> The recognition of a state merely signifies that the state which recognises it accepts the personality of the other, with all the rights and duties determined by international law – Article 6.

For the adherents to the declaratory theory the formation of a new state is a matter of fact, not law. Recognition is a political act by which the recognising state indicates a willingness to initiate international relations with the recognised state and the question of international personality is independent of recognition. However, the act of recognition is not totally without legal significance because it does indicate that the recognising state considers that the new entity fulfils all the required conditions for becoming an international subject.

The declaratory theory is more widely supported by writers on international law today and it accords more readily with state practice, as is illustrated by the fact that non-recognised 'states' are quite commonly the object of international claims by the very states which are refusing recognition, for example Arab states have continued to maintain that Israel is bound by international law although few of them, until recently, have recognised Israel.

6.3 Non-recognition

The legal regime established by the Covenant of the League of Nations 1919 and the Kellogg-Briand Pact 1928 was the basis for the development of the principle that 'acquisition of territory or special advantages by illegal threat or use of force' would not create a title capable of recognition by other states. The principle achieved particular significance as a result of the Japanese invasion of Manchuria in 1931. The US Secretary of State, Stimson, declared that the illegal invasion would not be recognised as it was contrary to the Kellogg-Briand Pact which outlawed the use of war as an instrument of national policy. Thereafter the doctrine of not recognising any situation, treaty or agreement brought about by non-legal means was often referred to as the Stimson Doctrine.

However, state practice before the Second World War did not seem to support the view that the Stimson Doctrine contained a binding rule of international law. The Italian conquest of Abyssinia (Ethiopia) was recognised as was the German take-over of Czechoslovakia. After 1945 the principle was re-examined and the draft Declaration on the Rights and Duties of States prepared by the ILC emphasised that territorial acquisitions achieved in a manner inconsistent with international law should not be recognised by other states. Similarly the Declaration on Principles of International Law 1970 adopted by the UN General Assembly included a provision to the effect that no territorial acquisition resulting from the threat or use of force shall be recognised as legal. There have been a number of occasions where the Security Council of the United Nations has called on states not to accord recognition to situations which have arisen as a result of unlawful acts:

> The Security Council, deeply concerned about the situation in Southern Rhodesia ...
>
> 6 Calls upon all states not to recognise this illegal authority and not to entertain any diplomatic or other relations with it.[3]

3 Security Council Resolution, 20 November 1965.

Recognition in such situations would itself be a breach of international law.

6.4 Recognition of governments

Although the practice of states is far from establishing the existence of a legal duty to recognise an entity which has established the factual characteristics of statehood, with regard to governments the position is even more difficult. The problem of recognition of governments will arise when a new regime has taken power:

(a) unconstitutionally;

(b) by violent means; or

(c) with foreign help,

in a state whose previous and legitimate government was recognised by other states. Recognition in such circumstances may appear an endorsement of the new regime, and the recognising state may not wish to offer such endorsement or approval. Alternatively, it may be impractical not to acknowledge a factual situation, in which case the recognising state may wish to indicate that recognition is inevitable once a given set of facts arise. Two approaches can therefore be identified: an *objective* approach, whereby recognition will occur if a given set of facts have occurred, or a *subjective* test, whereby recognition will depend on whether or not the new regime is going to act properly in the eyes of the recognising state.

One possible resolution of the problem of when to recognise is to avoid recognition altogether. In 1930, the Mexican Foreign Minister, Señor Estrada, rejected the whole doctrine of recognition on the ground that 'it allows foreign governments to pass upon the legitimacy or illegitimacy of the regime existing in another country, with the result that situations arise in which the legal qualifications or national status of governments or authorities are apparently made subject to the opinion of foreigners'. Henceforward, the Mexican government refused to make declarations granting recognition of governments. This Estrada Doctrine, as it came to be known, denies the need for explicit and formal acts of recognition; all that needs to be determined is whether the new regime has in fact established itself as the effective government of the country.

