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Recognition of Rhodesia and Traditional International Law: Some Conceptual Problems

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RECOGNITION OF RHODESIA AND TRADITIONAL INTERNATIONAL LAW: SOME CONCEPTUAL PROBLEMS

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I. INTRODUCTION

The Rhodesian rebellion against the British Crown, which began thirteen years ago, was universally condemned. The international community, through the machinery of the United Nations, isolated Rhodesia diplomatically and imposed mandatory economic sanctions. Nevertheless, Rhodesia continued to exist for over a decade as an "outlaw state." No state, except South Africa, recognized Rhodesia as a legal personality under international law.

The most serious challenge that Rhodesia faced was the refusal by the world community to recognize the legitimacy of the country's government. This policy of non-recognition in turn resulted in the denial of international personality, and therefore of statehood under traditional precepts of international law for the entity known as Rhodesia. The problem is compounded by the widely held view that only the United Kingdom, as the colonial power, can grant de jure independence (and, therefore, legal personality)

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to the territory. The United Kingdom, however, will only grant such independence to a Rhodesian government with at least a minimum degree of legitimacy.

Numerous unsuccessful conferences were geared to meet this criterion of legitimacy. When such talks failed, legal stalemate returned and the status quo prevailed: recognition was withheld as long as there was no acceptable government, and Rhodesia's statehood and international personality remained in limbo. The application of traditional principles of international law relating to recognition results in denial of statehood and international personality in situations similar to that of Rhodesia. The Rhodesian experience points out some conceptual defects in the traditional theories of recognition under international law. The major defect in the traditional theories of recognition is the failure to maintain a rigorous distinction between recognition of governments and recognition of states. The result of this confusion is that international personality and, therefore statehood, is no longer independent of recognition; rather, it has become a *consequence* of it. Recognition of government thus becomes a precondition to international personality. International personality, when properly conceived, attaches to the state, not to the government. This confusion leads to certain other anomalous results which further illustrate the inadequacies of the traditional theories of recognition.

Modifications of the traditional concepts of recognition will be suggested where necessary not only to cover the particular case of Rhodesia, but also to render a single, unified and conceptually consistent theory of recognition that more accurately reflects state practice.

II. RE-EXAMINATION OF THE TRADITIONAL APPROACH TO RECOGNITION IN INTERNATIONAL LAW

Under the traditional principles of international law, there are two major theories on the nature, function and effect of recognition.[1] The constitutive theory holds that the act of recognition

1. *See generally* G. SCHWARZENBERGER, A MANUAL OF PUBLIC INTERNATIONAL LAW 70-78. (5th ed. 1967) [hereinafter cited as SCHWARZENBERGER]; MANUAL OF PUBLIC INTERNATIONAL LAW 275-76 (M. Sorenson ed. 1968) [hereinafter cited as Sorenson]; J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 91, 149-81 (8th ed. 1967) [hereinafter cited as STARKE]; J. BRIERLY, THE LAW OF NATIONS 138-43 (Waldock ed. 6th ed. 1963) [hereinafter cited as BRIERLY].

itself creates statehood, gives a new government authority to act on the international plane and vests in the recognized state an international personality making it a subject of international law. The declaratory or evidentiary theory holds that statehood exists independently of recognition. The act of recognition is merely a formal acknowledgment of an established fact.

According to one authority, "the bulk of international practice supports the evidentiary theory," although "recognition has often been given for political reasons and therefore tended to be constitutive in character."[2] Other writers[3] support the constitutive theory.[4] The controversy has never been resolved. The view that a state's rights and duties in international law exist independently of recognition, supports the declaratory theory. The judicial practice of many states, however, of denying an unrecognized state or government full rights before domestic courts, underscores the constitutive character of recognition. It is probable that "the truth lies somewhere between these two theories."[5]

