non-discrimination on racial grounds (supra, pp. 665-672) would appear to be exceptional in this respect. However these obligations coincide with obligations which the United Kingdom also owes under Article 25 of the Charter of the United Nations by virtue of S.Res. 253 (1968) paragraph 2. Supra, pp. 702-704.

220) See Schwarzenberger, I, pp. 447-453.

absolute ones.²²¹⁾ Thus the performance of such obligations must be interpreted in a manner which excludes both absolute and relative impossibility from the very scope of such duties. Refusal to perform in such circumstances is not an international tort because in the circumstances, the "obligations", being impossible to perform, do not constitute treaty obligations.²²²⁾ In the case of practical impossibility of performing treaty obligations, good faith may require performance in some way other than that stipulated.²²³⁾ It is possible, therefore, that if the United Kingdom is unable to achieve a grant of self-government which is strictly in accordance with the spirit of its obligations as described by us that it might perform in some other way and that good faith would then require a grant of self-government on the best possible terms which the United Kingdom could attain to all the circumstances, taking its bargaining power into consideration.

The concept of relative impossibility in the instant case should however be more closely scrutinized. It raises two distinct questions in the Rhodesian context. (A) Is it at present possible for the United Kingdom to achieve a grant of independence to Rhodesia which would be in accordance with its obligations as described above? (B) Is it possible for the United Kingdom not to grant independence to Rhodesia except in accordance with its obligations as above? (A)/...

221) Ibid., p. 539.

222) Ibid.

223) Ibid., pp. 541-542.

(A) Possibility of achieving an appropriate independence.

It would appear that the United Kingdom does not have the factual ability to achieve such a grant. United Kingdom power is ineffective in Rhodesia, sanctions have not been successful²²⁴⁾ and the United Kingdom cannot, in good faith, be expected to resort to force to achieve an appropriate solution.²²⁵⁾

It is therefore submitted that the United Kingdom cannot be said to be in breach of its positive obligation to grant an immediate (and appropriate) independence to Rhodesia.²²⁶⁾ Relative impossibility excuses the United Kingdom. The existence of this relative impossibility is not, however, sufficient to terminate the positive obligation of the United Kingdom to grant an immediate and appropriate independence. At the moment it can be argued that it is probably merely enough to suspend the fulfilment of the obligation.²²⁷⁾ For the impossibility may be merely of a temporary character. Circumstances might conceivably arise in which the United Kingdom would find it possible to impose an appropriate solution, e.g. the sanctions campaign conducted against Rhodesia through the United Nations might have the effect of ultimately weakening
the/...

224) See note 217) supra.

225) Supra, pp. 707-713.

226) S.Res. 253(1968) paragraph 2 and S.Res. 277 (1970) paragraph 4 read together with A.Res. 1514 (XV) paragraph 5 and Article 25 of the Charter of the United Nations. See supra, pp. 702-704.

227) Schwarzenberger, I, p. 543.

the Rhodesian economy and might thus strengthen the hand of the United Kingdom making it possible for it to fulfill its positive obligation here.²²⁸⁾ While this possibility remains, it is submitted that the positive obligation remains merely suspended.

(B) Possibility of denying an inappropriate independence to Rhodesia.

It is self-evident that there can be no impossibility here. The obligation of the United Kingdom here would be merely a negative one which it can fulfill simply by refusing to settle the Rhodesian independence question. It could, in good faith, be expected to act in this way if it is unable to fulfill its positive obligation to grant an immediate and appropriate independence. By doing this the United Kingdom would deny (at least in relation to itself) an international personality to Rhodesia which the latter claims by virtue of U.D.I.

It may now be asked for how long the United Kingdom can be expected to refrain from formally granting an inappropriate independence to Rhodesia. Again, it is submitted, that the concepts of good faith and relative impossibility provide the answer. When it can be said that in the circumstances it has become practically and permanently impossible²²⁹⁾ to obtain an appropriate settlement/...

228) There has been recent speculation that Rhodesia may be on the edge of a precipice because of falling currency reserves and guerilla activities. See the Cape Times, 12th January, 1973.

229) As we have seen temporary impossibility does not have the effect of terminating obligations. It merely suspends them. See Schwarzenberger, I, p. 543.

settlement, the obligation will have fallen away. When this is the position, good faith could no longer require the United Kingdom to adopt an attitude which had been outdated by passing events. The obligation to grant an appropriate independence to Rhodesia would have become permanently impossible and as such would have fallen away.

(v) We may now summarize the position of the United Kingdom in the light of possibility of performance.

(A) The United Kingdom has no positive duty to grant an appropriate independence to Rhodesia at the moment. The "obligation" in question has been suspended on the grounds of practical impossibility of performance.

(B) The United Kingdom has a duty to refrain from granting an inappropriate independence to Rhodesia. This obligation will remain until it becomes manifest that the United Kingdom will not be able to achieve an appropriate independence. At that stage, there will be permanent impossibility and the United Kingdom would then be able to settle the Rhodesian question on the best terms it could achieve in the circumstances. Good faith could then demand no more.

(3) Obligations of the United Kingdom as a member state of the British Commonwealth of Nations.

The only possible obligations here are obligations flowing from unilateral undertakings given by the United Kingdom, both at Commonwealth Prime Ministers Conferences and elsewhere, and from agreements/...

agreements to which the United Kingdom is a party, such agreements being embodied in resolutions and communiques of Commonwealth Prime Ministers' Conferences. It is clear that international obligations can flow from undertakings embodied in unilateral declarations²³⁰⁾ and in treaties.²³¹⁾ Such obligations are consensual obligations.²³²⁾

We must in this connection examine the following questions. (a) What undertakings have been given by the United Kingdom in the Rhodesian context? (b) Are these undertakings obligatory in international law? Since the only possible obligations flow from such undertakings, it follows that the only possible obligations of the United Kingdom here are of a consensual character.

(a) Undertakings of the United Kingdom.

Since 1963 many members of the Commonwealth, on the initiative of President Nyerere, were insisting that the United Kingdom should not grant independence to Southern Rhodesia before constitutional reforms and universal adult suffrage were introduced.²³³⁾ At the 1965 Commonwealth Prime Ministers' Conference, the British Government, while retaining their responsibility for Southern Rhodesia, agreed that if discussions did not develop satisfactorily in a reasonably speedy time, it would be ready to consider prompting a constitutional conference to ensure Rhodesia's progress to independence on a basis acceptable to the people of Rhodesia as a whole.²³⁴⁾

In/...

230) Schwarzenberger, Manual, p. 172.

231) Ibid., p. 151.

232) Ibid., pp. 151, 172.

233) Cmnd. 2807, pp. 5-9. See too Georges Fischer, "Le Problème Rhodesien" (11) Annuaire Francais de Droit International, 1965, p. 41 at p. 59; The Times, 4th October, 1965, p. 8 (f).

234) Ibid.

In January, 1966 a Commonwealth Prime Ministers' Conference was called at Lagos for the first time in history to consider a single political question, viz. that of Rhodesia.²³⁵⁾ The final communiqué issued at the Conference contained the following affirmations inter alia:²³⁶⁾

- (i) that the Rhodesian rebellion must be ended;
- (ii) that those detained for purely political purposes should be released;
- (iii) political activities should be allowed, these should be constitutional and free from intimidation from any quarter;
- (iv) that repressive and discriminatory laws should be repealed;
- (v) that the use of force was not precluded if this was necessary to restore law and order.

The United Kingdom was naturally a party to the above communiqué. Indeed it was at the insistence of the United Kingdom that the qualification attached to (v) above, viz. "If this was necessary to restore law and order", was added.²³⁷⁾

At the Commonwealth Prime Ministers' Conference in September, 1966 the United Kingdom gave the following pledges:

(i) The NIBMR Pledge.

The British Government undertook to inform the Rhodesian Government that if they did not end the rebellion, the British Government would withdraw all previous proposals for a settlement and in particular they would not be prepared/...

235) Chayes, II, p. 1371.

236) For text see The Times, 13th January, 1966, p. 7 (a)(b).

237) See Chayes, II, p. 1371.

prepared to submit to the British Parliament any settlement which involved independence before majority rule.²³⁸⁾

(ii) The "Acceptance" Pledge.

Any settlement must be acceptable to the people of Rhodesia: The test of "acceptability" would be by "appropriate democratic means", it would be "fair and free" and acceptable to the general world community.²³⁹⁾

(iii) The "Sanctions" Pledge.

The United Kingdom undertook that if Rhodesia did not end the rebellion, it would be prepared to join in sponsoring in the Security Council effective and mandatory economic sanctions against Rhodesia.²⁴⁰⁾

At the Commonwealth Prime Ministers' Conference in 1969, the United Kingdom gave the following undertakings:

- (i) There was no change in the British Government's policy on NIBMR. If the people of Rhodesia as a whole approved the Fearless proposals, the British Prime Minister would consult his Commonwealth colleagues about the NIBMR commitments.²⁴¹⁾
- (ii) Any settlement would depend for its validity upon the democratically ascertained wishes of the people of Rhodesia as a whole. However, it was agreed that the process for ascertaining their views was the responsibility of the British Government but it would need to be made in a manner
which/...

238) Chayes, II, pp1371-1372; Baron, note 86) supra, p. 48; Cmd.4065, p.12. NIBMR means "no independence before majority rule".

239) Cmd. 3159, Appendix A, p.6. See too Baron, note 86) supra, p.41.

240) Chayes, II, pp. 1371-1372.

241) Cmd. 4065, p. 12.

which would carry conviction in the Commonwealth and in the international community generally.²⁴²⁾

(iii) The Prime Minister undertook to continue to consult Commonwealth members on the issue of Rhodesia.²⁴³⁾

Apart from these undertakings given at Commonwealth Prime Ministers' Conferences, the British Prime Minister also gave an assurance to President Kaunda that Britain would not stand idly by if Rhodesia cut off Kariba power supply to the Zambian copperbelt.²⁴⁴⁾

(b) Obligatory character of undertakings.