Although slow at first to catch on, the Estrada Doctrine has come to be followed by an increasing number of states. In 1977, the United States announced that it would no longer issue formal declarations of recognition, the only question in future would be whether diplomatic relations continued with the new regime or not. Following the US practice the UK has also de-emphasised recognition and there is now no formal recognition of new regimes, although the Foreign Office will still have to decide whether or not a new regime has effective control when considering matters such as trade and diplomatic relations.

6.5 *De facto* and *de jure* recognition

A distinction has sometimes been made in cases where governments have been accorded recognition between *de facto* and *de jure* recognition. Recognition of an

entity as the *de facto* government can be seen as an interim step taken where there is some doubt as to the legitimacy of the new government or as to its long-term prospects of survival. For example, the UK recognised the Soviet government *de facto* in 1921 and *de jure* in 1924. In some situations, particularly where there is a civil war, both a *de facto* and a *de jure* government may be recognised, as for example during the Spanish Civil War when the Republican government continued to be recognised as the *de jure* government, but as the Nationalist forces under General Franco took increasingly effective control of Spain, *de facto* recognition was accorded to the Nationalist government. Eventually the Nationalist government obtained full *de jure* recognition.

6.6 Collective recognition

COLLECTIVE RESPONSES TO THE UNILATERAL DECLARATIONS OF INDEPENDENCE OF SOUTHERN RHODESIA AND PALESTINE: AN APPLICATION OF THE LEGITIMISING FUNCTION OF THE UNITED NATIONS[4]

I INTRODUCTION

The proclamation in 1988 of the independent state of Palestine has underlined once again a major function which the United Nations has assumed by default, namely that of collective legitimisation, and its corollary, collective illegitimisation. A comparison with the attempted creation of another controversial state this century – that of Rhodesia – sheds light on this significant development of the United Nations.

It will be recalled that on 11 November 1965 a European minority under the leadership of Ian Smith unilaterally declared the independence of the British colony of Southern Rhodesia. The purported new state of Rhodesia had serious claims to fulfil the traditional criteria of statehood. If possessed a defined territory, permanent population and a government clearly manifesting its effectiveness both in terms of authority over the population, and in terms of independence from external control.

Twenty-three years later, on 15 November 1988, the Palestine National Council, at its 19th Extraordinary Session in Algiers, adopted the decision to declare 'in the name of God and on behalf of the Palestinian Arab people, the establishment of the state of Palestine in the land of Palestine with its capital at Jerusalem'. Whilst there clearly was an identifiable population, there was no *elected* government, and an apparent lack of effective control over defined territory.

In terms therefore of the traditional criteria for recognition of statehood, the contrasts between the two cases may seem to be evident. Yet in the former, the 'State of Rhodesia' was effectively denied recognition and entry into the international community by the United Nations until its accession to independence in 1980 as the State of Zimbabwe on the basis of majority rule. In the latter case, the proclamation of an independent State of Palestine was officially acknowledged by the General Assembly of the United Nations in December 1988, and granted recognition by close to 100 states.[5]

4 Vera Gowland-Debbas (1990) *BYIL* LXI at pp 135–55.

5 Keesing's *Record of World Events* (1988) 34 at para 36321.

This apparent paradox may be explained by reference to an underlying common denominator: in effect in both these cases the traditional criteria of statehood, in particular the principle of effectiveness, were overridden by the legitimising principle of self-determination of peoples, the United Nations acting as the 'dispenser of approval or disapproval' of these unilateral claims to independent status in accordance with their conformity or non-conformity with this principle.

The political and moral impact of this United Nations function of legitimisation has been underlined by a number of commentators.[6] In briefly reviewing the collective responses to these two unilateral proclamations of independent statehood, the present article seeks to demonstrate, however, that in both cases the United Nations went well beyond a political or moral function. For in its unanimous condemnation of the UDI, and its legitimisation of a Palestinian state, it is contended that the United Nations majority resorted to a series of pronouncements having a quasi-legal function: the collective defence of the right to self-determination, a norm now considered as of fundamental concern to the international community, and which has proved to be the cornerstone of subsequent claims to full sovereignty in both the legal and the material sense.

