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## Legal Issues Before the United Nations Sanctions Committee

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### *I. Introduction*

This paper will seek to present certain legal issues which have arisen before the Security Council Committee Established in Pursuance of Resolution 253 (1968) Concerning the Question of Southern Rhodesia,<sup>1</sup> hereinafter referred to as the "Sanctions Committee".<sup>2</sup> After outlining briefly the nature and scope of the obligation to

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1. Formerly known as "The Committee Established in Pursuance of Security Council Resolution 253 (1968)". This was changed to the present title in 1972. See U.N. Doc. S/10852, para. 69.

2. The following sources may be consulted :

(i). *Security Council Resolutions*: 216 (1965), 217 (1965), 221 (1966), 232 (1966), 253 (1968), 277 (1970), 288 (1970), 314 (1972), 318 (1972), 320 (1972) and 333 (1973).

(ii). *General Assembly Resolutions*: 2262 (XXII), 2379 (XXIII), 2383 (XXIII), 2508 (XXIV), 2765 (XXVI), 2945 (XXVII), 2946 (XXVII), 3115 (XXVIII), 3116 (XXVIII), 3298 (XXIX).

(iii). *Reports of the Sanctions Committee: Annual Reports*: S/8954 — December 30, 1968, S.C.O.R., 23rd Year, Supplements for July-September 1968; S/9252 and Add. 1-12 — June 1969, S.C.O.R., 24th Year, Supplements for April-June; S/9844 and Add. 1-3 — June 15, 1970, S.C.O.R., 25th Year, Special Supplement No. 3; S/10229 and Add. 1 - 2, June 16, 1971, S.C.O.R., 26th Year, Special Supplements No. 2 and 2A; S/10852 and Add. 1-2, 1972, S.C.O.R., 27th Year, Special Supplement No. 2; S/11178/Rev. 1, January 3, 1974; S/11594 — January 9, 1975. *Interim Reports*: S/10408, December 3, 1971; S/10580 and Add. 1, March 29, 1972; S/10593, April 10, 1972. *Special Reports*: S/10632, May 9, 1972, submitted in pursuance of Resolution 314 (1972) and S/10920, April 15, 1973, submitted in pursuance of Resolution 320 (1972).

(iv). *League of Nations Official Journal*, Vols. 16 and 17 (1935 and 1936) and Special Supplements Nos. 138, 145 to 150. *Dispute between Ethiopia and Italy* (1936; Cmd. 5071 and Cmd. 5094.).

(v). *General References*: See the bibliographies cited in M. Doxey, *Economic Sanctions and International Enforcement* (London: Oxford University Press, 1971) at 149-156 and M. Eisemann, *Les sanctions contre la Rhodésie* (Paris: A. Pedone, 1972) at 146-152. See also *Gallaher v. Customs and Excise Commissioners*,

implement sanctions, and describing the Sanctions Committee, we shall proceed to consider the following legal issues which have arisen before the Committee: (1) The Committee's competence to make determinations as to compliance with, or breach of, sanctions obligations; (2) The Committee's competence to make recommendations to the Security Council for strengthening sanctions; (3) The distinction between mandatory and non-mandatory obligations under resolution 253 (1968); (4) The responsibility of States regarding sanctions violations by their nationals who are abroad; (5) The position of neutral States and non-member States; (6) The question of who decides whether a case falls under one of the permitted exceptions; (7) The question of pre-sanctions contracts or licences and the plea of hardship.

## *II. The Nature and Scope of the Obligation to Implement Sanctions*

The obligation to implement sanctions flows from three sources: (1) the Charter of the United Nations, "acting under Chapter VII"<sup>3</sup> of which the Security Council adopted; (2) Resolution 253 (1968), as well as earlier and subsequent resolutions such as 217 (1965), 221 (1966), 232 (1966) and 277 (1970);<sup>4</sup> (3) the third source is general international law, in particular the principle of international responsibility, which is applicable in the event of breach of the obligation to apply sanctions. The scope of the obligation is to be found in resolution 253 (1968), as elaborated, interpreted and applied in practice and in subsequent resolutions of the Security Council and of the General Assembly. Operative paragraphs 1 - 22 of resolution 253 (1968) fall under eight categories<sup>5</sup> whereunder the Security Council: (1) decided,<sup>6</sup> (2) called upon,<sup>7</sup> (3) requested,<sup>8</sup> (4)

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[1971] A.C. 43; [1969] 2 W.L.R. 1209; [1969] 2 All E.R. 328 (H.L. (E)) and *Hodson v. The Superheater Co.*, [1968] 3 All E.R. 144 (Liverpool Crown Court).

3. Res. 253 (1968).

4. This paper assumes the validity of the relevant Security Council Resolutions and therefore does not deal with the various legal questions concerning these Resolutions which were raised by the former Government of Portugal. These questions may be consulted in U.N. Docs. S/7271 and Corr. 1, April 27, 1966; S/7745, August 3, 1966; S/7781, February 13, 1967; S8481, March 20, 1968; S/8786, August 20, 1968 at Add. 5 at 18-19.

5. *Infra* at 549-50.

