Legal Aspects of the "Joanna V" and "Manuela" Incidents, April 1966

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On 1 April 1966, units of the Royal Air Force which, in accordance with the United Nations Security Council's Resolution of 20 November 1965, had for some weeks been exercising surveillance over tanker traffic in the Mozambique Channel, reported the Greek ship *Joanna V* approaching Beira with oil, thought to be destined for Rhodesia.[1] The incidents which followed illuminated sharply the law of the freedom of the seas and of the use of force by the United Nations.

Background facts

On 12 November 1965, the Security Council had called upon all States to refrain from rendering any assistance to the "illegal" régime in Southern Rhodesia and, on 20 November, adopted a further resolution, of which paragraph 8 called upon all States "... to do their utmost in order to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products"; and paragraph 9 called upon the United Kingdom "to enforce urgently and with vigour all the measures it has announced, as well as those mentioned in paragraph 8 above".[2]

On 17 December, the United Kingdom imposed an embargo on the supply by British nationals of oil and oil products for Rhodesian use.[3]

The *Joanna V* had left Iran in February 1966, as the *Arietta Venizelos,* carrying some 18,000 tons of oil consigned to Rotterdam. On passage, she was sold to Varnicos, a Panamanian company. The sale was completed on 16 March, when the ship was at Dakar. Her name was there changed to *Joanna V* and she sailed for Durban.

Subsequently, another tanker, *Manuela,* recently purchased for the Varnima Corporation of Panama and placed on the Greek register, left the Persian Gulf on 27 March with 16,000 tons of oil for Beira.

Meanwhile, on 14 March, a Greek Royal Decree had been issued prohibiting the transport, by vessels flying the Greek flag, of petroleum or petroleum products to Rhodesia via ports in Mozambique or South Africa.[4]

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1 London *Times,* 5 April 1966.

2 S/RES/216/REV. 1 (1965), 15 November 1965; and S/RES/217 (1965), 22 November 1965.

3 Southern Rhodesia (Petroleum) Order 1965.

4 Keesings, *Archives,* 1966, par. 21418.

Interception of *Joanna V* and her change of flag; the facts

At 21.30 G.M.T. on 4 April, H.M.S. *Plymouth* intercepted *Joanna V* on the high seas. The master was informed that, in conformity with the United Nations Security Council resolution of 20 November, and with the knowledge of the Greek Government, *Plymouth* had instructions to require him not to proceed to Beira. The tanker stopped and her master agreed to receive an officer on board,[5] who was informed that the ship was entering Beira for provisions, her oil being for Djibouti. The tanker then proceeded to Beira, where she anchored in the roads.

On 5 April, the owners of *Joanna V* applied for her removal from the Greek register, and announced in Athens that the ship had hoisted the Panamanian flag.[6]

On 11 April, *Joanna V* went alongside at Beira, but did not discharge her cargo.[7]

On 12 April, the Panamanian Government announced that it would cancel the vessel's registration, if she broke the oil embargo on Rhodesia, and later on the same day revoked the registration.[8]

The law of freedom of navigation

The use of the word "intercepted" in the Foreign Office statement suggests at first that *Joanna V* was ordered to stop and receive a visit. The reference to the United Nations Security Council resolution of 20 November might have indicated that the purpose of the visit was to ascertain the destination of the cargo. If this were the case, the action would be similar to one of contraband control in war and would go far beyond any right of "approach" hitherto claimed in peace. Read as a whole, however, the statement must be understood differently. By inviting the master to agree to the officer's visit, the British authorities clearly asserted no claim to board as of right, and no element of force was involved.

International law, established on this fundamental point in the cases of *Le Louis*[9] and *Marianna Flora*,[10] is codified in article 2 of the Convention on the High Seas 1958:—[11]

> "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down in these articles and by other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:
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> (1) Freedom of navigation;
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> (2) . . . (3) . . . (4) . . . .
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> "These freedoms, and others which are recognised by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

5 Statement by Foreign Office official. London *Times*, 5 April 1966.

6 London *Times*, 6 April 1966.

7 Ibid., 12 April 1966.

8 Ibid., 15 April 1966.

9 (18) 2 Dodson 210.