II THE UNILATERAL DECLARATIONS OF INDEPENDENT STATEHOOD UNDER INTERNATIONAL LAW

(a) The background

The origins of the two unilateral declarations are by now sufficiently well-known to be recalled only briefly.

The constitutional relationship between the territory of Southern Rhodesia and the United Kingdom differed from that of other more classic colonies as a result of its particular circumstances. Instigated by Cecil Rhodes, the British had in 1888 first acquired a sphere of influence in the territory and had then secured exclusive mineral rights from the local chief, following this up by occupation in 1890 and conquest in 1894. The origins of the Southern Rhodesian crisis that was to erupt in November 1965 can be traced to the initial British policy of entrusting local administration to a chartered company, and then to the gradual delegation of powers to the European settlers, leading to the grant to this minority of a considerable measure of internal self-government (Constitutions of 1923 and 1961).[7] Whilst there was no formal system of *apartheid* in existence and legislation was not overtly based on racist lines, deliberate white Rhodesian governmental policies ensured that African participation in the political process and the rate of African political advancement were kept to a minimum. As a result, whilst Southern Rhodesia's two northern neighbours acceded to independence in 1964 as Zambia and Malawi, the United Kingdom, under pressure from the

6 Claude, 'Collective Legitimisation as a Political Function of the United Nations' (1966) 20 *International Organisation* 367–79; Virally, *L'Organisation mondiale*, 1992, Paris: Armand Colin, at pp 430–31 and 454–56; *id* '*Le Rôle des organisations dans l'attenuation et le règlement des crises internationles*' (1976) 14 *Politique Etrangère* pp 529–62. With a passing reference to Rhodesia and the PLO he states: 'La composition multilatérale de l'organisation internationale, la finalité d'"intérêt-général" … confère aux actes de ses organes une autorité morale spécifique. Par la-même, elle est en mesure de conférer ou de réfuser le label de la légitimitée aux situations crées par les états ou d'autres acteurs internationaux, ou a leurs aspirations … Les conséquences practiques de l'éxercice de cette fonction n'ont pas besoin d'être longuement commentées', *ibid*, pp 540–41.

7 See Palley, *The Constitutional History and Law of Southern Rhodesia 1888–1965, with special reference to Imperial Control*, 1966, Oxford: Clarendon Press.

international community not to abandon this large unenfranchised black majority, denied the territory independence so long as the white minority refused to give certain guarantees for their political advancement.[8]

It was the resentment of white Rhodesians over this, following the failure of negotiations with the United Kingdom to obtain independence by constitutional means, that led to a unilateral declaration of independence on 11 November 1965 by which the 'government of Rhodesia' purported to enact a constitution for an independent sovereign state. Significantly, the 'Independence Proclamation', whilst echoing the 1776 American Declaration of Independence, omitted the assertion that 'all men are created equal', and made no reference to 'the consent of the governed'.[9]

Palestine, it will be recalled, as one of the territories detached from the Turkish Empire, had been placed under the League of Nations Mandate system with Great Britain designated as the Mandatory Power. Article 22 of the Covenant of the League provided that the Mandates should be governed by the principle 'that the well-being and development of such peoples form a sacred trust of civilisation', and with respect to Class A Mandates, which included Palestine, provided for the provisional recognition of 'their existence as independent nations ... subject to the rendering of administrative advice and assistance by a Mandatory'. After the Second World War, however, Great Britain, finding itself, in the face of the inherent contradictions of the Mandate and the growing tension in the territory, unable to establish political institutions leading towards self-government, placed the matter in April 1947 in the hands of the General Assembly of the United Nations. The result was the adoption of Resolution 181 (II) on 29 November 1947 recommending a 'Plan of Partition with Economic Union' which provided for the establishment of independent Arab and Jewish states and of a special international regime for the City of Jerusalem. This was never implemented. The consequences are only too well known. Following the 1948-9 Arab-Israeli conflict, the newly proclaimed State of Israel appropriated territories not assigned to it under the Partition Plan, and Egypt and Jordan ended up administering the Gaza Strip and the West Bank respectively,[10] both of which territories were occupied by Israel following further hostilities in 1967.

