101-1613

Institut de Droit international
Annuaire, Vol. 61, Tome I
Session d'Helsinki 1985
Travaux préparatoires

Institute of International Law
Yearbook, Vol. 61, Part I
Session of Helsinki 1985
Preparatory work

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Justitia et Pace

Editions A. PEDONE - 13, rue Soufflot - Paris

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Printed in France by Bosc Frères, Lyon
ISBN 2-233-00155-9.

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Supplementary Report [1]

Bengt Broms

The Institute of International Law adopted on 2 September 1981 a Resolution suggesting that the Fifth Commission submit a further study in which it would take position on the questions raised in the plenary meetings, in particular:

" — the relationship between the notions of "state of war" and "armed conflict";

— the applicability of the customary rules of international law concerning treaties and of the provisions of the Vienna Convention on the Law of Treaties concerning the termination and suspension of treaties;

— the influence on the subject under study of the rules of the Charter of the United Nations on the prohibition of the use of force;

— in consequence of what has been suggested above, the cases where a party has legal grounds not to execute a treaty."

The observations made by Confrères at the plenary meetings of the Session of Dijon have been reported in the Annuaire, Vol. 59, Part II, at pages 175-244. The draft Resolution adopted by the Fifth Commission at an enlarged meeting is presented at pages 204-209. The observations made on that draft Resolution are at pages 208-239.

The draft Resolution presented during the Dijon Session has been amended in the light of the observations and further consideration

[1] See previous Reports in Annuaire IDI, Vol. 59, Part I, 1981, pp. 201-293; Debates, Part II, pp. 175-244.

by the Rapporteur and is annexed to this draft Report. The changes are as follows:

Preamble, para. 3. The text has been shortened by deleting the words "in so far as the effects of armed conflicts on treaties are concerned".

Para. 4. The words "being fraught with the existence of all types of weapons of mass destruction" have been added following a suggestion of Mr Ustor.

Para. 5. The amendment by Mr Brownlie has been adopted.

Article 1. A reference to "a state of war" has been made to indicate that the state of war is also covered by the draft Resolution. The text follows rather closely the previous text of Article 1 while combining the suggestions of Sir R. Jennings and Mr Ago together with Mr Salmon.

Article 2. The words "The mere outbreak of" replace the words "The occurrence of" adopting the amendment of Sir R. Jennings. The words "the operation of" have been added. The second paragraph has been deleted in the light of the debate.

Article 3. In accordance with the Resolution adopted on 2 September 1981 the customary rules of international law and the provisions of the Vienna Convention on the Law of Treaties concerning the termination and suspension of treaties have been taken into account in the new provision. Paragraph 2 has been added following the suggestion of Mr Ténékidès.

Article 4. The new provision is based on the Resolution adopted on 2 September 1981 referring to the rules of the Charter of the United Nations on the prohibition of the use of force.

Article 5. This provision is connected with Article 4. Especially Mr Tunkin supported by Messrs Brownlie, Salmon and Seyersted have stressed the importance of the definition of aggression in this context.

Article 6. This provision is somewhat similar to Article 3 of the previous draft Resolution. The words "The mere outbreak of" replace, however, as in Article 2 the words "The existence of". Following

the suggestion of Mr Graveson the word "existence" replaces the word "development".

Article 7. The text includes the same legal principle as the previous Article 4. The arguments presented by Mr Wolf justify the inclusion of this provision to the draft Resolution.

Article 8. This provision is somewhat similar to Article 5 of the previous draft Resolution: The word "should" replaces the word "will" in order to indicate that this provision is a recommendation *de lege ferenda.*

Helsinki, 6 January 1983.

Revised Draft Resolution

The Institute of International Law,

Recalling its Resolution at the Christiania session in 1912 on the effects of war on treaties,

Considering that the Charter of the United Nations has prohibited the use of force in international relations but that armed conflicts continue to occur in violation of this prohibition,

Considering that it is therefore appropriate to study the question of the effects of armed conflicts on treaties, that the practice of States varies and that the rules of international law cannot as yet be regarded as having been formulated to a satisfactory extent,

Having in mind that modern armed conflicts, being fraught with the existence of all types of weapons of mass destruction, can take different forms which may raise new legal questions in the treaty relations between States,

Believing that there is a need for the affirmation and clarification of the pertinent principles of general international law,

Adopts the following Resolution:

Article 1

For the purposes of this Resolution, the term "armed conflict" means a state of war or an international armed conflict involving armed operations which by their nature or extent are likely to affect treaties between the parties to the armed conflict, regardless of a formal declaration of war or other determination by either of the parties.

Article 2

The mere outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the

parties to the armed conflict. It renders operative between the parties the treaties which expressly provide that they are to be operative in time of war or during an armed conflict or which by reason of their nature or purpose are to be operative during an armed conflict.

Article 3

A State party to an armed conflict may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

An armed conflict does not entitle the parties to terminate or to suspend the operation of a treaty relating to the protection of the human person contained in treaties of a humanitarian character.

Article 4

A State using its right of self-defence in accordance with the Charter of the United Nations is entitled to suspend the operation of a treaty incompatible with the armed conflict and which is in force between the parties to the armed conflict.

A State complying with a decision by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace and acts of aggression is entitled to suspend the operation of a treaty in case this would be incompatible with the enforcement of such action.

Article 5

A State guilty of aggression in accordance with Resolution 3314 (XXIX) of the General Assembly of the United Nations is not entitled to terminate or to suspend the operation of a treaty in order to take special advantage resulting from aggression.

A State victim of an aggression is entitled to suspend the operation of such a treaty which has been concluded with the aggressor State prior to the aggression in case the treaty is incompatible with the aggression.

Article 6

The mere outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of the bilateral treaties in force between a party to that conflict and third States.

The mere outbreak of an armed conflict between some of the parties to a multilateral treaty does not *ipso facto* terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict, unless the operation of the treaty is rendered impossible by the existence of the conflict.

Article 7

A treaty establishing an international organization is not in itself affected by the existence of a state of war or an armed conflict between any of its parties.

Article 8

At the end of an armed conflict, and unless the parties have agreed otherwise, treaties the operation of which has been suspended should be put again into force between the parties as soon as their operation becomes again possible. It is desirable that the parties to the armed conflict give notification to that effect, either unilaterally or jointly.

Annex

Observations of the Members and invited Members of the Fifth Commission on the Supplementary Report and Revised Draft Resolution.

1. *Observations of Mr Herbert W. Briggs*

Ithaca, New York 14850
7 March 1983.

My dear Colleague:

I have your Revised Draft of 6 January 1983 on "The Effects of Armed Conflict on Treaties" and have carefully reread the debate at Dijon on the subject - much of which had little relevance to our task. The sometimes inviting byways down which a number of our distinguished *confrères* wished us to travel - i.e., the consequences of aggression, the provisions of the Vienna Convention on the Law of Treaties (which explicitly left aside [Art. 73] the effect on treaties of an outbreak of hostilities), the strange suggestion of searching for situations "where a party has legal grounds not to execute a treaty"--all divert attention from the effects of armed conflict on treaties.

For example, Article 3 of your Revised Draft repeats Article 61 of the Vienna Convention on the Law of Treaties which is of general application and is not a consequence of the outbreak of armed conflict. It has no place in our draft, any more than other provisions of the Vienna Convention on termination or suspension of treaties.

Similarly, Articles 4 and 5 should be deleted. It serves no purpose other than propaganda to devise rules as to the legal consequences of "aggression" or of armed action "in self-defence" in the absence of an international tribunal or organ with jurisdiction to determine what State is "guilty" of aggression or is engaged in legitimate self-defence.

We are confronted with a situation in which armed conflict does arise all too frequently and, without international determinations as to the "legitimacy" of the conflict, we must set forth the legal consequences on treaties arising from the fact of armed conflict.

Our first - and most important - rule is that the mere outbreak of armed conflict (whether declared war or not) does not *ipso facto* terminate or suspend treaties in force between parties to the conflict. This is established international law.

Next, the question arises whether a party to the conflict has a legal right under international law to suspend as between the parties to the conflict, the operation of treaties which in its judgment are incompatible with the conduct of hostilities. Abundant practice supports such a right in case of "war" between the parties; and it is only realistic to regard such a right as inherent in parties to an armed conflict. If desirable, an exception can be set forth as to treaties of a humanitarian character (e.g., the Geneva Conventions).

It will also be desirable to include a provision that the outbreak of armed hostilities provides the occasion for applying treaties intended to be operative during war or armed conflict. Although this appears in the second sentence of Article 2, I believe it should be a separate article.

The provisions in Article 6 of your Draft are important and desirable except for the "unless" clause in the second paragraph. The mere outbreak of armed conflict does not terminate any treaty - in particular, a multilateral treaty - and the assumption underlying the "unless" clause is too imprecise to permit formulation of a general rule.

Article 7 is unnecessary because the point is taken care of in Article 6.

The provisions of Article 8 are desirable, possibly as *voeux*.

I understand your attempt as Rapporteur to meet the wishes of some members of the *Institut*. However, I think the 5th Commission is entitled to report that we have examined the suggestions made and find some of them irrelevant or undesirable.

With best wishes,

Herbert W. Briggs

2. *Observations of Miss Krystyna Marek*

Laupen, March 3rd, 1983

Dear Confrère,

Our Secretary-General was good enough to send me your Supplementary Report with the Revised Draft Resolution, asking me to comment on it, even though I am not a member of your Commission.

I could not fail to respond to his invitation and am now sending you my comments on the new text which I have read with the greatest interest.

1. I find myself in agreement with those confrères who are opposed to a definition of "war" or "armed conflict" because I am not convinced of either

its utility or its feasibility. Article 1, defining "armed conflict" by "state of war" or "international armed conflict" does little to dispel my doubts.

I would therefore be in favour of abandoning all academic endeavour at a definition and concentrating instead on a purely functional approach, aiming at determining the field of application of the Resolution. This is the solution chosen by the Four Geneva Conventions of 1949 in their common Article 2, paras. 1 and 2. (I leave aside the extension of such applicability to cases covered by Article 1, para. 4 of the Additional Protocol I of 1977, if only because no question of treaties can arise there). For reasons of convenience the text may be recalled:

"Article 2. — En dehors des dispositions qui doivent entrer en vigueur dès le temps de paix, la présente Convention s'appliquera en cas de guerre déclarée ou de tout autre conflit armé surgissant entre deux ou plusieurs des Hautes Parties contractantes, même si l'état de guerre n'est pas reconnu par l'une d'elles.