10 (1826), 11 Wheaton 1.

11 H.M.S.O. Cmnd. 584.

The right of approach; State Practice

Exceptions to this general prohibition of interference have, however, been recognized. Gidel says: "By time-honoured custom, warships have the right to ascertain the identity and nationality of private vessels which they meet."[12] Derived from the necessity of suppressing piracy, the extent of this right of approach has been much discussed, controversy turning on the points whether a warship is entitled to send a party to board the merchant ship to examine her papers as well as closing on her, requiring her to show her national flag; and questioning her by hailing.[13] In the case of *Marianna Flora*[14] the Supreme Court of the United States held in 1826 that a warship was entitled to approach a foreign merchant ship, but did so at her peril and must be responsible for any injury which resulted from misunderstanding as to her intentions.

During a protracted correspondence between the British and United States Governments ending in 1859, the latter successfully denied the existence of any customary right of visit in the course of suppressing slaving.[15] The rights of "closing" and requiring colours to be shown were recognized, although it was agreed that the merchant vessel was not bound to stop or await the approach.

The right of approach; codification

During the preparatory work on the Régime of the High Seas by the International Law Commission in 1950, 1951 and 1955, attempts were made to introduce a positive definition of the right of approach, despite the facts that piracy was no longer a serious international problem, and that radio had almost eliminated approach as a means of identification.[16] Instead, the Geneva Convention on the high seas of 1958, in Article 22, followed the negative course of denying a right of visit (boarding), subject to exceptions:—

> "1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
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> (a) That the ship is engaged in piracy; or
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> (b) That the ship is engaged in the slave trade; or
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> (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
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> "2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end it may send a boat under the command of an officer to the

12 *Le Droit International de la Mer*, vol. 1 (1932), p. 289.

13 Ortolan, *Diplomatie de la Mer* (1864), vol. 1, pp. 228-56; Phillimore, *International Law* (1885, 3rd ed.), pp. 522-30; Gidel, *Le Droit International de la Mer* (1932), vol. 1, pp. 288-300; and Memorandum by the Secretariat, with which he is credited, U.N. Docs. A/CN 4/32, 14 July 1950, paras. 20-2. (*I.L.C. Yearbook*, 1950, vol. 2, p. 71.)

14 Note 10, *ante*.

15 Colombos, *International Law of the Sea* (1959, 5th ed.), p. 287.

16 I.L.C. Yearbooks: 1950, vol. 1, pp. 196-8; 1951, vol. 1, pp. 350-4; 1955, vol. 1, pp. 26-35, 229.

suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all consideration.

"3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained."

Of these situations, (b), relating to the slave trade, had not formed part of customary law, although a large number of treaties had granted a right of visit on a reciprocal basis in specific areas.

The general exception of acts covered by powers conferred by treaty is doubtless intended to refer to specific measures to control, e.g., pelagic fishing. Nevertheless, the Charter of the United Nations is a treaty, which in Articles 41 and 42 confers certain powers of interference with sea communications under appropriate conditions. Interference to the extent provided for in the Charter is therefore under powers conferred by treaty, and must be regarded as within the general exception in article 22 of the Convention. However, it must be a matter of construction whether in any particular case powers of interference have been granted by treaty. It may perhaps be argued that the resolution of 20 November 1965, granted such powers and the Russian representative in the Security Council on 9 April seemed to hold that it did.[17] Nevertheless, before Article 41 or 42 can be invoked, the Security Council must determine the *existence* of at least a threat to the peace, in accordance with Article 39 of the Charter. The resolution of 20 November merely determined as regards the situation in Rhodesia that its "continuance in time" constituted a threat to international peace and security. The British Government all along denied that the resolution authorized interference with shipping.[18]

