

**LEGAL SIGNIFICANCE  
OF THE LEGITIMIZING FUNCTION  
OF THE UNITED NATIONS :  
THE CASES OF SOUTHERN RHODESIA  
AND PALESTINE**

by

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**I. — THE UNILATERAL DECLARATIONS  
OF INDEPENDENT STATEHOOD**

A comparison of the traumatic birth of the newly proclaimed independent State of Palestine with the birth of another controversial State this century — that of Rhodesia — serves to shed light on a major function which the United Nations has assumed by default, namely that of collective legitimization, and its corollary, collective illegitimization.

It will be recalled that on November 11, 1965, a European minority unilaterally declared the independence of the British colony of Southern Rhodesia. The "Independence Proclamation" echoed the 1776 American Declaration of Independence with the significant omission of the assertion "that all Men are created equal", and of any reference to "the Consent of the Governed" (1).

Twenty-three years later, on November 15, 1988, the Palestine National Council at its 19th Extraordinary session in Algiers, declared "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". The "Declaration of Independence" was made, *inter alia*:

« — By virtue of the natural, historical and legal right of the Palestinian Arab people to its homeland, Palestine (...),

(1) Rhodesia Proclamation No. 53 of 1965. See V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, Dordrecht, the Netherlands, Martinus Nijhoff, 1990, pp. 71-72.

— (...) 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.»

It affirmed the establishment of a democratic and non-discriminatory State based on respect for the principles of the U.N. Charter (2).

Under international law, such unilateral declarations of independence can only be considered as a *claim* to personality. To actually attain that end traditionally fulfilment of the international legal criteria for independent statehood has been required (as a preliminary step or a determining factor in the achievement of international personality, depending on the constitutive or declaratory viewpoints of the effects of recognition); in particular, the necessity of effective governmental control has been underlined (3).

The purported new State of Rhodesia had serious claims to fulfilling these criteria. It possessed a defined territory and permanent population, and a government clearly manifesting its effectiveness both in terms of authority over the population, and independence from external control (4).

On the other hand, as regards the new Palestinian entity, whilst there clearly was an identifiable population, there was no *elected* government, and an apparent lack of effective authority over defined territory (5).

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

(2) English text in *International Legal Materials*, vol. 27, 1988, pp. 1660-1671. M. Flory, « Naissance d'un Etat Palestinien », *R.G.D.I.P.*, vol. 93, 1989, 385-407. The Proclamation followed on the Palestinian uprising (the *intifadah*) and on King Hussein's decision of July 31 1988 relating to Jordan's disengagement from the West Bank (*International Legal Materials*, vol. 27, 1988, pp. 1637-1645).

(3) See J. Crawford, *The Creation of States in International Law*, Oxford, Clarendon Press, 1979, pp. 36 ff.; H. Thierry, J. Combacau, S. Sur, Ch. Vallée, *Droit international public*, Paris, Editions Montchrestien, 1984, pp. 198-211.

(4) Gowlland-Debbas, *op. cit.*, pp. 205-215.

(5) The debate on statehood has taken place mainly outside the U.N. centring in particular on the, to date inconclusive, request of Palestine for a change from its observer status to full membership of W.H.O. and UNESCO. (See W.H.O. Docs. A 42/INF. DOC. 3, A 42/Conf. Papers No. 2, A 42/VR. 10; WHA 42.1, WHA 43.1; UNESCO Docs. 25 C/106, Annex 1, 131 EX/Decision 9.3, 132 EX/Decision 9.4, 25 C/106, vr/2 prov.). For arguments respecting non-fulfilment of statehood see Letters from Israel, Canada, Australia, the United States, Spain (in the name of the European Community), and Norway to the Director-General of the W.H.O. (W.H.O. Doc. A 42/INF. DOC. 3) and more nuanced statements of France, in *Le Monde*, 18 and 24 November, 1989. For extensive arguments to the contrary see in particular Explanatory Memorandum dated 12 May 1989 from six Afro-Asian States (UNESCO Doc. 131 EX/43).

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

The political impact of this U.N. function of legitimization was underlined on a number of occasions by Michel Virally who with his usual remarkable perspicacity, wrote in 1976 (6):

« La composition multilatérale de l'organisation internationale, la finalité d'« intérêt général » au service de laquelle elle est placée et qui est définie dans sa charte constitutive et souvent détaillée dans une série de principes juridico-politiques, confère aux actes de ses organes une autorité morale spécifique. Par là-même, elle est en mesure de conférer ou de refuser le label de la légitimité aux situations créées par les Etats ou d'autres acteurs internationaux, ou à leurs aspirations (...). Les conséquences pratiques de l'exercice de cette fonction n'ont pas besoin d'être longuement commentées. Il suffira, à titre d'exemples en sens contraire, de citer le cas de la Rhodésie et celui de l'O.L.P. ».

