ECONOMIC COERCION AND JUSTIFYING CIRCUMSTANCES

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When States, in the general conduct of their international affairs ever resort to economic coercion, or when international or regional organizations do the same in the pursuit of their institutional finality and social object, they generally tend to base their action on the law of nations (1). The latter indeed provides a number of rules or institutions which can be used when seeking grounds of justification for such actions. States can exercise economic coercion by means of reprisal, retortion or within the framework of collective measures decreed by or exercised within international or regional organizations (2).

As a first step in our research, we shall briefly discuss these rules and institutions *in abstracto* ; the second part of our discourse will then try to establish their relation to the general problem of economic coercion.

I. — REPRISAL (3)

Reprisal is usually reckoned among the sanctions of traditional inter-

(1) It is constant State practice to found claims on a rule of law (be it the *clausula rebus sic stantibus*) (See LAUTERPACHT, H., *The Function of Law in the International Community*, Oxford, 1933, p. 363 sq). The reason of this attitude is to be found in legal psyohology : a State placing himself *a priori* outside the scope of law is generally condemned by (international) public opinion.

(2) This does not imply that when States resort to economic coercion they always refer *expressis verbis* to grounds of justification. See in this respect the controversy between SEIDL-HOHENVELDERN, I, « Reprisals and the Taking of Foreign Property », Kollewijn-Offenhaus bundel, *N.T.I.R.*, 1962, p. 470 and VENEZIA, J. C., « La notion de représailles en droit international public », *R.G.D.I.P.*, 1960, p. 466, p. 476.

(3) On reprisal in general : AKEHURST, M., « Reprisals by thirth States », *B.Y.I.L.*, 1970, p. 1 sq ; BLECKMANN, A., « Gedanken zur Repressalie », *Festschrift für H. J. Schlochauer*, Berlin, 1981, p. 193 sq. ; BOWETT, D., « Reprisals involving recourse to Armed Force », *A.J.I.L.*, 1972, p. 1 sq. ; CANNEMAN, B., *Represailles*, Rotterdam, 1936 ; CLARK, G., « The English practice with regard to reprisals by private persons », *A.J.I.L.*, 1933, p. 694 sq. ; COLBERT, S. E., *Retaliation in international law*, New York, 1948 ; DE LA BRIÈRE, Y., « Evolution de la doctrine et de la pratique en matière de représailles », *R.C.A.D.I.*, 1928, II, p. 241 sq. ; DUCROCQ, L., *Les représailles en temps de paix*, Paris, 1901 ; HAUMANT, A., *Les représailles*, thèse, Paris, 1934 ; LAFARGUE, P , *Les représailles en temps de paix*, thèse, Paris, 1898 ; PARTSCH, J., *Repressalie* in STRUPP, K., und SCHLOCHAUER, H. J., *Wörterbuch des Völkerrechts*, Berlin, 1962,

national law (4). Reprisals are a form of coercive action, *in se* contrary to international law, which are taken by a claimant State against a target State accused by having committed an unlawful act, with the purpose of imposing respect for the law on the target State (5).

Essentially, reprisals are unlawful acts ; however they can be justified by the fact that they constitute a response to previously committed unlawful acts. During a period of time, they suspend the application of certain rules of international law between the claimant State and the target State.

From this definition it clearly appears that the constitutive elements of reprisals are threefold :

(i) reprisal is *in se* unlawful action ;

(ii) this unlawful action is justified by previously committed unlawful deeds ;

(iii) reprisal tends to achieve respect for international law by the target State, as well as restitution of damages or termination of an unlawful conduct.

Band III, pp. 103 sq. ; POLITIS, N., « Les représailles entre Etats membres de la S.d.N. », *R.G.D.I.P.*, 1924, pp. 5 sq. ; IDEM, « Rapport à l'Institut de droit international sur le régime des représailles en temps de paix », *A.I.D.I.*, 1934,vol. 38, pp. 1 sq.; SEIDL-HOHENVELDERN, I.,, *loc. cit.*, pp. 470 sq. ; STONE, J., *Legal Controls of International Conflict. A treatise on the Dynamics of Disputes- and War-Law*, London, pp. 289 sq. ; STRUPP, K., *Das völkerrechtliche Delict*, Berlin, 1920, *passim* ; IDEM, « Problèmes actuels du droit des représailles », *Mélanges E. Mahain*, Paris, 1935, Vol. II, pp. 341 sq. ; TUCKER, R., « Reprisals and self-defence, the customary law », *A.J.I.L.*, 1972, pp. 586 sq. ; VENEZIA, J. C., *loc. cit.*, pp. 465 sq. ; SCHUMANN, E., *Die Repressalie*, Rostock, 1927.

(4) See the ruling of the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case* (1910), in J. B. SCOTT, *The Hague Court Reports*, New York, 1916, Vol. I, p. 167.

(5) OPPENHEIM, L., *International Law*, ed. by H. Lauterpacht, London, 1958, Vol. II. Disputes, War and Neutrality, 7th ed., p. 134 ; SIBERT, M., *Traité de droit international public. Le droit de la paix*, Tome deuxième, Paris, 1951, p. 560 ; ROUSSEAU, C., *Le droit des conflits armés*, Paris, 1983, pp. 8 sq. ; WENGLER, W., *Völkerrecht*, Band I, Berlin, 1974, pp. 515 sq. ; VAN BOGAERT, E., *Volkenrecht*, Antwerpen, 1982, p. 601 ; BERBER, F., *Lehrbuch des Völkerrechts*, III, Band, *Streiterledigung-Kriegsverhütung-Integration*, München, 1977, pp. 95 sq. ; FAVRE, A., *Principes du droit des gens*, Paris, 1974, p. 704 ; SCELLE, G., *Droit international public*, Paris, 1944, pp. 655 sq. ; VERDROSS, A., SIMMA, B., *Universelles Völkerrecht. Theorie und Praxis*, Berlin, 1976, p. 652 ; DELBEZ, L., *Les principes généraux du droit international public*, Paris, 1964, p. 490.

See article 1 of the *Règlement* adopted by the *Institut de droit international* in 1934 (*A.I.D.I.*, 1934, p. 163) : « Les représailles sont des mesures de contrainte dérogatoires aux règles ordinaires du droit des gens, décidées et prises par un Etat en réponse à des actes illicites commis à son préjudice par un autre Etat, et ayant comme but d'imposer à celui-ci, par pression exercée au moyen d'un dommage, le retour à la légalité ». See also the ruling of the mixed Portugese-German arbitral tribunal in the *Naulilaa-Case* (Translated) : « Reprisal is a measure of self-help (*Selbsthilfehandlung*) taken by the injured State in reply to an act contrary to the law of nations on the part of the offending State-after summons which proves unavailing. Its effect is to suspend temporarily the observance of a particular rule of the law of nations in the relations between two States. It is limited by the experiences of humanity and by the rules of good faith, applicable in international relations. It would be illegal if a previous act, contrary to international law, had not provided its justification. Its object is to compel the offending State to make reparation for the injury or to return to legality, by avoiding further offences » (2 *U.N.R.I.A.A.*, p. 1026).

These elements distinguish reprisal from :

(i) *coercive measures consistent with common rules of international law* : retortion (6), retention, compensation, denounciation of treaties on the ground of substantive violation by one of the parties ;

(ii) *direct measures of coercion, i.e.* those which do not purport to reinstore legality by inflicting damage as a means of pressure, but are directly aimed at the unlawful act (7).

Reprisal is also to be distinguished from legitimate *self-defence* and war. This distinction is essential not only with respect to legal theory but also and mainly on practical grounds. The impossibility to draw an unambiguous distinction between these legal categories would indeed empower States to qualify acts of aggression as « acts of reprisal » or invoke legitimate self-defence when resorting to reprisals (8).

There are, of course, certain common characteristics between reprisal and legitimate self-defence (which, as determined in art. 51 of the U.N. *Charter*, is an exception to the obligation not to use force) : both are forms of « self-help » and share the following conditions for application (9) :

« 1) The target State must be guilty of a prior international delinquency against the claimant State.

2) An attempt by the claimant State to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances.

3) The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the target State ».