6. Paras. 3-7 and 20.

7. Paras. 8, 11, 16, 18 and 22.

8. Paras 9, 15, 19 and 21.

emphasised,<sup>9</sup> (5) deplored,<sup>10</sup> (6) urged,<sup>11</sup> (7) considered,<sup>12</sup> and (8) condemned.<sup>13</sup> *Ratione materiae*, there are in resolution 253 (1968), (1) acts prevented, as specified under paragraphs 3,4,5 and 8, and (2) acts called for, as specified under paragraphs 2, 11, 16, 18 and 22. *Ratione personae*<sup>14</sup>: (1) Duties are laid upon (a) all States members of the United Nations; (b) specific duties are laid upon the United Kingdom; and (c) calls are made upon non-members of the United Nations.<sup>15</sup> (2) The acts of the following persons are specified: Governments and their nationals;<sup>16</sup> other persons in their territories;<sup>17</sup> their vessels or aircrafts; and their airline companies.<sup>18</sup> Three provisions govern the obligations *ratione temporis*.<sup>19</sup> Under paragraph 3(a) States are required to prevent the import into their territories of all commodities and products originating in Southern Rhodesia and exported therefrom after the date of the resolution. Under paragraph 7, States are required to give effect to the obligations in paragraphs 3, 4, 5 and 6, notwithstanding any contract entered into or licence granted, before the date of resolution 253 (1968). Under paragraph 5 (a), States Members are required to prevent the entry into their territories, save on exceptional humanitarian grounds, of any person travelling on a Southern Rhodesian passport, regardless of its date of issue.

There are varying standards of duty: States shall prevent<sup>20</sup>, shall take all possible means<sup>21</sup>, shall take all possible further action<sup>22</sup>, and shall assist effectively<sup>23</sup>. Under paragraph 16 the call is made upon States Members of the United Nations, *and in particular* those with primary responsibility under the Charter for the maintenance of

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9. Para. 10.

10. Para. 12.

11. Paras. 13 and 14.

12. Para. 17.

13. Para. 1. This is more of an introductory paragraph and does not lay down any specific duty or request.

14. Report S/10852, para. 106.

15. Para. 14 of Res. 253 (1968).

16. Para. 3(b).

17. Para. 3(c).

18. Para. 6.

19. On the temporal element generally, see *Gallaher v. Customs and Excise Commissioners*, [1971] A.C. 43; [1969] 2 W.L.R. 1209; [1969] 2 All E.R. 328 (H.L. (E.)).

20. Para. 3.

21. Para. 8.

22. Para. 9.

23. Para. 16.

international peace and security. Under paragraph 21, the United Kingdom is required to give *maximum assistance* to the Committee. Qualifications and exceptions are laid down in paragraphs 3 (d), 4, 5 (a) and 7.

General principles governing the obligation to implement sanctions, including the principle of international responsibility, have been emphasised in resolution 253 (1968) as well as in subsequent resolutions of the Security Council and the General Assembly. Paragraph 11 of resolution 253 (1968) called upon all States Members of the United Nations to carry out the decisions of the Security Council contained in the resolution in accordance with Article 25 of the United Nations Charter and reminded them that failure or refusal by any one of them to do so would constitute a violation of that Article. In resolution 314 (1972), which dealt with the importation of Southern Rhodesian chrome by the United States of America in violation of its obligations under resolution 253 (1968), the Security Council declared that

. . . any legislation passed, or act taken, by any State with a view to permitting directly or indirectly, the importation from Southern Rhodesia of any commodity falling within the scope of the obligations imposed by resolution 253 (1968) . . . would undermine sanctions and would be contrary to the obligations of States.<sup>24</sup>

The resolution<sup>25</sup> specifically referred to Article 2, paragraph 6 of the Charter.<sup>26</sup> The principle of international responsibility for breach of the obligation to implement sanctions was similarly invoked in General Assembly resolutions 2765 (XXVI) of November 16, 1971, 2945 (XXVII) of December 7, 1972 and 3116 (XXVIII) of December 12, 1973.<sup>27</sup>

The principle of international responsibility was also present in the practice of the League of Nations in connexion with sanctions against Italy. Thus, at the seventh meeting of the 89th session of the Council, in 1935, the President of the Council drew attention to the fact that the Assembly of the League had stated in a resolution of October 4, 1921 that "the fulfilment of their duties under Article 16

24. Para. 3. See also para. 4 of G.A. Res. 2765 (XXVI) — November 16, 1971.

25. Para. 2.

26. See also para. 8(1) of the "Draft Conclusions and Recommendations Submitted by Poland, Sierra Leone, Somalia, Syria and the USSR", Annex III to the Fourth Report, S/10229.

27. See para. 1 of G. A. Res. 2765 (XXVI); paras. 2, 3 and 4 of G.A. Res. 2945 (XXVII) and paras. 1, 2 and 3 of G.A. Res. 3116 (XXVIII).