In briefly reviewing the collective responses to these two unilateral proclamations of independent statehood, the present article would like to make a modest contribution to this reflection by showing that the U.N. in both cases went well beyond a verbal or political function. In its unanimous condemnation of the Unilateral Declaration of Independence (U.D.I.), and its legitimization of the proclamation of a Palestinian State, it is contended that the U.N. majority resorted to a series of pronouncements having a quasi-legal function: the collective defense of the right to self-determination, a norm now considered as of fundamental concern to the international community.

## II. — THE UNITED NATIONS FUNCTION OF LEGITIMIZATION

Michel Virally has underlined the importance of the role played by the concept of legitimacy in international society. Whereas the function of legitimization was once exclusively assumed by individual States through the medium of State recognition, the institutionalization of State relations has provided a means for the international

(6) See « Le rôle des organisations internationales dans l'atténuation et le règlement des crises internationales », *Politique étrangère*, vol. 41, 1976, 529-562, pp. 540-541 (reprinted in M. Virally, *Le droit international en devenir. Essais écrits au fil des ans*, Paris, I.U.H.E.I./P.U.F., 1990, pp. 357-379) and *L'Organisation mondiale*, Paris, Armand Colin, 1972, pp. 430-431, 454-456. Also I.L. Claude, « Collective Legitimization as a Political Function of the United Nations », *International Organization*, vol. XX, 1966, 367-379.

community as a whole to pronounce on the legitimacy of new situations (7).

Legitimacy of course is not to be identified necessarily with legality (8). Indeed, affirmed within a moral or political framework on the basis of notions of justice or community interests, it may well serve to counter the existing legal order. Where however this process is successful, what was previously only legitimate may well become identified with a new legality. The function of legitimization, in its negative form of preventing the consolidation of illegal but otherwise effective changes, has thus been closely associated to the doctrine of collective non-recognition first enunciated in the 1932 Stimson doctrine (9).

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 U.N. 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 legitimization and its corollary that of illegitimization assumed by the political organs of the United Nations, may no longer be exclusively analyzed 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 which has seen the monolithic structure of traditional international law eroded by a hierarchisation (or relativisation) (10) of norms resulting from novel concepts: those of “*jus cogens*”, “obligations *erga omnes*” and “international crimes” (11).

Whilst not explicitly stated in the Charter, this U.N. function has evolved through practice on the basis of: (a) declaratory resolutions affirming the existence of certain fundamental rules — e.g. the prohibition of the use of force, the right to self-determination — (b) resolutions determining or characterizing certain situations or acts — territorial changes effected through the use of force, the birth of new entities — as valid or invalid, a change being considered legitimate only if carried out in conformity with such rules. Unarguably therefore, the function of legitimization has become part of a legal process, despite its evident political impetus, in the sense that a whole number of legal consequences (underlined by the I.C.J.) flow

(7) *L'organisation mondiale*, pp. 430-432. Also R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire*, Paris, Economica/UNESCO, 1985.

(8) J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine — Les relations publiques internationales*, Paris, Editions A. Pedone, 1975, p. 587.

(9) See generally: A. Cassese, *International Law in a Divided World*, Oxford, Clarendon Press, 1986, p. 27; Dupuy, op. cit., p. 106; J. Dugard, *Recognition and the United Nations*, Cambridge, Grotius Publications Limited, 1987, pp. 24-25.

(10) P. Weil, « Towards Relative Normativity in International Law? » *A.J.I.L.*, vol. 77, 1983, 413-442.

(11) See Vienna Convention on the Law of Treaties, art. 53 and 64; Barcelona Traction case, *I.C.J. Rep.* 1970, p. 32; Art. 19, Part I of the Draft Articles on State Responsibility.

from these declaratory resolutions and from determinations which have “operative design” (12), 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, breaches of which have been considered to warrant a different and more serious legal response from the international community. Under the vehicle of Res. 1514 (XV) and subsequent General Assembly resolutions, the principle, formulated as the right of a majority of a people not yet constituted into a State to determine its external and internal political status, was gradually given shape and expanded to include colonialism in all its forms and manifestations.

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.