"La Convention s'appliquera également dans tous les cas d'occupation de tout ou partie du territoire d'une Haute Partie contractante, même si cette occupation ne rencontre aucune résistance militaire.

"...".

It will be observed a) that the text quoted does not limit the Convention's applicability to cases of actual hostilities but extends such applicability to cases of occupation without fighting (case of Denmark during World War II) for the obvious reason that even such cases may call for humanitarian action; b) that, on the other hand, it does not extend such applicability to cases of mere declarations of war with strictly nothing happening in their wake (cases of Turkey and Latin American States during World War II) for the equally obvious reason that no need of humanitarian action whatsoever can arise in such cases. However legitimate the distinction from the point of view of the Geneva Conventions, I believe that *both* these situations are relevant to the problem here under discussion. (*Cf.* in particular observations of Mme Bindschedler and M. Münch, Annuaire Dijon, II, pp. 213-214).

Summing up on this point: I would suggest that Article I be remodelled in a purely functional spirit, covering all - and not merely some - situations in which the problem of treaty survival may arise and in which therefore the Resolution should apply.

2. Concerning Article 2 - as well as Article 6 - I have doubts as to the wording "The mere outbreak of war...", though I am aware of the discussion which led to its adoption. In fact, the expression could possibly be taken to mean that "the mere outbreak" has certain consequences for treaty survival which further developments may no longer have. To be quite explicit: the formula could possibly be interpreted to mean that, in case of Article 2, the "mere outbreak" does not "*ipso facto* terminate or suspend treaties..." but that further hostilities may have such effect. To avoid all ambiguity, I would therefore suggest the adoption of the Christiania formulation reading: "L'ouverture et la poursuite des hostilités"...

More particularly, Article 2, first sentence, lays down the principle of treaty survival in what seems to be a categorical form which is later contradicted in articles which follow. In the second sentence, it specifically lists two categories of treaties which survive the outbreak of war or armed conflict, while a third category is, surprisingly enough, listed in the second para. of Article 3 which deals with an altogether different matter. I wonder whether it would not be more coherent to a) lay down the general principle in a less peremptory manner and b) list all - and not only some - categories of treaties which certainly do, or at least should, survive. Here is a very tentative suggestion of redrafting:

"Article 2. The outbreak and pursuit of war or armed conflict does not *ipso facto* terminate or suspend all treaties in force between the parties to the conflict. In particular, it does not affect: a) treaties which expressly provide for their continued application in time of war or armed conflict, b) treaties concluded specifically to govern State conduct in time of war and armed conflict, c) treaties creating objective situations valid *erga omnes*, d) treaties relating to the protection of human rights, except as provided for in such treaties."

3. It would seem to me that a new Article 3 should necessarily follow, dealing with those categories of treaties which obviously do not survive war or armed conflict, such as treaties of a predominantly political (*e.g. alliances*) or technical (*e.g.* communications) character, as well as treaties the very application or interpretation of which is claimed to be the reason for the outbreak of war or armed conflict (this last category being taken over from the Christiania resolution). A second para. of this new article should raise the question of a possible severability of treaty provisions on the lines of Articles 3 of the Christiania resolution.

4. What would remain of the present Article 3, after the incorporation of its second para. into Article 2, would be para. 1 which embodies a general and obvious principle, resulting from an obvious situation of fact and, as such, not specifically relevant to war or armed conflict. I would suggest its deletion.

5. With Articles 4 and 5 the Resolution takes a turning which is as dangerous as it is unrealistic.

I am aware of certain opinions among the confrères which favour this kind of approach, just as I am aware of opposite - and apparently more numerous - views. It is certainly not my intention to re-open here the discussion of the subject in all its fullness and complexity. I would just recall: a) that there is little chance of a qualification of aggression forthcoming in any impartial and authoritative manner, but that there is every certainty of such qualification being effected by the parties themselves in a manner which will be just as reciprocal as inconclusive, b) that no legal regulation of war or armed conflict is possible on any other basis than the equality of the parties, whether the subject-matter of such regulation is the conduct of hostilities, the protection of the human person or the law of treaties. The idea that one State should, *durante bello*, be given free hand with respect to its treaty obligations while

the other should be denied such freedom, is about as realistic as the idea of one State complying with the laws and customs of war in face of an adversary not bound by such laws and customs. It is even less likely that one party will either, in a suicidal mood, qualify itself as "guilty of aggression" or submit to such qualification by anyone else, and be kind enough consequently to abide by the prohibition formulated in Article 5, para. 1, in the proclaimed absence of reciprocity. Once again, we are facing here what Lauterpacht called "the unavoidable mutuality of obligations" which indeed cannot "be set aside by a terminological device." (The Limits of the Operation of the Law of War, BYBIL 1953, p. 223).

As to what will happen *after* the conflict, it is an altogether different matter, historical experience tending to show that the *ex post* qualification will be the work of the victor. It should not be overlooked in this context that the party, qualified by some as victim of aggression, may not necessarily emerge victorious from the contest, unless of course we subscribe to Erich Kaufmann's view of war as judgment of God.

These then are unfruitful exercises and I venture to suggest that this line of approach be definitely abandoned and that the resolution concentrates instead on what seems the heart of the matter, *i.e.* the fate of all that enormous mass of treaties which do not obviously fall into any of the two clear categories: those which do and those which do not survive the conflict.

6. The intention of the Draft Resolution clearly is to salvage the reasonably possible maximum of the fabric of law *in extremis*. This exactly was the intention underlying the Politis report which led to the adoption of the Christiania resolution. It is an attitude which I fully share, particularly with regard to treaties concerning the rights and standing of individuals.

The apparent lack of uniformity in the practice of States and the judicial decisions in this field and the resulting doubt as to the existence of clear rules make it necessary to formulate such rules *de lege ferenda*. My personal feeling is that the Resolution should recommend to States: a) continued application *durante bello* of all treaties which are not, in the words of Judge Cardozo, "incompatible with the policy of the government, with the safety of the nation or with the maintenance of war" (*Techt v. Hughes*), special emphasis being laid on treaties concerning the rights and standing of individuals, b) their express confirmation *post bellum*, if only for reasons of clarity, c) a re-negotiation *post bellum* of all other treaties with a view to their possible revival, the result of such re-negotiation to be clearly stated.

All this could form the contents of an Article 4.

7. If the above were accepted, the present Article 6 would become Article 5 and would include the first para. only, since para. 2 deals with a different issue. As to "mere outbreak", see above, p. 10.

8. I would suggest combining the present para. 2 of Article 6 with the present Article 7, since both deal with multilateral treaties. The former could then be re-formulated so as to distinguish between termination and suspension,

while taking into account the experience of the 1947 peace treaties. A possible re-drafting could read:

> "Multilateral treaties are not terminated by the outbreak and pursuit of war or armed conflict. Their application may however be suspended between the parties engaged in war or armed conflict or between such parties and other parties to such treaties, if such application is rendered impossible by the existence of war or armed conflict.
>
> "In particular, a treaty establishing an international organization is not affected by the existence of war or armed conflict between any of its parties."

9. The present Article 8 would disappear in case my suggestion concerning a new article 4 were accepted.

10. I should like finally to make two observations concerning the preamble.

a) I would suggest deletion in para. 2 of the words "in violation of this prohibition" which seem to me irrelevant to the issue and which moreover may exclude certain types of conflicts from the operation of the Resolution;

b) With regard to para. 4, I frankly fail to see the relevance of the types of weapons to the problem of treaty survival.

With kind regards,

Yours sincerely,

Krystyna Marek

3. *Observations of Mr Shabtai Rosenne*

Jerusalem, 6 February 1983

My dear Friend and Colleague:

I have given careful consideration to the Supplementary Report you have prepared for the Fifth Committee, also in the light of our conversation in New York during the last session of the General Assembly. While I think you have covered adequately the main points which emerged at Dijon -- which unfortunately I had to leave before your report was examined -- I would like to suggest a few amendments to your revised draft resolution.

1. The second preambular paragraph may go too far in suggesting that the Charter of the United Nations contains a blanket provision against the use of force in international relations in all circumstances. The General Assembly has not gone so far, for instance in resolution 3314 (XXIX), 14 December 1974, on the definition of aggression or in article 6 of that definition; I would propose therefore that you make an appropriate adjustment of the opening phrase. As for the phrase beginning "but that armed conflicts..."; I think that this could

well stand as a separate preambular paragraph, commencing "*Considering*, nevertheless, that...".

2. Preambular paragraph 3. I suggest to drop from "and that the rules..." to the end of the paragraph.

3. Preambular paragraph 4 should commence: "*Bearing in mind* that armed conflicts today are fraught with new dangers deriving from the existence etc." I would drop the word "legal" before "questions".

4. Preambular paragraph 4 should commence "*Conscious* of the need for..."

5. Article 1, fourth word from the end: For "either" read "any or all".

6. Article 2, second sentence, page 5, line 2. Replace "the parties the treaties" by "them those".

7. Article 4. Revise to read:

A State exercising its right of self-defence in accordance with the Charter of the United Nations may suspend the operation of a treaty in force between it and any other party to the armed conflict continued operation of which is incompatible with the armed conflict.

A State complying... operation of a treaty whenever the application of the treaty would be incompatible with the decision of the Security Council.

8. Article 5. Since the expression "guilty of aggression" does not appear in the Charter of the United Nations or in article 75 of the Vienna Convention or in the definition of aggression, is it wise to introduce that concept here? Apart from that, after the word "aggression" add "against another State" and replace "is not entitled to... or to..." by "may not terminate or...".

Revise second paragraph to read:

A State victim of an act of aggression may suspend the operation of such a treaty which it has concluded with the aggressor State before the aggression whenever the treaty is incompatible with the situation created by the act of aggression.

9. Article 8. I recommend to bring this closer into line with article 72 of the Vienna Convention on the law of treaties, so that the phrase commencing in the second line should read "otherwise, the operation of treaties which have been suspended shall be resumed as soon as possible."

I would hope - and I supported Professor Castrén in this at the recent joint meeting of the Bureau and the Commission des Travaux - that it will be possible to complete action on your valuable reports at Cambridge. I do not think this will take up too much time now, especially if the Confrères who are members of the Fifth Commission are able to co-operate.

I am very appreciative of your conscientious work as rapporteur on what is an extremely delicate topic.

With all best wishes,

Yours sincerely.

