SANCTIONS AGAINST SOUTH AFRICA : RECENT DISCUSSIONS IN THE NETHERLANDS

Neri SYBESMA-KNOL

CHARGÉE DE COURS
À LA VRIJE UNIVERSITEIT BRUSSEL

> « The Netherlands belong to a category of States whose support of centralized economic sanctions is as important to their success as big power backing, namely the Western trading nations » (1).

The question of South Africa's *apartheid*-policy, as well as its continued presence in Southwest Africa, notwithstanding countless U.N. General Assembly *and* Security Council resolutions, and several advisory opinions of the International Court of Justice, have been a cause of concern within the United Nations for many years now (2).

The Dutch attitude towards South Africa formed a part of the coalition-agreement which is the basis of the foreign policy of the present Dutch coalition-government (3) : many political parties in The Netherlands have considered support of international actions against South Africa an important aspect of Dutch foreign policy. When in pratice the Government did prove to be rather reluctant to initiate activities concerning sanctions against South Africa, there have been three demands from Parliament, notably from the Second Chamber, over the past few years to do so (4).

In 1982, the Government promised Parliament a Note on its South African policy. But, because of the « political overtones » of this special subject, it did not, as is customary, consult the « Advisory Committee on International Law of the Ministry of Foregin Affairs » (5). Instead, the

(1) Pieter Jan KUYPER : « *The Implementation of International Sanctions; The Netherlands and Rhodesia* », Alphen a.d. Rijn, 1978, at p. 16.

(2) *Apartheid* has been on the agenda of the U.N. ever since its conception. On 30 November 1973, the General Assembly adopted the « International Convention on the Suppression and Punishment of the Crime of *Apartheid* », and on 9 November 1976 it approved a « Programme of Action against *Apartheid* ». The U.N. Secretariat has a special « Centre against *Apartheid* » to ensure the widest possible dissemination on *apartheid* and its consequences. 1982 was declared the Year of Sanctions against South Africa.

(3) « Notitie over het Zuid-Afrika beleid van de Nederlandse Regering » door de Minister van Buitenlandse Zaken H. van den Broek, *Tweede Kamer der Staten-Generaal*, zitting 1982-1983, 17.895, nr. 1, p. 1.

(4) WALLACE; *Verslag Tweede Kamer*, 21 juni 1983, a. p. 4709.

(5) The « Adviescommissie Volkenrecht van het Ministerie van Buitenlandse Zaken », including experts on international law.

Government decided to establish a special Working Group (the Stuurgroep) (6) to look into the possibilities of sanctions against South Africa, and to formulate its conclusions. In the spring of 1983, the Working Group finished its task. Its final Report (the *Rapport*) was communicated in annex to the Government's « *Note on Unilateral Sanctions against South Africa* » to the Second Chamber of Parliament (*Tweede Kamer der Staten-Generaal*) (7). The day of 6 June 1983 was fixed for Committee-hearings, the day of 21 June for the general debate.

I. — THE GOVERNMENT'S NOTE ON UNILATERAL SANCTIONS AGAINST SOUTH AFRICA

Point of departure of the Government's Note is the repeated condemnation, in various international fora, by the Dutch Government of South Africa's *apartheid*-policy. The continuation of that policy cannot lead to any solution of the racial problems in South Africa which would be acceptable to all parties concerned. It stands in the way of stability in the region. In the opinion of the Government, South Africa's *apartheid*-policy together with its continued presence in Namibia, constitute a situation which poses a real threat to international peace and security (8). Recent proposals by the South African Government to bring about changes in its policy at least toward coloured and Asian population groups, may lead to a certain amelioaration of the situation. Nevertheless, it is the Dutch Government's opinion that international pressure on South Africa should be increased, and it is prepared to cooperate.

— In the first place, The Netherlands want to continue their support for international sanctions in the framework of the United Nations. They have often in the past co-sponsored and supported U.N.-resolutions on this subject (9). It is the Government's opinion that the arms-embargo against South Africa as imposed by Security Council Res. 418, of 4 November 1977, should be implemented ; that an oil-embargo might be contemplated by the Security Council (10), and that restrictions on new foreign investments should be imposed.