### III. — THE COLLECTIVE RESPONSES TO THE UNILATERAL DECLARATIONS OF INDEPENDENCE

Having determined in 1962, over the protests of the United Kingdom, that Southern Rhodesia was a Non-Self-Governing Territory within the meaning of Chapter XI of the Charter, the U.N. sought the application to it of the principle of self-determination. 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 racial discrimination was thus opposed by the U.N.

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 (S.C. Res. 216, 217 (1965)) that this unilateral declaration of independence made by a racist minority, as well as the situation arising from it, was both *illegal and invalid under international law* as it ran counter to the rights of the majority of the people.

In consequence, the United Nations 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), and 2) the imposition for the first time in U.N. history, of a panoply of economic, financial and diplomatic sanctions under Article 41 on the basis of a determination that the illegality of the situation resulting from the unilateral declaration of independence constituted a threat to international peace and security under Chapter VII. (SC Res. 232 (1966), 253 (1968)). As a corollary, U.N. resolutions affirmed the legitimacy

(12) Namibia Opinion, *I.C.J. Rep.*, 1971, p. 50.

of the National Liberation Movements of Southern Rhodesia and of their struggle.

Thus whilst seemingly prepared to concede to Rhodesia a certain degree of effectiveness, the United Nations nevertheless denied independence to that entity irrespective of the traditional indicia of statehood. Arguments based on the existence or non-existence of the criteria of statehood therefore obscured the true function of this type of non-recognition of a situation based on a determination that an act contrary to international law has occurred and which is distinct from ordinary recognition predicated on the existence of statehood where questions of legality do not arise. This becomes apparent from an analysis of the content and legal effects of this policy, duplicated in the call for non-recognition of South Africa's presence in Namibia and the proclaimed independence of the South African bantustans. For behind the apparent object of an independent State of Rhodesia what States were called on not to recognize was in fact the illegal and invalid situation created by the U.D.I. (13).

Whilst, after the adoption of Res. 181 (II), and the subsequent establishment of a State of Israel, the Palestine question was not immediately associated with the decolonization process, the Palestinians initially being looked upon as refugees and treated within the context of an individual right of return (14), the General Assembly after 1969 shifted its perspective to acknowledge their status as a people belonging to a self-determination unit. At the same time the United Nations sought to illegitimize all Israeli actions contrary to this right. Thus in a number of resolutions the Assembly affirmed: (a) the legitimate inalienable right of the Palestinian people to self-determination, *including the right to establish its own independent State*; (b) the legitimacy of its representatives — the P.L.O. — having a right to participate on an equal footing with other parties in all deliberations and conferences on the Middle East; and (c) the illegality under international law and U.N. resolutions of Israel's occupation of Arab territories since 1967, including Jerusalem, considered contrary to the *jus ad bellum* (the principle of the inadmissibility of the acquisition of territory by force) as well as the *jus in bello* (the 1949 Geneva Conventions) and the consequent invalidity of all measures taken by Israel purporting to alter their character and status. Was also however affirmed the right of all States in the region to exist within secure and internationally recognized boundaries (15).

(13) Gowlland-Debbas, *op. cit.*, pp. 274 ff.

(14) See GA Res. 194 (III), 513 (VI), 2452 (XXIII), 2535 (XXIV), and 2963 (XXVII), W.T. and S.V. Mallinson, *The Palestine Problem in International Law and World Order*, Harlow-Essex, Longman, 1986, pp. 178-187.

(15) On the right to self-determination of the Palestinian people: GA Res. 2535B (XXIV); 2672C (XXV); 3210 (XXIX); 3236 (XXIX); 3237 (XXIX), 3375 (XXX); 3376 (XXX), On Jerusalem and occupied territories: SC Res. 242 (1967), 338 (1973), 446, 452 (1979), 456, 476, 478 (1980). GA Res. 2253 (XXII); and more recently SC Res. 605, 607 and 608 (1988), GA Res. 43/21. See also A.H. Tabiri, «Humanitarian Law: Deportation of Palestinians from the West Bank and Gaza», *Harvard International Law Journal*, vol. 29, 1988, 552-558, pp. 554-555.

The Assembly's response to the decision of the Palestine National Council of 15 November 1988 in the form of G.A. Res. 43/177 acknowledging the proclamation of an independent Palestine State must therefore be taken in the same vein, but acting in an opposed direction, as the Assembly's response to the Southern Rhodesian unilateral declaration of independence. This proclamation is considered in the preamble to be in line with G.A. Res. 181 (II) "and in exercise of the inalienable rights of the Palestinian people (...)." The resolution "affirms the need to enable the Palestinian people to exercise their sovereignty over their territory occupied since 1967" and decides that effective as of 15 December, 1988, the designation "Palestine" should be used in place of the designation "Palestine Liberation Organization" in the United Nations system.