Shabtai Rosenne

4. *Observations de M. Jean Salmon*

Bruxelles, 28 mars 1983

Préambule paragraphe 4

Je ne pense pas que l'introduction de l'idée de M. Ustor soit opportune à cette place et sous cette forme. En effet le fait que les armes de destruction massive puissent être utilisées dans un conflit armé ne paraît pas être un des éléments retenus dans votre typologie comme affectant le sort des traités. A mon sens l'idée ne doit apparaître au préambule que si elle sert à quelque chose dans celui-ci ou pour annoncer un développement dans le dispositif de la résolution. Comme cela n'est pas le cas, il vaut mieux supprimer la mention.

Article 3 — premier alinéa

Le texte en lui-même ne me dérange pas.

Il semble être une application de l'article 61 de la Convention de Vienne sur le droit des traités (impossibilité d'exécution). Ce qui me met mal à l'aise, c'est que c'est *la seule* hypothèse d'application de la Convention de Vienne que vous invoquiez alors qu'il me paraît qu'il peut y en avoir d'autres :

— le traité lui-même peut prévoir qu'il sera suspendu ou éteint en cas de conflit (art. 5 et 57) ;

— les parties peuvent convenir *durant le conflit* que le traité est suspendu ou disparaît (*idem*) ;

— le traité peut être suspendu ou éteint lorsque le conflit ou ses effets constituent une violation substantielle d'un traité ;

— le conflit peut enfin être constitutif d'un changement fondamental de circonstances susceptibles d'être invoquées comme motif pour mettre fin au traité ou pour s'en retirer (art. 62 de la Convention de Vienne).

Si la Commission est disposée à partager ce point de vue, deux possibilités me paraissent s'offrir à elle :

1° ou bien mentionner les quatre situations à l'article 3 et pas seulement une seule : l'impossibilité d'exécution (art. 61) ; mais cette rédaction alourdira me semble-t-il passablement la résolution;

2° ou bien faire un renvoi général à la Convention de Vienne englobant les divers chefs possibles en vertu desquels un traité peut être suspendu ou prendre fin. Dans cette branche de l'alternative, le premier alinéa de votre article III pourrait prendre une forme du genre de celle-ci :

> " L'ouverture (the outbreak) d'un conflit armé peut constituer une cause d'extinction des traités ou de suspension de leur application, conformément aux dispositions de la Convention de Vienne sur le droit des traités du 29 mai 1969 " ou encore :

> " La présente résolution ne porte pas atteinte aux possibilités d'application de la Convention de Vienne sur le droit des traités du 29 mai 1969, dans ses dispositions relatives aux causes d'exinction des traités ou de leur application en cas d'ouverture d'un conflit armé. "

Vous noterez que cette rédaction ne prend pas position sur *qui* peut invoquer la suspension ou l'extinction du traité. J'estime, en effet, que ce ne sont pas seulement les Etats parties au conflit, mais tout Etat partie au traité qui est affecté par le conflit.

Article 3 — deuxième alinéa

Je suis partisan de l'idée contenue dans cet alinéa mais sa rédaction est sans doute délicate. M. Seyersted — qui m'a obligeamment transmis ses observations — propose de supprimer les mots " contained in treaties of a humanitarian character ". Je suppose que, par là, il entend sauvegarder les dispositions relatives à la protection des droits de l'homme quelle que soit la nature du traité dans lequel les dispositions sont insérées. Mais en supprimant la dernière ligne de l'article il me paraît aller au-delà du droit positif.

La plupart des conventions relatives à la protection des droits de l'homme contiennent des clauses de dérogation en cas de guerre (ainsi l'art. 15 de la Convention européenne des droits de l'homme, l'art. 4 du pacte relatif aux droits civils et politiques, l'art. 27 de la Convention de San José, etc.).

Il n'en demeure pas moins que le droit de dérogation est limité par un standard minimum humanitaire (*cfr.* C.I.J., *Détroit de Corfou, Recueil*, 1949, p. 22, art. 3 des conventions de Genève, art. 60 § 5 de la Convention sur le droit des traités).

La rédaction que vous proposez et qui reprend les termes de l'art. 60 § 5 de la Convention de Vienne sur le droit des traités est certainement, à ce titre, défendable.

On pourrait néanmoins en garder l'esprit et couvrir plus largement l'hypothèse envisagée par une rédaction du genre suivant :

> " Un conflit armé n'autorise pas les parties à mettre fin à, ou à suspendre, l'application des dispositions d'un traité qui ont un caractère de droit humanitaire. "

Le but d'une telle rédaction — qui ne me satisfait pas entièrement — serait de couvrir non seulement les *traités* humanitaires, mais aussi les *dispositions* humanitaires dans un traité quelconque.

Pour bien montrer que l'idée exprimée dans l'article 3, deuxième alinéa, vaut aussi pour les hypothèses envisagées aux articles 4 à 6, je me demande s'il ne faut pas faire de cette disposition un article à part situé entre les actuels articles 6 et 7.

Articles 4 et 5

Je partage l'opinion de M. Seyersted qu'un Etat utilisant son droit de légitime défense individuelle ou *collective* peut dénoncer ou suspendre l'application de traités à titre de sanction contre l'agresseur.

De plus, l'article 4 alinéa 1 et l'article 5 alinéa 2 me paraissent couvrir la même hypothèse puisque la victime d'agression est en état de légitime défense en vertu de l'article 51 de la Charte. Ne faut-il pas souder ces deux alinéas ?

En outre j'estime que les Etats tiers, même s'ils ne sont pas tenus par une alliance (légitime défense collective) ont l'obligation de s'abstenir d'aider un agresseur ce qui peut affecter l'application de certains traités. Pour l'article 4, alinéa 2, je remplacerais seulement le "is entitled to" par "must".

Article 5 alinéa 1

D'accord avec le texte.

L'Article 6

Il envisage l'hyopthèse des relations entre une partie au conflit et un ou plusieurs Etats tiers.

Votre rédaction actuelle laisse dans le vide les cas où l'Etat tiers serait en droit de suspendre ou de mettre fin au traité.

A mon sens ce droit n'est pas limité à la seule hypothèse que vous envisagez "unless the operation of the treaty is rendered impossible by the existence of the conflict". Il s'étend tout d'abord aux hypothèses que je vous propose d'envisager à l'article 3 alinéa 1.

Le texte que je vous propose à cet égard couvre aussi bien le cas des Etats parties au conflit que les tiers à ce conflit.

Par ailleurs, j'estime qu'un conflit armé peut créer une situation rendant l'application du traité impossible pour le tiers soit parce que ce serait incompatible avec :

— des obligations de légitime défense collective contre l'agresseur,

— des obligations découlant de décisions du Conseil de sécurité,

— des obligations de ne pas aider un Etat considéré comme agresseur,

— des obligations découlant de la neutralité,

— des obligations découlant du principe de non-intervention.

Ne faudrait-il pas dès lors essayer de fondre l'article 6 avec l'article 2 car il y a identité de principe et s'assurer que la rédaction des exceptions qui suivent couvre aussi bien l'hypothèse des parties au conflit que celle des tiers au conflit ?

Vous auriez ainsi une résolution ayant la structure générale suivante :

Art. 1. — Définition de conflit armé.

Art. 2. — Principe général que le conflit armé n'est pas *par lui-même* une cause de suspension ou de terminaison des traités entre parties au conflit ou à l'égard des tiers, pour les traités bilatéraux comme pour les traités multilatéraux.

Art. 2 bis. — Le conflit armé rend applicables certains traités.

Art. 3. — Réserve générale des cas prévus par la Convention de Vienne.

Art. 4-5. — L'hypothèse de l'agression :

— autorise les victimes et les tiers ;

— n'autorise pas l'agresseur ;

— n'autorise pas l'agresseur ;

— le Conseil de sécurité peut ordonner.

Nouvel art. 6. — L'aide à une partie à un conflit armé peut être incompatible avec les obligations découlant de la neutralité ou du principe de non-intervention.

Art 6 bis. — On ne peut déroger aux dispositions de droit humanitaire.

Art 7. — Les organisations internationales.

Art. 8. — Souhait de remise en vigueur.

Jean Salmon

5. *Observations of Mr Dietrich Schindler*

Zollikon, July 15, 1983

My dear Colleague,

I am sorry to be so late in responding to your Supplementary Report of January 1983. As I only had a limited time to study the new draft resolution and to reflect on possible modifications I will restrict myself to a few remarks. I believe that a thorough discussion will be necessary by the Fifth Commission in Cambridge.

I could agree with Articles 1 and 2.

I can also agree with Article 3 but believe that it should be completed. You propose this Article in order to comply with the desire, expressed at the Dijon session, to take a position on the question of the applicability of the customary rules concerning treaties and of the provisions of the Vienna Convention on the Law of Treaties. I have some doubts that the two provisions of Article 3 sufficiently meet this desire. Would it not be necessary to refer also to the rules on the termination or suspension of the operation of a treaty as a consequence of its breach (Article 60) and on the fundamental change of circumstances (Article 62), possibly also to other rules mentioned by Mr Salmon (Annuaire 1981 II 220)?

As to Articles 4 and 5, I could not agree with their present wording. No doubt, the resolution must take into account the prohibition of the use of force in international relations. Yet, the two Articles put this question too much into the centre of the resolution. First, as I implied in earlier observations. State practice since 1945 does not confirm that parties to armed conflicts invoke aggression by the other party as a ground for terminating or suspending the operation of treatics. Secondly, the criterion of aggression or self-defence will prove impracticable and inapplicable in most armed conflicts. Hardly any of the armed conflicts which have taken place since 1945 would have permitted a clear identification of the aggressor and of the victim of aggression.

In most cases the factual situation has been much too complex to be brought under the simple antithesis "aggressor - victim of aggression" or "armed attack - self-defence". If the resolution is based on this antithesis, the question of the effect of armed conflicts on treaties will in practice be as insoluble as that of identifying the aggressor. Rather than clarifying the law, the resolution will increase the existing insecurity. Several confrères at Dijon expressed similar apprehensions (Schachter p. 224, Briggs p. 225, Münch p. 225, possibly El-Erian, p. 232, who suggested a mere "saving clause" with regard to aggression).

In my opinion a solution along the following lines would be better suited to the situation: First, the resolution ought to state that any party to an armed conflict, not only a State acting in self-defence, is entitled to suspend the operation of a treaty incompatible with the armed conflict. It would be useful to illustrate this principle by giving some examples of treaties which are "incompatible with the armed conflict".