We have now seen the more important undertakings given by the United Kingdom in the Commonwealth context and it now remains to see whether these undertakings are obligatory for the United Kingdom in international law. In order to formulate an opinion on this, it is necessary to discuss the inter se doctrine.

The inter se doctrine asserts that relations between countries of the Commonwealth which if subsisting between any of them and foreign countries, would be regarded as international relations governed by international law, are neither international relations nor governed by international law.²⁴⁵⁾ The relations in question are not incapable of being governed by international law, but members of the Commonwealth, by agreement, and with the acquiescence of foreign states, apply the inter se doctrine to that effect.²⁴⁶⁾

The/...

242) Ibid.

243) Ibid., p.13.

244) The Times, 2nd December, 1965, p. 8(f)(g).

245) J.E.S. Fawcett, The British Commonwealth in International Law, London, 1963, p. 144.

246) R.B. Stewart, Treaty Relations of the British Commonwealth of Nations, New York, 1939, p. 328.

The original inter se doctrine was a very strict version which denied that international law could ever apply to relations between members of the Commonwealth, but this old strict doctrine is now untenable.²⁴⁷⁾ In fact, international law is in general largely eroding the inter se doctrine²⁴⁸⁾ and it has been alleged that the doctrine is now probably largely obsolete.²⁴⁹⁾ Thus the inter se doctrine does not apply in the spheres of sovereign immunity,²⁵⁰⁾ diplomatic immunities,²⁵¹⁾ immunities of visiting forces,²⁵²⁾ and naturally where disputes are submitted to international tribunals.²⁵³⁾

The inter se doctrine cannot, however, be discarded altogether. It still applies and the incidence of its application varies from one subject matter to another. Thus while the matters which we just mentioned are governed by international law, there are still some aspects of Commonwealth relations which are not governed by international law but by Commonwealth conventions under the doctrine.²⁵⁴⁾ Thus for instance extradition inter se the members of the Commonwealth is not governed by international law.²⁵⁵⁾

The/...

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- 247) R.Y.Jennings, "The Commonwealth and International Law" (30) B.Y.I.L., 1953, p. 320 at p.349.
248) Ibid., p. 350.
249) Fawcett, note 245) supra, p. 144.
250) Jennings, note 247) supra, pp. 321-322.
251) Ibid., pp. 322-323.
252) Ibid., pp. 322-324.
253) Ibid., p. 329.
254) Ibid., pp. 320, 349.
255) Robert E. Clute, "Law and Practice in Commonwealth Extradition" (8) American Journal of Comparative Law, 1959, p. 15 at p. 20. Jennings, note 247) supra, says that Commonwealth extradition is modelled on international law but there are differences (pp. 325-326) but that such extradition could be easily assimilated into the international system (p.350).

The point which concerns us, however, is the relevance of the doctrine in the field of consensual undertakings. Originally the inter se doctrine applied to agreements between Commonwealth members and thus international law did not govern such agreements. They were not treaties. Such agreements were normally concluded in the Heads of State form and this was a stumbling block to the applicability of international law to such agreements.²⁵⁶⁾

However, the Heads of State form became obsolete in practice, treaties were concluded in an inter-governmental form, and this removed the stumbling block.²⁵⁷⁾ Today in relation to treaties the inter se doctrine is obsolete.²⁵⁸⁾ Thus there is no reason why agreements and undertakings by members of the Commonwealth to each other should not embody international law obligations.²⁵⁹⁾

Certainly if an agreement expressly provides that international law should govern it or where it does so by necessary implication, duties under that agreement will be a matter of international obligation. Thus, for instance, registration of an agreement under Article 102(1) of the Charter of the United Nations implies that it is an international agreement governed by international law even when between Commonwealth members.²⁶⁰⁾

Inter se agreements may also contain clauses specifically referring disputes arising out of them to the International Court/...

256) Ibid., p. 334.

257) Ibid. This would be even more so today than in 1953 when Jennings wrote because today the majority of the members of the Commonwealth are Republics with different Heads of State.

258) Ibid., pp. 333, 336.

259) See Fawcett, note 245) supra, p. 176; Stewart, note 246) supra, pp. 359-360.

260) Fawcett, note 245) supra, pp. 175-176. Registration does not mean that such an agreement necessarily binds. See Jennings, note 247) supra, pp. 333-334.

a Court of Justice or to some other international body.²⁶¹⁾ But apart from these clear cases, international law may govern an agreement between Commonwealth members where the circumstances do not exclude the application of that law. Thus, if Commonwealth members are parties to a treaty to which foreign powers are also parties, rights and obligations under that treaty will be governed by international law, even among the Commonwealth parties inter se.²⁶²⁾ The Charter of the United Nations applies inter se to the members of the Commonwealth.²⁶³⁾ If an agreement is concluded inter se and nothing is said in it about referring disputes arising out of that agreement to the International Court of Justice, but the parties are otherwise subject to the jurisdiction of the latter, it will be for the Court to decide whether it has jurisdiction over a dispute arising out of such an inter se agreement. It will be unlikely to sustain the inter se doctrine in such a case thus denying the applicability of international law and its own jurisdiction.²⁶⁴⁾ Again, it might even be argued that international law governs agreements such as that to establish the Commonwealth Secretariat.²⁶⁵⁾ It contains obligations to accord privileges and immunities to the Secretariat and its staff.²⁶⁶⁾ But the question of immunities is, as we have seen, now governed by international law even as between members of the Commonwealth. On the other hand, there is no reason why Commonwealth countries should not conclude international/...

261) Ibid., pp. 328-329, 335.

262) Fawcett, note 245) supra, p.176.

263) Jennings, note 247) supra, p. 335.

264) See Ibid., p. 329.

265) For text see (4) I.L.M., 1965, pp. 1108-1116.

266) Articles 39, 40.

international agreements to which international law does not apply.²⁶⁷⁾ Any two countries, not merely Commonwealth countries, can conclude "gentlemen's agreements". It is purely a matter of intention.²⁶⁸⁾ Commonwealth countries may also by joint reservation exclude the application of a particular international agreement between them.²⁶⁹⁾

From the above it should be apparent that the inter se doctrine no longer applies to agreements between Commonwealth members. These agreements are treated in the same way as other international agreements. Thus whether international law governs them or not is a matter of intention in the individual case. Despite the above the inter se doctrine still plays some role for it may operate to exclude an intention to create international law obligations.²⁷⁰⁾ This is particularly important when one has to consider the various agreements and undertakings, often of an informal character, concluded by Commonwealth members, such as those we are here considering. Agreements of a wide variety are concluded here and these find expression in the form of resolutions of Imperial Conferences, exchanges of notes, formal instruments and informal agreements.²⁷¹⁾ The species which we are interested in is the agreement concluded at Imperial Conferences (now Commonwealth Prime Ministers' Conferences).
It/...

267) Fawcett, note 245) supra, p. 176. An example of such an agreement may be the Commonwealth Telegraphs Agreement. For discussion of this see J.E.S. Fawcett, "Treaty Relations of British Overseas Territories" (26) B.Y.I.L., 1949, p. 86 at p. 105.

268) Fawcett, note 245) supra, p.176. See too discussion supra, pp. 354-358 on the various possibilities when states conclude agreements.

269) Fawcett, note 245) supra, p.176. Fawcett adds that the effect of such a reservation will be determined by international law.

270) Jennings, note 247) supra, p. 336.

271) Stewart, note 246) supra, p. 329.

It would appear that agreements couched in the form of resolutions or communiqués issued at such conferences are not binding in international law because they were not intended to be binding on anyone.²⁷²⁾ The Commonwealth convention on the equality of member states with its corollary of ultimate freedom of action is frequently overriding²⁷³⁾ and therefore excludes the necessary intention. The relations of individual members remain unchanged. Each retains the freedom it enjoyed hitherto in practice and the individual member is not bound by policy laid down at the Commonwealth Prime Ministers' Conference.²⁷⁴⁾ Stewart also discusses the question as to what the nature of agreements arrived at by members of the Commonwealth at such conferences is. He says there is a difference of opinion in that some say they have a constitutional law character, while others deny that they should be considered as such. Yet others would regard them as possessing no legal character at all and that it remains for each government to decide freely whether it will give any effect to any such resolution to which it has agreed.²⁷⁵⁾

Whatever the merits of the above dispute, it is submitted from all we have said that at least one proposition is reasonably clear. Such agreements are invariably not intended to be governed by international law. This conclusion is bolstered by the fact that the Commonwealth Prime Ministers' Conference only has the power to pronounce legally on one matter, viz. the question of admissions to the Commonwealth.²⁷⁶⁾ In fact, it
would/...

272) Jennings, note 247) supra, p. 336.

273) Ibid.

274) Ibid., p.337.

275) Stewart, note 245) supra, p. 336.

276) Fischer, note 233) supra, p. 59.

would appear that there is only one obligation for members of the Commonwealth - the obligation to consult. Thus Falley alleges there is an obligation to consult Commonwealth countries before granting independence to a dependency.²⁷⁷⁾ Jennings says members bind themselves generally to consult and, as far as possible, to cooperate with one another.²⁷⁸⁾ It is to be doubted whether even the obligation to consult can be an international law obligation.²⁷⁹⁾

From all that we have said, it is clear that the various undertakings concerning Rhodesia given by the United Kingdom to other members of the Commonwealth at various times are not international obligations. In any event, the question is largely academic for with the exception of the NIBMR undertaking and the undertaking given to Zambia in the event of a power cut at Kariba, the undertakings given by the United Kingdom overlap its obligations as a member state of the United Nations.

SECTION V.

EFFECT OF A HYPOTHETICAL GRANT OF INDEPENDENCE BY THE UNITED KINGDOM TO RHODESIA.

Here it is proposed to deal with the following effects: (1) effect on the personality of Rhodesia; (2) effect on the obligations of the United Kingdom; (3) effect on the responsibility of the United Kingdom; (4) effect in relation to state succession; (5) effect on mandatory sanctions.