Self-defence and insurgency; State practice

The law of war provides another exception to the general prohibition of interference. The right of visit and search is a strictly belligerent right,[19] permitted—even during an armistice[20]—to prevent neutral ships from carrying contraband, breaking blockades, or rendering unneutral service to the enemy. The extent to which such a right may be exercised in peacetime in consequence of insurrection is disputed, but it is probably true to say that a warship is entitled to stop or even to attack a foreign vessel on the high seas which is heading for the coast with a clear purpose of assisting in armed rebellion.[21] The International Law Commission at its Eighth Session seemed to recognize some such right, but declined to provide expressly for the right because of the danger of abuse.[22]

17 *U.N. Monthly Chronicle*, (vol. III, No. 5) May 1966, p. 10.

18 Mr. Harold Wilson, House of Commons, 21 December 1965. *Hansard*, (H.C.), vol. 722, col. 1919.

19 Phillimore, *International Law* (1885), vol. 1, p. 523.

20 Oppenheim, *International Law*, vol. II (1952, 7th ed.), pp. 848-9. But see Security Council Resolution of 1 September 1951, S/2298/REV. 1 (1951).

21 Smith, *The Law and Custom of the Sea* (1959), p. 70.

22 *I.L.C. Yearbook* 1955, vol. 1, pp. 33-4, and Report of 8th Session, Gen. Ass. Off. Rec., 11th Sess. Supplement No. 9 (A.3159, 1956), p. 30.

The classic statement of this doctrine of self-defence was made in the course of the *Caroline* incident in 1837, where an American ship being used to assist insurgents in Canada was burnt and set adrift over Niagara Falls by British subjects. The American Secretary of State, Webster, maintained that the use of force was justified in time of peace only when there was a "necessity of self-defence instant, overwhelming, leaving no choice of means and no moment for deliberation". This definition, which was accepted by the British Government, allows little room for anticipatory self-defence, or action in self-preservation.

British practice subsequently has not been entirely consistent in this respect, but may be said on balance to recognize a right of action in self-preservation within the narrow limits laid down in the *Caroline Case.*

In 1873, the American steamer *Virginius,* carrying arms to insurgents in Cuba, was captured by the Spanish warship *Tornado* and taken into Santiago. There were 53 of those on board, including British and American subjects, who were summarily tried for piracy and executed. The British Government did not complain of the seizure of the vessel but, arguing that "no pretence of imminent necessity of self-defence could be alleged" after the seizure, successfully demanded compensation for the death of their subjects.[23]

During the Spanish Civil War, on the other hand, when fighting was bitter and both sides claimed a right of self-defence, "all attempts on the part of the Spaniards to obtain legal sanction for visitation, search and seizure upon the high seas ... were met by the United Kingdom and other powers with protest and refusal".[24] By a series of unilateral declarations in 1936, 27 European States declared a policy of non-intervention, by which they undertook to refrain from assisting not only the insurgents, but also the Spanish Government. As one of an elaborate series of measures, the four principal naval powers, the United Kingdom, France, Germany and Italy provided a naval patrol to enforce the policy. Spanish ships of both sides were allowed to visit and search shipping for "contraband" in Spanish territorial waters—a right recognized normally only in war—but were prevented from interfering with shipping outside the three-miles limit, being denied even a right of hot pursuit.

The doctrine of self-preservation might well have been taken as the basis of the Nyon Arrangement of 14 September and the Supplementary Agreement of 17 September 1937, under which, in consequence of attacks by submarines, aircraft and surface vessels on merchant vessels, warships of the signatory powers, the United Kingdom, France and later Italy, were authorized to counter-attack and destroy the attacking vessels. The basis chosen, however, was Part IV of the London Naval Treaty of 1930, reaffirmed in the Naval Protocol

23 Moore, *International Law Digest,* vol. II, p. 895.

24 Padelford, *International Law and Diplomacy in the Spanish Civil Crisis* (1939), p. 26.

of November 1936, the attacks by the submarines being described in the Arrangement as contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy. The extensive literature which arose from the adoption of this basis cannot be studied here.