[of the Covenant] is required from the Members of the League by the express terms of the Covenant, and they cannot neglect them without a breach of their treaty provisions".<sup>28</sup>

### *III. The Sanctions Committee*

The Sanctions Committee was established under paragraphs 20-23 of Security Council resolution 253 (1968). The terms of reference of the Committee were reproduced and extended in paragraph 21 of resolution 277 (1970) adopted by the Security Council on March 18, 1970. Furthermore, by subsequent decisions generally formulated in the light of recommendations or proposals submitted by the Committee, the Security Council has spelled out more clearly certain aspects of its terms of reference. Resolutions 314 (1972), 318 (1972), 320 (1972) and 333 (1973) may be mentioned particularly. As stated in paragraph 20 of resolution 253 (1968), the Committee was set up as

. . . a committee of the Security Council to undertake the following tasks and to report to it with its observations: (a) to examine such reports on the implementation of the present resolution as are submitted by the Secretary-General; (b) to seek from any States Members of the United Nations or of the specialized agencies such further information regarding the trade of that State (including information regarding the commodities and products exempted from the prohibition contained in operative paragraph 3 (d) . . .) or regarding any activities by any nationals of that state or in its territories that may constitute an evasion of the measures decided upon in this resolution as it may consider necessary for the proper discharge of its duty to report to the Security Council.

Under paragraphs 21 and 22 of the same resolution, the United Kingdom, Member States of the United Nations or of the specialized agencies, and the specialized agencies themselves, were requested or called upon to supply such further information as may be sought by the Committee in pursuance of this resolution. In paragraph 21 of resolution 277 (1970), the Security Council decided that the Committee, in accordance with rule 28 of the provisional rules of procedure of the Council, shall be entrusted with the responsibility of: examining such reports on the implementation of the resolution as will be submitted by the Secretary-General; seeking from Member States such further information regarding the

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28. L.N.O.J. (1935) at 1226.

effective implementation of the provisions laid down in the resolution as it may consider necessary for the proper discharge of its duty to report to the Security Council; studying ways and means by which Member States could carry out more effectively the decisions of the Security Council regarding sanctions against the illegal regime of Southern Rhodesia and making recommendations to the Council. Between 1968 and 1974, the Committee issued seven annual reports<sup>29</sup>, three *interim* reports on urgent cases and two special reports requested by the Security Council concerning ways of improving the effectiveness of sanctions.

Until 1972 the Committee consisted of representatives of ten States. In 1972 its membership was enlarged to include all fifteen members of the Security Council. In the same year the Council approved certain changes intended to improve the procedure of the Committee.<sup>30</sup> Prior to 1972 the Chairmanship of the Committee rotated every month. In that year it was decided to elect the Chairman and two Vice-Chairmen annually. The Chairman is elected in his personal capacity, whereas delegations are designated to provide the Vice-Chairmen. At its first meeting the Committee decided that, in principle, meetings would be held in closed session, subject to the right of any delegation to request further discussion of the matter. An open meeting was held on November 9, 1973 (175th meeting) to emphasize the Committee's continuing concern for the full and total application of sanctions. It was also decided at the first meeting that since it was desirable for the Committee to arrive at unanimous decisions, recourse to voting seemed inadvisable. However, it was stipulated that where agreement could not be reached on a consensus the point in issue could be referred to the Security Council, together with reports reflecting any of the issues expressed.

#### *IV. Legal Issues Before the Sanctions Committee*

##### *1. The Committee's Competence to Make a Determination as to Compliance or Breach*

The question of the competence of the Committee to make a determination as to compliance or breach arose in connexion with Case No. 75 which concerned wheat exports to Southern Rhodesia

29. See note 2 above.

30. S. C. Res. 314 (1972) and Report S/10852, paras. 66-90. See also Report S/11594, paras. 6-13.

permitted by Australia on what it claimed were humanitarian grounds. In the Committee some members expressed doubts as to the applicability to the case of paragraph 3 (d) of resolution 253 (1968) which, *inter alia*, specifically excludes foodstuffs from the scope of sanctions “in special humanitarian circumstances”. They felt that it would be reasonable to speak of “special humanitarian circumstances” in the event, for example, of a natural disaster. Other delegations stated that since the resolution did not clearly define what constituted a humanitarian exception, there was room for doubt on the matter. However, they claimed “it was not the role of the Committee to pronounce whether or not this case was genuinely a humanitarian exception, but to provide the facts of the case”.<sup>31</sup>

In its consideration of Part VI of its fourth report, the Committee unsuccessfully tried to put forward to the Security Council some agreed “observations and recommendations” as it had done in the third report. The difficulty arose, *inter alia*, over the following passage put forward in a five-power<sup>32</sup> draft proposal for inclusion in Part VI, which was objected to by some delegations:

4. During its deliberations the Committee ascertained that there were three cases of flagrant violation of and evasion from the sanctions adopted in accordance with the Security Council resolution 253 (1968) and 277 (1970), namely by Australian shipments of wheat to Southern Rhodesia, by the Federal Republic of Germany — imports of graphite, and by Switzerland — imports of meat from Southern Rhodesia. The Committee is concerned with the fact that these trade transactions, violating the Security Council resolutions, are being concluded with the knowledge of the Governments of Australia, the Federal Republic of Germany and Switzerland, and as is evident from the notes received from the Governments concerned these countries intend to maintain trade relations with Southern Rhodesia.<sup>33</sup>

The resistance of the United Kingdom representative to the inclusion of the above passage in Part VI of the report included the following objection: His “delegation considered that it was the Committee’s duty to report the facts to the Security Council, but not to attempt to determine whether or not violations of sanctions had been committed”.<sup>34</sup> In the end, the Committee failed to agree and