(1)/...

277) P.744.

278) Note 247) *supra*, p. 337.

279) Jennings, *ibid.*, regards Commonwealth members as binding themselves morally to consult and cooperate.

(1) Effect of a grant of independence on the personality of Rhodesia.

The grant of independence to Rhodesia would amount to an act of recognition by the mother-state, the United Kingdom. This act of recognition would have the effect of establishing a full international personality in Rhodesia. The personality would only be effective against the United Kingdom itself unless other states decided to grant recognition to Rhodesia.¹⁾ As the act of recognition is discretionary,²⁾ other states would not be obliged to follow the example of the United Kingdom. Thus, by the device of non-recognition Rhodesia might be deprived in effect of a large measure of international personality even though it might have settled its differences with the United Kingdom itself.

A grant of independence has however one important consequence for third states. Once the mother-state has recognized the independence of the former dependency, there can be no question of recognition by third states being premature.³⁾

Rhodesia would be eligible for both United Nations and Commonwealth membership as it is an independent state.⁴⁾ It is unlikely however that/...

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- 1) See discussion on the constitutive nature of recognition supra, pp. 281-282. Even if the United Kingdom granted independence to Rhodesia in a manner which was contrary to its international obligations previously described (supra, pp. 662-713) it is submitted that an international personality would still be created in Rhodesia. This flows from the proposition previously discussed, that an unlawful act of recognition may nevertheless be valid. See supra, pp. 328-333. In addition, recognition of the new state would include an acknowledgment of its title to its territory, for statehood is inseparable from the notion of state territory. See R.Y. Jennings, The Acquisition of Territory in International Law, Manchester, 1963, p.7.
 - 2) There is no "duty to recognize". Supra, pp. 285-295.
 - 3) Lauterpacht, p. 36. The duty not to recognize prematurely falls away. Supra, p. 301. Whether the "duty not to recognize", owed in terms of the Charter of the United Nations, (supra, pp. 302-321) would still bind third states which are members of the Organization, is discussed infra, pp. 754 et seqq.
 - 4) See J.E.S. Fawcett, The British Commonwealth in International Law, London, 1963, p. 88.

that it would gain admission to either body. Chayes poses the question whether the United Kingdom could unilaterally reintegrate Rhodesia into the Commonwealth on the granting of independence to Rhodesia.⁵⁾ The answer to this question would appear to be in the negative. While the grant of independence in such cases is for the United Kingdom, no new members may be admitted without consultation between existing members.⁶⁾

(2) Effect of a grant of independence on the obligations of the United Kingdom.

If the United Kingdom settled the Rhodesian independence issue in accordance with the international obligations outlined above,⁷⁾ there would naturally be no breach of obligation. Conversely, it is obvious, that if the United Kingdom granted independence to Rhodesia on terms which conflicted with the above obligations, i.e. granted an "inappropriate" independence, this would be an international delinquency for which international responsibility would be incurred.⁸⁾ Reparation would be due for such a breach of international law.⁹⁾

(3)/...

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- 5) II, p.1378.
- 6) Fawcett, note 4) supra, pp. 86, 87. The Conference of Commonwealth Prime Ministers pronounces solely on the question of admission of a new state to the Commonwealth. See Georges Fischer, "Le Problème Rhodesien" (11) Annuaire Francais de Droit International, 1965, p.41 at p. 59.
- 7) Supra, pp. 662-713.
- 8) See Oppenheim, International Law, 8th Ed., London, 1955, I, pp. 337-338.
- 9) Ibid., p. 353. The possible kinds of reparation for the different kinds of damage suffered are discussed supra, pp. 323-328 in the context of a hypothetical recognition of Rhodesia in contravention of a "duty not to recognize". The contravention of the duty not to recognize Rhodesia is similar in principle to the contravention of the obligation not to grant an inappropriate independence to Rhodesia. Both contraventions have the effect of establishing a relative international personality in a manner contrary to the obligations of the actor. As such the discussion on the possible kinds of reparation (supra, pp.323-328) is applicable mutatis mutandis here.

(3) Effect of a grant of independence on the international responsibility of the United Kingdom.

We have previously seen the vicarious responsibility of the United Kingdom for conduct of the Rhodesian Government and officials which infringes the rights of aliens.¹⁰⁾ We must now enquire whether this responsibility would continue after the United Kingdom had settled the Rhodesian independence dispute by granting independence. Such a settlement would almost certainly contain an amnesty for the Rhodesian 'rebels'.¹¹⁾ The granting of an amnesty can, however, in certain circumstances incur the international responsibility of the state. The reason is that a state will be responsible for the acts of rebels which it ratifies expressly or implicitly. Normally such ratification does not take place during the rebellion¹²⁾ but when the matter is ultimately settled, the acts of the individuals in question may be said to be ratified by the amnesty for these acts contained in the settlement.¹³⁾

In discussing this question, it is necessary to make a fourfold distinction between: (a) amnesties for common crimes; (b) amnesties for political offences; (c) amnesties for civil wrongs; (d) ratification of rebels in official positions they assumed.

(a) Amnesties for common crimes.

This relates to the position where an alien is injured by the
_____ commission/...

10) Supra, pp. 597-619.

11) See Michael Akehurst, "State Responsibility for the Wrongful Acts of Rebels - An aspect of the Southern Rhodesian Problem" (43) B.Y.I.L., 1968-1969, p. 49 at p. 55.

12) Akehurst, note 11) supra, p. 61 would appear to regard Rhodesia as being exceptional here, in that there may even have been ratification during the rebellion.

13) Ibid.

commission of a common crime and the criminal receives an amnesty. The general rule would appear to be that pardons and declarations of amnesty have engaged state responsibility on the grounds of failure to punish effectively.¹⁴⁾ Akehurst points out¹⁵⁾ that with one exception,¹⁶⁾ the cases¹⁷⁾ establish that such amnesties make the state liable because by pardoning the criminal, a nation assumes responsibility for his past acts.

Akehurst submits that the rationale for responsibility is totally unconvincing. His reason is that such an amnesty does not deprive the injured alien of a remedy. He may still have a civil right to sue.¹⁸⁾ We may observe however that there is more to international reparation than a civil right to sue. In certain cases, a third state is entitled to demand the punishment of criminals and not merely the grant of compensation. In such cases a criminal amnesty would exclude an appropriate form of reparation. In international arbitrations the state's duty to punish crimes committed against aliens has been affirmed.¹⁹⁾

Akehurst again questions the soundness of the underlying reasons for holding a state responsible for an amnesty which excludes the duty to punish criminals. His main argument is that the duty to punish is based on the retributive theory of punishment which is outmoded.²⁰⁾ It is in any event unlikely that the amnesty for common crimes will be relevant in the Rhodesian context. In the
first/...

14) Sorensen, p. 563.

15) Note 11) supra, p.57.

16) Divine case, Moore's International Arbitrations, pp. 2980, 2981.

17) Cited by Akehurst, note 11) supra, p. 57.

18) Ibid.

19) West claim (1927) 4 R.I.A.A., 270, 271; Janes claim (1926) 4 R.I.A.A. 82.

20) Note 11) supra, pp. 57-58.

first place, it is to be doubted whether any eventual settlement which materializes will contain an amnesty for common crimes. In the second place, it is doubtful if there will be any cases of serious common crimes committed against aliens where the state has not endeavoured to see that the law takes its course.

(b) Amnesties for political offences.

An amnesty for political offences arising out of a rebellion does not make the state internationally responsible.²¹⁾ If there is a general amnesty for insurgents and this is founded on reasons of national policy which are designed to achieve the pacification of the country, there is no responsibility.²²⁾ Thus it was never urged that the United States was responsible for the acts of the Confederacy because it pardoned its leaders.²³⁾ The amnesty should only cover political crimes committed in a political context. It must not be extended to common crimes which cannot be regarded as normal incidents of civil war.²⁴⁾

Akehurst says that there are three exceptions to the general rule of non-responsibility for amnesties in relation to such offences.

- (1) If the amnesty is not a bona fide exercise of a state's discretion, e.g. if it is to spite aliens, responsibility is engaged. Akehurst admits that there is no authority for this proposition but says that its justice is self-evident.

(11)/...

21) Ibid., pp. 58-59.

22) Sorensen, p. 563.

23) Ibid.

24) Ibid.

(ii) The amnesty should only cover acts incidental to the revolution and which are also committed for a public rather than a private end. This is merely another way of saying that common crimes, not incidental to the rebellion, must not be included in the amnesty.

(iii) The state may always assume express liability in the amnesty.

The above rules are set in the context of rebellions in which there was resort to armed force. The Rhodesian rebellion is different in that the 'rebels' do not have the character of armed insurgents. It is submitted however that the same rules governing amnesties for political offences should apply to rebellions accomplished without the use of force. The essential characteristic is not the means by which the rebellion was perpetrated but the characterization of the offences for which an amnesty is granted as political. Thus the United Kingdom would not incur international responsibility arising out of a bona fide amnesty for political offences granted in a settlement with Rhodesia.

In any event, it is again unlikely that the amnesty for political offences will be important in the Rhodesian context, for while it is probable that an ultimate settlement would contain such an amnesty, it is to be doubted whether any such offences as might have been committed have resulted in injury to aliens.

(c) Amnesty for civil wrongs.

An amnesty excluding the civil liability of rebels to aliens renders the granting state responsible. Akehurst says, and with respect correctly, that it is better to regard the state
as/...

as being liable, not for the acts of the rebels as such, but for expropriating the right of action which the alien might have against the rebels.²⁵⁾ Thus, if the ultimate settlement between the United Kingdom and Rhodesia absolved the latter from payment of arrears of interest on Southern Rhodesian loans and public debt, the United Kingdom would in principle be responsible for such payment.

(d) Ratification of the official positions of rebels which they assumed during the rebellion.