The difference between reprisal and legitimate self-defence is situated in the finality of the measures taken. Whereas self-defence purports to protect the security of the State and its fundamental rights (more specifically, its territorial integrity and political independence), reprisals lack a protective element : they are unambiguous acts of punishment (10) (11).

(6) See *infra*.

(7) ROLIN (*I.D.I.Annuaire, loc. cit.*, p. 126) stresses the importance of the fact that reprisals are essentially *indirect* measures of coercion, acting by the infliction of damage, and cites as examples of *direct* measures of coercion : « la poursuite ... prolongée dans les eaux territoriales ..., l'expulsion hors du territoire de troupes armées qui y ont pénétré ..., le fait de pénétrer sur territoire étranger pour y délivrer des nationaux dont la vie est injustement menacée soit par les actes du Gouvernement étranger, soit par les actes de particuliers contre lesquels il parait hors d'état d'agir ».

(8) VENEZIA, J. C., *loc. cit.*, p. 474.

(9) BOWETT, D., « Reprisals involving recourse to armed force », *A.J.I.L.*, 1972, p. 3.

(10) In the same sense : BOWETT, D., *loc. cit.*, p. 3 ; FAVRE, A., *op. cit.*, p. 643 ; GIRAUD, E., « La théorie de la légitime défense », *R.C.A.D.I.*, 1934, III, p. 709.

(11) Other attempts to draw a distinction were undertaken by VENEZIA, J. C., *loc. cit.*, pp. 474 sq. ; TUCKER, R., *loc. cit.*, pp. 586 sq.

Although the difference between reprisal and self-defence may be relatively clear from the theoretical point of view, it is extremely difficult to establish it in practice. Actually, it is not always easy to decide whether a particular measure is to be qualified as a protective action or as a punitive one (12). Moreover, one could easily imagine measures of reprisal presenting features of both protection and punishment, as target States may eventually be seduced to commit further illegal acts in the future.

The same problem can be discerned with respect to the relation between reprisal and war. Theoretically, the difference between them seems evident. War is a voluntary, conscious and international armed struggle, at least from the part of one of the warrying States, with the view of settling a dispute (13). For war to exist, it is sufficient that one of the parties be possessed by *animus bellandi*, which being a criterion of intention, is extremely subjective and relative.

In general, a distinction is made between armed reprisals and others (14) (15). Armed reprisals are those involving a form of violence (16), such as pacific blockade, marine bombard, or the occupation of territory. Nowadays it is generally accepted that armed reprisals are prohibited (17). Although the U.N. *Charter* is devoid of express references to the notion of reprisal, the prohibition of armed reprisals must be seen as a logical extension of the contents of article 2, §§ 3, 4 and article 51 (18). This

(12) This is especially the case if one leaves out the concrete case to situate it in a global context.

(13) STRUPP, K., « Problèmes actuels du droit des représailles », *loc. cit.*, p. 342 ; MC NAIR, A., « The legal meaning of war, and the relation of war to reprisals », *Tr. Grotius Soc.*, vol. 11, 1926, pp. 29 sq.

(14) Reprisals in times of war (in marine or air war, against war prisoners, against the civilian population in occupied territories) are left outside the scope of this contribution. On this question, see : KALSHOVEN, F., *Belligerent Reprisals*, Leyden 1971.

(15) The difference which is sometimes made between positive and negative reprisals (OPPENHEIM, L., *op. cit*, p. 140 ; BERBER, F., *op. cit.*, p. 97) is of no importance.

(16) *I.D.I.Annuaire, loc. cit.*, p. 164.

(17) VERDROSS, A., SIMMA, B., *op. cit.*, p. 654 ; BOWETT, D., *Self-defence in international law*, p. 13 ; IDEM, « Reprisals involving recourse to armed force », *loc. cit.*, p. 1 ; TUCKER, R., *loc. cit.*, p. 586 ; DELBEZ, L., *op. cit.*, p. 490 ; SKUBISZEWSKI, K., in *Manual of Public International Law*, ed. by M. Sørensen, London, etc., 1968, p. 754 ; BROWNLIE, I., *International Law and Use of Force by States*, Oxford, 1963, p. 282 ; SALMON, J., *Droit des gens*, Bruxelles, 1982, p. 437. Still see : COLBERT, S. E., *op. cit.*, p. 203 ; FALK, R., « The Beirut Raid and the International Law of Retaliation », *A.J.I.L.*, 1969, pp. 415 sq.

(18) Art. 2.

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Art. 51.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Seourity Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be imme-

opinion is heavily supported by authorities (19), confirmed by the practice of the Security Council (20) and re-confirmed by the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (21).

Non-armed reprisals can be taken under various forms : expulsion or arrest of foreigners ; seizure of property, raising of customs tariffs, blocking of funds or goods, boycott (22), embargo (23), the refusal to respect treaties or the illegitimate denounciation of a treaty.

The consideration that armed reprisals are nowadays illegitimate does not necessarily imply that all other reprisals are *per definitionem* legitimate. In this context, it is useful to re-emphasize that *all* reprisals are *in se* unlawful acts.

Case-law and authorities have nevertheless purported to draw a line between legitimate and illegitimate non-armed reprisals. Reprisals, it is argued, are only justified to the extent that respect for legality by the offending State cannot be achieved by procedures of peaceful settlement (24). In the contemporary international community, reprisal must perforce reveal a subsidiary character : it is an *ultimum remedium* (25). This situation is the result of a long historical evolution purporting to abolish reprisals in times of peace (26).

diately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

(19) HIGGINS, R., *The Development of International Law through the organs of the United Nations*, London, etc., 1969, pp. 217-218 ; GOODRICH, L., HAMBRO, E., *Charter of the United Nations. Commentary and Documents*, London, 1949, pp. 94-95, p. 102.

(20) See the practice cited in : HIGGINS, *ibidem* en BOWETT, *loc. cit.*, *passim*.

(21) Res. 2625 (XXV) of October 24, 1970 : « States have a duty to refrain from acts of reprisals involving the use of force » (Text in : *A.J.I.L.*, 1971, pp. 243 sq.).

(22) On boycott : BROWN, E., « The boycott in international law », *Can. Bar. Rev.*, 1933, pp. 325 sq. ; BOUVE, C., « The national boycott as an international delinquency », *A.J.I.L.*, 1934, pp. 19 sq. ; HYDE, C., and WEHLE, L., « The boycott in foreign affairs », *A.J.I.L.*, 1933, pp. 1 sq. ; LAUTERPACHT, H., « Boycott in international relations », *B.Y.I.L.*, 1933, 125 pp. sq. ; LAFERRIÈRE, J., « Le boycott et le droit international », *R.G.D.I.P.*, 1910, pp. 288 sq. ; SEFERIADES, S., *Réflexions sur le boycottage en droit international*, Paris, 1912 ; ROUSSEAU, C., « Le boycottage dans les rapports internationaux », *R.G.D.I.P.*, 1958, pp. 5 sq. ; WALZ, C., *Nationalboycott und Völkerrecht*, Berlin, 1939.

(23) On embargo : BORCHARD, E., « The arms embargo and neutrality », *A.J.I.L.*, 1933, pp. 293 sq. ; CHAUMONT, C., *La conception américaine de la neutralité*, thèse, Paris, 1936, pp. 119 sq. ; LAMBERT, E., *L'embargo punitif sur les marchandises*, Lyon, 1934 ; IDEM, *L'embargo sur l'importation ou l'exportation des marchandises*, Paris, 1936 ; PELLOUX, R., « L'embargo sur les exportations d'armes et l'évolution de l'idée de neutralité », *R.G.D.I.P.*, 1934, pp. 58 sq. ; IDEM, « L'embargo sur les exportations d'armes », *R.G.D.I.P.*, 1935, pp. 146 sq. ; Also : *The Kronprinz Gustav Adolf Case* (2 *U.N.R.I.A.A.*, pp. 1241 sq.) ; LINDEMEYER, B., *Schiffsembargo und Handelsembargo. Völkerrechtliche Praxis und Zulässigkeit*, Baden-Baden, 1975.

(24) *I.D.I. Annuaire*, *loc. cit.*, p. 164 ; POLITIS, N., in *ibidem*, pp. 32 sq. ; OPPENHEIM, L., *op. cit.*, p. 142 ; SCELLE, G., *op. cit.*, p. 657.