There were several milestones leading to the declaration of an independent Palestinian state: the formation of the Palestine Liberation Organisation by the National Congress of Palestine in 1964; the recognition of the PLO as the sole and legitimate representative of the Palestinian people by the 8th Arab Summit in Rabat in October 1974; the Palestinian uprising, the *intifadah* begun in the

8 For a further analysis of the question of Southern Rhodesia see Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, 1990, Dordrecht: Martinus Nijhoff.

9 Rhodesia Proclamation No 53 of 1965. Text in Windrich, *The Rhodesia Problem. A Documentary Record 1923-1973*, 1975, London/Boston: Routledge/Kegan Paul at pp 210–11.

10 On the origins of the Palestine problem and the legal issues raised see Boyle, 'Creating the State of Palestine' (1987–88) 4 *Palestine Yearbook of International Law* pp 15–43; Cattan, *Palestine and International Law. The Legal Aspects of the Arab-Israeli Conflict*, 1973, London: Longma; Kassim 'Legal Systems and Development in Palestine' (1984) I *Palestine Yearbook of International Law* pp 19–35; WT and SV Mallinson, *The Palestine Problem in International Law and World Order*, 1986, London: Longman; Pellet, '*La Déstruction de Troie n'aura pas lieu*' (1987–88) 4 *Palestine Yearbook of International Law* pp 44–84.

occupied territories in December 1987; and King Hussein's decision on 31 July 1988 to give up legal and administrative links with the West Bank.[11]

In contrast to the Rhodesian 'Independence Proclamation', the 'Declaration of Independence' of Palestine was made, *inter alia*:[12]

> By virtue of the natural, historical and legal right of the Palestinian Arab people to its homeland, Palestine ...
>
> ... on the basis of the international legitimacy embodied in the resolutions of the United Nations since 1947, and
>
> through the exercise by the Palestinian Arab people of its right to self-determination, political independence and sovereignty over its territory ...

The Declaration also affirmed the establishment in the State of Palestine of, *inter alia*, a democratic parliamentary system and full equality of rights, and affirmed respect for the principles of the UN Charter.

(b) The Unilateral Declarations of Independence and the Criteria of Statehood

Under international law, such unilateral declarations of independence can only be considered as a claim to personality and a request for recognition. Actually to attain that end, fulfilment of the international legal criteria for independent statehood has traditionally been required (as a preliminary step or a determining factor in the achievement of international personality, depending on whether one argues from the constitutive or declaratory viewpoints of the effects of recognition).[13] In particular, the need for effective governmental control has been underlined.[14] Debate relating to the fulfilment of these criteria by Rhodesia and Palestine has been waged on both sides. This debate can be summarised as follows.

1 Southern Rhodesia and the criteria of statehood

In 1965 the purported new State of Rhodesia had serious claims to fulfil these criteria. the first two conditions regarding territorial boundaries and permanent population did not come into question. With respect to the criteria of effectiveness and independence, it appeared that the domestic effectiveness of the Smith regime, a regime given the judicial blessing by the Rhodesian courts,[15] was assured. It wielded effective control over the organs of government, successfully set up new governmental institutions under new constitutional arrangements, issued passports and introduced decimal currency and UDI

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11 Text in (1988) 27 *International Legal Materials*, pp 1637–54. Regarding the prior status of the West Bank, see Kassim, *loc cit* above pp 27–28; Pellet, *loc cit* p 60.

12 For the English text of the Declaration of Independence and accompanying political communique, see (1988) 27 *International Legal Materials*, pp 1660–71, and UN Doc A/43/827 and S/20278, Ann III (1988). See also Flory, '*Naissance d'un Etat Palestinien*' (1989) 93 *Revue generale de droit international public*, pp 385–407.