Not surprisingly, controversy arose over the legal significance of this "acknowledgement" (16). The United States declared that the General Assembly had expressly withheld the attribution of statehood to "Palestine" since it was specified that the change of the designation of the P.L.O. to "Palestine" was "without prejudice to the observer status and functions of the P.L.O. within the United Nations system" (17). Japan, Australia and the United Kingdom, amongst others, expressed reservations on the fact that the draft resolution presupposed the establishment of the State of Palestine (18).

However, it is clear that the function of this resolution was to recognize and affirm the intrinsic legality of a situation — the declaration of independence — considered to be in conformity with G.A. Res. 181 and other resolutions recognizing the right to self-determination of the Palestinian people, including the right to a State of its own, and the consequent intrinsic illegality of the Israeli occupation despite its effectiveness, which was preventing the State of Palestine from exercising authority over this territory. The Assembly was not concerned with cognition in the sense of affirmation of the existence of the criteria of statehood but with a process of legitimization. In a sense, by implicitly acknowledging that the conditions for the establishment of a Palestinian State had now been met several years after the adoption of Res. 181, the Assembly may be said to have been asserting its competence, assumed on a number of occasions, to determine the forms and procedures by which the right to self-determination was to be realized, a discretionary right which the Court has upheld (19). It may be seen therefore as the crowning of the decolonization process in Palestine.

The debate surrounding the adoption of this resolution supports this view. Arafat reiterated that the independent State of Palestine had been declared by virtue, *inter alia*, of "our belief in international

(16) The resolution, one of three adopted on Palestine on December 15, 1988, was voted on by 104-2 (Israel and the United States)-36 (see Flory, *op. cit.*, p. 402).

(17) A/43/PV.82, United States, pp. 46-47.

(18) A/43/PV.82, Australia, p. 81, Japan, p. 82, United Kingdom, p. 83, Canada, p. 86, France, p. 87.

(19) Western Sahara Opinion, *I.C.J. Rep.* 1975, p. 36.

legitimacy" (20). Egypt, amongst others, stated: "We are thus called upon to adopt resolutions consistent with the norms of international legitimacy and the purposes and principles enshrined in the U.N. Charter". (21) Even those States which had not yet recognized the State of Palestine stated that they nevertheless welcomed the Proclamation as the exercise of the right to self-determination, including the establishment of a State of its own, by the legitimate representatives of the Palestinian people, differing only in the view that recognition of statehood could take place only within the context of a comprehensive Middle East Settlement (22).

There have been similar claims to establishing a State on the basis of legitimacy. Indeed the declaration of independence of a Palestinian State reflects the wording of the Declaration on the Establishment of the State of Israel made also "by virtue of our Natural and Historic Right and on the Strength of the Resolution (181) (...)" admitted to the United Nations on 11 May, 1949 (23). Another significant precedent was admission of Namibia to membership of the International Labour Organisation and the acceptance of the Namibia Council as the government of Namibia for I.L.O. purposes, despite the clear absence of the traditional criteria of statehood, on the basis that the Organization was not prepared to allow the legitimate rights of the Namibian people to be frustrated by the illegal occupation of South Africa, in the absence of which Namibia would have qualified for independent statehood (24). Whilst G.A. Res. 43/177 was not related to admission of the State Palestine, it nevertheless appeared to be implying much the same thing.

#### IV. — CONCLUSIONS ON THE LEGAL EFFECTS OF LEGITIMIZATION

S.C. Res. 277 (1970) calling for collective non-recognition of an independent State of Rhodesia was clearly a mandatory resolution adopted by the Council on the basis of powers conferred under Chapter VII. G.A. Res. 43/177 on Palestine, it will be held, can place no corresponding obligation on Member States to acknowledge the Proclamation or *a fortiori* to recognize the State of Palestine, though naturally it has determinative effect on the status of the entity for internal purposes (the change of appellation in particular).

(20) GA A/43/PV.78, pp. 23, 27, 32-33.

(21) A/43/PV.78, p. 48. See also Saudi-Arabia, p. 72; Iraq, p. 87; A/43/PV.80, Sudan, p. 6.