(25) SIBERT, M., *op. cit.*, p. 564 ; BERBER, F., *op. cit.*, p. 95.

(26) The starting-point of this evolution was the *Porter-Convention* (1907) who prohibited forcible reprisals for the purpose of recovering contract debts when the debter state refused arbitration or did not give effect to an arbitral award. See : SCELLE, G., *op. cit.*, pp. 657-658.

It is generally accepted that reprisals must conform to the following criteria :

i) The first condition — *a conditio sine qua non* — is that reprisals be a response to an act which is contrary to the law of nations (27) ; this unlawful act and the subsequent refusal by the offending State to amend it, presents a *justa causa* for the claimant State ;

ii) Reprisals should only be taken after an unsuccessful request to redress (28) ;

iii) In view of the previous exhaustion of peaceful remedies, reprisals should react to a situation of necessity (29) ;

iv) Reprisals must not be disproportionate vis-à-vis the unlawful acts against which they are directed (30) ;

v) Reprisals must not consist of inhuman or cruel acts, nor acts prohibited by *jus in bello* (31) ;

vi) Reprisals must not prejudice the rights of third States (32) ;

vii) Reprisals should come to an end as soon as reparation of the unlawful act occured (33). Practically, this means the restoration of the State of affairs existing before reprisals were resorted to ; final situation is never to emerge on the basis of reprisals (34) ;

viii) Reprisals should only be taken by competent State organs (35).

(27) See note 5 *Naulilaa-case.*

(28) *Ibidem* ; BERBER, F., *op. cit.*, p. 96 ; SIBERT, M., *op. cit.*, p. 564.

(29) POLITIS, N., *loc. cit.*, p. 28 ; CHENG, B., *General Principles of Law as applied by International Courts and Tribunals*, London, 1953, p. 98.

(30) See note 5 *Naulilaa-case* : (Translated)

« This definition does not require that the act of reprisal should be strictly proportionate to the first unlawful act. On this point authors, unanimous until a few years ago, begin to be divided in opinion. The majority regard a certain proportion between the offence and the act of reprisal as a necessary condition to the legality of the latter. Others, amongst more recent writers, no longer require this condition. As regards the new trend in international law which is undergoing transformation pursuant to the experiences of the last war, it certainly tends to restrict the notion of legitimate reprisal and to forbid any excess ».

Also OPPENHEIM, L., *op. cit.*, p. 141 ; ROUSSEAU, C., *Le droit des conflits armés*, p. 12 ; CHENG, B., *op. cit.*, p. 98 ; VAN BOGAERT, E., *op. cit.*, p. 601 ; VERDROSS, A., SIMMA, B., *op. cit.*, p. 653 ; SIBERT, M., *op. cit.*, p. 564 ; VENEZIA, J. C., *loc. cit.*, p. 487.

(31) CASTREN, E., *The present law of war and neutrality*, Helsinki, 1954, p. 70 ; VERDROSS, A., SIMMA, B., *op. cit.*, p. 653 ; SEIDL-HOHENVELDERN, I., *loc. cit.*, p. 474.

(32) *I.D.I. Annuaire, loc. cit.*, p. 29 ; CHENG, B., *op. cit.*, p. 98 ; STONE, J., *op. cit.*, p. 290 ; VERDROSS, A., SIMMA, B., *op. cit.*, p. 653 ; *The Cysme*, 2 *U.N.R.I.A.A.*, p. 1057 : « Les représailles ne sont admissibles que contre l'Etat provocateur ».

(33) *I.D.I. Annuaire, loc. cit., ibidem* ; VAN BOGAERT, E., *op. cit.*, p. 601 ; OPPENHEIM, L., *op. cit.*, p. 143 ; VENEZIA, J. C., *loc. cit.*, p. 489.

(34) SEIDL-HOHENVELDERN, I., *loc. cit.*, p. 473.

(35) VERDROSS, A., SIMMA, B., *op. cit.*, p. 654 ; OPPENHEIM, L., *op. cit.*, p. 138 ; SEIDL-HOHENVELDERN, I., *Völkerrecht*, Köln, etc., 1975, p. 321 ; TOMUSCHAT, C., « Repressalie und Retorsion. Zu einigen Aspekten ihrer innerstaatlichen Durchführung », *Z.a.ö.R.V.*, 1973, pp. 179 sq.

It bears no doubt that many of the abovementioned criteria are of a subjective nature (36) ; consequently they concede some latitude to the claimant State and arbitrary doings are not impaired by strict limitations. In this situation the target State will often be inclined to resort to countermeasures (37).

Finally, one should not forget that pursuant to art. 2, § 3 of the U.N. *Charter*, States have the obligation to settle their disputes peacefully, *viz.* by such means as not to endanger international peace, security and justice. This implies that certain acts of reprisal in conformity with the abovementioned criteria and justified by certain circumstances, may sometimes by their character, constitute a threat to international peace, security and justice, and as such, be illegal in terms of the U.N. *Charter* (38).

II. — RETORTION (39)

Retortion is to be distinguished from reprisal. Although both acts pertain to the category of coereive measures, retortion does not constitute a violation of international law. It is an unfriendly, uncourteous or unfair act in reply to another unfriendly, uncourteous or unfair act (40). Being strictly an exercise of normal State competence it cannot be considered as an unlawful act (41).

The question whether a measure of retortion is or is not justified, is not a legal question and cannot be answered *in abstracto* (42). The contents of concepts as friendliness, courtesy and fairness are debatable and not easy to describe : consequently, it is left to each State individually to appreciate every individual case and, to decide whether or not to resort to measures of retortion. The latter must not embrace measures identical or analogous to those eliciting the retortion ; nor must they be illegal (43).

(36) See *e.g.*, with respect to the criterion of « *Verhältnismäszigkeit* » the critical opinion of A. BLECKMANN, *loc. cit.*, pp. 210 sq.

(37) It should be remembered that the target State is not permitted to take counter-reprisals (*I.D.I. Annuaire, loc. cit.*, pp. 165-166). However neglect by the claimant State of conditions under which reprisals can be taken is a ground of justification of counter-reprisals (*Ibidem* and VERDROSS, A., SIMMA, B., *op. cit.*, p. 653).

(38) WESTON, B., FALK, R., D'AMATO, A., *International Law and World Order*, St. Paul, 1980, pp. 738-739.

(39) KLEIN, P., « Retorsion », *Z.f.V.*, 1920, pp. 321 sq. ; RAPISARDI-MIRABELLI, A., « La rétorsion », *R.D.I.L.C.*, 1914, pp. 223 sq. ; IDEM, *La rétorsion*, 1919.

(40) BERBER (*op. cit.*, p. 94) observes that it can also be a sanction to a violation of law, against which the offended State does not (or not yet) whish to respond by taking reprisals. *Against* : SKUBISZEWSKI, K., in : *op. cit.*, p. 753.

(41) ROUSSEAU, C., *op. cit.*, p. 15 ; SIBERT, M., *op. cit.*, p. 560 ; VAN BOGAERT, E., *op. cit.*, p. 600 ; SCELLE, G., *op. cit.*, p. 655 ; VERDROSS, A., SIMMA, B., *op. cit.*, p. 648 ; SALMON, J., *op. cit.*, p. 437 ; BERBER, F., *op. cit.*, p. 94 ; DELBEZ, L., *op. cit.*, p. 490 ; FAVRE, A., *op. cit.*, p. 703 ; OPPENHEIM, L., *op. cit.*, p. 134 ; STONE, J., *op. cit.*, p. 288 ; *I.D.I. Annuaire, loc.cit.*, p. 10 ; *Baranyai v. Yugoslavia*, 7, *T.A.M.*, p. 865.

(42) OPPENHEIM, L., *op. cit.*, *ibidem* ; STONE, J., *op. cit.*, p. 289.

(43) OPPENHEIM, L., *op. cit.*, *ibidem* ; STONE, J., *op. cit.*, *ibidem* ; BERBER, F., *op. cit.*, p. 95.