It is said that this renders the state responsible because it is an implied ratification of the acts of the rebels committed during the revolution.²⁶⁾ Surely, however, this can only be the position where the revolution is aimed at the take over of a government in an existing state and not where a revolution is aimed at secession, as in the case of Rhodesia. There is a reason for the rule in the former case, for if it did not exist, the Government could settle its differences with the rebels, join forces with them confirming them in official positions, while at the same time denying all responsibility for their acts committed before the settlement. In the latter case of secession, there is no reason for the rule because the 'rebels', on achieving their secession, would in any event have to assume retrospective responsibility for their own acts committed during the rebellion.²⁷⁾

It/...

25) Note 11) supra, p. 55.

26) Ibid., pp. 60-61.

27) Schwarzenberger, Manual, pp. 178-179.

It is not clear whether Akehurst would limit the above rule to cases where the revolution is aimed at the take over of government rather than secession, but he might very well do so as he discusses the example of a de iure and rebel government getting together and forming a coalition and the resulting responsibility for the acts of the rebel government.²⁸⁾

For the above reasons, it is submitted, the United Kingdom would not attract responsibility under this heading for granting independence to Rhodesia.

We may make one final observation on international responsibility in the event of a grant of independence to Rhodesia. Rhodesia would have to assume responsibility retrospectively, at least to its recognizers, for infringements of international law attributable to officials of the "illegal regime" in the pre-settlement period. As we have just seen, rebels, when successful, must assume responsibility for international delinquencies. Thus, for instance, all arrear payments on Southern Rhodesian loans, due to aliens, whether British or otherwise²⁹⁾ would become payable and failure to make such payments would be an international tort.

(4) Effect of a grant of independence on the question of state succession to treaties.

We must make a primary distinction between treaties to which Rhodesia is a party and treaties to which the United Kingdom is a party. The
former/...

28) Note 11) supra, p: 60.

29) Provided of course that the state of nationality of the bondholder had recognized Rhodesia, for otherwise Rhodesia would have no relevant personality against it.

former category includes United Kingdom treaties to which Southern Rhodesia had acceded before U.D.I., treaties of the Federation of Rhodesia and Nyasaland to which Southern Rhodesia succeeded on the dissolution of the Federation at the end of 1963 and treaties which Southern Rhodesia concluded as such before U.D.I.³⁰⁾ Naturally those treaties would automatically continue to bind Rhodesia in the event of a grant of independence.³¹⁾ Rhodesia would continue to be bound by such treaties on the basis of evolution rather than succession. In the case of the older Dominions of the British Commonwealth, there was a gradual evolution to complete independence.³²⁾ Thus there was an attainment of limited international personality and limited treaty-making powers before independence.³³⁾ On the attainment of such independence there was simply a continuity of identity which meant that treaties binding in the pre-independence era continued to bind.³⁴⁾ Southern Rhodesia, it is submitted, resembled the older Dominions in that it too had a substantial pre-independence international personality.³⁵⁾ As such the doctrine of continuity of identity would also apply to it.

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- 30) These various categories of treaties are described supra, pp. 107-115.
- 31) See Akehurst, p. 200.
- 32) A.P. Lester, "State Succession to Treaties in the Commonwealth" (12) I.C.L.Q., 1963, p. 475 at p. 506.
- 33) International Law Association, The Effect of Independence on Treaties, London, 1965, pp. 113-114.
- 34) Ibid., p. 113; Sorensen, p. 296; Lester, note 32) supra, p. 506. In the case of the newer independent members of the Commonwealth there was, however, no such evolution and thus no room for the application of a doctrine of continuity of identity. Ibid.
- 35) It has been asserted that the Federation of Rhodesia & Nyasaland and Singapore should be assimilated to the older Dominions rather than the newer Commonwealth members for the purposes in question. Ibid. Southern Rhodesia, post 1963, would, however, be in precisely the same position for international law purposes as the Federation pre-1964. For the extent of pre-U.D.I. Southern Rhodesian international personality see supra, pp. 105-119.

The second category of treaty comprises those to which the United Kingdom itself was a party but which were territorially applied by it to Southern Rhodesia.³⁶⁾ Territorial application clauses relate solely to the sphere of applicability of a treaty. They do not make the territory itself a party to the treaty, either directly or indirectly or even potentially. International law rights and duties are vested solely in the metropolitan power.³⁷⁾ When the territory in question becomes independent, the question of state succession to such treaties arises.³⁸⁾

In considering whether Rhodesia would succeed on a grant of independence to it by the United Kingdom, to treaties which had in the past been territorially applied to it, we must, it is submitted, distinguish between two situations: (a) where the other party to the treaty in question does not recognize Rhodesian independence; (b) where the other party does recognize Rhodesian independence.

(a) Non-recognition of Rhodesian independence.

If the other party to any particular treaty refuses to recognize an independent Rhodesia, it is submitted that Rhodesia cannot succeed to any rights or to any obligations under the treaty in question in relation to the non-recognizing state. The reason is that the non-recognizer by refusing to accord recognition to Rhodesia, at the same time denies it the necessary international personality to be the bearer of rights and duties under the treaty/...

36) For a full list of such treaties see The International Law Association note 33) supra, pp. 66-90.

37) Lester, note 32) supra, p. 491.

38) The insertion of the territorial application clause certainly does not ensure automatic devolution on independence. Such clauses are inserted for the convenience of the metropolitan power only. See ibid., p. 507.

treaty in question.³⁹⁾ The United Kingdom alone remains the bearer of rights and obligations vis à vis the non-recognizing state. There can be no succession.

(b) Recognition of Rhodesia by the other party.

If the other party to a United Kingdom treaty does recognize a Rhodesian independence, we are faced with the ordinary question of state succession to treaties on independence. The ordinary rules relating to this topic apply.⁴⁰⁾ The general rule would appear to be that a new state does not succeed to the treaty rights and obligations of its predecessor. It starts with a "clean slate".⁴¹⁾ The reason is that, to the succeeding state, treaties concluded by its predecessor are res inter alios acta. The general rule outlined above must however be qualified. There are a number of possible exceptions to it which we must now consider.

- (1) A state succeeds to treaties which have become part of customary international law.⁴²⁾ Examples of such treaties are The General Treaty for the Renunciation of War (The Briand-Kellogg Pact) 1928, the Declaration of Paris 1856 and the Hague Convention of 1907 for Pacific Settlement of Disputes/...

39) This submission is based on views propounded in connection with the constitutive nature of recognition. Supra, pp. 281-282.

40) The rules on this topic are somewhat complex and controversial. A full discussion will be found in D.P.O'Connell, State Succession in Municipal and International Law, 1967. What follows here is merely a summary of the operative rules.

41) Akehurst, pp. 200-201; Lord McNair, The Law of Treaties, Oxford, 1961, p. 601; G.P.Verbit, "State Succession in the New Nations", Proceedings, A.S.I.L., 1966, pp. 119-124.

42) Sorensen, p. 295.

Disputes.⁴³⁾ It is submitted however that this exception is more apparent than real. The state succeeds to the rights and obligations in question not because they are treaty obligations and rights but because they are rules of a customary character, though originally they may have existed only in the form of a treaty. As Sorensen puts it.

"A customary rule founded in treaty binds the new state not because of its treaty character, but because of continued universal acceptance which has extended its operation beyond the original parties or region".⁴⁴⁾

(ii) It is suggested that a state succeeds to treaties which have a great number of adherents but this has no foundation in principle nor does it accord with state practice.⁴⁵⁾ The fact that there is no such rule is most clearly shown by the fact that a state does not succeed to membership of an international organization even if it happens to be a near universal organization such as the United Nations.⁴⁶⁾

(iii) It is also sometimes suggested that a state succeeds to treaties of a technical administrative or humanitarian character,⁴⁷⁾ but there is no justification for the view
that/...

43) Akehurst, pp.41-42; Sorensen, pp. 295-296.

44) P.295. Lester, note 32) supra, p. 489 says too that when a general convention grows into custom, it devolves not as a treaty but as general custom.

45) Sorensen, p. 299.

46) Thus when India was partitioned, Pakistan had to apply for new membership of the United Nations. See Schwarzenberger, Manual, p. 278; Sorensen, p. 304. When the Irish Free State was admitted to the League of Nations, the existing membership of the United Kingdom was not regarded as conferring membership on the new state. Ibid.

47) These include conventions relating to labour standards, public health, meteorological services, bills of exchange, shipowners' liability, anti-slavery and genocide. Political treaties, such as extradition treaties, are normally not regarded as devolving but even here one finds examples of those which have been regarded as devolving. See Lester, note 32) supra, p.496.

that such treaties automatically devolve.⁴⁸⁾

(iv) It has also been argued that a state succeeds to treaties of a technical, administrative or humanitarian character if these have received the approval of the local legislature prior to independence but this again would not appear to be correct. Approval in the form of colonial legislation is no guarantee that the new state will accept the treaty.⁴⁹⁾

(v) It is suggested that a state succeeds to treaties where it has concluded a "devolution" agreement with its mother state. The devolution agreement is concluded between former dependency and former colonial power and in it the latter transfers all its rights and obligations under treaties, in so far as those treaties applied to the dependency/...

48) Sorensen, pp. 297, 299. The argument is based on the practice of some new states, especially those which were formerly part of the French Empire of declaring themselves bound, by virtue of state succession, by all such treaties as were applied to them by their former rulers. But the practice is by no means general and its evidential value as to the existence of such a rule can be discounted by contrary practices. See Sorensen, pp. 301-302 for the practice of Burundi, Kenya, Malawi, Tanganyika, Uganda and Zambia which do not regard succession as being automatic even where there is a devolution agreement. Algeria, Israel and Upper Volta have adopted a completely negative attitude to the question of succession while Guyana, Barbados and Mauritius affirm succession subject to the qualification that they would notify other parties that they did not consider themselves to have succeeded. See O'Connell, I, p. 370.