13 See Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933, League of Nations Treaty Series, Vol 19, p 165, which states: 'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states'. See also the *American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States*, 1987, Vol 1, para 201, St Paul, Minnesota.

14 For example, Brownlie, *Principles of Public International Law*, 4th edn, 1990, Oxford: Clarendon Press at p 73; Crawford, *The Creation of States in International Law*, 1979, Oxford: Clarendon Press at pp 36 ff; Thierry, *Combacau, Sur and Vallee, Droit International Public*, 1984, Paris: Editions Montchrestien at pp 198–211.

15 *Archion Ndhlovu and others v The Queen*, Appellate Division, High Court of Rhodesia, 13 September 1968; [1968] (4) SALR 515.

stamps. There was no serious challenge at the time from within, the threat of guerrilla warfare having initially been contained. Southern Rhodesia's independence from the United Kingdom was also clearly demonstrated in the face of that state's futile attempts to assert its sovereignty, whilst refusing at the same time to use force against 'kith and kin'. Finally, Southern Rhodesia's dependence on South Africa's support was said not to affect its legal independence. These arguments concerning statehood were bolstered by the fact that the regime maintained itself in power for over 14 years, despite considerable external pressures.

On the other hand, serious doubts were expressed at the time, which in retrospect proved to be only too well founded, concerning the 'reasonable prospects of permanency' of a regime which denied political participation to the majority in the territory on a racially discriminatory basis, and the stability of a state, the independence of which had been opposed by the entire international community.[16]

2 Palestine and the criteria of statehood

The greater part of this debate has arisen from the request of Palestine for a change from its observer status to full membership of certain of the specialised agencies (so far, the WHO and UNESCO), since the constituent instruments of these organisations make admission to full membership contingent on 'statehood'.[17] This discussion has not at the time of writing been conclusive, compromise resolutions being adopted in both organisations which effectively shelved the admission for an indeterminate period.

However, certain conclusions regarding statehood may be drawn from this stage of the debate. Not surprisingly, the representative from Israel considered that 'the declaration from Algiers proclaims a so-called independent Palestinian state, with no territory, no borders and with Jerusalem, my home town and the capital of Israel, as its declared capital. That declaration has no meaning in reality.'[18] Other states such as Canada, Australia, the United States, Spain (speaking in the name of the European Community) and Norway also declared that, in their view, the proclaimed Palestinian state did not conform with the criteria of international law for the recognition of statehood.

The French Foreign Minister in a more nuanced statement declared:

> Si cette reconnaissance par la France d'un Etat palestinien ne soulève aucune difficulté de principe, il est toutefois contraire à sa jurisprudence de reconnaître un Etat qui ne dispose pas d'un territoire défini.[18]

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16 For arguments and references, see Gowlland-Debbas, *op cit* above (n 4, pp 205–15).

17 Letters dated 1 and 27 April 1989 from Mr Yasser Arafat in his capacity as President of the State of Palestine and Chairman of the Executive Committee of the PLO, to the Directors-General of WHO and UNESCO (WHO Doc A42/INF Doc/3 and UNESCO Doc 25 C/106, Annex 1). The application for admission to the WHO, for example, refers to 'the desire of the State of Palestine to become a full member of the WHO in accordance with Article 6 of the Constitution' (which provides that 'states … may apply to become Members and shall be admitted as Members when their application has been approved by a simple majority vote of the Health Assembly'), and undertakes 'to fulfil all duties and responsibilities arising from the full membership of the State of Palestine in WHO'.

18 UN Doc A/43/PV 79 at p 32 and letter from the Permanent Representative of Israel to the Director General of the WHO, 21 April 1989 reproduced in WHO Doc A42/INF Doc/3.