31. Report S/10229, para. 57.

32. Sponsored by Poland, Sierra Leone, Somalia, Syria and the USSR.

33. See Report S/10229, Annex III.

34. Report S/10229, remarks of Mr. Jamieson (United Kingdom) at 56-57. See also Mr. Castaldo (Italy) at 41 and 57.



included in Part VI a few introductory paragraphs followed by the Summary Records of the meetings at which Part VI was discussed, and the two draft papers which were used as bases of discussion. On the substantive issue, the Committee stated in paragraph 63 of its report that because of the differences of opinion as to whether a breach had occurred in the case of Australian exports of wheat to Southern Rhodesia, “the Committee did not pass any judgment on the question, leaving it for consideration by the Security Council”.<sup>35</sup>

In our view the Committee does possess the competence to make a determination of compliance or breach and to submit this as an observation to the Security Council. The terms of reference of the Committee clearly state that it is to “report to [the Security Council] with its *observations*” on its examination of reports submitted by the Secretary-General and on information sought for, and received from, States or the specialized agencies. The phrase “with its observations” is not qualified and therefore includes the competence to make observations as to whether the Committee thinks that there has, in a particular case, been a breach or a compliance. However, if the Committee does make a determination it can only be an *interim* one and its formal status is that of an advice to the Security Council. The power of final determination rests with the Security Council.<sup>36</sup> The existence of the competence of the Committee to make determinations is implicit in other decisions or pronouncements in other cases. Thus, with respect to the participation of a Southern Rhodesian team in the 1972 Olympic Games, the Committee noted that this would be “in violation of para. 5(b) of Security Council resolution 253 (1968)”. Again, in its report for 1969, the Committee noted that “certain States . . . are not complying or are not yet complying fully with the measures imposed by the Security Council.” The Committee also noted that the illegal regime in Southern Rhodesia has been carrying on trade with States in contravention of the sanctions.<sup>37</sup>

## *2. The Committee's Competence to Make Recommendations for Strengthening Sanctions*

The question of the Committee's competence to make recommenda-

35. Report S/10229 (1971), para. 63.

36. See on this Mr. Strulak (Poland), Report S/10229 at 31. See also Report S/10852, paras. 39 and 106.

37. Report S/9252, paras. 45-46.

tions to the Security Council regarding the strengthening of sanctions also arose in the context of its discussion of Part VI of its fourth report. The five-Power draft for inclusion in Part VI, to which we have already referred,<sup>38</sup> put forward certain recommendations which the sponsoring Powers felt that the Committee should make to the Security Council in order to strengthen sanctions against Southern Rhodesia. These included, *inter alia*, the recommendation that the Security Council should: (1) apply all measures provided for in article 41 of the Charter against the illegal regime of Southern Rhodesia; (2) consider sanctions against South Africa and Portugal in view of their refusal to implement the relevant resolutions of the Security Council; (3) request the Government of the United Kingdom as the administering Power to use military force in order to secure the right of self-determination and independence to the people of Southern Rhodesia; (4) call upon all States to take further measures in order to stop emigration of their citizens, as well as visits of their citizens, to Southern Rhodesia; and (5) call upon non-governmental organisations to comply with the sanctions imposed by resolutions 253 (1968) and 277 (1970) against Southern Rhodesia. The representative of the United Kingdom objected to these recommendations on the ground, as regards the first three and the fifth, that they exceeded the Committee's terms of reference, and as regards the fourth, that in so far as it concerned visits by private individuals to Southern Rhodesia, it went beyond the sanctions imposed by the Security Council.

On the point regarding the terms of reference of the Committee, we think that the contention of the United Kingdom representative was ill-founded. The power to submit observations to the Security Council which, as we pointed out above, is unqualified, includes, in our view, the power to comment on such measures which the Committee, in the light of its experience and of the information available to it, thinks may be necessary to strengthen those sanctions or to make them more effective.

As a result of the debate as to the Committee's terms of reference, some representatives on the Committee mentioned the possibility of amending its terms of reference. However, it was recognized that difficulties would arise in the way of doing this<sup>39</sup> and no proposal to

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38. *Supra* at 546.

39. See, *e.g.*, Mr. Castaldo (Italy), Report S/10229 at 41.

this effect was made. On any future occasion it may be desirable to spell out the terms of reference of a Sanctions Committee in more detail and to include, specifically, the competence to submit provisional determinations on questions of compliance or breach, and the competence to submit recommendations for strengthening sanctions, or for making them more effective.

### *3. The Distinction Between Mandatory and Non-Mandatory Provisions of Resolution 253 (1968)*

In its second report to the Security Council the Committee reported that “in taking measures for the implementation of the resolution, some states have made a distinction between mandatory and other provisions”<sup>40</sup> of resolution 253 (1968). The Committee did not comment upon this practice. However, the passage cited is significant because it reveals the manner in which the States in question interpreted resolution 253 (1968).