49) Sorensen, p. 297 quotes examples of refusals by new states to accept such treaties. In practice however the treaties in question have been almost universally accepted although cases do exist where newly independent states have declined to consider themselves bound by such treaties. The exceptional cases prove that the "rule" does not exist. Further, if the rule did exist, it would, it is submitted, exemplify the process of evolution rather than succession.

dependency.⁵⁰⁾ There is no doubt that such an agreement is valid as a mode of transferring rights and obligations inter partes.⁵¹⁾ But this is irrelevant in the context of state succession where the vital question is whether the new state acquires rights against and obligations to third parties, i.e. the other parties to the treaty with the colonial power.

It is extremely unlikely that such rights and obligations devolve. In the first place, it is difficult to see how in principle a state can acquire rights under a treaty to which it was not a party, without the consent of the other party or parties, or without acceding to the treaty in a manner provided for by the treaty itself.⁵²⁾ In the second place, state practice would seem to reject the idea of such automatic succession under "devolution" agreements. On attaining independence the Government of Tanganyika stated/...

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- 50) Akehurst, p. 201; Sorensen, p. 300. Such agreements have been concluded by Britain, France and the Netherlands with a number of their former dependencies, e.g. Article 2 of the Treaty Regarding the Recognition of Burmese Independence, 1947 (70 U.N.T.S., 183). This provides: "All the obligations and responsibilities heretofore devolving on the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Burma, devolve upon the Provisional Government of Burma. The rights and benefits ... shall henceforth be enjoyed by the Provisional Government of Burma."
- 51) Sorensen, p. 301. Lester, note 32) supra, p. 507 says that such agreements regulate relations between former mother-state and former dependency. They may also be the basis for new treaties between the new state and third parties created by acquiescence in conduct taken pursuant to prior treaties.
- 52) See Akehurst, p. 202; E. Lauterpacht, "The Contemporary Practice of the United Kingdom in the field of International Law - Survey and Comment" (7) I.C.L.Q., 1958, p. 514 at p. 525; Van Panhuys, "Accords internationaux conclus par les Pays-Bas avant l'indépendance de l'Indonésie" (2) Nederlands Tijdschrift voor Internationaal Recht, 1954, p. 55; the International Law Association, note 33) supra, pp. 170-179, 191-196. Lester, note 32) supra, p. 507 says that inheritance agreements cannot affect the rights of third parties.

stated that it would continue to regard itself as bound by United Kingdom bilateral treaties on a basis of reciprocity for a period of two years unless abrogated or modified earlier by mutual consent. At the end of that time all treaties, which could not by the application of customary law be regarded as surviving, would be regarded as being terminated. With regard to multilateral treaties, these would be reviewed by Tanganyika, and other parties would be informed as to its attitude. In the meantime they could rely on such treaties, on the basis of reciprocity, against Tanganyika.⁵³⁾ There are conflicting court decisions on the question of succession under such agreements⁵⁴⁾ and the result is that the working of devolution agreements has not met with success. The overall conclusion is that devolution agreements serve no useful purpose in that they do not ensure automatic succession.⁵⁵⁾

(vi) A state may succeed to a treaty through the operation of estoppel. If it continues to apply a treaty, not out of a sense of obligation, but because it finds it convenient to do so, it may find itself bound by such a treaty.⁵⁶⁾ Here in effect there is in reality no succession to treaty rights and obligations at all. All that has happened is that/...

53) The Declarations of Uganda, Kenya and Burundi were couched in similar terms. See Sorensen, p. 303. So too was that of Lesotho. See Molefi v. Principal Legal Adviser and Others [1970] 3 W.L.R. 338 at 344.

54) See cases cited by Sorensen, p. 301 and Molefi's case, note 53) supra.

55) Sorensen, p. 303. The existence of a devolution agreement is however one of the main factors taken into account by the Secretary-General of the United Nations in his capacity as depositary of multilateral conventions, when deciding whether to list a new state as a party to such a convention. The United States and Japan also pay attention to such agreements. See Akehurst, p. 202.

56) See Akehurst, p. 202.

that the state in question has by its conduct brought a new implied treaty into being which is similar in terms to the former treaty.⁵⁷⁾

(vii) It is also sometimes asserted that special rules relating to state succession to treaties may operate within the British Commonwealth of Nations. Thus it is alleged that succession to treaties was automatic where the Crown remained Head of State of the successor state.⁵⁸⁾ This doctrine is of little relevance today where the vast majority of Commonwealth states do not recognize the Queen as Head of State. It has also been pointed out that it is not satisfactory to rely on the doctrine nowadays.⁵⁹⁾ It is also maintained that the transition from dependency to independent state within the Commonwealth is a novel form of succession which does not necessarily result in the lapse of the parent state's treaties.⁶⁰⁾ It is submitted, however, that when this occurs there is no succession.⁶¹⁾ The new state is bound by the treaty through evolution or alternatively, it has continued to regard itself as being bound, thus in effect concluding a new implied treaty with the same terms as the former one.⁶²⁾

(viii)/...

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- 57) Such practices were followed by Australia, Canada, Czechoslovakia, Ireland, New Zealand and South Africa. See Akehurst, p. 202; Customs House (State Succession) case, Ann. Dig., I. 1919-1922, p. 68; Statement of Mr. de Valera at (24) B.Y.I.L., 1947, p. 367.
- 58) D.P.O'Connell, State Succession in Municipal Law and International Law, I, pp. 39-41.
- 59) See R.H.C., "State Succession to Treaty Rights S. v. Eliasov" (5) Rhodesia Law Journal, 1965, p. 56 at p. 57.
- 60) O'Connell, I., p. 370. See Comment of C.J.R. Dugard, "Succession to Federal Treaties Revisited" (84) S.A.L.J., 1967, p.250 at pp.253-254.
- 61) Supra, p. 737.
- 62) Supra, pp. 743-744. See too Lester, note 32) supra, pp.480-482. Even within the Commonwealth, state practice supports the view that a new state starts life with a clean slate as to treaties. Ibid., p. 506.

(viii) A state succeeds automatically to the rights and obligations in a localized treaty.⁶³⁾ The localized treaty has the legal effect of impressing a status which is intended to be permanent upon a territory. The status imposed is independent of the personality of the state exercising sovereignty and is in the nature of a real burden.⁶⁴⁾ Examples of localized treaties are treaties regulating territorial boundaries,⁶⁵⁾ treaties which establish riparian regimes, servitudes, free zones and freedom of navigation through artificial waterways.⁶⁶⁾ It is necessary to distinguish such localized provisions from provisions which contain executory or continuing obligations because the latter will not devolve.⁶⁷⁾ It may even be necessary in an individual case where a treaty contains both types of provision to sever the localized provisions from those relating to executory or continuing obligations for the purposes of devolution.⁶⁸⁾ Thus the British and Ethiopian Governments/...

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- 63) The United States on seceding from Great Britain accepted the frontiers which had previously been fixed. Almost without exception African states have accepted the colonial boundaries. See Akehurst, p. 200; Sorensen, pp. 297-298. By the same token, it will also inherit, subject to frontier disputes. See Jennings, note 1) supra, p. 37.
- 64) Sorensen, p. 297. Jennings, note 1) supra, p. 11 says where real rights have been created which attach to a particular territory, these will subsist if the territory becomes part of a new state just as they would if the territory was ceded to or annexed by an old state. At p. 37 he says that a new sovereign state does not begin its legal life with a tabula rasa. It will inherit real rights and obligations attaching to the territory (even though its title to the territory may be original and not derivative).
- 65) Temple of Preah Vihear case, I.C.J. Rep., 1962, 8.
- 66) Sorensen, p. 297.
- 67) Ibid., p. 298.
- 68) Ibid.

Governments were of the view that an 1897 Treaty between them providing grazing rights for certain Somalis in Ethiopia lapsed on Somali independence, though the provisions of the same treaty settling the frontier were severable and remained operative as a kind of conveyance rather than as continuing obligations.⁶⁹⁾ So too Sorensen considers that Tanganyika was correct in declaring itself free from the obligations relating to port facilities at Dar-es-Salaam and Kigoma created by Anglo-Belgian Treaties of 1921 and 1951.⁷⁰⁾

We have now discussed the possible exceptions to the principle that a new state does not succeed to treaty rights and obligations. It will be apparent from our discussion that there is only one true exception to the principle, viz. that a new state succeeds to localized or dispositive treaties. All the other possible exceptions turn out on examination either to be insufficiently substantiated or to be something other than instances of state succession to treaties.

It is submitted, in view of this, that for the purpose of establishing whether a state succeeds automatically to a treaty, the distinction of importance is that between localized and non-localized treaties. We have seen the concept of a localized treaty. By definition all other treaties are non-localized.⁷¹⁾

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69) See Lester, note 32) supra, p. 494. Lester however considers the attitude of the Government is at variance with the role that localized treaties devolve as few rights could be so locally connected and so in rem as the right to graze.

70) P.298. However Tanganyika relied upon other grounds. See O. Kahn Freund, "Problems of State Succession in Africa: Statement of the Prime Minister of Tanganyika", (11) I.C.L.C., 1962, pp. 1210-1214.

71) Sorensen, p. 298.

It is useful however to pin-point the essence of the distinction between localized and non-localized treaties. The former, as we have just seen, relate to the status of territory and are independent of the personality of the state exercising sovereignty. The most prevalent view is that localized treaties lie midway between the municipal law concepts of contract and property. The obligation is localized but the right is not. Hence the obligations run with the territory.⁷²⁾ Lester submits that British and Commonwealth practice supports the conclusion that even localized treaties do not devolve. His view is that where rights in rem do devolve, such devolution is explicable on grounds other than the automatic descent of treaties.⁷³⁾ Such devolution occurs as a matter of customary law when a fragment of imperium is conferred on another state.⁷⁴⁾ This view, he says, is consonant with the principle that a treaty is res inter alios acta in so far as third parties are concerned.⁷⁵⁾ He would make one exception however in which treaty devolution does take place. This is where the treaty settles a frontier. His reason is that such a treaty operates as a conveyance rather than a contract.⁷⁶⁾ Sorensen would go even further. He alleges that even/...