The rule of proportionality is not to be observed either ; retortion is, indeed, *in se* a lawful act (44). Nevertheless, the measures of retortion should be withdrawn as soon as their cause ceases to exist (45). This is a logical corollary of the coercive nature of retortion.

As we have indicated when discussing reprisals, retortion may cause problems with respect to art. 2, § 3 of the U.N. *Charter*, in the sense that certain measures which are *in se* legitimate, could, under certain circumstances constitute a threat to international peace, security and justice, and, as such, be contrary to the obligation contained in the aforesaid article (46).

Finally, the forms of measures of retortion are unlimited, provided they are not contrary to positive law.

III. — COLLECTIVE MEASURES

A. — *The League of Nations* (47).

The *Pact*'s fundamental article concerning this question is article 16 (48).

(44) BERBER, F., *op. cit., ibidem.*

(45) OPPENHEIM, L., *op. cit.*, p. 135 ; BERBER, F., *op. cit., ibidem.*

(46) WESTON, B., FALK, R., D'AMATO, A, *op. cit.*, p. 738 ; STONE, J., *op. cit., ibidem.*

(47) BARANDON, P., *Le système juridique de la S.D.N. pour la prévention de la guerre*, Paris, 1933 ; CAVARE, L., « Les sanctions dans le Pacte de la S.D.N. et dans la Charte des Nations Unies », *R.G.D.I.P.*, 1950, pp. 647 sq. ; JAHNZ, R., *La nature des mesures coercitives du Pacte de la S.D.N.*, thèse Genève, 1932 ; HADJISCOS, D., *Les sanctions internationales de la S.D.N.*, Paris, 1920 ; LECOUTRE, *Les sanctions internationales de la S.D.N.*, thèse, Aix, 1924 ; NANTEL, J., *Les sanctions dans le Pacte de la S.D.N.*, thèse, Paris, 1936 ; RUFFIN, H., *L'entr'aide dans l'application des sanctions*, thèse, Genève, 1938 ; PETRASCU, *Les mesures de coercition international entre les membres de la S.D.N.*, thèse, Paris, 1927 ; TENEKIDES, C., « L'évolution de l'idée des mesures coercitives de la S.D.N. », *R.D.I.L.C.*, 1926, pp. 398 sq.

(48) Art. 16.

1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

2. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

3. The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

4. Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

On this article : BERTRAN, A., « The economic weapon as a means of peaceful pressure », *Tr. Grotius Soc.*, vol. 17, 1932, pp. 139 sq. ; DE L'HOPITAL, B., *Des moyens de coercition autre que la guerre entre membres de la S.D.N.*, thèse, Paris, 1926, ; FRANKE, R., *Der Wirtschafskampf*

According to its phrasing, every unjust war conducted by a member of the League is considered to be an act of war against all other members. Apart from optional military sanctions, the *Pact* explicitly mentions compulsory economic sanctions (the breaking of all economic and financial relations, the prohibition of relations between the nationals of the member-States and the target State ; the ending of all financial, trade- and personal communications).

These economic and financial sanctions were conceived of as collective action by all the members of the League (49). By certain « Resolutions Regarding the Economic Weapon ». (4 October 1921) the Second Assembly recommended as « Rules of Guidance » that every member who was of the opinion that the *Pact* had been violated, should be bound to apply the measures provided by art. 16.

Pursuant to these Resolutions, the Council did not have to decide whether there was a violation of the Pact, but to formulate an opinion on this matter, inviting the members of the League to take action accordingly.

Members then were only bound to take action if satisfied that a breach had occurred. Thus the only function of the Council consisted in submitting the problem to each of the members individually, so that they would take action (50).

In the entire League's history, article 16 was applied only once against Italy by reason of her invasion of Ethiopia (51).

B. — *The United Nations* (52).

Collective measures issued in the framework of the United Nations can

dargestellt an Hand seiner historischen Entwicklung und in seiner Verwendung als Sanktionsmittel nach Artikel 16 des Völkerbundspaktes, Leipzig, 1931 ; FISHER WILLIAMS, J., « Sanctions under the Covenant », *B.Y.I.L.*, 1936, pp. 130 sq. ; KNOSS, F., *Die Zwangsbefugnisse des Völkerbundes*, Binger, 1927 ; LAMBERT, E., *Les embargos sur l'importation ou l'exportation des marchandises*, Lyon, 1936 ; LEVITCH, R., *La collaboration dans l'application des sanctions de l'article 16 du Pacte de la S.D.N.*, thèse Genève, 1938 ; ROTTGEN, M., *Die Voraussetzung für die Anwendung von Völkerbundzwangsmassnahmen*, Leipzig, 1931 ; SCHIFFER, W., « L'interprétation de l'artiele 16 du Pacte de la S.D.N. à la lumière de sa génèse, » *Rev. int. fr. dr. des gens*, 1938, pp. 241 sq. ; VORONOFF, T., *L'article 16 du Pacte de la S.D.N.*, thèse, Paris, 1937.

(49) SERUP, A., *L'article 16 du Pacte et son interprétation dans le conflit italo-ethiopiën*, thèse Genève, 1938, p. 67 ; DUPUIS, C., « Les relations internationales », *R.C.A.D.I.*, 1924, I, p. 427.

(50) STONE, J., *op. cit.*, pp. 176-177.

(51) BARTHOLIN, P., *L'aspect économique des sanctions contre l'Italie*, thèse, Paris, 1938 ; BELIN, J., « L'article 16 du Pacte de la S.D.N. et le conflit italo-ethiopiën », *R.D.I.*, 1936, pp. 118 sq. ; HIGHLEY, A., *The action of the States members of the League of Nations in application of sanctions against Italy*, thèse Genève, 1938 ; MOHYDDINE, M., *L'article 16 du Pacte de la S.D.N. et le conflit italo-ethiopiën*, thèse, Lyon, 1947 ; SERUP, A., *op. cit.* ; ROUSSEAU, C., « L'application des sanctions contre l'Italie et le droit international », *R.D.I.L.C.*, 1936, pp. 5 sq. ; IDEM, « Le conflit italo-éthiopien », *R.G.D.I.P.*, 1937, pp. 291 sq.

(52) COMBACAU, J., *Le pouvoir de sanction de l'O.N.U.*, Paris, 1974 ; COHEN, B., *Principles governing the imposition of sanctions under the United Nations Charter*, Washington, 1951 ; CAVARE, L., « Les sanctions dans le cadre des Nations Unies », *R.C.A.D.I.*, pp. 191 sq. ; DJAFAR, *Les sanctions dans le cadre de l'O.N.U.*, thèse, Paris, 1953 ; SOUBEYROL, J., *Les inciativas coercitivas de la O.N.U. y la legalidad interna de la Organisacion*, Valladolid, 1970.

either be preventive : *e.g.* peace operations (observation and police-forces) or repressive : *e.g.* economic and military sanctions. A distinction has to be made between, on the one hand, sanctions which do not involve the use of armed force (total or partial interruption of economic relations (53) and communication, the severance of diplomatic relations (54)) and, on the other hand, sanctions where the use of armed force is formally provided for (55) (56).

The fact that States, when exercising economic coercion, are seeking grounds of justification for their action, implies that certain kinds of economic conduct are considered as illegal. What are the legal criteria for distinguishing between legal and illegal economic conduct by States (57)?

It is accepted that economic coercion is illegal on the following grounds :

i) violation of specific obligations resulting either from a general multilateral treaty such as G.A.T.T. (58) or from a bilateral treaty (59) ;

ii) violation of a general rule of international law concerning for instance the freedom of the high seas, navigation through international straits, certain forms of expropriation ;

iii) violation of the principle of non-intervention in domestic affairs (60).

(53) See : CHIROUX, R., « Le recours de l'organisation des Nations-Unies aux sanctions économiques », *An. de la Fac. de Clermont*, 1972, pp. 237 sq.

(54) Article 41 : The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

(55) Article 42 : Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

(56) HASSE, R., *Wirtschaftliche Sanktionen als Mittel des Auszenpolitik. Das Rhodesien-Embargo*, Berlin, 1977 with an extensive bibliography.

(57) BOWETT, D., « International Law and Economic Coercion », *Va. J. Int'l L.*, 1975-1976, p. 247.