In recent years, the French Government successfully asserted a right to interfere on the high seas with vessels suspected of carrying arms to the Algerian rebels. One of the last of these incidents concerned the British freighter *West Breeze,* intercepted off the Algerian coast on the high seas by a French naval search party on 23 February 1961, and ordered into Mers-el-Kebir, where the vessel was searched and released. The British Government asked for an explanation and appear to have been satisfied when told that the French Government had reason to suspect that she had arms for the rebels in her cargo of textiles and medical supplies from China consigned to Casablanca.[25]

The practice of the United States Government has been less inconsistent. It did not accept the legality of the seizure of the *Virginius* (see *ante*), rejecting self-defence as justifying the Spanish action. During the Spanish Civil War, the United States made a declaration of non-intervention on 11 August 1936, and followed it with an Embargo Law of 8 January 1937. That this constituted a denial of a right of self-defence seems borne out by the protest of the Spanish Ambassador in Washington in 1938, who asserted that the embargo hindered his government in its struggle against "acts of invasion and aggression committed by foreign elements aiding the Nationalist rebels".[26]

In the Cuban Missile Crisis in 1962, however, President Kennedy asserted the defence of the security of the United States as a reason for action, although justifying it on grounds of authorization by the regional Organization of American States.

Against the right of acting in "self-preservation", may be quoted the dictum of the Danish Presiding Commissioner of the United States-Mexico General Claims Commission in the *U.S.A. (Oriental Navigation Co. Claim) v. United Mexican States,* in 1928, that a warship of a State engaged against insurgents would have no right to interfere if, on the high seas, she met with a neutral vessel bound for a port in the hands of the insurgents.[27]

The right of self-defence on the high seas in time of peace is, therefore, not universally approved. It is probably more circumscribed than the right of self-defence preserved by Article 51 of the Charter, since the practice out of which it has grown has developed entirely against a background of armed insurrection, whereas the right in Article 51 may be exercised, in the opinion of some authorities, even before armed attack occurs. It is certain that the incident of the *Joanna V* presented no such instant, overwhelming necessity for self-defence as would have justified the use of force against her.

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25 London *Times* 1961, 24, 25 and 27 February.

26. *United States Foreign Relations* (1938), vol. I, p. 180.

27 *Opinions of the Commissioners* (1929), p. 23.

Protection by the flag State

On 4 April, the Greek Government refused its consent to the interception of the *Joanna V* by the Royal Navy, the Foreign Ministry pointing out that no government would consent to a foreign power intercepting or intimidating merchant ships under the national flag. Nevertheless, the Greek statement went on: "We abide by the Resolution of the United Nations Security Council on Rhodesia. If the United Nations authorizes the British Government to intercept the vessel, we shall respect the decision." Thus it would seem that the Greek Government intended to refuse its protection to the owners of the ship, if interference was authorized by the United Nations. Deprived of that protection, the owners would have had little chance of success if they sought compensation for the interference.

Interception of the *Manuela;* the facts

On 9 April, the Security Council, determined that the situation created by the imminent arrival of cargoes of oil to sustain the régime in Rhodesia constituted a threat to the peace. By 10 votes to *nil,* with five abstentions, a resolution was adopted, initiated by the United Kingdom which, in the words of her representative: "Should enable my Government to take within the law all steps including force to stop the arrival at Beira of vessels taking oil to the rebel régime."[28]

At 07.30 G.M.T. on 10 April, the *Manuela* was intercepted by H.M.S. *Berwick* as she approached Beira. The master ignored the following message from *Berwick*: "I have instructions from my Government, acting on the resolution of the Security Council, to order you not to proceed to Beira",[29] but stopped when informed that a boarding party was being sent. A boarding officer, with an armed escort of two seamen and a witnessing officer, went on board and was given every assistance. But the master refused to give an undertaking not to proceed to Beira. A further 12 armed seamen were sent and the necessary undertaking was given. The *Manuela* then altered course away from Beira. The boarding party was withdrawn early next day.