19 *Le Monde*, 18 November 1988. See also the statement by the President of the French Republic, underlining 'le principe de l'éffectivité, qui implique l'éxistence d'un pouvoir responsable et indépendant s'éxerçant sur un térritoire et une population. Ce n'est pas encore le cas …': *ibid*, 24 November 1988.

The Federal Department of Foreign Affairs of Switzerland, with respect to a communication of 21 June 1989, from the Permanent Observer of Palestine to the UN concerning the participation of Palestine in the four 1949 Geneva Conventions and 1977 Additional Protocols, informed the contracting parties that:

> due to the uncertainty within the international community as to the existence or the non-existence of a State of Palestine and as long as the issue has not been settled in an appropriate framework, the Swiss government, in its capacity as depositary of the Geneva Conventions and their additional protocols, is not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additional protocols ...[20]

As for writings on the subject, in a recent article concerning the admission of Palestine to the specialised agencies, one author was led to conclude: 'It is very doubtful that 'Palestine' currently qualifies as a state under international law.'[21]

The case for fulfilment of the criteria of statehood is, however, convincing. In so far as the requirement of population is concerned, it is hard to dispute the existence of a Palestinian people with its own separate cultural identity. This existence has been recognised in a number of international instruments,[22] numerous General Assembly resolutions[23] and state unilateral and collective declarations.[24] It has also been argued that the *intifidah* 'has shown that even 20 years of occupation cannot destroy the aspirations of a people'.[25]

As for a defined territory, it has been pointed out that the declaration of independence and political communiqué of 15 November 1988, combined with recognition of the right of Israel to exist, have now served to remove past ambiguities. These decisions accept the convening of an International Conference on the basis of Security Council Resolution 242 (1967) which, together with General Assembly Resolution 181 (II), would delimit the frontiers of the State of Palestine within the confines of the Palestinian territory occupied since 1967. It may be added that though the Proclamation purports to establish Jerusalem as the capital of an independent Palestinian State (contrary to the *corpus separatum* established by Resolution 181), this has clearly been limited to Arab Jerusalem. It

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20 Note of information dated 13 September 1989.

21 Kirgis, 'Admission of "Palestine" as a Member of a Specialised Agency and Witholding the Payment of Assessments in Response' (1990) 84 *American Journal of International Law*, pp 218–30 at pp 219 and 230, although he concludes that this does not necessarily determine its eligibility for admission to the specialised agencies or to the United Nations, since these also take into account other factors than that of statehood under customary international law, such as the ability to carry out the ongoing obligations of membership *(ibid*, pp 220–21).

22 An explanatory memorandum dated 12 May 1989 from six Afro-Asian States (UNESCO Doc 131 EX/43, pp 1–2) refers to Article 16 of the Treaty of Sèvres (1920) and the Treaty of Lausanne (1923) and the Mandate over Palestine entrusted to the United Kingdom on the basis of Article 22 of the League Covenant.

23 GA Res 181 of 29 November 1947 on the partition of Palestine and relevant resolutions adopted since 1967 recognising the right to self-determination of the Palestinian people.

24 The Declaration of Venice (12 June 1980) of the Heads of State, Heads of Government and Ministers of Foreign Affairs in the name of the European Community, in which it is explicitly mentioned that 'the Palestinian people, which is conscious of existing as such …' should exercise in full its right to self-determination (cited in UNESCO Doc 131 EX/43 p 2). See also the declaration of the President of the French Republic: 'D'ores et déjà émerge la nation paléstinienne, identifiée comme telle aux yeux des autres nations du monde': *Le Monde*, 24 November 1988.

25 UN Doc A/43 PV 80, Austria, p 21; Flory, *loc cit* p 397; Pellet, *loc cit* pp 60–61.

can also be contended that a new state may exist despite undefined boundaries[26] – witness the creation of Israel in 1948, admitted to the United Nations on 11 May 1949 despite not only undefined frontiers but also claims relating to its territory as a whole. Furthermore, it may be argued that as a result of the withdrawal of Jordanian administration, there is an absence of other valid claims to this territory since (in accordance with the well-established principle of international law concerning non-acquisition of territory through the use of force) Israel cannot be said to have acquired sovereignty over the territories which it presently occupies.