— Apart from this apparent and traditional Dutch support for centralized international sanctions, the question of even more stringent *unilateral sanctions* has come up. The Government does in principle not exclude this possibility. The recent denunciation of the Treaty on Cultural Coopera-

(6) The Working Group consisted of representatives of the Ministries of Foreign Affairs, Finance, Economic Affairs, Justice, and Transportation; chairman was the Director-General for Political Affairs of the Ministry of Foreign Affairs.

(7) *Tweede Kamer*, Zitting 1982-1983, 17.895, nr. 2, Annex.

(8) Notitie, p. 3.

(9) *Ibid.*, p. 5.

(10) *Ibid.*, p. 5, See : GA Res. 37/69 J, which was co-sponsored by The Netherlands.

tion with South Africa, and certain measures in connection with South African tourists should be regarded as « political signals ».

Also, the Government is considering a more strict policy towards visiting sportsmen from South Africa (11).

The mandate of the Working Group had been, to study the legal possibilities of imposing these *unilateral* sanctions against South Africa, as well as their economic and political consequences.

II. — REPORT OF THE INTER-DEPARTMENTAL WORKING GROUP ON UNILATERAL ECONOMIC SANCTIONS AGAINST SOUTH AFRICA

After a short introduction, and an overview of several possible measures, *Chapter III* of the Report deals with the question of their compatibility with existing international obligations of the Dutch Government. It is this part of the Report that is most interesting from an international legal point of view. We will look into its arguments more closely, also because it was precisely this, legal, part of the Report which provoked a certain reaction in circles of Dutch experts on international law (12).

According to the Report, the measures to be considered were :

— Dutch participation in the existing (O.P.E.C.) voluntary oil-embargo against South Africa ;

— Measures to check the expansion of Dutch investments in South Africa, in order to limit Dutch economic interests there ;

— Restrictions on imports of coal from South Africa.

A. — *Participation in the oil-embargo.*

Within the framework of the United Nations there have been repeated attempts to strengthen the existing voluntary oil-embargo by the O.P.E.C. states, and to make it complete and worldwide. The Netherlands have voted in favour of G.A. Res. 37-69 J. which proposed *inter alia* an international conference on the question of an oil-embargo against South Africa (13).

Any effective Dutch participation in the embargo would have to include both a prohibition of transportation of oil and oil products to South Africa and a stop to all exports of oil and oil products to that country. At this moment, Dutch law would in principle permit such measures (14).

(11) *Ibid.*, p. 6.

(12) See *infra*, p. 214.

(13) Belgium voted against res. 37-69 J.

(14) The « Sanctiewet ». Cfr. : P. J. Kuyper : « De Nieuwe Sanctiewet », in *S.E.W.*, 1980, p. 319 H.

B. — *Investment-limiting measures.*

For its definition of « investments », the Report follows O.E.C.D.-practice, which determines them as : « the establishment or expansion of enterprises in a foreign country, participation in such an enterprise (either newly established or existing) and the granting of long-term loans with a view to exercise a certain influence in the management of the enterprise ». Dutch measures could be modeled after Swedish law. For any measures with regard to investments involving financial transactions, the *Sanctiewet* would provide the legal framework.

C. — *Import restrictions,*

namely on coal-imports from South Africa would certainly be possible under Dutch law : existing im- and export regulations could be used (15).

However, even when these measures would be regarded as permitted under existing Dutch law, certain international obligations would, according to the Report, stand in the way. The *Sanctiewet* states that, as a rule, *in the case of non-mandatory sanctions the implementation* of which by the Dutch Government would collide with certain international treaty-obligations, these treaties would prevail and that no implementation of such measures may take place before these legal barriers are removed.

In this case, and concerning the proposed measures, there are various international legal obligations which would have to be « overcome », each in its own way, if and when the political decision to impose the sanctions would be taken. In any case, this would be a long, complicated and costly procedure :

— First of all, any one of the proposed measures would only be possible after a denunciation of the 1935 *Treaty* with South Africa *concerning a Provisional Regulation of Trade Relations with, and Maritime Transport to and from, South Africa.* The treaty contains a most-favoured-nation clause.

Such a denunciation would of course only serve its purpose if there were no other international legal barriers to sanctions. But, according to the Report, there are several :

— Obligations under G.A.T.T. are of importance for any measures concerning transports and im- and exports. Article XXI does provide for a general escape clause in the case of « security exceptions ». Apart from this, there is a provision (Art. XXV, 5) that « ... in exceptional circumstances, not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation ... » under the Agreement. However : the E.E.C. Member States do no longer exercise their individual power

(15) The « Sanctiewet ».

under the Common Commercial Policy. A request for a waiver as foreseen in Article XXV.5, has become a Community-affair.