Legal authority for placing the resolution on the agenda of the Security Council

Articles 34 and 35 of the Charter authorize any Member of the United Nations to bring to the attention of the Security Council any situation which might lead to international friction.

On 7 April, a request for an emergency meeting that afternoon was sent by the United Kingdom Government to the President of the Security Council, M. Keitla of Mali.[30] The President, desiring to consult other members regarding the meeting, did not convene the

28 U.N. Monthly Chronicle (vol. III, No. 5) May 1966, p. 6. Text of Resolution, ibid., p. 12.

29 Extracted from Ministry of Defence Press Release of 10 April held by author. See also press generally 11 and 12 April 1966; and U.N. Docs. S.7249, 11 April 1966.

30 U.N. Docs. S.7235 (1966).

Council until the forenoon of 9 April.[31] The constitutionality of the delay was disputed before and at the meeting, but to avoid further delay was not then pressed. Article 28 of the Charter provides that: "The Security Council shall be so organized as to be able to function continuously", and Rule of Procedure No. 2 of the Council that: "The President shall call a meeting . . . at the request of any member of the Security Council."[32] The calling of a meeting is thus mandatory upon the President. Discussions of timing to meet the convenience of members have become customary, but consultation is at the President's discretion and meetings have been called without it.[33] The opinion was expressed at the meeting that a delay of 48 hours was excessive. Subsequent correspondence between the United States Representative and the President on the matter was inconclusive.[34]

Constitutional basis of United Nations action

Inasmuch as there is no reference to particular articles of the Charter in the resolution, one is forced to deduce from the words used which articles are being invoked. The Security Council, charged with primary responsibility for the maintenance of international peace and security under Article 24 of the Charter, by their determination on 9 April that a threat to the peace existed must be taken to have invoked Chapter VII of the Charter. Such a determination distinguishes the *Manuela* incident from, for example, the operations in the Congo, where internal order and not international peace was the cause of action, so that there Chapter VII was not invoked. The resolution of 9 April called upon the Portuguese Government and all other States for certain measures not involving armed force (Article 41), and invoked Article 42 by calling upon the United Kingdom to use force, if necessary.

At the beginning of the Korean war, the Security Council resolution of 25 June 1950, recognized a breach of the peace and seems to have intended to apply Article 39. The more crucial resolution of 27 June 1950, "recommends" and does not "decide" that action shall be taken. Disagreement exists as to the basis of the United Nations' action at that time, but there seems to be no dispute that there must be a "decision" before Article 41 or 42 can be applied. There was no such decision in the Korean case and Article 42 could not therefore have been invoked.

The United Nations' Operations in the Congo (ONUC) were authorized by a series of resolutions beginning on 14 July 1960, which authorized the Secretary-General to take the necessary steps to provide the Government of the Republic of the Congo with military assistance until the national security forces were able to meet their

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31 U.N. Monthly Chronicle, May 1966.

32 Provisional Rules of the Security Council, S/96/REV. 4.

33 *Répertoire of Practice of the Security Council* (ST/PSCA/1/Add. 2), pp. 3-4, Case 2.

34 S.7261, 22 April and s.7272, 29 April 1966.

tasks. Not until the resolution of 21 February 1961, was the use of force mentioned, and not until a further resolution of 24 November 1961, was the use of force categorically authorized to facilitate clearing mercenaries from Katanga. Although ONUC was certainly not constituted originally under Article 42, it might appear that its basis should be regarded as being shifted to that Article by the resolution of 24 November. The Secretary-General in 1960 insisted that the Security Council had not invoked either Article 41 or 42. He referred also particularly to the necessity under Article 2, paragraph 7 of the Charter of avoiding interference with the domestic jurisdiction of the Congo. This would have been irrelevant had the Security Council been applying enforcement measures under Article 42, as Article 2, paragraph 7 expressly excludes such measures. During the debate on the resolution of November 24, the Members were concerned to give the Secretary-General a more specific mandate for a limited object and not to change the basis of his authority. The representative of Ethiopia, for example, said that "a requisite measure of force" meant, according to his understanding, that force would be used only if necessary. The United Nations was not being converted into a fighting force merely because it was said that police action was necessary to evict the mercenaries from Katanga.[35]