(58) See art. I (General Most-Favored Treatment) ; art. XI (General Elimination of Quantitative Restrictions) ; art. XIII (Non-discriminatory Administration of Quantitative Restrictions).

(59) See the thesis of J. PAUST and A. BLAUSTEIN (« The Arab Oil Weapon — A Threat to International Peace », *A.J.I.L.*, 1974, pp. 424-426) that the Arab oil embargo of 1973 was (among others) a breach of bilateral treaties concluded between the U.S. on the one hand and Saudi Arabia, Oman and Iraq on the other, containing most-favored nation treatment clauses with respect to import, export, and other duties and charges affecting trade and similar principles with respect to any concession, regulation, advantage, prohibition, or restriction on imports or exports. *Contra* : SHIHATA, I., « Destination Embargo of Arab Oil : Its legality under International Law », *A.J.I.L.*, 1974, pp. 623-625.

(60) See BLUM, Y., « Economic Boycotts in International Law », in : *Conference on Transnational Economic Boycotts and Coercion. February* 19-20, 1976 *University of Texas Law School. Papers presented at the Conference*, Ed. by M. Mersky, Volume I, New York, 1978, pp. 96 sq. ; LILLICH, R., « The Status of Economic Coercion Under International Law : United Nations Norms », in : *ibidem*, pp. 115 sq. ; IDEM, « Economic Coercion and the 'New International

Nowadays, one generally accepts that the notion of « threat or use of force » in art. 2, § 4 of the U.N. *Charter* is restricted to « armed force » and does not include the notion of « economic coercion » (61). Several adjustments of the traditional principle of non-intervention in domestic affairs have led to the result that this principle now covers the use of economic coercion. In the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independance and Sovereignty* (62) a State's « use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind » is condemned ; in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (63) it is stipulated (under the heading « Principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter ») that « no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind » ; the *Resolution on Permanent Sovereignity over National Ressources* (64) « deplores acts of State which use force, armed aggression, economic coercion or any other illegal or improper means in resolving disputes concerning the exercise of the sovereign rights mentioned ... above » ; art. 32 of the *Charter of Economic Rights and Duties of States* (65) prohibits « the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights » (66).

Two problems arise in this context. Ascertaining that several GA Resolutions consider economic coercion as an intervention in domestic affairs,

Economic Order' : A Second Look at Some First Impressions », *Va. J. Int'l L.*, 1975-1976, pp. 234 sq. ; BOWETT, D., *loc. cit.*, p. 246.

(61) See in these context : SCHWEBEL, S., « Aggression, Intervention and Self-defence in Modern International Law, *R.C.A.D.I.*, 1972, II, pp. 449-452.

See article 19 of the *Charter* of the Organization of American States : « No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind » ; *Contra* : PAUST, J., and BLAUSTEIN, A., *loc. cit.*, p. 415 : « Thus the substantial impairment of goals of the international community as articulated in the Charter through the deliberate use of coercion against other States, not counterbalanced by complementary policies relating to legitimate self-defence or the sanctioning of U.N. decision, constitutes a violation of Article 2 (4) as well as of other provisions of the Charter ».

(62) Res. 2131 (XX) of december 21, 1965 (*A.J.I.L.*, 1966, pp. 622 sq.).

(63) Res. 2625 (XXV) of october 24, 1970 (*A.J.I.L.*, 1971, pp. 243 sq.).

(64) Res. 3171 (XXVIII) of december 17, 1973 (*A.J.I.L.*, 1974, pp. 381 sq.).

(65) Res. 3281 (XXIX) of december 12, 1974 (*A.J.I.L.*, 1975, pp. 484 sq.).

(66) See the *Final Act of Helsinki* (*A.J.I.L.*, 1967, pp. 417 sq.) under the heading : « Non-intervention in internal affairs » : « They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by an other participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind ».

one can still have doubts about the binding force of GA Resolutions. Diverging opinions exist, but it surely cannot be denied from a legal-technical point of view, that Resolutions do not have legal binding force (67). They do have a certain value ; however this value is disagreed on by various authorities (68).

The second issue is to determine what kinds of economic measures are illegal. This seems to be a question without an answer. Economic measures have to be « coercive » in order to be illegal. This condition however remains very vague. In fact a State can always consider the economic measures taken by another State as « coercive », just because of the fact that it was obliged to take them into account while determining its own economic policy (69).

The previously cited GA Resolutions regard economic measures as illegal when they are used « to obtain the subordination of the exercise of sovereign rights or secure from it advantages of any kind » (70). This criterion is also very vague since a State can consider almost each activity as « an exercise of sovereign rights » (71). Moreover, an economic measure cannot be recognized as illegal just because the acting State tries to secure one or another advantage from the other State. Considering economic measures as illegal only because of their inflicting damage upon

(67) HAIGHT, G., « The New International Economic Order and the Charter of Economic Rights and Duties of States », *The Int. Law.*, 1975, p. 597 : « General Assembly Resolutions do not in any way have the force of law. Under the United Nations Charter the General Assembly may discuss and make recommendations, but it is not a lawmaking body and its Resolutions, no matter how solemnly expressed or characterized, nor how often repeated, do not make law or have binding effect ». Also : BROWER, C., and TEPE, J., « The Charter of Economic Rights and Duties of States : A Reflection or Rejection of International Law », *ibidem*, pp. 300-302.

(68) BOWETT, D., « International Law and Economic Coercion », *loc. cit.*, p. 246 : « ... resolutions of the General Assembly, lack the normative quality of a treaty provision. They are, however, indicative of the gradual acceptance of a concept whose influence cannot be ignored » ; LILLICH, R., « Economic Coercion and the 'New International Economic Order' : A Second Look at some First Impressions », *loc. cit.*, p. 237 : « While technically such resolutions are not regarded as binding obligations under international law, their authoritativeness, in that they reflect the expectation of the international community, certainly cannot be dismissed out-of-hand ... » ; WHITE, G., « A New International Economic Order? », *Va. J. Int'l L.*, 1975-1976, p. 330 : « Objectively, applying the accepted sources of international law, the Charter (of Economic Rights and Duties of States) is a non-binding resolution of the General Assembly and can have legal force only if, and so far as, it declares or restates existing principles or rules of international law. Its value as evidence of the *opinio iuris* of States cannot altogether be denied ... » ; HIGGINS, R., *op. cit.*, p. 5 : « But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence » ; Also : FALK, R., « On the Quasi-Legislative Competence of the General Assembly », *A.J.I.L.*, 1966, pp. 782 sq and CASTANEDA, J., *Legal Effects of United Nations Resolutions*, New York, 1969.

(69) BOWETT, D., « Economic Coercion and Reprisals by States », *loc. cit.*, p. 3.

(70) « Secure from it advantages of any kind » is omitted in the Resolutions 3171 (XXVII) and 3281 (XXIX).

(71) BOWETT, D., *loc. cit.*, *ibidem* : « There have been cases where States have assumed the 'right' to expropriate in breach of treaties or concession agreements as if this were a part of 'sovereignty' ».

another State, can hardly be accepted since all economics are competitive and since « promoting one's own economy may well be injurious to others » (72). BOWETT's interesting attempt to discern legal from illegal economic measures is based upon their intent rather than upon their effect : « In other words, measures not illegal *per se* may become illegal only upon proof of an improper motive or purpose » (73). This viewpoint (supported by some authorities (74) and criticized by others (75)) engenders another problem, namely who will test those economic measures on their intent and consequently on their illegality (76)? In any case, we agree with BOWETT when he points out that the inevitable conclusion is « that it will require a great deal of practice, of « case-law », to give the concept of illegal economic coercion substance and definition » (77).

The three illegal economic activities described above (78), are generally justified by States on the basis of three different grounds.

1. — Economic measures of reprisal.

As explained above, the use of armed reprisals is prohibited under the U.N. *Charter* (79), however this does not apply to economic reprisals. Consequently economic reprisals are not *per definitionem* illegal (80). The Court of Appeal of Bremen pointed this principle very clearly out in the *Indonesian Tobacco Case* : « Reprisals are, however ... a legal institution recognized in international law and in private international law » (81).

(72) BOWETT, D., *op. cit.*, p. 5.