Secondly, as an exception to this principle, I would accept the provision (now contained in Article 5, par. 1) that a State guilty of aggression is not entitled to terminate or suspend the operation of a treaty in order to take special advantage resulting from the aggression. The adoption of this exception (and the deletion of Art. 4, par. 1 and Art. 5, par. 2) would have the effect that the question of the legality of the use of force would not have to be raised in all cases of treaties which are "incompatible with the armed conflict". Thirdly, as a further exception to the mentioned-before principle I would add the provision of Article 4, par. 2, concerning decisions of the Security Council.

Article 6 could be supplemented by the provision that obligations of neutrality constitute a ground for suspending contradictory treaty obligations, *e.g.* treaties on arms supply.

I apologize for the incompleteness of my remarks, and for possible errors. I am looking forward to seeing you in Cambridge.

Sincerely,

Dietrich Schindler

6. *Observations of Mr Finn Seyersted*

Oslo, 1. February 1983

Kjære Broms,

I am pleased with your draft on the effects of armed conflicts on treaties, which I think represents a good solution of the problems we discussed in Dijon. I now only have some proposals of detail and amalgamation:

Preamble, second paragraph: Your text follows loyally the text of the Dijon resolution, but I would suggest the following broader formulation: "Considering that war has since been outlawed, but that...", in order to take account of the earlier Briand-Kellogg Pact and the prohibition of war under general international law binding even upon non-members of the UN.

Article 3: I suggest deleting the last line ("contained in treaties of a humanitarian character").

Articles 4 and 5, second paragraph: I propose amalgamation of these and - moreover - to delete in all three places the requirement that the treaty must be incompatible with the armed conflict, action or aggression, confining instead the provisions to treaties of a non-humanitarian nature. I feel that the evaluation of incompatibility is imprecise and should be left to the victim of aggression - and even that he must be entitled to apply as a sanction the denunciation of any non-humanitarian treaty. I suggest adding three words on the first line of Art. 4 as follows: "A State using its right of *individual or collective* self-defence...". This would render the second paragraph redundant. The substantive reason for this proposal is that states are entitled under general international law to aid the victim of aggression even if the Security Council is unable to act.

Article 5: I suggest deleting the last line of each paragraph ("in order to take special advantage resulting from aggression" and "in the case the treaty is incompatible with the aggression"). - If the second paragraph is not amalgamated with Art. 4, I suggest deletion of the words "and" on the first line of the second paragraph and "such" on the second line, but adding "non-humanitarian". The second paragraph would then read: A State victim of aggression is entitled to suspend the operation of a non-humanitarian treaty which has been concluded with the aggressor State [prior to the aggression]". I even suggest deleting the words between square brackets, in recognition of the fact that any non-humanitarian treaty concluded after the aggression is likely to be void under art. 52 of the Vienna Convention on the Law of Treaties (coercion of a state by the threat or use of force).

Article 6: I propose deletion of the words "the existence of" on the last line, trusting that this, too, would meet Mr Graveson's point, covering both outbreak and development of the conflict.

I enclose a copy of the text where I have inscribed these proposals and some other - mostly drafting - suggestions intended partly to eliminate a few words that do not appear to add to the meaning and partly to facilitate translation into other languages. I am sending a copy of these comments to the other members of the commission.

Med vennlig hilsen

Finn Seyersted

Amendments proposed by Mr Finn Seyersted

Revised Draft Resolution

The Institute of International Law,

Recalling its Resolution at the Christiania session in 1912 on the effects of war on treaties,

Considering that *war or aggression has since been outlawed* [the Charter of the United Nations has prohibited the use of force in international relations] but that armed conflicts continue to occur in violation of this prohibition,

Considering that it is therefore appropriate to study the question of the effects of armed conflicts on treaties, that the practice of States varies and that the rules of international law cannot as yet be regarded as having been formulated to a satisfactory extent,

Having in mind that modern armed conflicts, being fraught with the existence of all types of weapons of mass destruction, can take different forms which may raise new legal questions in the treaty relations between States,

Believing that there is a need for [the] affirmation and clarification of the pertinent principles of general international law,

Adopts the following Resolution:

Article 1

For the purposes of this Resolution, the term "armed conflict" means a state of war or an international armed conflict involving armed operations which by their nature or extent are likely to affect treaties between the parties to the armed conflict, regardless of a formal declaration of war or other determination by either of the parties.

Article 2

The mere outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties [in force between the parties to the armed

conflict]. It renders operative [between the parties the] treaties which expressly provide that they are to be operative in time of war or during an armed conflict or which by reason of their nature or purpose are to be operative during an armed conflict.

Article 3

A State party to an armed conflict may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

An armed conflict does not entitle the parties to terminate or [to] suspend the operation of a treaty relating to the protection of the human person [contained in treaties of a humanitarian character].

Article 4

A State using its right of *individual* or *collective* self-defence in accordance with the Charter of the United Nations is entitled to suspend the operation of a *non-humanitarian* treaty [incompatible with the armed conflict and which is] in force between the parties to the armed conflict.

A State complying with a decision by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace and acts of aggression is entitled to suspend the operation of a *non-humanitarian* treaty [in case this would be incompatible with the [enforcement of such] action].

Article 5

A State guilty of aggression in accordance with Resolution 3314 (XXIX) of the United Nations General Assembly is not entitled to terminate or [to] suspend the operation of a treaty [in order to take special advantage resulting from aggression].

A State victim of [an] aggression is entitled to suspend the operation of [such] a *non-humanitarian* treaty which has been concluded with the aggressor State prior to the aggression [in case the treaty is incompatible with the aggression].

Article 6

The mere outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of [the] bilateral treaties in force between a party to [that] *the* conflict and third States.

The mere outbreak of an armed conflict between some of the parties to a multilateral treaty does not *ipso facto* terminate or suspend the operation of [that] *the* treaty between other contracting States or between them and the States parties to the armed conflict, unless the operation of the treaty is rendered impossible by [the existence of] the conflict.

Article 7

A treaty establishing an international organization is not in itself affected by [the existence of] a [state of] war or [an] armed conflict between any of its parties.

Article 8

At the end of an armed conflict, and unless the parties have agreed otherwise, treaties the operation of which has been suspended should be put again into force between the parties as soon as their operation becomes [again] possible. It is desirable that the parties to the armed conflict give notification to that effect, either unilaterally or jointly.

7. *Observations de M. Georges Ténékidès*

92210 Saint-Cloud, le 9 avril 1983

Mon cher Confrère,

Etant ces derniers temps constamment en voyage, ce n'est que tout récemment que j'ai pris connaissance de votre rapport définitif sur " Les effets des conflits armés sur les traités ". Je vous félicite pour cet excellent travail qui ne manquera pas de réunir, au sein de notre compagnie, un grand nombre de suffrages. J'ai également eu sous les yeux les observations de notre confrère Seyersted.

Je vous remercie d'avoir tenu compte de ma suggestion concernant les droits de l'homme (article 3 para. 2 de votre projet). Mon amendement se fondait non seulement sur le devoir de ne point rester en deçà de la Résolution de Christiania de 1912 (Annuaire de l'Institut, Rapport de N. Politis, " Effets de la guerre sur les obligations internationales et les contrats privés ", 1910, pp. 251 et s., 1911, pp. 200 et s. et 1912, pp. 611 et s.) mais aussi et surtout sur la nécessité de tenir compte de la récente évolution du droit international qui, de plus en plus renforce la garantie internationale *collective* des droits de l'homme.

L'adjonction d'un second paragraphe à l'article 3 de votre projet de résolution me trouve donc, comme vous le pensez, entièrement d'accord.

Je me permets toutefois de formuler quelques réserves portant sur le libellé de ce paragraphe. J'estime en effet que le membre de phrase "contained in treaties of a humanitarian character" limite indûment la portée d'une disposition qui devrait viser la protection *générale* des droits de l'homme. Je me demande si, en l'état actuel de votre texte, d'aucuns ne seraient pas amenés à penser que seules les Conventions de Genève sont visées. En tout état de cause de difficiles problèmes d'interprétation ne manqueraient pas de surgir.

Je propose donc d'élargir le champ d'application de la règle prévoyant le maintien en vigueur — malgré la survenance d'un conflit armé entre les co-contractants — des traités portant protection des droits de l'homme.

Au point de vue rédactionnel ma proposition pourrait être formulée sous une forme alternative. Elle consisterait :

— soit à biffer purement et simplement la phrase "contained in treaties of humanitarian character" (tel est aussi l'avis de notre confrère Seyersted) ;

— soit de rédiger la phrase finale du second paragraphe de l'article 3 de la façon suivante : "a treaty relating to protection of fundamental human rights".

Reste à savoir si le maintien en vigueur des traités concernant les " droits de l'homme " au sens technique du terme épuise la question. Il m'est difficile de l'affirmer. Une controverse avait surgi autrefois — avant l'apparition dans le cadre du droit positif du concept de " droit international de l'homme " — aussi bien en doctrine qu'en jurisprudence, sur le point de savoir si les dispositions conventionnelles concernant les droits individuels (quels qu'ils soient) devaient ou non rester en vigueur malgré la survenance de l'état de guerre entre co-contractants (v. entre autres : sentence de la Cour Permanente d'Arbitrage du 7 novembre 1910 dans l'affaire des Pêcheries des côtes de l'Atlantique Nord, R.G.D.I.P., 1912, p. 453 ; plusieurs décisions des tribunaux des Etats-Unis ; jurisprudence constante des tribunaux helléniques; *adde :* G. Scelle, " De l'influence de l'état de guerre sur le droit conventionnel ", Journal de Droit International, Clunet, 1950, pp. 26-84).

Accepterions-nous d'aller au-delà de la notion actuelle des droits de l'homme tels qu'ils apparaissent par exemple dans la Convention européenne de sauvegarde ou dans le Pacte des Nations Unies ? Accepterions-nous d'envisager, afin de les intégrer dans le deuxième paragraphe de l'article 3, toutes sortes de droits individuels d'origine conventionnelle ? Je pose simplement la question sans proposer pour l'instant de solution, quitte à revenir sur ce point au cours de nos discussions à l'Institut.

Croyez, mon cher Confrère, à mes sentiments cordialement dévoués.

Georges Ténékidès

The effects of armed conflicts on treaties

(*Fifth Commission*)

Addition to the Supplementary Report

Bengt Broms

The supplementary report and proposed draft resolution of the Fifth Commission were discussed during the Session of Cambridge at two meetings. The following members and Colleagues were present: *Briggs, Castrén, Marek, McDougal, Mosler, Rosenne, Röling, Salmon, Schindler, Seyersted, Ténékidès, Wang, Wolf* and *Broms.*

After several changes had been made to the revised draft resolution it was unanimously adopted at the second meeting. It was also felt that the item is ready for a discussion at the next session of the Institute of International Law.