As we pointed out earlier,<sup>41</sup> resolution 253 (1968) uses language wherein the Security Council “decided, called upon, requested, emphasised, deplored, urged, considered and condemned.”<sup>42</sup> In our view, there is a gradation in the obligations imposed upon States. A request, for example, is lower than a decision. A request carries the implication that a State has a discretion whether or not to follow it, though there is an obligation to do everything possible to carry out that request, and if unable to do so to take measures to minimise the effect of non-compliance. These obligations flow from the general duty under the Charter of the United Nations to give effect to the sanctions imposed by the Security Council under Chapter VII.

However, the foregoing view has to be considered against the pronouncements of the World Court in its Namibia Opinion. In paragraph 114 of its Opinion, the Court dealt with the contention that the relevant Security Council resolutions in that case were couched in exhortatory rather than mandatory language and that, therefore, they did not purport to impose any legal duty on any State, nor to affect legally any right of any State. The Court stated that “the language of a resolution should be carefully analysed before a conclusion can be made as to its binding effect.”

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40. Report S/9252, para. 10.

41. *Supra* at 541-42.

42. *Id.*

In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.<sup>43</sup>

It will be seen that the Court emphasised the language test alone in the first part of the above passage, whereas in the second part it placed it among other tests. Is there a distinction between the two? Let us consider two types of cases. In Case A, a resolution is accepted as being a mandatory one but there are, on the basis of the language used, *prima facie* mandatory and non-mandatory provisions. Would the second set of tests cited by the Court, if satisfied, enable the conclusion to be reached that all parts of the resolution are mandatory despite the language used? And, if such a conclusion were to be asserted, what then would be the point of using different language in the resolution? In Case B, the question is one of whether or not a resolution as such is mandatory (leaving aside the status of particular provisions) — the question of the exercise of Article 25 as was involved in the Namibia Opinion. Here the Court applied its second set of tests to find the resolution to be a mandatory one under Article 25 and to find that particular provisions were also mandatory. But let us assume that it is found that Article 25 has been exercised in the case of a particular resolution, does it necessarily follow that all of its provisions are automatically mandatory, or does one still have to refer to the language for this? In our view, where a resolution as such is a mandatory one, the question as to whether and which parts are mandatory and non-mandatory has to be resolved by reference to the language of the resolution. On this reasoning we take the view that there is gradation of obligation under resolution 253 (1968).

#### *4. The Responsibility of States Regarding Sanctions Violations by their Nationals Abroad — the Question of Extra-Territorial Competence*

In some cases of suspected violation of sanctions to which the Committee drew the attention of the States concerned, the Committee received replies stating that inasmuch as it appeared that the reported transaction had been conducted outside the national

43. [1971]I.C.J. Rep at 16, paras. 114-115.

territory and that the goods concerned had never entered the national customs inspection control, no measures could be taken by governmental authorities against the firms involved, whether or not they were registered in that country and operating from it.

Thus, in one case, Switzerland made the following statement:

Nitrex A.G., which is mentioned in the United Kingdom charges of 14 January 1969 was registered in the commercial register of the city of Zurich in 1962. However, most of its capital is in foreign hands. The transactions in which it normally engages concern the export of nitrogenous fertilizers manufactured by other enterprises associated with it. In this case, the nitrogenous fertilizers exported to Rhodesia, were not manufactured in Switzerland. In fact, they did not enter the Swiss customs area, even in transit. This is therefore, a typical case of triangular trade, in which the role of Nitrex A.G. is simply that of a middleman. Since the goods in question did not pass through Swiss customs inspection, the federal authorities have no way in law, or even in practice, of proceeding against Nitrex A. G.

Lastly, the Permanent Observer wishes to emphasise that the federal authorities have warned Swiss shipowners that as a consequence of the resolutions adopted by the Security Council on the subject of Rhodesia, they should not take on board goods destined for or originating in that country.<sup>44</sup>

In another case, Switzerland in a *note verbale* dated January 20, 1971 stated:

According to information which has reached the Government of the United Kingdom [which raised the case initially], it would appear that the sale of this chrome ore in Europe was supervised and co-ordinated by a Swiss firm, the RIF Trading Co. Ltd. of Zurich. The Permanent Observer of Switzerland has already had occasion by a note of April 14, 1970 (S/9844/Add.II/Annex VIII, page 31, para. 10 (B)) to provide the Secretary-General of the United Nations with various data on the activities of this firm whose business is conducted, it seems, outside Swiss territory. In this connexion, therefore, the Federal Authorities can only repeat that they have no legal or practical means of intervening outside the territory of the Confederation. Under public international law, each state is entitled to apply legal rules only in its own territory; the Swiss authorities cannot, therefore, take steps which would contravene positive international law.<sup>45</sup>

In a still further case, Switzerland, in a reply dated September 8, 1972 made the following statement:

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44. Report S/9252/Add. 1. Annex XI at 34, para. 462.

45. Report S/10229/Add. 1 at 45, Case No. 103.

The Permanent Observer of Switzerland to the United Nations has the honour to refer to [a note from the Secretary-General of the United Nations] concerning a consignment of sugar suspected to be of Southern Rhodesian origin, reportedly purchased by a Kuwaiti firm in a transaction with UNIMER S.A. Geneva and shipped on the Greek vessel *Evangelis* from Lorenzo Marques to Kuwait in January 1971.