— The *BENELUX*-Treaty provides for a common im- and export policy. In principle it would form an obstacle to any unilateral measures by one of the BENELUX-partners concerning an oil-embargo or import-restrictions. Unilateral investment-restrictions would not be governed by the Treaty. Thus, in the case of Dutch measures concerning oil trade and coal imports without support from Belgium and Luxemburg, the common regulations would have to be suspended. Questions could be raised as to the legality of such a suspension in view of the principles of progressive integration and a common commercial policy, incorporated in the BENELUX-Treaty. Furthermore, the Treaty contains the irrevocable principle that all inter-BENELUX-traffic should continue unhampered; this would considerably reduce the practical effect of any unilateral Dutch measures in the case of non cooperation by Belgium and Luxemburg.

— *The E.E.C.-E.C.S.C.-Treaties.* Under the E.E.C.-Treaty the Member States' competence in the domain of commercial policy now belongs to the Community, and any measures with regard to trade with third countries should be taken by the Community.

It is true that Article 224 provides for the possibility that a Member State may be called upon to take certain measures « in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security ».

But, according to the Report, such obligations do *not* exist in the present case. And with regard to the products which would be subject to the proposed measures, the Community's competence is exclusive : any changes in the existing régime have to be brought about by Community procedures. The Report reminds us that The Netherlands had taken that view already at the time of the oil-boycott in 1974. And it refers to the Donckerwolcke-Case to indicate that the same view is held by the Court of Justice of the Communities (16).

(16) It should be noted that in the past, even when mandatory sanctions *had* been imposed by the Security Council (in the case of Rhodesia) problems have arisen as to how the (evident) prevalence of the Council's decisions *over* Community law had to be arranged.

KUYPER, P.J., *The Implementation of International Sanctions*, at. p. 192, has concluded that the Community as such in its own view was not even bound by Security Council resolutions, which were directed at the Member States. Uncertainty in this respect has clearly created a legal escape route for all concerned.

It is amazing that nowhere in the Government's Note, nor in the Report of the Working Group, nor in the Commentary by the Group of international law experts any mention is made of the fact that there do exist mandatory Security Council sanctions against South Africa, namely whenever South Africa acts for or on behalf of Namibia. See Security Council Resolution 276 of 30 January 1970 and the corresponding 1971 Advisory Opinion of the International

Most important of all, says the Report, existing obligations concerning the free movement of goods within the Community would seriously restrict the effect of any unilateral measures by one of the Member States.

The Report concludes with a *résumé* of all legal obstacles which would have to be overcome in each case :

Measures relating to an oil embargo would presuppose

— the denunciation of the 1935 Treaty with South Africa ;

— under G.A.T.T., a waiver, requested by the Community for the Netherlands ;

— both BENELUX-partners agreeing to suspend or change existing regulations ;

— under the E.E.C. Treaty : an authorization by the competent organs of the Community ;

— the applicability of the *Sanctiewet.*

For *Investment Restrictions* would be necessary :

— a denunciation of the 1935 Treaty ;

— the applicability of the *Sanctiewet.*

For *Import restrictions on coal,* the conditions would be the same as in the case of an oil-embargo.

All of this (17) has led the Government to the following conclusions : The Government considers a firm South Africa-policy absolutely necessary. Such a policy should include a strict condemnation of *apartheid* as well as support for developments leading to peaceful change.

The Government will continue to work for increased international pressure on South Africa in international fora, and will sound out possibilities for more mandatory sanctions in the framework of the U.N. (In view of the South Africa-policy of the other Western nations, these possibilities appear at the moment rather small).

The Government will support a tightening of the existing arms — and oil embargo's. However : *The Government at this moment does not find any real possibilities for the realization of the three types of unilateral measures which have been considered by the Working Group* (18).

Court of Justice on the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276.

(17) Of course, the international legal obstacles were not the only arguments against unilateral measures : economic considerations, fear for retaliations by South Africa, the question of a general foreign policy in the framework of the « Western Group », and the harm such measures would certainly inflict on the economic conditions of black workers in South Africa were also considered. However, the legal arguments have played a major role, especially in the Report of the Working Group.

(18) Notitie, pp. 11-12.