(73) *Ibidem* : « This idea is found in the English common law. For example, the tort of conspiracy evolved to cover the situation in which two or more persons conspire to commit acts which are lawful *per se* but are motivated predominantly by the desire to injure the economic interests of the plaintiff rather than to protect the interests of the defendants ».

(74) LILLICH, R., *loc. cit.*, pp. 239-240 ; SHIHATA, I., « Arab Oil Policies and the New International Economic Order », *Va. J. Int'l Law*, 1975-1976, p. 268.

(75) BOORMAN, J., « Economic Coercion in International Law : The Arab Oil Weapon and the ensuring juridical issues », *Journ. Int. Law and Econ.*, 1974, p. 231 proposes : « substituting objective disapproval of specific types of economic force without reference to the reason for employment of the coercion ».

(76) The problem did not escape to the author since he points out in a note (*Ibidem*) : « However there remains the difficulty of deciding who will apply this test. The only answer may lie in the States themselves and such review organs as the Security Council, the General Assembly, and the Councils of regional organizations which are confronted with economic disputes ».

(77) *Loc. cit.*, p. 4.

(78) BOWETT, D., *loc. cit.*, p. 5 : « It must be emphasized that the inherent vagueness of the non-intervention principle does not affect the characterization of measures as illegal where the illegality derives from a breach of specific treaty commitments or established general principles of international law ».

(79) *Supra.*

(80) BOWETT, D., « International Law and Economic Coercion », *loc. cit.*, p. 251 ; IDEM, « Economic Coercion and Reprisals by States », *loc. cit.*, p. 9 ; BROWNLIE, I., *op. cit.*, p. 282.

(81) *N.V. Verenigde Deli-Maatschappijen and N.V. Senembah Maatschappij v. Deutsch-Indonesische Tabak-Handelsgesellschaft m.b.H.*, Court of Appeal of Bremen. August 21, 1959, *I.L.R.*, vol. 28, p. 38. The petitioners saw in the effect of the Indonesian Act n° 86 of december 31, 1958 « concerning the nationalization of Dutch enterprises in Indonesia » a contravention of international law because the expropriation was carried out as an act

The limits and conditions for the applicability of economic reprisals are the following :

i) According to international law reprisals have to be a reaction against an illegal action. There is no legal ground for ordering reprisals if the original infringement by the other State does not exist.

As a result, one can doubt about the legality of the economic reprisals that have been issued in a lot of cases (82) ;

ii) Reprisals have to be the *ultimum remedium* ; all other procedures have been tried without results (83). This implies *primo* that before a unilateral reprisal can be ordered, the procedures provided for in a bi- or multilateral treaty for the settlement of disputes which should arise, have been exhausted (84). *Secundo* that if sanctions are provided for in the framework of certain organizations, parties are obliged to use those sanctions rather than unilateral reprisals (85) ;

iii) Reprisals have to be proportionate vis-à-vis the unlawful act (86) ;

of pressure with the object of forcing the Government of the Kingdom of the Netherlands to withdraw from West New Guinea.

Also : *Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France)*, Arbitral Tribunal, 9 december 1978, *I.L.R.*, vol. 54, p. 337 :

« Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'counter-measures' ».

(82) On the Indonesian nationalization of Dutch property in 1958 : ROLIN, H., « Avis sur la validité des mesures de nationalisation décrétées par le gouvernement indonésien », *N.T.I.R.*, 1959, p. 274 ; the Cuban nationalization of American property in 1960 : SEIDL-HOHENVELDERN, I., *loc. cit.*, p. 472-473 ; the Libyan nationalization of Italian and British property in 1970 and 1971 : BOWETT, D., « International Law and Economic Coercion », *loc. cit.*, p. 252 ; the Arab Oil embargo of 1973 : IDEM, *loc. cit.*, p. 251.

(83) See the ruling of the *ad hoc* arbitral tribunal in the cited *Case Concerning the Air Services Agreement of 27 March 1946, loc. cit.*, p. 340 : « But the Arbitral Tribunal does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations, especially where such counter-measures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute ....

The situation changes once the tribunal is in a position to act. To the extent that the tribunal has the necessary means to achieve the objectives justifying the counter-measures, it must be admitted that the right of the Parties to initiate such measures disappears ».

(84) See I.C.A.O. : art. 84 ; I.T.U. : art. 50 ; U.P.U. : art. 32 ; E.F.T.A. : art. 31 ; G.A.T.T. : art. 23.

(85) See the judgement of the European Court : Case 232/78 : *Commission of the European Communities v. French Republic* (« *Mutton and Lamb* ») (Reports 1979-1980, p. 2739) : « A Member State cannot under any circumstances unilaterally adopt, on its own authority, corrective measures or measures to protect trade designed to prevent any failure on the part of another Member State to comply with the rules laid down by the Treaty ».

(86) *Case Concerning the Air Services Agreement of 27 March 1946, loc. cit.*, p. 338 : « It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach ; this is a well known rule ... It has been observed,

iv) Reprisals have no final character (87) ;

v) The utmost limits of reprisals are the rules of the *jus in bello* (88) ;

vi) Reprisals are not permitted against a State for actions undertaken by its national subjects (89) ; however nationals of the delinquent State may be the objects of reprisals (90).

2. — Economic sanctions ordered by a competent organ.

For instance are meant the economic sanctions authorized by the Security Council pursuant to article 41 of the *Charter* (91). In the *Rhodesia*-case the Security Council invoked for the first time this article 41 *expressis verbis* (92).

The Security Council recalled the member States in the relevant Resolution « that the failure or refusal by any of them to implement the present resolution shall constitute a violation of Article 25 of the Charter » (93).

In other cases the Security Council called for the application of the measures of article 41, without referring to this article and without indicating it as a situation provided for in Chapter VII of the *Charter* (Action with respect to threats to the peace, breaches of the peace and acts of aggression) (94).

generally, that judging the 'proportionality' of counter-measures is not an easy task and can at best be accomplished by approximation ».

(87) ROLIN, H., *loc. cit.*, p. 274 and SEIDL-HOHENVELDERN, I., *loc. cit.*, p. 473.

(88) *Banco-Nacional de Cuba v. Sabbatino, Farr, Whitlock & Co, A.J.I.L.*, 1961, p. 745 : « The justification (of the Cuban nationalization measures) is simply reprisal against another government. Doubtless the measures which states may employ in their rivalries are of great variety but they do not include the taking of the property of the nationals of the rival government ».

ROLIN, H., *loc. cit.*, p. 274 concerning the Indonesian nationalization : « Il y a plus grave encore, c'est que même si le gouvernement indonésien avait été en droit d'exercer des représailles, la confiscation dépassait par sa nature les limites que le droit des gens fixe aux représailles. En effet, même en temps de guerre l'article 46, alinéa 2 du règlement concernant les lois et coutumes de la guerre sur terre prévoit que la propriété des ressortissants de l'Etat occupé ne peut être confisquée. Même en temps de guerre, les belligérants se bornent à prendre des mesures de séquestre, vis-à-vis des ressortissants de l'Etat avec lequel ils ont engagé des hostilités, l'appropriation n'intervenant qu'ultérieurement généralement en vertu de Traités de Paix comme mode d'exécution des réparations dues par l'Etat vaincu et à charge pour celui-ci d'indemniser ses ressortissants dépouillés ».

SEIDL-HOHENVELDERN (*loc. cit.*, p. 474), is right when he notes that the Court in the *Sabbatino* case : « approved Rolin's argument *de majore ad minus* ».

(89) BOWETT, D., « Economic Coercion and Reprisals by States », *loc. cit.*, p. 10.

(90) *Ibidem.*

(91) Text see note (54).

(92) SC Res. 232, December 16, 1966.

(93) Article 25 : The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

(94) For examples : GOODRICH, L., HAMBRO, E., and SIMONS, A., *Charter of the United Nations. Commentary and Documents*, New York, 1969, p. 313.

This was the reason why some member States believed that the Security Council was acting under Chapter VI (Pacific Settlement of disputes) and therefore they were not legally bound by the decision of the Security Council to implement the economic sanctions (95) (96).