. . . the transaction took place entirely outside Swiss territory. As the Permanent Observer has already had occasion to explain to the Secretary-General, the Swiss authorities have no legal or practical means at their disposal of intervening in such cases. Under international law, a State can enforce legal provisions only in its own territory.

The Committee considered that the matter raised a question of general importance and requested the advice of the Legal Counsel of the United Nations.<sup>46</sup> The substantive part of the Legal Counsel's opinion stated:<sup>47</sup>

The Government first comments that its authorities have no legal or practical means of intervening outside its own territory. This seems to me to deal only partially with the means available to the authorities concerned to influence the companies in question. If those companies are organized under the law of the State concerned, have its nationality and are registered under its law, it would appear to be open to the competent authorities to decide whether or not to allow the companies to maintain whatever status they enjoy under local law. It would, for example, seem that the authorities may be in a position to require that the companies concerned desist from engaging in the transactions in question as a condition of the continuance of their registration under local law.

In the second place, the Government comments that under public international law, each State is entitled to apply legal norms only in its own territory, and that its authorities cannot therefore take steps which would contravene positive international law. To the extent that this remark is to the effect that a State may only enforce its national legislation within its own territory, it is no doubt correct. However, it would be at variance with both law and precedent, to assert that public international law precludes a State from enacting laws having extraterritorial effect and providing for enforcement within the territory of the legislating State.

With regard to the law, reference is made to a pertinent passage in the judgment of the Permanent Court of International Justice in the

46. Report S/10852/Add. 1, Annex II at 55, para. 8.

47. Report S/11178, para. 138.

case of the *SS Lotus* [Publications of the Permanent Court of International Justice, Judgments, Series A-916, at pages 18 and 19]:

Now the first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which related to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

With regard to precedent, the United Kingdom Trading with the Enemy Act of 1939 (2 and 3 Geo 6, c. 89), the United States Trading with the Enemy Act (50 USCA), and more recently, the United Kingdom-Southern Rhodesia (Petroleum) Order of 1965 (ST/1965 No. 2140), and the Southern Rhodesia (Prohibitive Export and Import) Order of 1966 (SI/1966 No. 41) all provide clear examples of national legislation controlling the activities of nationals and legal persons not only at home but also abroad and providing for enforcement at home of penalties in respect of contraventions by them abroad without such legislation being regarded as in conflict with public international law.<sup>48</sup>

##### *5. Neutral States and Non-Member States*<sup>49</sup>

Prior to becoming a member of the United Nations in 1973, the

48. See, further, Report S/11594, paras. 86-89.

49. See on this, L.N.O.J., Special Supplement No. 146 at 13, 35-40, for

Federal Republic of Germany, which held Observer status at the United Nations, voluntarily complied with sanctions and cooperated with the Sanctions Committee. It never raised the question of whether it considered itself bound as a non-member of the United Nations, to comply with sanctions obligations.<sup>50</sup> However, the issue was raised by Switzerland, a non-member as well as a neutral State. In one case, Switzerland stated in its reply that “. . . for reasons of principle, Switzerland, a neutral State cannot submit to the mandatory sanctions of the United Nations”. However, “independently and without recognizing any legal obligation to do so, it has taken steps to ensure that any possibility of increasing Rhodesian trade is excluded and that the United Nations sanctions policy cannot be contravened.”<sup>51</sup>

#### 6. *Who Decides Whether a Case Qualifies as a Permitted Exception?*

In Case No. 133, the Swedish Government, by a letter dated June 7, 1972, informed the Committee that it had authorized the exportation to Rhodesia of electro-medical equipment. The letter stated that the goods had been ordered from a Swedish exporter by the University of Rhodesia. The licence had been granted as an exception to the general prohibition against trade with Rhodesia stipulated in the pertinent Swedish law, which allows for exportation of medical equipment and equipment used for educational purposes. The letter went on to say that these exceptions were in line with the provisions in paragraph 3 of resolution 253 (1968).

At its 102nd meeting, the Committee decided that further information as to the nature of this shipment should be requested from the Swedish Government in order to dispel any doubt as to the use which the illegal regime could make of it. Accordingly, at its request, the Secretary-General sent a *note verbale* to the Permanent

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consideration of the position of Luxembourg and Switzerland as Neutral States. On the position of non-member States, see the remarks of Mr. Potemkne (USSR), L.N.O.J., Special Supplement No. 145 at 40.

50. See, however, *supra* at 546.

51. Report S/9252 at 6. See also, Report S/10229, paras. 51-54. Cf. Report S/10229 at 66-67, where a five power draft resolution called upon “the Governments of the Federal Republic of Germany and Switzerland which still maintain illegal trade with Southern Rhodesia to comply with sanctions imposed by the Security Council resolution and in this connexion to recall the provision of para. 6, Article 2 of the Charter.” See also the Namibia Opinion, [1971] I.C.J. Rep. 16, paras. 126-127, 133 and operative paragraph 3.