Neither theory maintains a strict distinction between recognition of a state and recognition of a government, yet the advocates of both theories assert that the recognition of a state is not the same as the recognition of a government. Brierly states that "the recognition of a new government is not to be confused with the recognition of a new state but it raises problems in some respects similar."[6] Another writer notes that the recognition of a government "has nothing to do with the recognition of a State itself"[7] although "[i]t is practically impossible to lay down any definite legal principles on the matter, so materially do political considerations usually impinge thereon, while the practice is, as may be expected, confused and conflicting."[8] Brierly makes a similar admission.[9]

The only meaningful distinction between statehood and govern-

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2. STARKE, *supra* note 1, at 153.
3. *E.g.*, Schwarzenberger, Kelsen, and Lauterpacht.
4. *See* Sorenson, *supra* note 1, at 276. Lauterpacht, while supporting the constitutive theory, asserts that every state has a legal duty to recognize a new state if it fulfills the conditions of statehood. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 55 (1947) [hereinafter cited as LAUTERPACHT].
5. STARKE, *supra* note 1, at 153.
6. BRIERLY, *supra* note 1, at 146.
7. STARKE, *supra* note 1, at 159.
8. *Id.*
9. BRIERLY, *supra* note 1, at 146.

ment maintained under the traditional approaches to recognition is in the proposition that international personality belongs to a state and survives changes in government. This distinction, however, does not help in answering the more crucial questions of how a new state can acquire international personality and how a new government can acquire the capacity to act on the international plane.

Although traditional principles of international law purport to distinguish between recognition of statehood and recognition of governments, they leave to every state an absolute discretion to grant or withhold recognition to states and governments. It is clear that states apply identical political criteria in the grant of either type of recognition. Thus, states treat the question of recognition of states in the same manner as any decision concerning the recognition of governments. This pattern is apparent when questions of recognition arise over a new government claiming to represent a new state.

The constitutive or subjective element in the practice of recognition impedes all efforts to construct a single theory based on objective criteria. The declaratory theory is an improvement on the constitutive theory yet it too appears insufficient as it fails to establish objective criteria for recognition. Its achievement is that it lays down the principle that

> [a] state may exist without being recognised, and if it does exist in fact, then whether or not it has been formally recognised by other states, it has the right to be treated by them *as* a state. The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely the independence of the body claiming to be a state, and to declare the recognising state's readiness to accept the normal consequences of that fact, namely the usual courtesies of international intercourse.[10]

The principal objection to this theory is that it combines the two questions of recognition of state and of government. If the purpose of recognition is merely to acknowledge a pre-existing situation, then the existence of statehood may be objectively verifiable.[11] Under the declaratory theory, however, recognition is not

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10. *Id.* at 139.

11. Although the declaratory theory makes no attempt to define a state, a state as a person of international law has been defined under the Montevideo Convention of 1933 on the Rights and Duties of States as possessing (a) a permanent population, (b) a defined territory, (c) a government which is effective

only an acknowledgment of the existence of statehood, it also declares "the recognising state's readiness to accept the normal consequences of that fact (*i.e.*, of statehood), namely the usual courtesies of international intercourse."[12] This latter part of the thoery is not objectively verifiable. A state will enter into "the usual courtesies of international intercourse" with another state only if it recognizes that state's government. Neither the declaratory theory nor general international law establishes any objective criteria for the recognition of a government, as opposed to a state. The result is that recognition of governments is left to the absolute discretion of each government and the recognition of statehood impliedly remains subjective since the acquisition of international personality and the capacity to act on the international plane remain conditional upon recognition of the government.[13] Recognition under the declaratory theory is not "declaratory" of the existence of international personality as a pre-existing fact, but international personality is instead postulated as a consequence of recognition. In practice, states grant recognition only if some kind of relations are to be established with the recognized state. International personality is therefore granted in varying degrees. Schwarzenberger notes that

> [t]he normal method for a new state to acquire international personality is to obtain recognition from existing states . . . . Until the existing subjects of international law choose to transfer the function of recognition of new subjects of international law to a world authority, the effect of recognition is necessarily relative. It is limited to the relations between the recognising and recognised entities.
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> The scope of the international personality granted is a matter of intent.[14]