The International Court of Justice also considered the basis on which ONUC was established. In its Advisory Opinion of 20 July 1962, the Court said: "It is not necessary for the Court to express an opinion as to which Article or Articles of the Charter were the basis for the Resolutions of the Security Council", but held that: "the operation did not involve 'preventive or enforcement measures' against a State under Chapter VII."[36] Whilst this is not conclusive on the applicability of Articles 41 and 42, it suggests that the Court did not feel these to be the appropriate Articles.

The action against the *Manuela*, on the other hand, appears to have had this character of a preventive measure against a State, since it was forcible action against the Greek flag. It is true that the Greek Government had not sought to oppose United Nations action: had said that it would respect any decision to authorize the United Kingdom to intercept; and claimed to have done everything in its power to attempt to stop the delivery of oil cargoes to Beira. Nevertheless, *Joanna V*, a Greek tanker, had entered that port on 5 April. By way of enforcing the Royal Decree of 14 March, the Greek Government struck her off the Greek register, but did not seek the aid of either the United Nations or the United Kingdom to prevent the *Manuela* reaching Beira. It seems correct, therefore, to regard the resolution of 9 April rather as a preventive action under Article 42, than as a police measure such as ONUC, and moreover as the first of its kind.

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35 U.N. Sec. Council Off. Rec., 16th Year, Meetings 973-9 (1961), 977th Meeting, p. 38.

36 *Certain Expenses of the United Nations*, I.C.J., Reports, 1962, p. 177. See also p. 166.

It might be said that such a conclusion was wrong because action was not being taken against a State at all, but against an individual trading owner. In war, the commercial activities of neutral individuals are subject to action by the belligerent States, the neutral States being under a duty to acquiesce and having no occasion to interfere until a belligerent oversteps the boundary of his rights. In time of peace, however, in the absence of any concession of belligerent rights, this is not so.

Relationship between Articles 42 and 43

It was thought, at the time of the Korean Resolutions, that Article 42 could not be invoked in the absence of the special agreements and organization envisaged in Articles 43 to 47. For that reason, action took the form of recommendation rather than of the decision required to invoke Article 41 or 42. The States of the Soviet bloc have frequently asserted that the Security Council was legally impotent in the absence of special agreements, but before the International Court of Justice in the *Expenses Case*,[37] the pleadings of several Western nations also accepted this to be the position. Mr. Chayes, the U.S. representative, for example, referred to the safeguards of Chapter VII as including the Security Council veto and the necessity for prior special agreements.[38] The majority opinion did not deal with this aspect of Article 43, but Judge Bustamante dissenting, said: "The legal question is whether the negotiation of special agreements is, according to the spirit of the Charter, such a basic one that, if such agreements are not concluded, the action ordered should not be undertaken. I incline not to think so." There is no agreement on this point among the writers on international law.

State practice, such as it is, may be said to have tended against the view of Judge Bustamante, and it was probably awareness of the intended departure from practice which led the United States representative to say that the Security Council would be making international law if it approved the resolution of 9 April.[39] Practice, however, developed in the context of the veto and was largely concerned with finding other grounds for action than Article 42. It seems insufficiently settled to constitute a rule of customary law such as would rebut the reasonable presumption that an organ of the United Nations acts constitutionally. Some of the arguments in the *Expenses Case* seemed to suggest that the Security Council could not be said to take a mandatory decision to use enforcement action, when some States have taken part in the action voluntarily. Any such argument seems to be lacking in cogency. The wording of Article 42 is broad, leaves the method of recruitment open and envisages operations by Members of the United Nations, making no reference to Articles 43 to 47. It would hardly be legitimate to deny the right of the Security Council

37 *Certain Expenses of the United Nations*, Pleadings, I.C.J., 1962.