Representative of Sweden, asking for a complete description of the equipment in question and a detailed account of its intended use. By a note of September 8, 1972, the Permanent Representative of Sweden transmitted copies of documents on the basis of which his Government had founded its conviction that the medical equipment would be used solely for educational purposes in the new phonetics and linguistic laboratory at the University of Rhodesia.<sup>52</sup> The Committee thus emphasised that *it* would decide whether a case qualified as a permitted exception. In thus acting it was of course acting on behalf of the Security Council of which it is a subsidiary organ. In its fourth report the Committee had already asserted the principle that it would scrutinize the decisions of Governments. Noting that information provided by Governments in reply to requests for investigation often gave little or no indication of the considerations underlying the conclusions reached, the Committee stated that whenever an investigation is performed at its request, the inquiring authorities should be requested to provide the Committee with an indication of the considerations on which they based their findings and/or copies of the documentary evidence.<sup>53</sup>

#### 7. *Pre-Sanctions Contracts or Licences and the Plea of Hardship*<sup>54</sup>

Under paragraph 7 of resolution 253 (1968), all States Members of the United Nations are required to give effect to the decisions set out in operative paragraphs 3,4,5, and 6 of the resolution notwithstanding any contracts entered into or licence granted before the date of the resolution. Some cases have occurred in which Governments have permitted transactions *prima facie* in breach of sanctions obligations and have submitted the plea of hardship.<sup>55</sup> The United States Government, by a note dated September 17, 1970, informed the Committee that at the time the United States implemented

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52. Report S/10852, paras. 55-56.

53. See Report S/10229 at 18, para. 69. See also Mr. Zaldumbide (Ecuador), 17 L.N.O.J. (1936) at 541.

54. See on this the "Report of the Legal Sub-Committee on the Questions put to it on October 17, 1935, by the Sub-Committee on Economic Measures: Application of Sanctions and Private Contracts, Commercial Treaties and Treaties of Friendship and Non-Aggression", which dealt with certain legal problems concerning contracts in progress of execution. The performance of these contracts was prevented under paras. 3 and 4 of "Sanctions Proposal I" — L.N.O.J., Special Supplement No. 145 at 21-22; Special Supplement No. 150 at 6-7.

55. The plea of hardship was also raised in the League of Nations. See, *e.g.*, Mr. Wszelaki (Poland), L.N.O.J., Special Supplement No. 145 at 106.

Security Council resolution 232 of December 16, 1966 (United States Executive Order of January 9, 1967), the United States Government announced that provisions would be made to alleviate undue hardship for American firms which had legally commenced transactions before United States implementation of the Security Council resolution. According to the "hardship" provision, the Treasury would "in general licence in those cases where payment had been made by Americans prior to 5 January 1967" (date in the Executive Order). The United States Government considered that in those circumstances it was consistent with the purpose of the sanctions programme to place the illegal regime in a less favourable position by denying it the benefit of keeping both the funds and the goods. In accordance with this hardship provision, a case involving the importation of 150,000 tons of Rhodesian chrome ore was found by the Government of the United States to qualify since the ore was duly paid for and the funds transferred to Southern Rhodesia before January 5, 1967; but similar requests from other firms which had applied for import licences but did not qualify were denied.<sup>56</sup>

In case No. 38, a reply dated January 16, 1970 from the Federal Republic of Germany stated that it had successfully endeavoured to implement United Nations sanctions against Southern Rhodesia and had taken all necessary legislative measures. Consequently, trade between the Federal Republic of Germany and Southern Rhodesia had declined to less than ten per cent of its former volume and was then almost exclusively confined to commodities which were not included in the sanctions provisions or were covered by so-called "old-contracts". All but one of these contracts had expired. Investigations had established that the shipments of Southern Rhodesian graphite in question were covered by the last pending contract. The contract was concluded in 1964 and provided for long-term imports of raw graphite from a Southern Rhodesian graphite mine. The importing company was the only one operating a graphite mine in the Federal Republic of Germany. This company had made increasing efforts to substitute new graphite from the USSR, Czechoslovakia, the People's Republic of China, Madagascar, and Norway in place of graphite from Southern Rhodesia. However, it was not possible to eliminate Southern Rhodesian sources completely. The imported crystalline raw graphites had to be similar to the graphite mined by the Federal Republic of

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56. Report S/10229, para. 34.

Germany company since they had to be reworked and refined structurally. The company depended on the imports mentioned above as only the Southern Rhodesian material, which was not found in any other country, could be mixed with the Federal Republic of Germany graphite. The Federal Government would continue its efforts to help the importing company reduce or even discontinue imports from Southern Rhodesia. At the request of the Committee at its 27th meeting, the Secretary-General sent a *note verbale* dated April 27, 1970 to the Government of the Federal Republic of Germany referring to its reply dated January 16 and requesting confirmation that the Government of the Federal Republic intended to comply fully with the provisions of resolution 253 (1968).<sup>57</sup>

The Committee received a further communication dated September 16, 1970, from the Federal Republic of Germany re-emphasising the difficulties of the German company in its efforts to obtain elsewhere graphite of similar specifications, and stating that although the German importers were looking for other sources, "their negotiations have shown that it is at present not possible nor will it be possible for the foreseeable future to obtain the necessary quantities elsewhere."<sup>58</sup>

At the request of the Committee, the Secretary-General sent a *note verbale* dated January 28, 1971 to the Federal Republic of Germany, referring to its latest reply and informing it that in its next report to the Security Council the Committee would have to indicate that for the reasons stated, the import of graphite in question had been permitted. In its reply dated February 24, 1971, the Federal Republic of Germany indicated that since the immediate and total discontinuation of imports of natural graphite from Southern Rhodesia would endanger the existence of the German company concerned and result in the closing down of the Federal Republic of Germany's only graphite mine, the company had been continuing its efforts to reduce graphite imports from Southern Rhodesia. Despite increasing difficulties to obtain natural graphite from other sources, it had to a certain degree succeeded in buying such graphite from other countries.<sup>59</sup>

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57. Report S/9844/Add. 2, Case No. 38 at 72.