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and which receives habitual obedience, and (d) a capacity to enter into relations with other states. This Convention is, of course, not necessarily an authoritative statement of the position under general international law, but it shows that a "State" can be "objectively" defined. Another definition is that a state is a "definite territory of human society politically organised, independent of any other existing state, and capable of observing the obligations of international law . . . ." Institute of International Law, *Resolutions Concerning the Recognition of New States and New Governments,* art. 1, *reprinted in* 30 AM. J. INT'L L. Supp. at 185 (1936).

12. BRIERLY, *supra* note 1, at 139.

13. SCHWARZENBERGER, *supra* note 1, at 70.

14. *Id.* at 71-72.

If one of the consequences of statehood is the acquisition of the capacity to enter into international relations,[15] and that capacity is made contingent upon recognition of the government in question, there cannot be any real distinction between recognition of states and of governments. Furthermore, if international personality is conditional upon recognition, it follows that the withdrawal of recognition should extinguish the legal personality of the derecognized state. This would create confusion because of constantly shifting and contradictory statuses depending on who recognizes whom. Traditional international legal theory, perhaps in order to avoid this difficulty, postulates that a withdrawal of recognition does not extinguish personality. In circumventing the difficulty, however, international law has to live with the uncomfortable paradox that while recognition confers personality, the withdrawal of recognition does not extinguish it.[16]

The development of the law of recognition has focused on situations in which there have been abrupt changes of government in entities already recognized as states with international personality.[17] Criteria for recognition of a government, such as "actual and peaceful control,"[18] stability or permanence,[19] have normally been applied in only these situations. When applied to new and specific situations, such as when a new government and a new state demand separate but simultaneous recognition, the traditional theories do not provide any clear answers. The Rhodesian case and the case of Guinea Bissau illustrate the shortcomings of the traditional theories.

Starke raises the issue of the recognition of nascent states, but summarily dismisses the question by saying that most states give de facto recognition followed by de jure recognition.[20] However, even the concept of de facto and de jure recognition is unable to distinguish between recognition of States and of governments. Thus: "When in the opinion of the recognising state a new regime or authority meets some but not all the requirements which are deemed essential before recognition should be granted, that state

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15. *Cf.* note 11 *supra.*

16. For a further discussion, see text accompanying note 34 *infra.*

17. Tinoco Arbitration, 1 R. Int'l Arb. Awards 369 (1923); BRIERLY, *supra* note 1, at 144-45. *See also* Sorenson, *supra* note 1, at 271; STARKE, *supra* note 1, at 135-36.

18. *See* Tinoco Arbitration, *supra* note 17.

19. STARKE, *supra* note 1, at 159.

20. *Id.*

may grant de facto recognition."[21] Similarly, Lauterpacht explains that the purpose of de facto recognition is "a declaration that the body claiming to be the Government of an established or a new state actually wields effective authority without, however, satisfying other conditions of full de jure recognition."[22]

The concepts of de jure and de facto recognition speak primarily to the recognition of governments of pre-existing states.[23] Even if applied to a new state, the concepts are still concerned with the recognition of government, awarded on the basis of the effective authority and permanence of the government. Thus, says Starke:

> *[D]e facto* recognition is purely a non-committal formula whereby the recognising state acknowledges that there is a legal *de jure* government which "ought to possess the powers of sovereignty, though at the time it may be deprived of them," but that there is a *de facto* government "which is really in possession of them although the possession may be wrongful or precarious."[24]

When the question of de facto or de jure recognition arises, there is no threat or doubt as to the existence of the state as a politically independent geographical entity, or indeed, as an international person.