III. — REACTIONS AND COMMENTS

The Government's Note, including the Report of the Working Group, met with mixed reactions from the Dutch Business Community, Trade Unions, Churches and Political Parties.

The most interesting reaction from our point of view was a commentary drafted by a group of international law experts (19) within the framework of the Inter-University Institute T. C. Asser. The Commentary consists of three Chapters, dealing with, respectively, « Aspects of General International Law », « Aspects of International Economic Law » (E.E.C., BENELUX and G.A.T.T.), and « Conclusions » (20).

In comparison with the Report, the possibilities for unilateral measures, notwithstanding certain obligations under the G.A.T.T.-Agreement and the BENELUX- and E.E.C.-Treaties, come out somewhat more favourably in the Commentary. There seems to be room for interpretation here.

However, the Commentary's point of departure is basically different from that of the Working Group. Its entire first chapter is devoted to an analysis of the general principles of international law which govern states' attitudes and obligations towards *apartheid* as a legal phenomenon :

— *Apartheid* constitutes a gross violation of human rights, which seriously disturbs international peace and security (Security Council Resolution 473, 13 June 1980, at para. 3) and is « a flagrant violation of the purposes and principles of the Charter », according to the International Court of Justice in its 1971 Advisory Opinion on the continued presence of South Africa in Namibia (21).

— The International Court of Justice has stated that « In view of the importance of the rights involved, all States can be held to have a legal interest in their protection », for « they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from ... the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination » (22).

(19) Consisting of professors and teachers of international law, meeting in the framework of the Interuniversity Institute for International Law, T.M.C. Asser, The Hague.

The commentary was drafted by profs. Meyers, Van Boven, de Cooker, van Dijk, Koers, Kooymans, Lauwaers, Verwey, de Waard and Wellens. Having read the text the profs. Dekkers, van den Dool, Flinterman, Lammers, van Lith, Mortelmans, O'Keeffe, Post, Schrijver, Slot, Timmermans en Winter expressed their agreement. Profs. Alting van Geusau and Schneider did not share the views expressed in the commentary. *Tweede Kamer*, zitting 1982-1983, 17.895, bijlagen, n°s 2 en 3.

(20) The « affair » got wide publicity in the press. Several articles were written on the subject, notably : Pieter Jan KUYPER, « Internationaal Recht in plaats van politiek. Het juridisch debat over eenzijdige sancties tegen Zuid-Afrika », in : *De Internationale Spectator*, december 1983, pp. 778-784.

(21) I.C.J. *Reports* 1971, p. 57.

(22) Case concerning the Barcelona Traction Light and Power Company Limited, I.C.J. *Reports*, 1970, p. 33.

For an interesting analysis of the right of States to react on violations of human rights by

— Under the Charter of the United Nations (namely its Article 56) the Member States have a duty to promote respect for human rights and fundamental freedoms.

— G.A. Resolution 2625 (XXV) gives a concrete meaning to this duty by stating that « In order to maintain international peace and security ... States shall cooperate ... in the elimination of all forms of racial discrimination » (23).

The group of legal experts considers the general principles of international law as enumerated above as *ius cogens*. Therefore, the law of international economic organizations should be interpreted against the background of international legal obligations of a general character, such as those under the Charter of the United Nations. Article 103 of the Charter explicitly states that ... « obligations under the present Charter shall prevail » (24).

The commentary concludes that « every Member State has the right to react against Apartheid and the duty to cooperate with other states in its elimination ».

There are no insurmountable legal barriers against the proposed unilateral measures.

Everything depends on the political will of the present Dutch Government to impose them.

other states, see : P. H. KOOYMANS, « Actie, harde Actie; enkele opmerkingen over de volkenrechtelijke toelaatbaarheid van eenzijdige sanctiemaatregelen », in *Internationale Spectator*, december 1983, pp. 771-777.

(23) Commentary, § 7 and 8.

(24) Cfr. Art. 234 of the E.E.C.-Treaty.

Professor Henri Schermers of the University of Leiden, in a separate letter to the Committee on Foreign Affairs gives a « dissenting opinion » on this problem. He is of the opinion that, even when the elimination of *apartheid* seems a « worthy cause ». any unilateral measures by the Netherlands would constitute such a serious threat to European integration, that even a « worthy cause » could not justify that risk. *Tweede Kamer*, zitting 1982-1983, 17.895, nr. 3, bijlage 6, pp. 41-42.