72) See Lester, note 32) supra, p. 495. Lester points out that some writers would postulate a complete extension of the municipal law concepts of praedium dominans and praedium serviens to the idea of localized treaties. The present writer considers the localized treaty to be more akin in principle to the personal servitude of Romanistic law or the profit in gross found in English law where no praedium dominans is required. See Max Kaser, Roman Private Law (translated Dannenbring) 2nd.Ed., Durban, 1968, pp.121-125; R.E.Megarry, A Manual of The Law of Real Property, 3rd.Ed., London.1962, pp.462, 490-492. The analogy is not however exact.

73) Note 32) supra, p. 503.

74) Ibid., p. 501.

75) Ibid., p. 503.

76) Ibid., p. 507.

even boundary treaties do not devolve. The treaty does not survive. It is the obligation in the treaty which survives.⁷⁷⁾

The following observations on the above theories are apposite:

- (i) Where devolution occurs, it occurs in the case of territorial rights which are akin to real rights in municipal law.
- (ii) Such rights are created by a localized treaty, for a localized treaty, by definition impresses a status on territory which is independent of the personality of the state exercising sovereignty over the territory in question for the moment.
- (iii) If such a localized treaty creates obligations and rights other than those akin to real rights, it is not a localized treaty in relation to these. Severability may take place and as a result these other rights and obligations may not devolve.
- (iv) As far as rights akin to real rights are concerned, these devolve. It is a matter of academic dispute whether the localized treaty containing them devolves itself, or whether such real rights, once created, devolve independently of the treaty which created them (and which does not itself devolve). On either viewpoint, the practical result will be the same. The non-localized treaty, by way of contrast, is fundamentally a contrast of the type which can only be performed personally.⁷⁸⁾ It attaches to the person of the state which concludes or accedes to it.⁷⁹⁾ If that state loses/...

77) P.298.

78) Sorensen, p. 298.

79) Ibid., p. 299.

loses some of its territory, its personality remaining unaffected, whether it continues to be bound by such a treaty depends upon the purpose of the treaty and on the extent to which it related to the territory over which the state has lost control.⁸⁰⁾ The new state which acquires the territory will not however succeed to the treaty.

Non-localized treaties can, of course, vary greatly in content. Among the types of treaty encountered here we find treaties of alliance and treaties entailing membership of international organizations,⁸¹⁾ treaties of commerce and navigation, most-favoured-nation agreements, civil aviation agreements, extradition treaties, the Genocide Convention, 1948.⁸²⁾ It follows of course that a non-localized treaty can be of a bilateral or multilateral nature.

Before we conclude on the question of state succession, two further questions may be posed.

- (a) If the United Kingdom did not grant independence to Rhodesia but the independence of Rhodesia was recognized by some other state or states, what would the position be in relation to state succession to treaties? It is submitted that upon such recognition state succession would also occur in accordance with the rules which we have outlined, but such succession could of course only be effective between Rhodesia and its recognizers. Thus
- Rhodesia/...

80) Ibid.

81) Akehurst, p. 201 calls these intensely "personal" treaties.

82) Sorensen, p. 299; Lester, note 32) supra, p. 496.

Rhodesia would accede to rights against its recognizers under the terms of localized treaties and would incur obligations under the same treaties to the same states.

We may, therefore, conclude that upon recognition Rhodesia will succeed to localized treaties⁸³⁾ in so far as its recognizers are concerned whether or not the United Kingdom grants independence to it.⁸⁴⁾ Hence the vital factor for state succession to operate is recognition by third parties and not the formal grant of independence by the United Kingdom. However, in practice, the grant of independence by the United Kingdom is relevant because recognition by third states would be likely to follow such a grant of independence. In any event, there would be no succession by Rhodesia to non-localized treaties. By estoppel, by tacit or express consent, such treaties might come to operate between Rhodesia and other states, but juristically there would be a new treaty between Rhodesia and the third state in question, the terms of which would be the same as the old treaty with the United Kingdom. Thus Rhodesia could unilaterally avoid being bound by non-localized treaties should it wish to do so.

- (b) The second and final question which must be posed in relation to state succession is whether there would be any possibility of the doctrine of reversion to sovereignty applying in the event of a United Kingdom grant of independence to Rhodesia.

When/...

- 83) These will include a large number of important boundary treaties concluded between the United Kingdom and Portugal. For a list see the International Law Association, note 33) supra, p. 84.
- 84) A grant of independence by the United Kingdom would of course amount to recognition of Rhodesia by the United Kingdom itself. Supra, pp. 135-136.

When a transfer of sovereignty occurs, and the successor is recognized as recovering a previous state of independence, the state so restored reverts to the legal position prior to the loss of its independence.⁸⁵⁾ Thus, according to Brownlie, the new state may repudiate the interim acts of the previous holder and is not bound by territorial grants or recognition of territorial changes by the previous holder.⁸⁶⁾ In effect, such a doctrine of reversion means that the state in question would not be bound by localized treaties concluded by the previous holder and so the doctrine is of obvious relevance to the question of state succession. Alexandrowicz would not couch the doctrine in such absolute terms as Brownlie. He regards it as operating more on the procedural level. Thus there is a presumption that a state reverts to its original position unencumbered and if it is asserted otherwise, the onus lies on a colonial power to show that changes have taken place.⁸⁷⁾

We may make a number of observations on the possible application of this doctrine.

- (i) The existence of the doctrine is controversial. There is little authority to support it.
- (ii) In general the doctrine of reversion to sovereignty does not apply to sub-Saharan Africa. Alexandrowicz describes the position as follows.⁸⁸⁾ The scramble for Africa resulted in partition irrespective of the ethnological and social traditions of the African communities. The African state/...

85) See dissent of Judge Moreno Quintana in the Right of Passage over Indian Territory case, I.C.J., Rep., 1960, 6 at 93-96.

86) P.152.

87) C.H. Alexandrowicz, "New and Original States - the Issue of Reversion to Sovereignty" (45) International Affairs, 1969, p.465 at p.473.

88) Ibid., pp. 472-473.

state entities which emerged after the Second World War from this chaotic political and economic set-up hardly have a claim to identity with the vast numbers of states and chiefdoms which had disappeared in the melting pot of colonial absorption. Thus unlike the case of countries in the East Indies, there is generally no room for a claim to their classification as original states. Most of the African entities are new states in the present-day meaning of the word, and reversion to sovereignty has no application. But different considerations would apply to African states on the Mediterranean coast.

(iii) It is doubtful if Rhodesia can be identified with the sovereignty which existed before the establishment of a British Protectorate in the territory.⁸⁹⁾ In favour of such identification is the fact that the territory of an independent Rhodesia would be virtually identical with the territory over which Lobengula was sovereign. For, as we have seen, Lobengula was recognized as the ruler, not only of the Matabele, but also of the Mashona and Makalaka which were tributaries of the Matabele.⁹⁰⁾ However, the following factors militate against such an identification and thus reversion.

(A) The structure of the population of the territory has changed substantially. Thus to the original population of African tribes, there has since been added a substantial minority consisting mainly of Europeans, but/...

89) Supra, pp. 66-67.

90) Supra, pp. 62, 65.

but also of Asians and persons of mixed race. This minority has wielded a political and economic influence in the territory which is infinitely more important than its numbers would suggest. In effect the European minority have ruled the country since the early twentieth century.

(B) The form of government in an independent Rhodesia would vary greatly from that pertaining in Lobengula's time. Lobengula was the ruler but he had a kind of senate and popular assembly for consultative purposes.⁹¹⁾ In an independent Rhodesia the government would almost certainly be in the hands of the representatives of the European minority for a considerable length of time,⁹²⁾ a minority which was not even in Rhodesia in Lobengula's time. It is submitted that the doctrine of reversion to sovereignty, even if it exists, would be inapplicable to Rhodesia. The latter would therefore be bound by localized treaties concluded by the United Kingdom.

- (5) Effect of a grant of independence on mandatory sanctions instituted by the United Nations against Rhodesia.

Mandatory sanctions have been imposed on Rhodesia by various resolutions of the Security Council of the United Nations under Chapter VII
of/...

91) Supra, p. 62.

92) This would be the position whether the 1961 Constitution, the 1965 Constitution or the 1969 Constitution formed the basis for the constitutional structure of an independent Rhodesia. It would also be the position if the Tiger Proposals (Cmd.3171) the Fearless Proposals (Cmd. 3793) or the Anglo-Rhodesian Proposals for a Settlement, 1971 (Cmd. R.R. 46-1971) were implemented.

of the Charter.⁹³⁾ These mandatory sanctions are of various kinds and we can include among them the "duty not to recognize Rhodesia" which we have previously discussed.⁹⁴⁾ These resolutions impose obligations on member states of the United Nations to co-operate and give effect to the sanctions campaign and to obey the directives of the Security Council contained in the resolutions. Chayes poses the pertinent question whether such sanctions would continue to be obligatory even if the United Kingdom settled the Rhodesian question by granting independence to Rhodesia.⁹⁵⁾ It is submitted that we must discuss in this connection the clausula rebus sic stantibus doctrine.

The clausula rebus sic stantibus doctrine embodies one of the recognized methods of terminating treaties and thus the obligations thereunder.⁹⁶⁾ There is however no reason why it should not be similarly applicable to obligations arising out of resolutions of the Security Council of the United Nations. The reason is that such obligations are in essence treaty obligations. They derive their obligatory force from the provisions of a treaty, viz. Article 25 of the Charter, in which the members agree to accept and carry out the decisions of the Security Council. We must therefore ascertain what the essentials for the application of the doctrine are. In this regard we may consider the following ingredients.

(a)/...

93) S. Res. 221(1966); S.Res. 232 (1966); S.Res.253(1968); S.Res.277(1970).