III. Rhodesia and the Traditional Approach to Recognition

The existence of an independent state of Rhodesia with international personality is debatable because the world community considers illegal the act which purported to bring the state into existence. Only an act of the British Parliament can grant de jure independence to a British colony.[25] It may, however, be argued under the traditional approach that the Smith/Muzorewa regime was a government requiring de facto recognition, and that the British government, in negotiating the cease fire and elections arrangements with the Smith government as a party, recognized that government as a de facto government. Further, the occasions

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21. Sörenson, *supra* note 1, at 279.

22. Lauterpacht, *supra* note 4, at 340.

23. *See* Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co. [1921] 3 K.B. 532, 543; Stark, *supra* note 1, at 139-41.

24. Starke, *supra* note 1, at 163 (quoting Luther v. Sagor, [1921] 3 K.B. at 432).

25. Fawcett, *Security Council Resolutions on Rhodesia, [1965-66]* Brit. Y.B. Int'l L. 102, 107 [hereinafter cited as Fawcett].

on which the "front line" states have had contacts with the Smith government demonstrate a similar de facto recognition. This argument would be valid only if the United Kingdom and the "front line" countries regarded the Smith government as the (de facto) government of an independent sovereign state of Rhodesia. This they have refused to do, and it is generally accepted that Rhodesia was a colony to which only the United Kingdom Parliament can grant independence. Further, insofar as the concept of de facto and de jure recognition presupposes the existence of an independent state and is concerned primarily with the recognition of the government of such a state,[26] it is inadequate in explaining a Rhodesia-type situation.

The question of the recognition of Rhodesia's government arises only if there is a recognized state of Rhodesia. Yet the traditional theories reverse the order of recognition since they regard the acquisition of international personality and, therefore, statehood, as a consequence of recognition of government. Under the "declaratory" theory of recognition a state may declare recognition of the "State" of Rhodesia and indicate its willingness to enter into "the usual courtesies of international intercourse"[27] with it, so that it may acquire international personality as of the date of recognition.[28] The result is the same under constitutive theory. Recognition *per se* confers capacity on a government to act on the international plane under the constitutive theory. A "state" is then not only presumed to exist, but automatically acquires international personality. The lack of independent criteria for recognition under the traditional theories results in the inability of either theory to maintain a proper distinction between state and government. Further, since the effect of recognition is relative,[29] the recognition of Rhodesia by one state and not another would apparently render Rhodesia an international person and an international non-entity at the same time.[30] An unrecognized

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26. For a discussion of *de jure* and *de facto* recognition, see text accompanying notes 20-24 *supra*.

27. *See* text accompanying note 10 *supra*.

28. SCHWARZENBERGER, *supra* note 1, at 70-72.

29. Recall that recognition is a matter of intent and has legal consequences only between the recognizing and recognized states. *See* text accompanying note 14 *supra*.

30. Brierly sees this difficulty arising only with the constitutive theory. BRIERLY, *supra* note 1, at 138. Insofar as the declaratory theory identifies the acquisition of international personality as a consequence of the recognition of

state, lacking international personality, has neither rights nor duties under international law. As Brierly warns, "some of the consequences of accepting that conclusion might be startling."[31] To hold that an entity which has all the internal and external properties of other states of the world community is not subject to international law is hardly conducive to the promotion of the international rule of law.

IV. A Tentative Re-Formulation of the Concept of Recognition

A strict distinction between statehood and recognition of government is needed under international law. The Montevideo Convention provides that[32] an entity acquires statehood if three conditions are satisfied: a permanent population, a certain territory, and an effective and independent government. Such an entity acquires all rights and duties under customary international law and becomes capable of entering into legal relations with other subjects of international law. Under these three criteria, the concept of statehood is objectively definable.

Under the traditional approach recognition is irrevocable. Thus, a formal severance of diplomatic relations will not deprive a state of international status.[33] This results in an anomalous situation. If the purpose of recognition is to indicate the initiation of international relations with the recognized state "it is a paradox that when a gesture is made in a contrary sense, indicating that no further relations will be maintained with the formerly recognized state or government, it is not in general attended by a withdrawal of recognition."[34] This paradox results from two factors: the inability of the traditional theories to distinguish between statehood and governorship; and the automatic implication of recognition of statehood and international personality. If the acquisition of international personality is a consequence of recognition of government, it is indeed an anomaly that the withdrawal of recognition does not cause the formerly recognized state to lose its international personality.