In conclusion I would again like to express my thanks to those members and interested colleagues who have made written and oral comments.

Helsinki, 31 January 1984.

Draft Resolution

The Institute of International Law,

Recalling its Resolution at the Christiania session in 1912 on the effects of war on treaties,

Considering that the Charter of the United Nations has prohibited the illegal use of force in international relations but that armed conflicts continue to occur in violation of this prohibition,

Considering that it is therefore appropriate to study the question of the effects of armed conflicts on treaties, and that the practice of States varies,

Conscious of the need for the affirmation and clarification of the pertinent principles of international law,

Adopts the following Resolution:

Article 1

For the purposes of this Resolution, the term "armed conflict" means a state of war or an international armed conflict involving armed operations which by their nature or extent are likely to affect treaties between the parties to the armed conflict, regardless of a formal declaration of war or other determination by any or all of the parties.

Article 2

The mere outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict.

Article 3

The outbreak of an armed conflict renders operative between

the parties the treaties which expressly provide that they are to be operative during an armed conflict or which by reason of their nature or purpose are to be regarded as operative during an armed conflict.

Article 4

A state party to an armed conflict may invoke the impossibility of performing a treaty as well as other relevant provisions of the Vienna Convention on the Law of Treaties as a ground for the suspension of the operation or termination of a treaty.

Article 5

An armed conflict does not entitle the parties to terminate or to suspend the operation of treaty provisions relating to the protection of the human person.

Article 6

A State using its right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend the operation of a treaty incompatible with the armed conflict.

Article 7

A State complying with a decision by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace and acts of aggression shall terminate or suspend the operation of a treaty which would be incompatible with such action.

Article 8

A State committing aggression within the meaning of the Charter of the United Nations and Resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty to benefit from aggression.

Article 9

The mere outbreak of an armed conflict does not *ipso facto*

terminate or suspend the operation of the bilateral treaties in force between a party to that conflict and third States.

The mere outbreak of an armed conflict between some of the parties to a multilateral treaty does not *ipso facto* terminate or suspend the operation of that treaty between other contracting States or between them and the States parties to the armed conflict, unless the operation of the treaty is rendered impossible by the existence of the conflict.

Article 10

A treaty establishing an international organization is not in itself affected by the existence of a state of war or an armed conflict between any of its parties.

Article 11

Without prejudice to the application of the previous Articles the obligations resulting from neutrality or non-intervention may be a ground for the suspension of the operation of contradictory treaty provisions.

Article 12

At the end of an armed conflict, and unless the parties have agreed otherwise, treaties the operation of which has been suspended should again be applied between the parties as soon as their operation becomes possible. It is desirable that the parties to the armed conflict give notification to that effect, either unilaterally or jointly.

The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective

L'élaboration des grandes conventions multilatérales et des instruments non conventionnels à fonction ou à vocation normative

(*Thirteenth Commission*)

Resolutions of the General Assembly of the United Nations

Preliminary *Exposé*

Krzysztof Skubiszewski

§ 1. *Introduction*

The research of the Thirteenth Commission concentrates on various procedures that lead to the elaboration of two types of acts, *viz.* treaties and non-contractual instruments. It is the latter that have been assigned to this rapporteur for study, and the topics falling under this heading were listed in the Final Report dealing with the method and scope of the Commission's work[1].

Thirty years ago Count *Balladore Pallieri* called our attention to declarations adopted by States where there were no parties contracting mutual obligations: "un procédé qui est encore à son stade embryonnaire et en voie de formation". And he added: "Depuis plus d'un siècle la Communauté internationale est à l'œuvre pour sortir de la forme contractuelle et créer des instances propres à

[1] Annuaire IDI, vol. 57, Part II, 1977, p. 96, at pp. 102-103, items 26-33, and also 34-36.

exprimer un droit obligatoire ". The learned author also mentioned the inability of legal theory of that time to encompass "dans ses formules scientifiques cette matière flottante"[2]. It is one of the tasks of the Thirteenth Commission to supply an answer to the theoretical difficulties of the problem of non-contractual instruments.

Among these instruments the mandate of the Commission permits of the distinction between those which lay down legal rules for States, and those which, being adopted by organs not equipped with legislative powers, are not regulative, yet they aim at, and contribute to, the making of law.

Enactment of law by international bodies, in contradistinction to conclusion of law-making treaties by States, still remains a rare and, therefore, marginal phenomenon in the development of international law. It is true that many intergovernmental organizations frequently regulate their internal life, and the rules so enacted constitute a body of law. However, these rules concern the conduct of States only to a small degree. Nor is the picture changed by the legislation of the European Communities. Their enactments are mainly a substitute for domestic law-making, while their pattern of legislative process has so far not been imitated even by other regional organizations which aim at economic integration, not to speak of the international community at large.

The enactment of law by international organs figures on the list of problems to be studied by the Commission[3], and it will be explored at some later time. However, it did not seem advisable to begin our study by concentrating on a procedure which, at least for the time being, is rather exceptional. On the other hand, several international organizations, though they do not possess the power to legislate for States, adopt resolutions in which they say what the law is or should be. This is particularly the case of the General Assembly of the United Nations.

Non-binding resolutions which lay down rules of conduct for States and thus influence the growth of law are not an invention of the United Nations. The International Labour Organization had

[2] G. Balladore Pallieri, La formation des traités dans la pratique internationale contemporaine, RC, vol. 74, 1949-I, p. 465, at pp. 541 and 542.

[3] *Op. cit.* note 1, p. 102, items 30-33.

achieved, through this procedure, tangible and favourable results long before the present world Organization came to exist. Today many organizations adopt resolutions bearing on the development of various branches of international law.

The resolution-making activity of organizations other than the United Nations will be analysed in a separate study to be undertaken by the Thirteenth Commission. However, priority is now given to the United Nations. The resolutions of the General Assembly are particularly interesting because of the breadth of their subject matter and the tendency of many Governments to influence, in this way, the growth of law on a world wide scale. Other organizations are limited either to a specific field of international co-operation or - if their scope of activity is general - to a more or less narrow grouping of States. The pronouncements of the Assembly contrast visibly with those of other bodies: they deal with almost the whole gamut of international law, and their object is often to bring about a change in the existing law, particularly in domains that are essential for the functioning of the international community.

The Assembly devoted several resolutions to the fundamental rights and duties of States (res. 375 (IV)) and fundamental principles governing their relations, including pacific settlement of disputes and prohibition to use force (res. 2131 (XX), 2625 (XXV) and 2734 (XXV)). The Assembly also adopted a definition of aggression, res. 3314 (XXIX). In formulating new principles and re-formulating the old ones it paid especial attention to novel problems and developments in international society. Thus the Assembly enunciated principles, rules and standards relating to such matters as the granting of independence to colonies (res. 1514 (XV)); sovereignty over natural resources (res. 1803 (XVII), 2158 (XXI), 2692 (XXV) and 3171 (XXVIII)); economic rights and duties of States (res. 3281 (XXIX)) and framework and structure of the world economic order, including development and economic co-operation (res. 2626 (XXV), 2849 (XXVI), 3201 and 3202 (S-VI) and 3362 (S-VII)). The Assembly concerned itself with the law on human rights (res. 217 A (III)), including prohibition of discrimination (res. 1904 (XVIII), 2263 (XXII), 2784 (XXVI), 3057 (XXVIII)) and certain specific categories of rights (res. 1386 (XIV), 2018 (XX), 2312 (XXII), 2856 (XXVI). Further, the Assembly resolutions dealt with the law

of the sea (res. 2749 (XXV)), air travel (res. 2551 (XXIV) and 2645 (XXV)), protection of the human environment (res. 2849 (XXVI)), armed conflict (res. 378 A (V), 1653 (XVI), 2162 (XXI), 2603 A (XXIV), 2674 and 2675 (XXV), and 3103 (XXVIII)), or responsibility for war crimes and crimes against humanity (res. 95 and 96 (I) and 3074 (XXVIII)). In resolution 1962 (XVIII) the Assembly laid down the foundations for the law of outer space: an example of influence on the making of law in a field where prior to that resolution there was practically no regulation at all.

While the foregoing enumeration is not exhaustive, it should also be kept in mind that resolutions reciting general and abstract rules are not the only method which the Assembly uses to determine law. In particular, the Assembly often assumes the existence of a principle or rule when it condemns certain acts or calls upon States to follow a line of conduct, e.g. resolutions 2551 (XXIV) and 2645 (XXV).

However, we are concerned here only with those resolutions in which the Assembly explicitly lays down general and abstract rules of conduct. A rule is general when both its addressees and the circumstances in which they must behave as required, are defined in a generic, and not individualized, way. On the other hand, the rule is abstract when it deals with a conduct that can or does recur and not with one that is specific. Accordingly, our discussion concentrates on the making of rules that relate to an unlimited number of situations envisaged in the rule and apply to any Member or State which happens to find itself within the ambit of the rule; they do not designate any specific addressee or addressees.

Several of the Assembly resolutions have raised and still raise serious doubts which concern their merits and possible influence on the state of international law. Yet this is exactly why the subject calls for elucidation with a view to assessing the role of that category of non-contractual instruments in international law-making.

This *Exposé* does not give an overall picture of the topic but concentrates on certain preliminary problems before further issues are treated in the provisional and final reports, especially on the basis of the questionnaire. Thus the *Exposé* first deals briefly with the non-binding nature of the Assembly resolutions (Section I). It also makes an attempt at classifying them (Section III). Elaboration

of resolutions is discussed in two Sections. Section II is devoted to questions of terminology, while Section IV tentatively takes up some further and more general problems relating to the elaboration of resolutions.

I. *Non-Binding Nature of the Assembly Resolutions*

§ 2. *Absence of Law-Making Powers*

The Charter of the United Nations does not vest the General Assembly with the powers to make law. The exceptions are few and they are not relevant for the present study. One is the Assembly's power to enact the internal law of the Organization. By internal law the rapporteur understands rules governing the structure, functioning or procedure of the United Nations. This power flows explicitly from the provisions of the U.N. Charter (e.g. Article 21) or it can be implied from the functions of the Assembly which, in turn, are regulated by the Charter. The enactment of internal law belongs undoubtedly to the realm of legislation. But the Thirteenth Commission is not, for the time being, concerned with this type of law-making. Though internal law regulates primarily the conduct of the business of the organization, it can also constitute a source for some rights and duties of States. If one regards budgetary powers as legislative in nature, then the approval of the budget and the apportionment of the expenses of the United Nations is a case in point (Article 17).