94) Supra, pp. 303-317.

95) II, pp. 1378-1379.

96) Akehurst, pp.178-179; Sorensen, pp.234-235. Akehurst, loc.cit. says the doctrine should be limited to exceptional cases and that it is not settled whether it terminates the treaty automatically or gives the affected party the option to terminate it. It may also operate to suspend the operation of a treaty. See Vienna Convention on the Law of Treaties, 1969, Article 62; Lissitzyn, note 104) infra, p. 911.

- (a) Certain circumstances must have existed at the time of the conclusion of the treaty⁹⁷⁾ and this must have constituted an essential basis of the consent of the parties to be bound by the treaty.⁹⁸⁾ This means that the treaty obligation was assumed because of the existence of certain circumstances at the time of the conclusion of the treaty. Put another way we might say that there must have been a causal nexus between the circumstances in question and the conclusion of the treaty. The circumstances should have been a conditio sine qua non the conclusion of the treaty. As a matter of history, the obligation must have been created "in view of and because of the existence of a particular state of facts ..."99)
- (b) A fundamental change in the above basic circumstances must have occurred since the conclusion of the treaty.¹⁰⁰⁾ The basic facts must have disappeared.¹⁰¹⁾ If that which was essential to, and the moving cause of, the engagement, has undergone a material change, or has ceased, the foundation of the engagement is gone

and/...

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- 97) In the case of an obligation imposed by decision of the Security Council, it is submitted that the relevant date would be that of the decision of the Council. This would be the actual date of the creation of the treaty obligation under Article 25 of the Charter.
- 98) Vienna Convention on the Law of Treaties, 1969, Article 62; Draft Articles on the Law of Treaties, 1963 (prepared by the International Law Commission) Article 59.
- 99) Free Zones of Upper Savoy and the District of Gex case (1932) P.C.I.J. Ser. A/B, No. 46 at p. 156. See too Sorensen, pp. 234-235.
- 100) Vienna Convention on the Law of Treaties, 1969, Article 62; Draft Articles on the Law of Treaties, 1963, Article 59.
- 101) Free Zones case, note 99) supra, p. 156.

and the obligation has ceased.¹⁰²⁾

- (c) The fundamental change in circumstances must not have been foreseen by the parties. This requirement is laid down by Article 62 of the Vienna Convention on the Law of Treaties, 1969.¹⁰³⁾ It would appear, however, that this is an innovation introduced by the Convention and does not reflect a customary requirement. Lissitzyn draws the conclusion from state practice that a change may be invoked even if it was not unforeseen. The parties may have been aware of the possibility of the change but for various reasons may have failed to provide for it expressly.¹⁰⁴⁾
- (d) The fundamental change must radically transform the extent of obligations still to be performed under the treaty. This again, it is submitted, is an innovation introduced by Article 62 of the Vienna Convention, 1969 which does not reflect a customary requirement.¹⁰⁵⁾

The above are the possible requirements for the doctrine to operate but our submission is that only the first two exist in international
customary/...

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- 102) O'Connell, I, p. 278; C.J.R. Dugard, "The Simonstown Agreement: South Africa, Britain and the United Nations" (85) S.A.L.J., 1968, p. 142 at p.153. The latter applies the doctrine to the Simonstown Agreement. He says that the understanding that Britain would supply South Africa with arms for the joint defence of the Cape Sea Route might be regarded as basic to the whole arrangement and was too obvious to be expressed in the Agreement. Britain's decision to terminate the supply of arms might be viewed as a matter which destroys the essential basis of the Agreement and which radically transforms the scope of obligations to be performed under the treaty, viz. the obligation to defend the sea route round Southern Africa. Ibid., pp. 154-155.
- 103) It also appears in Article 59 of the Draft Articles on the Law of Treaties, 1963.
- 104) Oliver J. Lissitzyn, "Treaties and Changed Circumstances (Rebus sic Stantibus)" (61) A.J.I.L., 1967, p. 895 at p. 912.
- 105) It also appears in Article 59 of the Draft Articles. See too the application of the requirement by Dugard, note 102) supra, p.155 to the Simonstown Agreement.

customary law with which we are here concerned.

There has been much discussion as to the basis of the doctrine. The most generally accepted view, representative of writers, courts and state practice would base the operation of the doctrine on the intentions of the parties at the time of concluding the agreement.¹⁰⁶⁾

But some writers seek different bases. Thus it has been suggested that the shared expectations of the parties is the basis of the doctrine. Insistence on performance where circumstances are completely different would be contrary to the shared expectations of the parties and thus contrary to good faith.¹⁰⁷⁾ Another approach would regard the repudiation of excessively burdensome treaty obligations as a basis for the doctrine.¹⁰⁸⁾

We must now apply the doctrine in the Rhodesian context bearing in mind that this is a doctrine which must be applied somewhat cautiously as it is not every change in circumstances which justifies termination/...

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- 106) See Lissitzyn, note 104) supra, pp. 898-899; McNair, note 41) supra, p.436, Briggs, pp. 917-918; Schwarzenberger, I, p.545; Harvard Research in International Law Draft Convention on the Law of Treaties, Article 28; American Law Institute, Restatement of the Foreign Relations Law of the United States, 1965, s.153. For others see Lissitzyn, op.cit., pp. 898, 899, 900, 901.
- 107) See Lissitzyn, note 104) supra, p.896. The present writer sees little difference between the "original intentions of the parties" and the "shared expectation of the parties". Perhaps the only difference is the time factor. While the former is immutably fixed at the moment of the conclusion of the treaty, the latter may not be so limited. In other words the "shared expectations of the parties" may simply be their intentions at the moment of concluding the treaty or at some later stage.
- 108) Lissitzyn, note 104) supra, p. 897. Lissitzyn regards Article 59 of the Draft Articles on the Law of Treaties, 1963 as adopting the "intolerable burden" approach because of the provision relating to the radical transformation of the scope of obligation. See too Article 62 of the Vienna Convention, 1969. Lissitzyn would regard these approaches as objective in that they provide an objective rule of law for terminating treaties (p.913). With respect, the "original intention of the parties" or the "shared expectations of the parties" are also objective, though their content is naturally more difficult to verify.

termination.¹⁰⁹⁾ In applying the doctrine we shall consider four questions. (a) What are the basic circumstances which led the United Nations to impose mandatory sanctions? (b) Would the grant of independence to Rhodesia amount to a fundamental change of circumstances so as to discharge the obligations of member states under the resolutions in question? (c) Was the fundamental change of circumstances foreseeable? (d) Would the fundamental change radically transform the extent of obligations still to be performed under the resolutions?¹¹⁰⁾

(a) Basic circumstances underlying United Nations sanctions.

Here we consider the facts which motivated the United Nations into decreeing mandatory sanctions and without which it would not have decreed sanctions against Rhodesia. There are, it is submitted, three possibilities:

- (i) that Rhodesia, by virtue of U.D.I., is in constitutional rebellion against the United Kingdom;
- (ii) that Rhodesia, by virtue of U. D. I., enjoys an "inappropriate independence" in that such independence does not make proper provision for the enjoyment of political rights by the African population;
- (iii) that Rhodesia is in rebellion and enjoys an "inappropriate" independence, i.e. a combination of circumstances (i) and (ii).

To/...

109) Sorensen, p. 235. In the Wimbledon case (1923) P.C I.J. Ser.A,p.25 the court was reluctant to hold that any such doctrine applied to Article 380 of the Treaty of Versailles. However the terms of the latter probably excluded the specific change of circumstances relied upon by Germany in the case. For general discussion of the history of the doctrine see D.P.O'Connell, International Law, London,1965, I, pp. 296-299.

110) We previously submitted that "unforseeability" and "radical transformation of extent of obligations" were not required for the operation of the doctrine in customary law. In case this submission is incorrect, it is proposed to deal with the requirements anyway ex abundanti cautela.

To establish which of these constitutes the motivating factor, we examine the relevant resolutions.

On 9th April, 1965 the Security Council, when instituting the 'Beira Blockade' considered that

"such supplies [of oil to Rhodesia through Beira] will afford great assistance and encouragement to the illegal regime, thereby enabling it to remain longer in being". 111)

The reason for the institution of these sanctions seems to be the continued existence of the "illegal regime", i.e. the continuance of the rebellion against the United Kingdom.

On 16th December, 1966 the Security Council, when instituting selective mandatory economic sanctions, was deeply concerned that

"the Council's efforts so far and the measures taken by the administering Power have failed to bring the rebellion in Southern Rhodesia to an end". 112)

Again the only reason for this resolution appears to be the continuance of the rebellion.

On 29th May, 1968 the Security Council, when instituting comprehensive mandatory economic sanctions, noted

"with great concern the measures taken so far have failed to bring the rebellion in Southern Rhodesia to an end". 113)

Again the only reason for the institution of such sanctions would appear to be the continuance of the rebellion.

On the 18th March, 1970 the Security Council, when instituting further sanctions, including the duty not to recognize Rhodesia, noted with grave concern

"(a)/...

111) S. Res. 221 (1966).

112) S. Res. 232 (1966).

113) S. Res. 253 (1968).

- "(a) that the measures so far taken have failed to bring the rebellion in Southern Rhodesia to an end, ...
- (d) that the situation in Southern Rhodesia continues to deteriorate as a result of the introduction by the illegal regime of new measures, including the purported assumption of republican status, aimed at repressing the African people in violation of General Assembly resolution 1514 (XV)". 114)

If we examine the above, we can, it is submitted, discover two reasons for the introduction of the measures: (i) as before, the continuance of the rebellion; (ii) the enjoyment by Rhodesia of an "inappropriate independence" by means of which it represses the African population contrary to A.Res. 1514(XV). For the first time two basic circumstances prompt the United Nations to impose obligations.