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government, however, the same difficulty arises under both the declaratory and constitutive theories.

31. Brierly, *supra* note 1, at 138-39.
32. *See* note 11 *supra*.
33. Starke, *supra* note 1, at 160.
34. *Id.*

If, however, one maintains a strict distinction between statehood and recognition of government, the above difficulties can be avoided. A subject of international law could then exist independently of recognition, so that the acquisition of international personality would not be dependent on the act of recognition, and the withdrawal of recognition could not affect that personality. For example, the withdrawal of recognition by states such as Zambia and Tanzania from the government of Idi Amin Dada did not affect the status of Uganda as an international person. Similarly, the military coups in Ghana, Nigeria, the Sudan, the Congo, Zaire, Chad, and Portugal, installed new governments in these states; each retained its international personality and continued unchallenged as a member of the United Nations.

Although an entity which satisfies the three conditions of statehood becomes entitled to certain international rights, the exercise of each right is not entirely unfettered. As in all developed systems of municipal law, all rights have corresponding obligations.[35] A prisoner serving a jail sentence for murder cannot complain that his incarceration has resulted in the loss of his guaranteed freedom of movement. Similarly, the capacity or right of A to enter into a contract with B is always dependent on B's willingness to contract with A. If B is unwilling A cannot complain of any violation of his right to contract by B since the latter has absolute discretion in the matter. The state, as an international personality, is in an analogous position. It cannnot repudiate its obligations and at the same time enjoy its rights without the demand for sanctions from other states. Likewise, the ability of the state to enter into legal relations with other states is dependent on the absolute discretion of these entities to treat with it.

At this stage the issue of the recognition of government arises. Recognition of government is a discretionary act in the same way as is the establishment of diplomatic relations. The absolute discretion that international law grants states with regard to recognition disposes states to act in accordance with their political interests. If a state refuses to have any relations with another state, the latter has no grounds of complaint, unless of course there is an infringement by the former of any of the latter's customary rights—to the extent that state enjoys these rights. Some of these

35. W. FRIEDMANN, LEGAL THEORY 270, 287-88 (4th ed. 1967); R. DIAS, JURISPRUDENCE, 249 *et. seq.* (3d ed. 1970), for discussion of W. N. Hohfeld's scheme of rights and duties.

rights may be diminished or even extinguished if the law enforcement agencies of the world community have instituted measures against a state to remedy breaches of international law that may have been committed by it. Although the development of criteria for the recognition of governments, in order to "de-politicize" the practice of recognition, has been suggested, this may not be readily possible.[36]

Under the criteria of the Montevideo Convention the state of Rhodesia existed prior to its recent independence because it had a population, a defined territory and an effective and *de facto* independent government. These criteria are always objectively verifiable, and are evident from the history of Rhodesia traced from 1923 when Rhodesia became a self-governing colony up to the time when it acquired a *de facto* independent status not unlike that enjoyed by other sovereign states of the world. As will be seen, this independent status was not created by the controversial Declaration of Independence of 1965, but was created by other independent factors.