The law-making power based on Article 18, para. 2, of the U. N. Charter can be distinguished from the competence, specific or implied, to enact internal law. By virtue of this provision the Assembly can determine categories of questions to be decided by a two-thirds majority that are additional to those enumerated in that Article. By making a determination of this kind the Assembly enacts a new rule supplementing the law of the Charter.

However, all this does not change the picture of the Assembly as an organ which has no competence, either general or in a particular field, to enact law for States. One can say with Sir Hersch *Lauterpacht* that in the Charter there is "the paramount rule that the General Assembly has no legal power to legislate or bind its

Members by way of recommendations [...]"[4]. Apart from making the internal law in the narrow connotation indicated above, the power of an international organ to legislate for States cannot be implied but it must result from an unequivocal authorization. Committee II/2 of the Conference of San Francisco considered a proposal by the Philippines aiming at empowering the Assembly to enact rules of international law, with the approval of the Security Council. The Committee rejected this proposal[5] and, as a result, the Charter contains no such authorization. The Assembly cannot command that States abide by the rules which it enunciates. In contradistinction to the decisions of the Security Council (Article 25) the Members did not "agree to accept and carry out" the resolutions of the Assembly[8].

It is true that the provision on voting by the Assembly (Article 18) speaks of "decisions" which term normally implies obligatory force[7]. But Article 18 does not regulate the legal effect of the resolutions. It is exclusively concerned with the method of adopting resolutions; their effect is regulated by other provisions. Sir Hersch *Lauterpacht* observed[8] that under Article 18 the term "decision" had a "wider, somewhat non-technical sense"[9].

[4] Separate Opinion, Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, ICJ Reports 1955, p. 90, at p. 116.

[5] Documents of the U.N. Conference on International Organization, vol. 9, pp. 70 and 316.

[8] F.B. Sloan, The Binding Force of a Recommendation of the General Assembly of the United Nations, BYBIL, vol. 25, 1948, p. 1, at pp. 14-15, while noting the absence of a duty similar to that of Article 25, nevertheless considers the question of "an implied undertaking to be bound by the recommendations of the General Assembly".

[7] Decisions, "in ordinary connotation, signify binding expressions of will", Lauterpacht, *op. cit.* note 4, p. 115.

[8] *Ibid.* For a discussion of the meaning of the term in a context more general than the U.N. Charter, see S.M. Schwebel (ed.), The Effectiveness of International Decisions. Papers of a Conference of the American Society of International Law and the Proceedings of the Conference, Leyden - Dobbs Ferry, N.J. 1971, pp. 366-372 and 379-382.

[9] *Cf.* comment by Sir Gerald Fitzmaurice, Hersch Lauterpacht - The Scholar as Judge: Part II, BYBIL, vol. 38, 1962, p. 1, at p. 4,

Resolutions which are of interest to the present *exposé* belong to the category of recommendations. Article 13, para. 1 (a), mentions recommendations "encouraging the progressive development of international law and its codification". It is not the only Charter basis for the adoption of resolutions bearing on international law. Several such resolutions can also be fitted into Articles 10, 11 or 14. Occasionally, official opinions differed on that point. For example, the adoption of resolution 2625 (XXV) was seen by some as based on Article 10[10], while others invoked Article 13[11]. The problem is of no importance, for both provisions refer to recommendations.

At present, the Assembly could acquire law-making powers only through a revision of its constitutional position. In his report submitted to the centenary session of the *Institut*, Sir Gerald *Fitzmaurice* emphasized that to achieve this an amendment to the Charter would be necessary[12]. Let us repeat that to legislate for States, an international organ must have this power explicitly conferred on it by States. Interpretation does not have this effect: a legislative function cannot be read into the Charter provisions[13]. Many commentators have rejected the possibility of an extensive interpretation of the Charter, especially Article 13. Among them, we may quote Mr *Seidl-Hohenveldern:* the Assembly can foster the development of international law, yet its "weaker means" of influence cannot be turned into "stronger" ones by virtue of an extensive interpretation based on the doctrine of implied powers[14].

Nor could the Assembly's legislative power have a source other than the Charter itself. Neither a treaty (different from the Charter)

[10] GAOR, 25th Sess., 6th Cttee, 1182nd Mtg, 25 September 1970, p. 31, para. 41 (Turkey).

[11] *Ibid.*, 1180th Mtg, 24 September 1970, p. 19. para. 21 (USA).

[12] Sir Gerald Fitzmaurice, The Future of Public International Law and of the International Legal System in the Circumstances of Today, in: IDI, Livre du centenaire 1873-1973, p. 196, at p. 270.

[13] Some observations by Judge Sir Percy Spender on the interpretation of the Charter, though made in another context, are relevant here, see his Separate Opinion, Certain Expenses of the United Nations, ICJ Reports 1962, p. 182, pp. 195-197 ("In any case [the organs'] right to interpret the Charter gives them no power to alter it", p. 197).

[14] Berichte der Deutschen Gesellschaft für Völkerrecht, 11. Tagung, 1969, Heft 10, Karlsruhe 1971, p. 223.

nor a custom[15] could invest the Assembly with a law-making competence. "The Assembly - writes Sir Gerald *Fitzmaurice* - can only exercise powers conferred upon it or derived *aliunde* or *ab extra* provided it keeps within the limits of its constitutional role under the structure of the Charter"[16]. And it would no doubt go beyond that role, had it assumed law-making functions without a prior amendment of the Charter.

The absence of legislative powers did not prevent the Assembly from adopting numerous resolutions in which it said what the law was or ought to be. Do these resolutions amount, as some would suggest, to "an usurpation of competences"[17]? It seems not. As acts of the Assembly the resolutions remain what they are, i.e. recommendations. During the debate on one of the Assembly's declarations on international law the view was expressed that the instrument in question "could be no more than what the General Assembly had power to bring into being" [18]. It is true that the States which favour a particular enunciation of rules, attempt to attach to the resolution an effectiveness that goes beyond mere recommendation. But the danger of "usurpation of competences" is not real: the Assembly has no means of imposing its rules on

[15] Some writers seem to take no account of the constitutional difficulty. G. Arangio-Ruiz, The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations with an appendix on the Concept of International Law and the Theory of International Organization, RC, vol. 137, 1972-III, p. 419, at pp. 452 *et seq.*, considers the possibility of a customary basis for the Assembly's eventual competence to make law by way of resolutions. He rightly concludes that no such custom developed. *Cf.* also, though less explicit, L. Schnorr von Carolsfeld, in: *op. cit.* note 14, p. 212. As to treaty basis, N.G. Onuf, Professor Falk on the Quasi-Legislative Competence of the General Assembly, AJIL, vol. 64, 1970, p. 349, at p. 354, inquires into the question of how "to legitimate the legislative competence of the General Assembly". He admits that "[t]he requisite endowment of legitimacy might come in the form of a multilateral treaty or Charter amendment".

[16] Dissenting Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, p. 220, at. p. 284.

[17] G. Jaenicke, in: *op. cit.* note 14, p. 220: "eine Usurpation von Kompetenzen seitens der Generalversammlung, die in der Satzung keine Stütze findet".

[18] GAOR, 4th Sess., 6th Cttee, 170th Mtg, 20 October 1949, p. 181, para. 73 (Israel).

States which are unwilling to accept them, though it may exercise some influence by setting up machinery for compliance with the resolution (the Commission will deal with that problem at a later stage of its work). According to some commentators[19], the lack of sanctions makes it possible to distinguish between rules of law and rules laid down in Assembly resolutions; the correctness of the distinction based on this criterion need not now be discussed.

Finally, it may be observed that the difficulty residing in the absence of law-making powers is not disposed of, and the position of the Assembly does not change, when its pronouncements are equated to those of the international community. An example is to be found in the first para. of the preamble to resolution 3171 (XXVIII) where it is said that the right therein mentioned "has been repeatedly recognized by the international community in numerous resolutions of various organs of the United Nations". If one assumes that the United Nations is the organized community of States, the latter, through the very factor of organization, must fall under the limiting effect of constitutional provisions. In other words, whether one regards the Assembly as the organ of the international community[20] or not, it remains subject to the law governing its powers.

[19] *Cf.* M. Bothe and D. Rauschning, in: W.A. Kewenig (ed.), Die Vereinten Nationen im Wandel. Referate und Diskussionen eines Symposiums, Kiel 1974, Berlin 1975, pp. 117 and 119 respectively.

[20] Sloan, *op. cit.* note 6, p. 21 *et seq.* discusses the Assembly as "the representative organ of the world community". At p. 23 he writes that "there is an inherent power in the General Assembly as the most nearly representative organ of the international Community to impose its will in limited fields". And he concludes (p. 24): "In those areas and on those matters where sovereignty is not vested in a Member state, the General Assembly acting as the agent of the international community may assert the right to enter the legal vacuum and take a binding decision". This statement does not seem to cover law-making decisions, for Sloan admits that the Assembly "cannot enact new law", p. 24. In any case, his view goes a long way beyond the Charter. Jenks, *op. cit.* note 36 below, p. 201, observes that the Assembly "is the most representative organ of the community and this gives the decisions of the Assembly an authority which is already unique". Johnson, *op. cit.* note 59 below, p. 109, criticises Sloan's view. See also Arangio-Ruiz, *op. cit.* note 15, pp. 460-468. Mr *Tunkin* recalls that the "legal force of the decisions of [the General Assembly] depends on the Charter, but not on abstract considerations regarding the representative character of the organ", International Law in the International System, RC, vol. 147, 1975-IV, p. 1, at p. 64.

§ 3. *Absence of Obligation*

General and abstract rules are the fabric of law-making acts. The Assembly resolutions which enunciate such rules are, to that extent, similar to, or even identical with, those acts. In other respects, however, the analogy is not present. To avoid confusion, it is advisable to maintain the elementary yet crucial distinction between obligatory and non-obligatory rules. It helps to define the nature of the Assembly's resolutions and their role in the process of law-making. The following questions should be asked: are the Assembly resolutions binding or not? Do they constitute law? Can they be regarded as a source of law?