There is however another important factor to consider. The resolution in question¹¹⁵⁾ reaffirmed the continuance of sanctions imposed by the former resolutions.¹¹⁶⁾ Thus it can be said that from 18th March, 1970 two basic circumstances underlay the imposition of all United Nations mandatory sanctions. These are the existence of the rebellion and the continuance of the "inappropriate" independence in Rhodesia. That not only the existence of the rebellion but also the continuance of the "inappropriate" independence is a basic circumstance underlying the obligation to participate in sanctions, appears also from the terms of the resolution of the Security Council passed on 28th February, 1972 after the United States had announced its intention to import chrome from Rhodesia.¹¹⁷⁾ The Security Council reaffirmed:

"its/...

114) S. Res. 277 (1970)

115) S. Res. 277 (1970).

116) S. Res. 221 (1966); 232 (1966); 253 (1968).

117) For the United States' attitude to this question see Statement of Ambassador Phillips in (11) I.L.M., 1972, pp. 680-682. But for a contrary attitude by the United States courts see Diggs v. Schultz, (11) I.L.M., 1972, p. 1252.

"its decision that the present sanctions against Southern Rhodesia shall remain fully in force until the aims and objectives set out in resolution 258 (1968) are completely achieved." 118)

When we examine S.Res. 258 (1968) it would appear that the objectives of that resolution are the ending of the rebellion, the enabling of the people of Rhodesia to achieve self-determination and independence in conformity with the objectives of A.Res. 1514(XV). From this it would appear that the basic circumstances underlying the continuance of sanctions are still the existence of the rebellion and the enjoyment of an "inappropriate" independence by Rhodesia.

(b) Grant of independence to Rhodesia as a fundamental change in circumstances.

If the United Kingdom granted independence to Rhodesia, the rebellion would end and thus one of the basic circumstances would have changed fundamentally. Such a grant of independence might not however bring about any fundamental change in the other basic underlying factor. Here, it is submitted, we would have to distinguish between the grant of an "appropriate" independence to Rhodesia and the grant of an "inappropriate" independence. If the United Kingdom granted an "appropriate" independence, i.e. one which was in accordance with its international obligations in this respect,¹¹⁹⁾ it is submitted that obligations relating to/...

118) S. Res. 314 (1972). This was repeated in S.Res. 320 (1972). See too S.Res. 318 (1972).

119) Supra, pp. 662-713. In particular the independence granted should be in accordance with its obligations under S. Res. 253 (1968) as the aims and objectives of this resolution are specifically mentioned by S.Res. 314 (1972) as being particularly relevant to the question of terminating sanctions.

to mandatory sanctions would terminate by virtue of the clausula rebus sic stantibus doctrine. The "inappropriate" independence would no longer be present and thus this basic factor would have changed fundamentally.

On the other hand, it is difficult to see how these obligations could terminate if the independence granted was not such as conformed with the United Kingdom's obligations in this respect. There would be no change in the basic underlying circumstances in that an "appropriate" independence would still be lacking. In such circumstances, it is submitted, that the rebus sic stantibus doctrine would not operate to terminate the sanctions obligations.¹²⁰⁾

From the above we may conclude that if the United Kingdom took the matter into its own hands and granted an independence which was in conflict with its obligations, mandatory sanctions would still continue and would bind not only other states but even the United Kingdom itself. Such sanctions would continue until terminated by one of the recognized methods for terminating treaty obligations.¹²¹⁾ Thus they might in theory continue indefinitely.¹²²⁾ It is possible that the Security Council itself/...

120) In the same way a member state of the United Nations could not avoid its obligations to carry out mandatory sanctions by recognizing Rhodesian independence during the currency of the rebellion or in an "inappropriate" form. It would still be obliged to carry out sanctions against Rhodesia as the basic circumstances underlying its obligation would not have changed. The rebellion or the "inappropriate" independence, as the case might be, would still be present.

121) For a summary of these see Brownlie, pp. 496-499. See too Vienna Convention on the Law of Treaties, 1969, Articles, 54-56, 59-62.

122) The International Law Commission in fact recommended a presumption as to the continuance in force of a treaty. Brownlie, p. 496 says such a presumption may be based upon pacta sunt servanda as a general principle of international law. Article 42(2) of the Vienna Convention, 1969 provides that termination of a treaty may only take place as a result of the application of the provisions of the treaty in question or of the Convention itself.

itself might terminate sanctions, but to do this, it is submitted, that it would have to adopt a specific resolution annulling the sanctions obligations. Such resolution would be subject to veto by any of the permanent members of the Council. One feels that the United Kingdom has lost control of the sanctions campaign by its failure to insist initially on some provisions imposing a time limit on the operation of sanctions, or perhaps some provision for periodic renewal by vote of the Council.¹²³⁾ Rosalyn Higgins would not however agree that sanctions might continue beyond the grant of independence.¹²⁴⁾

Discussing the permanence of S. Res. 232 (1966), she says:

"The sanctions are declared to be for the purpose of bringing the rebellion to an end, and it is for the British Government as the constitutional authority to decide when that event has occurred. This task cannot be assigned to the United Nations. Should the United Kingdom wish to terminate sanctions, she would declare the rebellion ended and announce that as the United Nations sanctions had succeeded in their purpose, they were now automatically terminated.... The onus would be upon any state which wished for the sanctions to continue to introduce a resolution to this effect. It would be this resolution which would be subject to the negative vote of Britain To argue therefore, that sanctions cannot be lifted without Russian approval (125) seems to me to miss the point that, as a matter of tactics, it is open for the United Kingdom alone to determine that eventuality. I therefore regard this as something of a faux problème".

From the above it would appear that Higgins would regard the existence of the rebellion and not the existence of an "inappropriate " independence as the basic factor underlying sanctions.

Thus on termination of the former, sanctions end. In fairness to/...

123) Perhaps S. Res. 314 (1972) is a step in this direction and an attempt to impose a time limit. It provides that sanctions shall remain in force until the aims and objectives in S. Res. 253 (1968) have been achieved. Ergo it can be deduced that when these aims and objectives have been achieved, sanctions are to terminate.

124) "International Law, Rhodesia and the United Nations" (23) The World Today, 1967, p. 94 at pp. 102-103.

125) And now also the approval of the Chinese Peoples' Republic!

to Higgins, it must be pointed out that she is discussing S. Res. 232 (1966) and as we have seen the only basic factor underlying this particular resolution was the existence of the rebellion.¹²⁶⁾ The other basic factor underlying the sanctions campaign, viz. the existence of an "inappropriate" independence was only introduced for the first time by S. Res. 277 (1970).¹²⁷⁾ Thus if independence had been granted at the time Higgins wrote, it would have constituted a fundamental change in basic circumstances. However, against this we must mention the provision contained in Article 62 of the Vienna Convention on the Law of Treaties, 1969, that a fundamental change may not be invoked as a ground for terminating a treaty if the fundamental change is the result of a breach by the party invoking it of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. If the United Kingdom granted an "inappropriate" independence contrary to its obligations under the Charter of the United Nations, it would, in effect, have achieved a fundamental change through breach of obligation and thus might not be able to invoke the doctrine. It may be mentioned however that the obligations of the United Kingdom relating to Rhodesian independence were less onerous before the introduction of S. Res. 253 (1968)¹²⁸⁾ and that Higgins wrote before the introduction of the latter resolution.

In any event, whether or not Higgins was correct at the time she wrote, the position has now changed materially as a result
of/...

126) Supra, p. 759.

127) Supra, pp. 759-760.

128) Obligations which pre-existed S. Res. 253 (1968) are described supra, pp. 662-697. Obligations under S. Res. 253 (1968) are described supra, pp. 697-713.

of S. Res. 277 (1970) and S. Res. 314 (1972).¹²⁹⁾ It is submitted that the present position is that sanctions would not terminate on the grant of an "inappropriate" independence by the United Kingdom to Rhodesia.

(c) The foreseeability of the fundamental change in circumstances.

The grant of an "appropriate" independence by the United Kingdom to Rhodesia was foreseeable at all material times. This is quite clear from the protracted negotiations which have taken place on various occasions since 1963 and which culminated with the activities of the Pearce Commission in 1972.¹³⁰⁾ If, therefore, "unforeseeability" at the date of the imposition of the obligations is a requirement for the operation of the clausula rebus sic stantibus doctrine, it would seem that the doctrine could not operate to discharge United Nations mandatory sanctions because the change in circumstances, viz. the ending of the rebellion and the grant of an "appropriate" independence to Rhodesia were at all times foreseeable.

We have seen, however, that the "unforeseeability" requirement is provided for by Article 62 of the Vienna Convention, 1969, that the provision is probably an innovation introduced by the Convention and is not declaratory of the customary law on the topic.¹³¹⁾ The latter governs this particular question since the Convention had not come into force when the obligations were imposed.

(d) / ...

129) Read with S. Res. 253 (1968) to the aims and objectives of which it refers. See supra, pp. 759-761.

130) See Cmnd. 2807; Cmnd. 3171; Cmnd. 3793; Cmnd. 4065; Cmnd. 4835; Cmnd. 4964.

131) Supra, p. 756.

- (d) The grant of independence as radically transforming the extent of obligations.

The sanctions obligations are continuing obligations. Their content would thus remain essentially the same before and after a grant of independence to Rhodesia. Thus if "radical transformation" is an essential requirement for the operation of clausula rebus sic stantibus, the doctrine would not appear to be capable of operating so as to discharge the sanctions obligations against Rhodesia. It might however be possible to regard an indefinite extension in time of continuing obligations as "radical transformation" so as to bring the doctrine into play.

It was submitted however that the requirement of "radical transformation" was also an innovation introduced by Article 62 of the Vienna Convention, 1969. It does not thus reflect the customary position and so is not applicable here.¹³²⁾ That the provision does not reflect customary law is bolstered by the fact that the terms of Article 62 differ slightly from the earlier proposals contained in Article 59 of the Draft Articles on the Law of Treaties, 1963. The latter does not provide for radical transformation of the extent of obligations but radical transformation of the scope of obligations.

132) Supra, pp. 756-757.

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