38 *Certain Expenses of the United Nations*, Pleadings, I.C.J., 1962, p. 419.

39 *U.N. Monthly Chronicle*, May 1966, p. 5.

to have recourse to Article 42, where the requisite force can be secured, and the appropriate resolution passed.

In a further respect also the *Manuela* incident is a landmark in the development of the use of force under international control. In Korea, in Egypt with the United Nations Emergency Force, and in ONUC, forces representing a number of member states were deployed under the flag of the United Nations. Now, for the first time, the Security Council authorized a single member of the United Nations to act in its own right with United Nations authority.

Constitutional basis, Portuguese protest

The Portuguese Foreign Minister wrote to the Secretary-General on 27 April, *inter alia*: (a) questioning the validity of the resolution of 9 April in view of the abstention of two of the permanent members of the Security Council; and (b) describing the resolution as a clear denial of the principles of the freedom of the seas and of free access to the sea by land-locked countries, querying whether the Security Council could repeal international law.[40] As to (a), abstention has appeared well established in the practice of the Security Council, though not envisaged in Article 27, paragraph 3. During the period 1949-1963, 93 decisions of a non-procedural character were adopted by the Council by a vote from which one or more of the permanent members abstained. Presidential rulings, and statements by each of the permanent members have affirmed that abstention does not preclude fulfilment of the requirement for the concurring votes of the permanent members.[41] Friedmann, however, suggests the possibility still of a doubt[42] and Mr. Nogueira has now expressed it. His letter stated that he was aware of the jurisprudence of the Council and that a doctrine contrary to the Charter had been admitted according to which the abstention of permanent members is not equivalent to a veto. But:—

(a) this doctrine appeared to have been advanced to deal with matters not involving Chapter VII; and

(b) at a time when the Security Council consisted of eleven members. The abstention of all five permanent members meant the rejection of any resolution, so the Council could never make positive decisions against the simultaneous abstention of the permanent members; and

(c) the Security Council now consists of fifteen members with a requirement of nine affirmative votes for any resolution. The abstention of all five permanent members can, therefore, no longer prevent the requisite majority from passing a resolution.

The letter posed three questions for clarification by the Office of Legal Affairs of the United Nations, the effect of which can perhaps be

40 U.N. Docs. S.7271, 28 April 1966.

41 *Répertoire of Practice of U.N. Organs*, 1955, vol. II, p. 81 and Supplements Nos. 1 to 3.

42 *The Changing Structure of International Law* (1964), p. 269.

summed up as asking whether the non-permanent members of the Council have the opportunity to take decisions concerning peace, war and security and affecting the entire community of nations, without the votes of all or some of the permanent members.

The reply of the Secretary-General on 21 June stated that it was not for him, but for the Security Council itself to give an authoritative interpretation of its resolution of 9 April, of the Charter Articles on which it is based, and of the procedures followed in adopting it. He took it upon himself to say, however, that a detailed legal study prepared for him did not in its conclusions support any of the reservations advanced by the Portuguese Government.[43] Amplifying this, one might say that the new composition of the Security Council does not affect the position of the permanent members and need not cause a change in the practice of the Council. The permanent members still know that the adverse vote of any of them can defeat any proposal on a non-procedural matter, so that if they abstain, they must be assumed to have waived their power of defeating a resolution.