V. RHODESIA—TRANSITION FROM COLONY TO STATE

Even though Rhodesia has had a defined territory, a population, and effective self-government since 1923,[37] that date appears too early for Rhodesia to be called a State. Although Rhodesia had internal self-government, it did not have, nor did it ever purport to exercise, any powers in the external sphere. In this sense, there was no "independent" self-government, de facto or de jure. After the formation of the Federation of Rhodesia and Nyasaland in 1953, further progress was made in the evolution of self-government on the constitutional, as well as in the external, sphere. The United Kingdom officially recognized the constitutional convention, agreeing that the British Parliament would not amend or repeal any Federal Act or deal with any matter within the competence of the Federal legislature, or pass any legislation for self-governing colonies without their consent.[38] The international competence of the Federation was enlarged to include

36. SCHWARZENBERGER, *supra* note 1, at 71-72.

37. *See* Fawcett, *supra* note 25, at 103 *et seq.*

38. Joint Declaration of the British and Federal Governments, April 27, 1957, *quoted in id.* at 104. This position was reaffirmed by the U.K. Government in 1961, and in 1963 at the United Nations. Fawcett, *supra* note 25, at 104.

> the right to conduct all relations and to exchange representatives with Commonwealth countries without consultation with the United Kingdom Government; the right to conduct all negotiations and agreements with foreign countries subject to the need to safeguard the United Kingdom Government's international responsibilities; the right to appoint representatives to the diplomatic staffs of H.M. embassies; the right to appoint its own diplomatic agents, who will have full diplomatic status . . . in any foreign countries prepared to accept them, and to receive such agents from other countries; the right, on its own authority, to acquire the membership of international organisations for which it is eligible.[39]

Many of the above rights "are attributes of an independent State."[40] After the dissolution of the Federation, the Rhodesian government proceeded on the basis that its external powers were the same as those of the Federation, with the Secretary of State for Commonwealth Relations expressly accepting the position.[41] Although Rhodesia did not purport to act as an independent sovereign State before 1965, "this result was to be attributed not to lack of qualification of Rhodesia to be an independent state, but to constitutional limitations accepted by it."[42] Rhodesia had, therefore, acquired all the attributes of statehood well before 1965, and whatever limitations it accepted were rather insignificant when compared with its positive powers of self-government. Further, even under traditional international law, a state is free to impose as many self-limitations to its sovereignty as it wishes without losing its statehood or international personality. Although Rhodesia did not actually proclaim or assert any sovereign legal status, such status was not dependent either on its own acts or the acts of any foreign government. The Declaration of Independence was, therefore, irrelevant to the acquisition of statehood by Rhodesia. The absence of recognition from other states as to either the state of Rhodesia or its government likewise had no bearing on the statehood of the new entity. The ultimate responsibility of the United Kingdom Parliament over the Federation was little more than a political device to retain some form of political association with the imperial Power.[43] After the dissolution

39. Joint Declaration of 1957, *quoted in* Fawcett, *supra* note 25, at 105-06.
40. *Id.* at 106.
41. *Id.* at 107.
42. *Id.*
43. *Id.*

of the Federation, this "responsibility" over Rhodesia was progressively eroded, until it became no more than the mere assertion of a right.[44]

Even the absence of recognition of the state of Rhodesia from the United Kingdom Parliament did not affect the issue of statehood. Earlier practice suggests that the absence of recognition from the metropolitan country does not affect the statehood of a rebellious colony. This question arose as early as 1811 in connection with British recognition of rebellious Spanish colonies in Latin America. Chief Justice Best said:

> I take the rule to be this—if a body of persons assemble together to protect themselves, and support their own independence and make laws and have courts of justice, that is evidence of their being a state . . . . It makes no difference whether they formerly belonged to Spain, if they do not continue to acknowledge it, and are in possession of a force sufficient to support themselves in opposition to it.[45]

Similarly, Lauterpacht, summarizing the traditional practice, maintains that

> [the] refusal of the mother country to recognize such independence is not conclusive. The legal title of the parent State is relevant to the extent that clear evidence is required showing that the latter has been definitely displaced and that the effectiveness of its authority does not exceed a mere assertion of right.[46]

During the currency of the Federation and still less after its dissolution, United Kingdom responsibility over Rhodesia amounted to no more than a mere assertion of a right. Therefore, the absence of recognition of either statehood or government from the imperial Parliament in these circumstances is not decisive of the existence of the state of Rhodesia.