The precise competence of the General Assembly in this field is disputable. On the one hand, it is said that the Security Council has a monopoly for the application of sanctions provided for in article 41 (97) and that such sanctions can only be issued as a result of a Security Council decision. The International Court of Justice affirms this viewpoint in her Advisory Opinion in the *Certain Expenses of the United Nations-Case (Article 17, paragraph 2 of the Charter)* (98). On the other hand it was pointed out that States can also break unilaterally their economic and financial relations they have with another State ; in addition no disposal of the *Charter* prohibits the States to act collectively in response to a UNGA-resolution (99) (100). This viewpoint could find support in the *Uniting for Peace Resolution* (101) : the Collective Measures Committee established under this Resolution undertook a study of the problems involved in applying non-military measures regardless of whether they were taken in response to a recommandation of the Assembly or a decision of the Council (102).

Another problem is the competence of the regional organizations with regard to the application of economic sanctions. This difficulty originates from article 53 of the *Charter* stipulating that « The Security Council shall, where appropriate, utilize such regional arrangements or agencies for

(95) *Ibidem.*

(96) See also : GREIG, D. W., *International Law*, London, 1970, p. 575 : « Furthermore, as the Charter itself implies, and as was accepted in the debates on the Palestine question in 1948, the Security Council's powers, even under Article 41, are restricted to measures directly designed to maintain international peace and security. Action designed to help maintain international peace and security by imposing a settlement on the parties to a dispute or situation (in this case, preventing Rhodesia from acquiring independance without guarantees of majority rule) cannot be imposed, or furthered by the imposition of sanctions, within Chapter VII of the Charter, but at most can be the subject of recommendations by the Council ».

(97) BERBER, F., *op. cit.*, p. 110 ; ROUSSEAU, C., *op. cit.*, p. 599. Also : KEWENIG, W., « Die Anwendung wirtschaftlicher Zwangsmasznahmen im Völkerrecht », in : KEWENIG, W., und HEINI, A., *Die Anwendung wirtschaftlicher Zwangsmasznahmen im Völkerrecht und im International Privatrecht.* Berichte der Deutschen Gesellschaft für Völkerrecht, Heft 22, Heidelberg, 1982, p. 31.

(98) « ...it is the Security Council which exclusively, may order coercive action ... » (*I.C.J., Reports*, 1962, p. 163).

(99) GOODRICH, L. HAMBRO, E., and SIMONS, A., *op. cit.*, p. 314.

(100) In most of the cases, the Security Council acted after urgings by the General Assembly for the application of sanctions and in some cases the Assembly self had requested members to take measures of the type covered in Article 41.

(101) GA Res. 377 (V), November 3, 1950.

(102) GAOR/6th Sess./*Suppl.* 13, 1951 ; 7th Sess./*Suppl.* 17, 1952 ; 8th Sess., *Annexes*, agenda item 19, 1953 ; BOWETT, D., « Economic Coercion and Reprisals by States », *loc. cit.*, p. 6, note 23.

enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council ... » (103). Several opinions concerning this issue have been worked out, particularly in consequence of the economic sanctions ordered by the O.A.S. against Cuba and the Dominican Republic (104). On the one hand, it was held that the authorization of the sanctions was necessary to give them a legal ground. On the other hand it was argued that the authorization by the Security Council was not necessary because the collective measures taken by the O.A.S. could also have been taken by its individual members while exercising their national sovereignty ; in addition article 53 would not have been relevant to the case because these sanctions cannot be considered as « enforcement action » in the sense of article 53 of the *Charter*. Thereupon has to be answered that the *procès-verbaux* of the San Francisco Conference support the viewpoint that « enforcement action » means all measures that the Security Council can take under articles 41 and 42 (105), including economic sanctions. Besides, the International Court in the cited Advisory Opinion in the *Expenses-Case* (106) pointed out that « it is the Security Council which exclusively may order coercive action », without making a distinction between the different kinds of coercive action. Hence, we may conclude with BOWETT that « sanctions, whether military or economic, can be taken only by the Security Council or by a regional organization, pursuant to Security Council authorization » (107).

The fact that the Security Council or a regional organization pursuant to Security Council authorization can order economic sanctions, does not mean that States *ut singuli* (108) or an organization of States not of the type covered by Chapter VIII of the Charter (O.P.E.C.) can authorize economic « sanctions » (109).

3. — Economic measures of self-defence.

State practice proves that self-defence is invoked not only to protect

(103) With the exception of measures against any enemy State (any State which during the Second World War has been an enemy of any signatory of the Charter).

(104) GOODRICH, L., HAMBRO, E., and SIMONS, A., *op. cit.*, pp. 365 sq. ; LEVIN, A., « The Organization of American States and the United Nations. Relations in the peace and security field », in : ANDEMICHAEL, B., *Regionalism and the United Nations*, Dobbs Fery, etc., 1979, pp. 147 sq.

(105) U.N.C.I.O., *Documents*, X, 507-508.

(106) Note 98.

(107) *Loc. cit.*, p. 7. In the same sense : BERBER, F., *op. cit.*, p. 113 ; SALMON, J., *op. cit.*, p. 464 ; BEYERLIN, U., « Regionalabkommen », in : *Handbuch Vereinte Nationen* herausgegeben von R. WOLFRUM ; N. PRILL ; J. BRUCKNER, München, 1977, p. 355.

(108) ROUSSEAU, C. *op. cit.*, p. 597.

(109) BOWETT, D., « International Law and Economic Coercion », *loc. cit.*, p. 254.

the territorial integrity, the political independence, the nationals, but also to defend economic interests (110) (111).

Notwithstanding the fact that learned publicists (112) advocate the right of self-defence in specific cases of protection of economic interests, this possibility seems to us rather hypothetic.

It is well-known that legitimate self-defence has three main requirements (113) :

« i) An actual infringement or threat of infringement of the rights of the defending State ;

ii) A failure or inability on the part of the other State to use its own legal powers to stop or prevent the infringement and

iii) Acts of self-defence strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object ».

The right of self-defence is generally considered as an exception to the prohibition of the use of force and normally the context of force is not relevant to the defence of economic interests (114) (115).

(110) See the preamble of the Indonesian Law N° 86 of 1958 : « the nationalization of said Dutch-owned enterprises is intended to provide the greatest possible benefit for the Indonesian nation and further to enhance the security and the defence of the State » ; the preamble of the Cuban Law N° 851 of 1960 : « Whereas the attitude assumed by the Government and legislative power of the United States of America of constant agression for political purposes against the fundamental interests of the Cuban economy (... especially the change in sugar quotas ...) as an arm of political action against Cuba, obliges the Revolutionary Government to adopt without hesitation, also the measures that it may deem pertinent for the defence of the national sovereignty and the free economic development of our country », Cited in SEIDL-HOHENVELDERN, I., *loc. cit.*, p. 471. Other examples : BOWETT, D., *loc. cit.*, pp. 250-251.

(111) See also article XXI of the G.A.T.T. :

Nothing in this Agreement shall be construed

(*a*) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests ; or

(*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived ;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment ;

(iii) taken in time of war or other emergency in international relations ; or

(*c*) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

(112) E.g. BOWETT (*Self-defence in international law*, pp. 106 sq.) ; Also : KEWENIG (*loc. cit.*, p. 21).

(113) WALDOCK, C., « The Regulation of the use of force by individual States in international law », *R.C.A.D.I.*, 1952, II, pp. 463-464.

(114) BOWETT, D., *op. cit.*, pp. 109-110.

(115) The International Military Tribunal for the Far East did not accept the argument that Japanese military operations against France, the Netherlands, Great Britain and the United States were justifiable measures of self-defence because these Powers took economic measures against Japan. See : BROWNLIE, I., *International Law and the Use of Force by States*, p. 253.

Non-violent aggression of the economic type gives rise to a right to recourse before the Security Council under article 39 (116), but not a right to forceful action under article 51, since this article only applies in cases of armed attack (117).

TO SUM UP.

The problem of the justifying circumstances of economic coercion is a complex one ; and it would be impossible to exhaust all its aspects in this single report, which, moreover, was largely inspired by Derek BOWETT's ideas.

But although additional advanced research in this field remains necessary, it is a fact that the Law of Nations offers certain grounds of justification to States which exercise economic coercion. Claiming grounds of justification is dependent on certain conditions, whose actual application provides for tremendous difficulties.