As regards Portugal's point (b), paragraph 2 of the resolution of 9 April called upon the Portuguese Government: "not to permit oil to be pumped through the pipe-line from Beira to Rhodesia", which clearly conflicts with Article 3 of the Geneva Convention on the High Seas of 1958, requiring a State situated between the sea and a State having no sea-coast to accord to the latter free transit through their territory. The Convention makes no mention of war, but international law recognizes that a duty such as that in Article 3 is subject to an exception in the event of war, when in appropriate circumstances the law of neutrality would prevent the supply of munitions of war to a belligerent State having no sea-coast by a non-belligerent State between it and the sea.[44] As a member of the United Nations, Portugal is bound by Articles 2, paragraph 5 and Article 25 of the Charter to refrain from giving assistance to any State against which the Security Council is taking preventive action; and to carry out the decision of the Security Council. As a sanction, interruption of means of communication is specifically envisaged by Article 41 of the Charter. When the Council imposes sanctions interfering with the right of free transit to a land-locked State, it would seem, not that the international right of free-transit is repealed, but that a fresh exception is recognized, comparable with and of equal force with that imposed by the law of neutrality in war. This view appears to be put beyond doubt by the Convention on the Transit Trade of Land-locked States 1965, which amplifies the duty laid on coastal States by Article 3 of the Convention on the High Seas 1958, but in Article 14 provides that:—

> "This Convention does not impose upon a Contracting State any obligation conflicting with its rights and duties as a Member of the United Nations."

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43 S.7373, 21 June 1966.

44 Oppenheim, "International Law" (7th ed.) vol. II, p. 739.

Legal Principles Governing the action against the *Manuela*; Proportionality

The amount of force used by the Royal Navy appears to have been carefully controlled to ensure that proportionate means only were employed to ensure compliance with the resolution of 9 April. In the *Caroline* incident, referred to, *ante*, Secretary of State Webster asserted that a permissible use of force must involve "nothing unreasonable or excessive since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it" The Security Council seems to have been guided by some similar restraint in rejecting an amendment calling for a wider application of force under Article 42, confining itself to the specific objective of preventing the arrival of oil at Beira. It may be that in choosing this alternative, the Council has revealed Article 42 as a more flexible weapon than the bludgeon it had perhaps been thought to constitute.

Summary of conclusions

1. *Freedom of Navigation*

(a) Neither the customary law of the sea nor the Geneva Convention on the High Seas of 1958, Article 22, would have justified the forcible boarding of the *Joanna* on 4 April, although an approach for identification was the right of any warship.

(b) Rebellion, not recognized as belligerency, does not bring into play the law of neutrality. Under the doctrine in the case of the *Virginius*, British practice recognized a very limited right of interference with the ships of nations aiding insurgents, but it is doubtful how far this doctrine still survives. In the absence of open hostilities with the insurgents, any attempt to apply the docrine unilaterally would infringe Article 2, paragraph 4 of the Charter.

(c) Had *Joanna V* been boarded forcibly, but notwithstanding this the Greek Government declined its protection, the owners would have had but a negligible chance of success if they had sought compensation.

2. *Constitutional basis of action against Manuela*

(a) The absence of special agreements under Article 43 of the Charter does not necessarily prevent the Security Council having recourse to Article 42.

(b) The resolution of 9 April constituted enforcement or preventive action by the Security Council under Article 42, and was probably the first occasion on which such action had really been taken. Also for the first time, the Security Council authorized a single member of the United Nations to act in its own right with United Nations' authority.

(c) The validity of the resolution was not affected by the abstention of France and of the Soviet Union.

(d) Sanctions imposed by the Security Council may in certain circumstances represent an exception to the right of free transit for non-coastal States, comparable with that imposed by the law of neutrality.

(e) Only a legitimate minimum of force was used to divert the *Manuela*, and the Security Council displayed moderation in the limited

authority which it gave for the employment of force. This may prove that Article 42 is a more flexible weapon than had been thought.

General

The political wisdom of having recourse to Article 42 of the Charter on this occasion may well be questioned. There must be some disagreement as to the importance of preventing one or two tankers delivering oil to Beira, when set against the chance of more frequent and less responsible recourse to the use of force under Article 42, on the basis of the precedent now established. Against this, the veto of the permanent members of the Security Council is still available. The resolution of 9 April appears, however, to have been completely constitutional. The use of force which it authorizes as preventive action is an important precedent and may prove that Article 42 is a more flexible weapon than had been thought. The United Kingdom has shown her respect for the principle that, except in case of urgent self-defence, lawful use of force is a monopoly of the United Nations itself.