Negative answers follow from the absence of legislative powers on the part of the Assembly (§ 2) [21] and from the frequent denials by Governments that the Assembly resolutions were binding. But this is saying the obvious, and one is still far from disposing of all the question marks.

Some jurists have doubts whether the dichotomy of what is obligatory and what is not, is relevant here. In commenting on the *résolutions déclaratives* adopted by the General Assembly Mr *Castañeda* has written[22]: "A vouloir tracer une division catégorique et nette, dans ce domaine, entre ce qui est totalement obligatoire et ce qui ne l'est pas, on ne ferait que manifester un formalisme juridique exagéré. A vouloir déterminer la valeur juridique de ce genre de résolutions en employant des critères aprioristiques, schématiques et rigides, on s'exposerait à ne pas tenir compte de la variété multiforme et de la complexité de la réalité internationale sous-jacente, qui ne peut manquer de se refléter dans sa qualification juridique".

The rapporteur also wishes to draw the attention of the Commission to Mr *McDougal*'s inquiry into the "global process of author-

[21] " 'bindingness' depends primarily on the competence attributed, explicitly or implicitly, to the international organ concerned", F.V. Garcia-Amador, in: *op. cit.* note 8, p. 351.

[22] J. Castañeda, Valeur juridique des résolutions des Nations Unies, RC, vol. 129, 1970-I, p. 205, at p. 321. E. Lauterpacht, in the context of a specific discussion, refers to "the understandable tendency for us not to become too concerned with the definition of what is legally binding and what is not legally binding", in: *op. cit.* note 8, p. 394; *cf.* also, p. 399.

itative decision", including an examination of the creation of law and its interplay with other factors. Mr *McDougal* explains the notion of "prescription" as "a process of communication". "Prescription is at once broader and more specific than the commonly used term 'legislation'. [...] A significant amount of what is conventionally identified as legislation is not prescription [...]. [...] In general, inherited terminology has become an obstacle to, rather than an instrumentality of, scholarship. Working within the frame of Article 38 of the Statute of the International Court and seeking to extend it to cover the myriad patterns of world constitutive prescription, scholars have been forced to invent such fabulous terms as "binding recommendations', 'instantaneous custom', and 'pressure-cooked custom'."[23] Still other labels have been suggested. In Mr *Colliard*'s opinion the category under discussion approximates "d'un droit transitoire, une sorte de pré-droit qui met fin au droit ancien et précède le droit nouveau"[24]. Mr *Tunkin* introduces the notion of the "international juridical system. Such a system would include not only legal, but also semi-legal norms, closely interrelated". He concludes that "the resolutions-recommendations of international organisations constitute a new category of international norms which are not norms of international law, but have some legal element, and therefore, should be considered part of the international juridical system" [25].

Article 38 does not mention binding resolutions of international bodies; Mr *Verzijl* regards this as a "serious lacuna "[26]. Nor does it say whether other resolutions, i.e. non-obligatory, could play the

[23] M. S. McDougal, Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry, Journal of Conflict Resolution, vol. 4, 1960, p. 337. The quotations (except for the first one) are from M. S. McDougal, H.D. Lasswell, W.M. Reisman, The World Constitutive Process of Authoritative Decision. Chapter 3 in: C.E. Black and R.A. Falk (eds), The Future of the International Legal Order, Princeton 1969, vol. 1, p. 73, at pp. 139 and 140 (footnotes omitted - the quoted expressions are those of Sloan, Bin Cheng and Engel respectively).

[24] C.A. Colliard, Institutions des relations internationales, 7e éd., Paris 1978, p. 280.

[25] Tunkin, *op. cit.* note 20, pp. 61 and 70.

[26] J.H.W. Verzijl, International Law in Historical Perspective, Leyden 1968, vol. 1, p. 74.

role of "subsidiary means for the determination of rules of law". If a resolution is law-making then automatically it becomes a source of law, though this category is passed over in silence by Article 38. The fact that Article 38 does not contain an exhaustive list of contemporary sources of international law or that its terminology has some flaws makes it perhaps even more imperative to inquire into the nature of the Assembly resolutions *qua* source.

In doing this it is worthwhile to remember the warning voiced by Charles *De Visscher*[27]: "On ne peut se dissimuler les dangers d'un processus qui, au cours des années, tend à estomper la différence entre les décisions à effet obligatoire et les recommandations dépourvues de ce caractère, différence dont il a été rappelé avec raison qu'elle 'constitue une des bases de toute l'économie de la Charte' ". It is true, as Mr *Schachter* has pointed out, that "the distinction between 'binding' and 'non-binding' is not easily determinable" when one looks to the activity of political bodies like the Assembly and to the diplomatic arena[28]. Nevertheless the distinction is to be maintained. Sir R. *Jennings* has spoken of the dangers of "the present laxity and excessive flexibility in the limits of what may plausibly be alleged to be international law, or not to be international law [...]". "Unless the formal test of what is international law and what is not can be tightened, clarified and disciplined, we shall find international law becoming more and more a series of expressions in juridical guise of the ambitions of different political and economic pressure groupings". "But unless the line can be drawn more or less clearly between law and proposal, international law will be greatly weakened". "Perhaps we all should look again at the elementary principles governing what is law and what is not, and discipline our pronouncements accordingly"[29].

[27] Ch. De Visscher, Problème d'interprétation judiciaire en droit international public, Paris 1963, p 152. The quotation is from the Dissenting Opinion of President Winiarski in the *Expenses* case, ICJ Reports 1962, p. 227, at p. 233.

[28] O. Schachter, Towards a Theory of International Obligation, in: *op. cit.* note 8, p. 9, at. p. 13.

[29] R.Y. Jennings, The Discipline of International Law (Lord McNair Memorial Lecture), ILA Report, 57th Conference, 1976, p. 620, at pp. 631 and 632. *Cf.* also B. Simma, Methodik und Bedeutung der Arbeit der Vereinten Nationen für die Fortentwicklung des Völkerrechts, in: *op. cit.* note 19, p. 79, at p. 96 where he

One must also remember the practical effect of the non-binding nature of the Assembly's resolutions. These instruments have often secured the required majority or general consensus and could, consequently, be adopted "precisely because they were not binding in law" (Sir Gerald *Fitzmaurice*)[30]. The records of discussion in the United Nations abound in examples[31].

The Assembly resolutions are not a new source of international law. The Assembly, writes Max *Sœrensen*, "ne peut pas modifier le droit existant ou créer des nouvelles règles"[32]. In his Dissenting Opinion in the *South West Africa Cases, Second Phase*, Judge *Jessup* says that his "conclusion does not rest upon the thesis that resolutions of the General Assembly have a general legislative character and by themselves create new rules of law"[33]. Judge *Jiménez de Aréchaga* notes that "the General Assembly may not legislate for the world, nor do its decisions constitute an independent source of law"[34].

emphasizes the necessity of a "scharfe Unterscheidung zwischen politischer Eindrücklichkeit und völkerrechtlichem Verpflichtungscharakter". Tunkin, *op. cit.* note 20, pp. 62 *et seq.*, 70, 145 and 146, emphatically maintains the distinction between what is binding and what is not. Mr *Bindschedler* makes the following point: "Eine Eigenart der Akte internationaler Organisationen liegt darin, dass zwischen *verbindlichen* und *nichtverbindlichen* Rechtsakten unterschieden werden muss", R.L. Bindschedler, Rechtsakte der internationalen Organisationen, Berner Festgabe zum Schweizerischen Juristentag 1979, p. 361.

[30] In: *op. cit.* note 12, p 269. *Cf.* also L. Gross, The United Nations and the Role of Law, International Organization, vol. 19, 1965, p. 537, at p. 541. Tunkin, *op. cit.* note 20, p. 145, expresses the view that States approach the process of making a treaty on the basis of a resolution (the "transformation of a recommendatory norm into a treaty norm") "with much greater care than that of the formation of recommendatory norms".

[31] *Cf.* the debates on resolutions 1962 (XVIII) or 2625 (XXV). For a comment on the former, see B. Cheng, United Nations Resolutions on Outer Space: "Instant" International Customary Law?, Indian JIL, vol. 5, 1965, p. 23, at pp. 41-45. As to the latter, see B. zu Dohna, Die Grundprinzipien des Völkerrechts über die freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten, Berlin 1973, pp. 241 *et seq.*

[32] M. Sœrensen, Principes de droit international public. Cours général, RC, vol. 101, 1960-III, p. 1, at p. 100.

[33] ICJ Reports, 1966, p. 325, at p. 441.

[34] E. Jiménez de Aréchaga, International Law in the Past Third of a Century, RC, vol. 159, 1978-I, p. 1, at p. 34. See also E. Hambro, Some Notes on the Development of the Sources of International Law, Scandinavian Studies in Law,

These and similar denials do not exclude a role for the Assembly to influence, through its resolutions, the operation of the sources of law; but that is another problem (§ 11).

Resolutions that bear the name of "declarations" are not an exception to what has been said above. A memorandum of the Office of Legal Affairs of the U. N. Secretariat notes that a resolution "cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a 'declaration' rather than a 'recommendation' ". The memorandum refers to subsequent State practice and goes on to say that "a declaration may by custom become recognized as laying down rules binding upon States"[35]. Some delegates saw the matter along the same lines: a declaration had "much greater force than a mere recommendation" in the sense that its rules could later be accepted by States, in one way or another. This possibility is part of the larger question of the relationship between the Assembly resolutions and the formation of custom (§ 11 (3))[36]. States have been giving the name of declaration to their agreements, yet a declaration adopted by the General Assembly is something else. It is not an agreement, unless States have decided to have it concluded in the unusual form of an Assembly resolution (§ 11 (4)). During the discussion on the draft Declaration on Rights and Duties of States it has been pointed out that a "declaration,

1973, p. 75, at p. 92. For a contrary view, see T.O. Elias, Africa and the Development of International Law, Leiden - Dobbs Ferry, N.Y., 1972, p. 71, who speaks of resolutions adopted by the majorities indicated in Article 18, paras 2 and 3, of the UN Charter as "binding upon all concerned". *Cf.* same writer, Modern Sources of International Law, Transnational Law in a Changing Society: Essays in Honour of Philip C. Jessup, New York 1972, p. 34 at p. 46.

[35] UN doc. E/CN.4/L.610, 2 April 1962.