Similarly, the results of the London Conference, namely, the dispatch of British Governor Soames to Rhodesia, and the order of 11 December 1979, of the Rhodesian Parliament rescinding its own previous declaration of independence and declaring Rhodesia once more to be "a part of Her Majesty's dominions," does not affect Rhodesia's statehood. Rhodesia had acquired statehood

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44. *Id.* at 110-11.

45. Yrisarri v. Clement [1825] 2 C. & P. 223, *reprinted in* 1 B.I.L.C. at 70, 71.

46. LAUTERPACHT, *supra* note 4, at 26.

before the 1965 declaration of independence; it became a state while still a part of Her Majesty's dominions. Thus, the formal return to that legal status for the sole and limited purpose of installing a new and more acceptable government cannot affect that statehood.[47]

Applying the premise that a state is free to impose as many self-limitations as it chooses, the latest acts of the Rhodesian Parliament must be seen as attributes of sovereignty rather than as evidence of a lack of sovereignty. Rhodesia acquired these attributes of sovereignty through a slow process of evolution. These acts, therefore, do not constitute the one and only definitive proof of sovereignty, rather they constitute one of the many developments demonstrating Rhodesia's statehood. No act of the Rhodesian government or of the United Kingdom government declaring Rhodesia to be a colony or declaring it to be independent can, by itself, create or extinguish statehood.

VI. RHODESIA AS A SUBJECT OF INTERNATIONAL LAW

To avoid the difficulties of recognition in situations similar to that of Rhodesia, it is preferable to hold that having satisfied the three conditions of statehood regarding population, territory and effective and independent government, there exists today the state of Rhodesia. The legality of its government from the constitutional viewpoint of the parent state is irrelevant. International law has not removed from the absolute discretion of each state the question of the recognition of its government, except perhaps in the sense that every state has a general duty in international law not to promote or assist other states to commit breaches of international law.

The state of Rhodesia may, therefore, be viewed as having had not only the *capacity* to enter into relations with other states, but also the rights which other states possess under customary international law. It must have been, therefore, eligible for membership in the United Nations provided it satisfied article four of the United Nations Charter. Under this article, membership is open to "states," but only those states which are "peace-loving" and

47. At the time of writing Lord Soames' role is ill-defined. His primary task appears to be overseeing the implementation of the cease-fire and ensuring free elections. This mandate is limited in scope, time, and purpose, and at the time of writing no iron-clad guarantees can be given to ensure the success of even this minimal function of the British presence.

which "accept the obligations contained in the [present] Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations."[48] Although Rhodesia is a state, a question may legitimately be raised as to its acceptance of Charter obligations, particularly respect for human rights and the principle of self-determination.[49] Further, the ability of a state to observe Charter obligations is a question which is expressly left within "the judgment of the Organisation" under article four, so that the Organisation alone has the competence to decide the membership question.

Since recognition of governments is discretionary, recognition is often a matter of degree. Recognition may be absolute if the recognizing state acknowledges the recognized government as legitimately representing the state in question, or recognition may be qualified if the recognizing state has reservations as to the recognized government's legitimacy or its stability and/or permanence. The contracts between Zambia and Rhodesia in December 1974, which ventually led to the Lusaka Accord, were of such limited nature that they do not indicate readiness on the part of the Zambian government to enter into normal or regular international relations with Rhodesia.[50] Indeed, even within the context of the negotiations, Rhodesia acquired no international right against Zambia. It must be acknowledged, however, that during the negotiations Zambia was dealing with the "state of Rhodesia," as was the United Kingdom during the numerous occasions when it has tried to promote a negotiated settlement. The existence of this state was not determined by any act of recognition or non-recognition from a foreign State or by any act of the government within the new State declaring itself "independent."

If Rhodesia had the attributes of a state and was, therefore, an international person, it was obligated by the same regime of rights and correlative duties as all other subjects of international law. Rhodesia has the capacity to enter into relations with other states to the extent that the latter are willing to transact with it. As a subject of international law, other subjects could have demanded of Rhodesia compliance with rules of international law

48. U.N. CHARTER art. 4.

49. *Id.* art 1, paras. 2, 3.