58. See further, Report S/11594, paras. 84-85.

59. Report S/10229 at 13, paras. 48-50. See also Report S/9844/Add. 2, Annex VII at 99, Case No. 14; Report S/9252 at 6, para. 11; Report S/9844 at 28, Case No. 41.

Leaving aside the merits of the particular cases, the important issue that arises here is whether the plea of hardship is entertainable at all to permit exceptions from the obligation to implement sanctions. In our view such a plea is entertainable<sup>60</sup> on the ground of equity. However, as regards the application of this principle, in our view the decision as to whether or not there is a case of hardship should be taken by the Sanctions Committee. Moreover, the decision should not be taken after the event has occurred but the permission of the Committee should be sought beforehand.

### 8. Other Legal Issues

The following additional legal issues, with which we shall not deal in this paper, have arisen in the course of the Committee's work: (1) What kinds of obligation does a State have to provide information to the Committee?<sup>61</sup> (2) What weight is to be placed upon particular pieces of evidence such as newspaper reports?<sup>62</sup> (3) What reliance is to be placed upon documents issued by countries such as Portugal and South Africa which openly violated sanctions?<sup>63</sup> (4) What is a "special humanitarian circumstance" which can qualify as an exception?<sup>64</sup> (5) Do visits by private individuals to Southern Rhodesia contravene sanctions?<sup>65</sup> (6) What is the nature and extent of the obligations of non-governmental organizations to comply with sanctions?<sup>66</sup> (7) How is the duty to ascertain the origin of goods distributed between buyer and seller?<sup>67</sup> (8) Does the

60. G. A. Res. 3116 (XXVIII) — December 12, 1973, makes reference to "strict compliance" with sanctions obligations: see paras. 3 and 5(a). See also G. A. Res. 2946 (XXVII) — December 7, 1972, para. 3.

61. See on this, Report S/9252/Add. 1, Annex XI at 9-12; Report S/9844/Add. 2, Annex VIII at 21; Report S/10229/Add. 1 at 14-15 and 73.

62. See on this, Report S/10229/Add. 1 at 111, Case No. 9:

The French Government refuses to form any conclusion solely on the basis of newspaper cuttings since news items published in the press are unreliable in too many cases to be used as the exclusive basis for judging whether certain industrial, commercial or tourist activity is going on in Rhodesia.

63. See Report S/10852, para. 44.

64. See Report S/10229, para. 57, and Report S/11594, paras. 82-83.

65. See Report S/10229 at 56 (Mr. Jamieson (U.K.)). Cf. Report S/10852, para. 106, quoted in note 66, *infra*. See also G. A. Res. 3116 (XXVI) — December 12, 1972, para. 5; Report S/11594, paras. 134-137.

66. See Report S/10852, paras. 100 and 106:

... the provisions of the relevant resolutions of the Security Council on sanctions include the activities of individuals, private organizations and governments.

67. See Report S/10229/Add. 1 at 99-100, where the following observation was

participation of Southern Rhodesians in international sporting competitions or the participation of foreign competitors in Southern Rhodesia violate the sanctions resolutions?<sup>68</sup> (9) Do franchise contracts which do not involve transfer to or from Southern Rhodesia of goods, services or capital violate sanctions?<sup>69</sup>

### *V. Conclusion*

The foregoing survey of legal issues which have arisen in the course of the work of the Sanctions Committee has to be evaluated against the outlook that exists in the Committee. As stated in its Report for 1971, representatives have expressed the view that the "Committee [is] not called upon to deal merely with technical questions but that its work [is] governed by Security Council resolutions which [are] political in nature".<sup>70</sup> ". . . The difficulties involved [are] of a highly political nature. The problem of Southern Rhodesia [is] one of the major problems facing the world."<sup>71</sup> The Committee has on occasions addressed itself to legal issues and, on one occasion, has sought and obtained legal advice, but on the whole its approach is a political rather than a legal one. There have been instances when legal issues which have arisen have been cursorily faced but then left hanging. Sometimes pronouncements have been made on basically legal issues without serious prior legal examination. The latter consideration may colour some of the legal pronouncements which we have discussed in the earlier parts of this paper. The question may be asked: "Should there be a stronger legal approach in the work of the Committee?" In this connexion, it will be recalled that the League of Nations established a legal sub-committee to which were referred legal problems which arose in the implementation of sanctions. Is there a case for a legal sub-committee of the Sanctions Committee?

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made by the Government of Kuwait:

. . . it is the duty of the seller to ascertain the origin of the goods and it is he who must be held accountable for the invoice he had given which the purchaser had accepted in good faith.

68. Report S/11594, paras. 118-122.

69. *Id.*, paras. 179-185.

70. Report S/10229, para. 4.

71. Report S/9844, para. 58.