Summarizing the issues analyzed above, the following points should be stressed :

1. *With respect to measures of economic reprisal,* they are subject to the following criteria :

— a previous international delinquency against the claimant State ;
— the circumstance of *ultimum remedium* ;
— the rule of proportionality ;
— the absence of final character ;
— the limitations as regards content.

Finally, one should take into account the general obligation contained in article 2, § 3 of the U.N. *Charter*, when qualifying reprisals as justified or unjustified ; indeed, theoretically justified forms of reprisal could be illegal in terms of the *Charter*.

2. *With respect to economic sanctions authorized by a competent organ,* there is no doubt that the exercise of economic coercion is legal if the measures were ordered by the Security Council pursuant to article 41 of the U.N. *Charter* or by a regional organization pursuant to Security Council authorization. The competence of the General Assembly or of the regional

(116) Article 39 : The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

(117) HIGGINS, R., *The Development of International Law through the political organs of the United Nations*, p. 204.

organization without Security Council authorization, in this area are arguable. States *ut singuli* and organizations not of the type covered by Chapter VIII of the *Charter* cannot order economic « sanctions ».

3. *With respect to economic measures of self-defence*, it is hypothetical whether self-defence may be invoked in cases of protection of economic interests. If so, the essential conditions for self-defence must be fulfilled in any case : self-defence must be a reaction to a delinquency directly and gravely violating fundamental rights, against which no alternative protection exists, and which must be in proportion to the actual danger encurred.

Discussion du rapport de M. Beirlaen sous la présidence de M. Salmon

M. DAVID approuve la typologie dressée par le Rapporteur. Il insiste sur la nécessité de distinguer par leur contenu les notions de souveraineté et de non-intervention. La première ne permet certes pas de faire n'importe quoi, mais elle autorise pour le moins la riposte à un acte illicite. Par ailleurs, certains éléments du rapport devraient être nuancés. Ainsi, les résolutions de l'Assemblée des Nations Unies ont un effet obligatoire certain lorsqu'elles sont déclaratoires de principes du droit international. De plus, la légitime défense économique doit être tolérée dans la mesure où elle est une forme atténuée du principe admis de légitime défense. Enfin, l'octroi d'une compétence exclusive au Conseil de sécurité repose sur une interprétation trop littérale de la Charte. L'Assemblée générale doit également se voir reconnaître une compétence dans la mesure où celle-ci est reconnue à chaque Etat individuellement.

Le RAPPORTEUR précise qu'une compétence de l'Assemblée générale n'est certes pas exclue, mais on ne peut affirmer pour autant qu'elle soit indiscutable : le caractère exclusif de la compétence du Conseil de sécurité ne repose-t-il pas sur les textes, sur les procès verbaux de la Conférence de San Francisco et sur la jurisprudence de la Cour Internationale de Justice?

S'agissant de l'affaire des otages, citée par le rapporteur, M. DAVID rappelle que la Cour a condamné l'Iran tout en gardant le silence sur les mesures économiques prises par les Etats-Unis après que fût rendue l'ordonnance portant mesures conservatoires. Il faut cependant admettre que l'on tend à une reconnaissance de la licéité des moyens de pression économiques, même si de nettes réserves sont formulées à cet égard dans la doctrine française.

M. SALMON signale que, dans l'affaire des otages, les mesures de représailles avaient été unilatérales. Le caractère obligatoire des règles violées était par ailleurs indiscutable. La question est plus délicate au sujet des recommandations de l'Assemblée générale des Nations Unies. On ne peut

pas exclure le droit pour l'Assemblée de recommander à ses membres de prendre des mesures de représailles pour le reste licites.

Abordant la question des dommages que les mesures de représailles peuvent causer à des Etats tiers, M. KUYPER se demande si ceux-ci ne doivent pas accepter de telles mesures dès lors qu'elles sont prises pour sauvegarder une norme du *ius cogens*, et que leur efficacité peut dépendre de leur respect par des Etats tiers. C'est ainsi que l'on envisage aux Pays-Bas une action contre l'Afrique du Sud, dont les partenaires européens devraient respecter les effets.

Plus généralement, M. SALMON estime que le *ius cogens* doit être pris en considération de l'appréciation de la légalité d'une mesure de représailles, même si l'on peut s'interroger sur son contenu exact : un courant de plus en plus large considère que le principe de non-intervention et le droit des peuples à disposer d'eux-mêmes en font partie.

Speaking about trade embargoes under Article XXIII G.A.T.T., Mr. PETERSMANN indicates that two cases have arisen. The first occurred in 1949, opposing the United States to Czechoslovakia. Then, it was considered that each nation was free to determine its security interest. However, the recent sugar embargo decreed by the United States against Nicaragua could not be based on Article XXIII G.A.T.T., because the United States didn't justify the import quota under general international law. This apparent shift in reasoning leads to the question to what extent it is possible, or even necessary, to resort to general international law on the admissiblity of reprisals, in order to fill in the notion of a security interest, such as protected by Article XXIII G.A.T.T. In addition, Mr. PETERSMANN wonders whether coercitive measures that aren't justified by a security interest of the State, could nevertheless be legitimate under the principles of general international law.

Pour M. VERHOEVEN, la question revient à savoir si, dans le cadre du G.A.T.T., l'on peut invoquer d'autres dérogations que celles que l'accord prévoit. La réponse est *a priori* négative dès lors surtout que les dérogations sont définies de manière assez large, sauf autorisation de l'organisation pour motif exceptionnel sur la base de l'article 25, § 5.

Selon M. SALMON, la mesure de représaille est illégale à défaut d'illicéité de l'acte chaque fois que l'invocation de la clause de sécurité est non fondée. Il convient donc d'ajouter aux conditions limitatives de la validité de la mesure de représailles le cas d'exclusions conventionnelles explicites ou implicites de leur emploi.

Il est clair qu'en cas de clause, tout acte respectant ses dispositions est licite, convient M. EHLERMANN : la question ne se pose que si l'acte sort du champ d'application de la clause. La question essentielle est de savoir si l'existence même d'une clause exclut toute mesure de représailles prise en dehors de celle-ci. En fait, on admettra difficilement que l'insertion

d'une clause de sécurité vaille renonciation à des mesures dépassant sa portée.

Cette solution, qui repose en dernière analyse sur une interprétation de la volonté des parties, n'est défendable que pour les traités dépourvus de tout appareil institutionnel, estime M. VERHOEVEN. Dans ces derniers cas, il faut, avant de prendre la mesure, avoir épuisé toutes les ressources qu'offre le mécanisme institutionnel. Et les ressources offertes par l'article 25, § 5, de l'accord du G.A.T.T. sont de ce point de vue pratiquement illimitées. A raisonner autrement l'on supprimerait la raison d'être du mécanisme institutionnel. M. EHLERMANN approuve cette précision en ce qui concerne les accords multilatéraux.

Revenant au rapport de M. Beirlaen, M. LAKEHAL entend y apporter trois précisions. D'abord, il conviendrait d'ajouter aux conditions déterminant la licéité d'une mesure de représailles, la nécessité d'une sommation. Ensuite, on peut se demander si l'état de nécessité peut encore être invoqué comme cause de justification. Enfin, c'est l'Etat qui, inopportunément, est seul compétent pour apprécier l'illicéité.

M. SALMON se demande si la légitime défense (dans son sens large et vague), dont M. TURP suggère par ailleurs une comparaison avec les conditions du droit à l'autodéfense, constitue une cause de justification, et si elle n'est pas purement et simplement une mesure de représailles camouflée sous une qualification vague et abusive. La légitime défense n'a de place certaine que dans le cadre de l'article 51 de la Charte.

M. BEIRLAEN admet l'observation, confirmée par la jurisprudence, mais la pratique des Etats distingue l'une de l'autre. Il suffit de se référer aux lois cubaine ou indonésienne de nationalisation, où l'on parle de mesures de légitime défense. Sans négliger cette pratique, M. SALMON suggère qu'à tout le moins l'on ne confonde pas deux concepts distincts, la contre-mesure individuelle de représailles et la légitime défense individuelle ou collective de l'article 51 de la Charte.