50. The contacts were designed to secure the release of political prisoners in Rhodesia and to bring about a cease-fire. Although an "accord" was reached, it was never implemented.

essential to the maintenance of a minimum world order. Neither the Smith government, nor the Smith-Muzorewa government, met this minimum standard.

The principle of self-determination and respect for human rights has in recent times acquired normative status in international law for the breach of which the international community may take remedial action in order to maintain at least the minimum order of world justice. It can be argued that minority rule is inconsistent with the principle of self-determination and a contravention of human rights insofar as it is postulated on racial domination by six percent of the population over the remaining 94 percent in all aspects of state work and law. Lauterpacht has said that "human rights and freedoms, having become the subject of a solemn international obligation . . . are no longer a matter which is essentially within the domestic jurisdiction [of states] . . ."[51] and that under international law "the correlation between peace and observance of fundamental human rights is now a generally recognised fact. The circumstance that the legal duty to respect fundamental human rights has become part and parcel of the new international system upon which peace depends, adds emphasis to that intimate connection."[52]

According to McDougal and Reisman, "the intimate nexus between human rights and minimum world order is clearly articulated in article 55 of the [United Nations] Charter . . . "[53] The authors maintain that not only is the policy of mandatory economic sanctions, imposed by the international community against Rhodesia, justified under international law, but that the community would under international law be justified in taking any further measures against it through the United Nations. Such action would be either under chapter VII of the Charter or as part of "the coercive strategies of humanitarian intervention."[54] The authors maintain that each state possesses the right of humanitarian intervention under customary international law.[55]

The Security Council of the United Nations, acting under arti-

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51. H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 178 (1950).

52. *Id.* at 186.

53. McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern,* 62 AM. J. INT'L L. 1, 12 n.50. (1968). *See also* B. MURTY, PROPAGANDA AND WORLD PUBLIC ORDER 83 n.16 (1968).

54. McDougal & Reisman, *supra* note 53, at 6-10.

55. *Id.* at 11-12; LAUTERPACHT, *supra* note 51, at 120.

cle 39 of the Charter, found as early as 1966 that the Rhodesian situation constituted a "threat to the peace."[56] It has been argued[57] that a determination of a "threat" to peace is sufficient for the United Nations to compel its members under article 25 of the Charter to take preventive measures against the offending state—measures which under article 2(6) may be applied to non-member states "so far as may be necessary for the maintenance of international peace and security."

VII. Conclusion

The traditional theories of recognition do not properly maintain the essential distinction between state and government. The only proper way to maintain this distinction is by laying down verifiable criteria for statehood, and treating the recognition of governments as purely discretionary. A state must have come into existence before the question of recognition of a particular government can arise. International personality is a consequence of statehood, not of recognition; if a state can objectively come into existence, so can international personality, and the grant or withdrawal of recognition cannot affect that personality.

The degree of recognition conferred by the United Kingdom and other countries on Rhodesia on various occasions was limited in scope, purpose, and time, and was not indicative of any opinion that the Smith government or the Smith/Muzorewa government was the legitimate government of Rhodesia; nor did such qualified recognition demonstrate any intention to have normal relations with Rhodesia. It would seem proper to view this as a question of recognition of a de facto governing authority. Rhodesia must, therefore, be regarded as a state with international legal personality. As such, it is bound by international law, like any other state, and is subject to the usual range of penal sanctions available to the international community to counter any breach of international law.

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56. Sec. Council Res. 221, April 9, 1966; Sec. Council Res. 232, Dec. 16, 1966.

57. McDougal & Reisman, *supra* note 53, at 8-11; *see also* Hadderman, *Some Legal Aspects of Sanctions in the Rhodesian Case,* 17 Int'l & Comp. L.Q. 672 (1968).