(22) A/43/PV.79, Sweden, p. 74; A/43/PV.80, Chile, pp. 18-20; Austria, pp. 21-22; New Zealand, p. 132; Canada, pp. 172-176. A/43/PV.82, Australia, p. 81; Japan, p. 82; France pp. 87-88.

(23) Quoted in Dugard, *op. cit.*, pp. 60-61. See also Verhoeven, *op. cit.*, p. 28.

(24) I.L.O. 64th Session (Geneva, June 1978) Provisional Record No. 24, p. 24. E. Osieke, « Admission to Membership in International Organizations: The Case of Namibia », *B.Y.I.L.*, vol. 51, 1980, 189-229, pp. 214-215.

However, the characterization by the Organization of the situation could not remain without legal effect (25). In the case of Southern Rhodesia, there existed, beyond the conventional obligation, a general international law duty on the part of States not to recognize a situation determined to be contrary to a fundamental norm — that of self-determination — and hence invalid. It could therefore be argued along the same lines, that acknowledgement by the Assembly of the proclamation of an independent State of Palestine, a proclamation determined in this case to be *in conformity* with that right, could not similarly remain without legal effects.

This means, at the very minimum, that recognition by States of this entity cannot be held to be illegal in the sense of premature recognition. This is not to say that in recognition of statehood, the traditional criteria have been totally replaced, but that when this concerns certain postulated legal rules considered essential for the international community, different considerations operate where a situation of legality or illegality is involved and where the object is the upholding of the maxim *ex injuria jus non oritur* over its rival principle *ex factis jus oritur* or the law-creating influence of facts (26).

As a legal mechanism, this process of legitimization which attempts to override considerations of effectiveness, may be criticized for creating an unbridgeable gap between the facts and the law. However, just as the lack of legal title may serve to weaken a situation of fact, assumption of legal title may serve to strengthen it. It is undeniable that the ostracism of the European minority regime and denial to it of international personality had constitutive effect to the extent that it undermined its effectiveness — it is enough to think of the corollary of U.N. policy, had Rhodesia been accepted into the United Nations under a white minority regime in 1965 — (27). Similarly, the legal fiction of a U.N. Territory in Namibia served to undermine the effectiveness of South Africa's hold over Namibia. Whilst therefore the U.N. may be accused of perpetuating a legal fiction, it may be argued that acknowledgement of the legitimacy of the proclamation of an independent Palestinian State coupled with individual State recognition may also serve to create the very effectiveness that is said to be lacking and contribute towards consolidation of its status. Cassese states that traditionally international law provided that only those claims and situations which are effective can produce legal effects, in other words claim international legitimacy (28). Today however there is evidence that only those claims and situations which are legitimate can produce legal effects and hence be effective.

It may be said that this tendency to entrust to political organs the task of validating or invalidating claims and situations by means

(25) Namibia Opinion, *I.C.J. Rep.* 1971, pp. 47-51, 54.

(26) Sir H. Lauterpacht, *Recognition in International Law*, London, Cambridge University Press, 1947, pp. 426-427.

(27) Gowlland-Debbas, *op. cit.*, pp. 661-663. See also G. Abi-Saab, Foreword to Gowlland-Debbas, pp. 18-20.

(28) *Op. cit.*, pp. 26-27.

of legal judgements is in keeping with the contemporary tendency to refuse, at the international level, municipal law concepts of separation of powers, as the *Nicaragua* Case underlined. It is in keeping with the conception of the International Law Commission in relation to the defense of fundamental norms, of the need for collective action within an *institutionalized* framework (29). Finally, it is in keeping with a noticeable tendency of the contemporary international community to promote a more dynamic and hence interventionist international law, concerned no longer merely with jurisdictional issues but with the evolution, if not transformation of the international system.

It would be fitting to end with the words of Michel Virally on the problem of legitimization:

*« Dans certains cas, loin d'éliminer les causes de conflit, l'O.N.U. peut perpétuer certaines situations génératrices de tensions et de crises, en refusant de sanctionner le fait accompli. Cette attitude n'est pas contradictoire, si on admet que l'objectif à atteindre n'est pas d'entériner n'importe quel règlement qui mette un terme à une crise (...) mais bien de parvenir à un règlement durable, qui puisse être accepté sincèrement par toutes les parties concernées, parce qu'il tient compte de leurs intérêts légitimes (...) »* (30).

(29) See Y.B.I.L.C. 1976, vol. I, pp. 60 and 78-79.

(30) Virally, *L'Organisation mondiale*, p. 432.