As for the requirement of effectiveness, it has been argued that the state is endowed with legitimate and representative political powers, namely, an Executive Committee entrusted by the Palestinian National Council (the supreme body of the PLO) with governmental functions, exercising responsibility outside the Palestinian territory in full independence and, inside the territory, carrying out certain (clandestine) functions (social, educational, cultural, etc by the intermediary of clandestine popular committees) since it is temporarily deprived of exercising territorial authority. It must be pointed out, however, that despite allusions to precedents such as the Czechoslovak and Polish National Committees (1917–18) and the French Committee of National Liberation (1943), the status of the Palestinian government remains difficult to define, since the Executive Committee is only entrusted with governmental functions pending the constitution of a provisional Palestinian government and there is a deliberate intention to avoid the term 'government-in-exile'.

However, whilst in these two cases of Rhodesia and Palestine states continue to give lip service to the traditional criteria of statehood, it is remarkable that in both cases these should have been considered irrelevant by the United Nations majority, as reflected in the collective response by the organisation to the two declarations of independence. The reason may be sought in the United Nations function of legitimisation.

III THE UNITED NATIONS FUNCTION OF LEGITIMISATION

The concept of legitimacy plays an important role in international society. Moreover, whereas the function of legitimisation was once exclusively assumed by individual states through the medium of state recognition, the institutionalisation of state relations has provided a means for the international community as a whole to pronounce on the legitimacy of new situations.

It has been pointed out quite rightly that legitimacy is not to be defined necessarily with legality. It has been stated: '*Même si la distinction n'est pas absolue, il convient cependant de tenir pour légitime ce qui est conforme a une valeur alors qu'est légal ce qui est conforme au droit*.'[27] Indeed, legitimacy affirmed within a moral or political framework may serve to counter the existing legal order. In turn, however, where this process is successful, what was previously only legitimate may well become identified with a new legality. The function of legitimisation has thus been closely associated to the doctrine of collective non-recognition traced back to the 1932 Stimson Doctrine but revived in modern form. The Doctrine is envisaged as a collective response to an act or situation contrary to

26 See, eg, *North Sea Continental Shelf* cases, in which the Court stated that 'there is no rule that the land frontiers of a State must be fully delimited or defined …' [1969] *ICJ Rep* at p 32; Brownlie, *op cit* at p 73.

27 Verhoven, *La Reconnaissance international dans la practique contemporaine. Les Rélations publiques internationales*, 1975, Paris: Editions A Pedone at p 587.

international law and consisting in the withholding of legitimisation, the function of legitimisation being used here in a negative fashion to prevent the consolidation of illegal but otherwise effective changes which would have had, under traditional international law, a law-creating function.

This evolution has been well illustrated in contemporary international society where, under the impetus of the so-called new states, the political process set in motion by the UN majority on the basis of a proclaimed new legitimacy has resulted – largely though not exclusively by means of the passage of General Assembly declaratory resolutions – in the establishment of new rules of conduct for states.

In this sense, therefore, the function of legitimisation – and its corollary, that of illegitimisation – assumed by the political organs of the United Nations may no longer be exclusively analysed within a political context of upholding what is moral, or just, but applied within the framework of a new *legal* order, considered to be more in conformity with contemporary notions of justice and community interests, and which has seen the erosion of the monolithic structure of traditional international law by a hierarchisation (or relativisation) of norms resulting from novel concepts: those of '*jus cogens*' (endorsed by the 1969 Vienna Convention on the Law of Treaties), of 'obligations *erga omnes*' (enunciated by the International Court in the *Barcelona Traction* case) and of 'international crimes' (introduced into the Draft Articles on State Responsibility of the International Law Commission). The process of legitimisation – and illegitimisation – by the United Nations has therefore also become a legal process, as a tool in the collective defence of those norms of the new legal order which are considered fundamental to the international community.

Whilst not explicitly stated in the Charter, this UN function has evolved through the practice on the basis of (a) declaratory resolutions affirming the existence of certain fundamental rules, eg the prohibition of the use of force in international relations and the right to self-determination, and (b) resolutions determining or characterising certain situations or acts – in particular those relating to territorial changes effected through the use of force, and to the birth of new entities – as valid or invalid, as the case may be, a change being considered legitimate only if carried out in conformity with such rules. Unarguably, therefore, the function of legitimisation has become part of the legal process, despite its evident political impetus, in the sense that a whole number of legal consequences (underlined by the International Court of Justice) flow from these declaratory resolutions and from determinations which have 'operative design',[28] thus impinging on and modifying the prior legal situation.

Nowhere is this so evident as in the role played by the United Nations in the promotion of the fundamental right to self-determination. Under the vehicle of Resolution 1514 (XV) on the Declaration of Independence to Colonial Countries and Peoples, and subsequent General Assembly resolutions, the principle, formulated as the right of a majority of a people not yet constituted into a state to

28 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1971] *ICJ Rep* at p 50 ('It would not be correct to assume that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design'). See the by now classic work of Casteneda, *Legal Effects of United Nations Resolutions*, 1969, London: Columbia University Press.

determine its external and internal political status, was gradually given shape and expanded to include colonialism in all its forms and manifestations. It was to find its way into treaty law and judicial pronouncements, and is now considered to form part of the body of rights fundamental to the international community, breaches of which are deemed to warrant a different and more serious legal response.

Placed within the context of the right to self-determination, the questions of Southern Rhodesia and Palestine were to constitute important precedents in this process.

IV THE COLLECTIVE RESPONSES TO THE UNILATERAL DECLARATIONS OF INDEPENDENCE

Action with respect to Southern Rhodesia had been initiated in 1961 at the international level as a result of the concern of the UN majority over the progressive evolution towards independence of a territory placed under a local administration of settlers and based on racial discrimination and a denial of political and other rights to the African majority. In seeking the means to oppose and eradicate this system before it could slide into the formal *apartheid* system of its Southern neighbour, and to substitute for it the only goal acceptable, that of self-determination for its people, the UN majority sought to ground international jurisdiction on the international status of Southern Rhodesia. In 1962, this status was determined by the General Assembly, over the protests of the United Kingdom but in the light of international standards and criteria, to be that of a non-self-governing territory under Chapter XI of the Charter (General Assembly Resolution 1747 (XVI)), and hence a self-determination unit to which could be applied the body of law on decolonisation which had progressively been shaped. In this context, it is easy to understand why the UN opposed efforts by the European minority in 1965 to perpetuate colonialism in another form by unilaterally declaring the independence of a state based on minority rule and discrimination.

It is contended that the United Nations went well beyond a verbal condemnation in determining, on the basis of a series of quasi-judicial pronouncements (Security Council Resolutions 216, 217 (1965)),[29] that this unilateral declaration of independence made by a racist minority, as well as the situation arising from it, was not only unconstitutional but also *illegal and invalid under international law* as it ran counter to the rights of the majority.

The United Nations then called for collective sanctions in the form of a dual response: (1) The refusal to validate the purported changes in the status of the territory, by the initiation of a policy of collective non-recognition (one of the most significant revivals of the pre-war Stimson Doctrine) (Security Council Resolutions 216, 217 (1965), 277 (1970)); and (2) the imposition, for the first time in UN history, of a panoply of economic, financial and diplomatic sanctions under Article 41 of the Charter on the basis of a determination that the illegality of the situations resulting from the unilateral declaration of independence constituted a threat to international peace and security under Chapter VII of the Charter (Security Council Resolutions 232 (1966), 253 (1968)). As a corollary, UN resolutions affirmed the legitimacy of the National Liberation Movements of Southern Rhodesia, entailing their right to representation in the international

29 See also 277 (1970); 288 (1970); 328 (1973).