[36] The quotation is from GAOR, 17th Sess., 6th Cttee, 757th Mtg, 12 November 1962 (Ukraine). As to this larger question, see, *e.g.*, the views of V. Pechota commented upon by E. McWhinney, Soviet Bloc Publicists and the East-West Legal Debate, Canadian YIL, vol. 2, 1964, p. 172, at pp. 173-175; J. Castañeda, Legal Effects of United Nations Resolutions, New York and London 1969, pp. 168-172; C.W. Jenks, A New World of Law? A Study of the Creative Imagination in International Law, London 1969, pp. 205 *et seq.*

which was neither a treaty nor a convention, would have no binding force"[37] (see § 10 below).

II. *The Language of the Resolutions*

The choice of language is one of the essential elements in the process of elaborating any instrument, and the task of the 13th Commission is to examine this process in its multifarious manifestations on the international legal plane. Besides, exploring the language helps to identify the obscurities and inaccuracies of drafting, which in turn might lead to some suggestions or proposals at improving that part of the elaboration process.

§ 4. *Operative Words and their Inconclusiveness*

While it is true, as one writer observed, that the General Assembly "has shown considerable ingenuity in its selection of operative words"[38], the normative meaning and effect (if any) of these words is rather inconclusive.

The Assembly often "affirms", "reaffirms", "confirms", "recognizes" or "considers" that there is a rule (of whatever rank) or a standard; these and other verbs express different degrees of the Assembly's engagement for or against a certain conduct. But the normative significance of such approval or disapproval still remains to be elucidated.

If the resolution limits itself to "declaring" a rule and it does not indicate, in one way or another, the status of the rule, one can assume that the rule so declared partakes in the recommendatory nature of the resolution. When the same rule is later "reaffirmed", the position of the rule is not thereby changed (e.g., res. 2880 (XXVI), para. 9 and res. 3185 (XXVIII), para. 5). On the other hand, the very subject matter of what is "declared", references to international

[37] GAOR, 4th Sess., 6th Cttee, 173rd Mtg, 25 October 1949, p. 207, para. 57 (Philippines). Earlier in the ILC, talking about the form of an eventual Assembly declaration on the rights and duties of States, J.M. Yepes observed: "No State would place itself beyond the pale of civilization by violating a collective declaration which it had accepted at an international conference and which most of the other States had accepted", ILC Yearbook, 1949, p. 64.

[38] Sloan, *op. cit.*, note 6, p. 3.

law or to the rights and duties of States, or employment of preserving clauses taking account of law, show that the Assembly moves on the plane of law, though it may not specify whether it is positive law or law to be made. Several resolutions contain statements where the element *de lege lata* is not easily separable from that of *legis ferendae*, e.g. resolutions 1803 (XVII), 2749 (XXV) or 3074 (XXVIII).

The verbs "confirm" and "reaffirm" can have two meanings. Either the rule has already been approved by the Assembly and is now confirmed or reaffirmed; examples are resolutions 2160 (XXI) and 3171 (XXVIII), and some uses of the term "reaffirm" in res. 2734 (XXV). Or the Assembly confirms a rule which until now has not figured in any resolution, e.g. para. 4 of res. 2158 (XXI).

While the use of the words "recommend" or " recommendation" facilitates, to some extent, the determination of the Assembly's view on the legal nature of the rule so recommended (§ 5 below), other terms are even less conclusive. In most instances the language of the resolution is not, by itself, decisive for the purpose of ascertaining the nature of the rule. For example, in several paragraphs of res. 2626 (XXV) one finds the language of an agreement[39], yet it was clear from the outset that this was not an instance of contractual obligations taking the form of an Assembly resolution. On the other hand, in res. 1962 (XVIII) the Assembly limits itself to saying that it "declares" the legal principles of outer space by which States "should" be guided. The latter term (in contra-distinction to "shall", cf. § 8 (4)) excludes the existence of legal obligation, contractual or other, though at the moment of the adoption of the resolution it was already known that some States, in particular the U.S.A. and the U.S.S.R., would abide by these principles.

§ 5. *Recommendatory Language*

(1) *Recommendations* expressis verbis. When the resolution speaks of "recommendation" or uses the verb "recommend" in regard to the rule it formulates, the rule is a recommended one. The Assembly may, of course, aim at a future acquisition of binding force by that rule, but that is another problem. For the time being,

[39] M. Virally, La deuxième décennie des Nations Unies pour le développement. Essai d'interprétation para-juridique, AFDI, vol. 16, 1970, p. 9.

and as far as the Assembly resolution is concerned, the words "recommendation" or "recommend" clearly indicate that the rule has no more force than the act which embodies it.[40] On the other hand, the omission of these words makes it possible to separate the status of the rule from that of the resolution: the rule as such and in itself can be obligatory.

Resolution 378 (V) "recommends" that in the event of the outbreak of hostilities States comply with certain duties. With one possible exception (cf. para. 1 (a) of the resolution) the procedure envisaged is indeed a new one and could, therefore, be only recommended. In resolution 2018 (XX) the term "recommendation" figures in the title, which is a rare instance of such an explicit indication, and the resolution employs the verb "recommend" several times. The principles laid down in that resolution are suggestions for domestic law-making. Similarly, the principles formulated in resolution 2312 (XXII) were recommended as a basis for State practice. The use, in these two resolutions, of the word "should" (§ 8 (4)) additionally emphasized that the Assembly did not regard its principles as legal ones.

Expressions other than "recommendation" or "recommend" can have the same effect, for instance, the adoption of a set of rules "as a common standard of achievement" (res. 217 (III)). Also, when the addressees of the resolution are called upon "to recognize the principles set forth" in the resolution "and to ensure their observance by means of appropriate measures" (res. 2037 (XX)), the principles remain recommendations.

According to one view a transformation of an Assembly resolution into a source of law (provided certain other requirements are met) becomes possible if the rules are "declared" and not "recommended"[41]. However, apart from the fact that the whole idea of such a transformation is highly debatable, the use of the term "recommend"

[40] Sloan, *op. cit.* note 6, p. 14, is of the opinion that the authority granted to the Assembly is not so obviously limited by the use of the word "recommendation". His examples, however, concern recommendations addressed to organs placed under the authority of the Assembly, and not to States.

[41] A. Bueckling, Entschliessungen der Vereinten Nationen für das Weltraumrecht, Zeitschrift für Luftrecht und Weltraumrechtsfragen, vol. 13, 1964, p. 193, at p. 201.

is not, by itself, a bar to an eventual evolution of the nature of the rule after the adoption of the resolution.

(2) *Recommendations and legal rules.* The nature of rules which are embodied in an Assembly resolution is not automatically identical with the nature of the resolution. The latter is non-binding but its subject matter may have already been regulated by law. In other words, the recommendatory character of the Assembly's resolution does not detract from the obligation which the resolution states and which have a different source. Speaking of the inclusion of rules of customary law into an Assembly resolution Fernand *Dehousse* noted that the "act of inscribing them in an international declaration could not deprive these rules of the binding character they already possessed"[42].

This, in any case, is the position that follows from strict law and logic. But there are resolutions in which elements of law are mixed with declarations of intention or recommendations, and political motives additionally blur the picture. For instance, the draft declaration on non-intervention, which later became resolution 2131 (XX), has been described as being, "if anything, in the nature of a general political recommendation"[43], though it repeats a number of prohibitions stemming from law. Resolution 2625 (XXV) recites and develops several principles of international law, and yet, according to some official statements, it contains "guidelines"[44] or "markers

[42] GAOR, 3rd Sess., 1st Part, 3rd Cttee, 108th Mtg, 20 October 1948, p. 200. Nor is a reverse effect possible: the binding force of the rules proclaimed does not change the non-binding status of the resolution. For a somewhat different view, see J. Castañeda, The Underdeveloped Nations and the Development of International Law, Int. Org., vol. 15, 1961, p. 38, at pp. 47-48, where he maintains that "for all practical purposes" a resolution embodying rules of customary law "could not easily be distinguished from compulsory decisions. Naturally, the ultimate basis for the binding force of the rule so adopted would reside in their character as customary rules, or in their nature as general principles of law".

[43] GAOR, 20th Sess., 1st Cttee, 1423rd Mtg, 20 December 1965, p. 436, para. 8 (Belgium).

[44] GAOR, 25th Sess., 6th Cttee, 1178 Mtg, 23rd September 1970, p. 6, para. 7 (Czechoslovakia) and 1179th Mtg, 24th September 1970, p. 13, para. 15 (Sweden). The Declaration was also described as "a guide for the conduct of the international community" (Bolivia).

and guidelines which might have a significant influence on the conduct of States"[45]; the resolution is "a code of good conduct"[46] and "a source of inspiration"[47]. All this may be true on the plane of politics, but such statements are harmful, for they throw some doubt on the otherwise unquestionable legal status of the principles involved[48].

Usually, when the resolution repeats a rule of law, it avoids a language that might wrongly suggest that the rule, like the resolution, is non-binding. In law-affirming resolutions the words "recommendation" or "recommend" are normally not to be found. Sometimes the Assembly is reticent on the use of these words even if the rule it proclaims is solely one *de lege ferenda*.

§ 6. *The Notion of Principle in the Assembly Resolutions*

Numerous resolutions of the General Assembly enunciate principles. The declaration of principles, as a type of instrument, is considered below (§ 9). The present paragraph deals with the meaning in which the Assembly uses the term "principle", while § 7 is devoted to categorization of principles.

(1) *Different meanings of the term.* The resolutions of the Assembly reflect various meanings of the word "principle".

If a principle is understood as a rule of higher or highest order (§ 7 (3)), the reference in the resolution is usually to legal principles. If, on the other hand, the test of the principle consists in its function of generating specific rules or even a whole system of rules, either the spheres *de lege lata* or that *de lege ferenda* can be envisaged (subpara. (3) below). The same is true if one uses the criterion of importance: here the principle is a rule which is especially important in view of the objective sought (subpara. (4) below).

Sometimes States disagreed on whether a particular resolution

[45] *Ibid.*, 1180th Mtg, 24 September 1970, p. 19, para. 30 (United Kingdom).
[46] *Ibid.*, 1179th Mtg, 24 September 1970, p. 12, para. 13 (France).
[47] *Ibid.*, 1181st Mtg, 25 September 1970, p. 25, para. 39 (Mali).
[48] *Cf.* the criticism regarding the multiplicity of instruments (of various rank) expressing rights and duties of States, GAOR, 4th Sess., 6th Cttee, 170th Mtg, 20 October 1949, p. 183, para. 85 (Israel).

laid down principles or not[49]. When the Assembly avoids the word "principle", one can presume that what it affirms has not, in its view, attained the rank of principle, even if there was room for stating a principle. For instance, the Assembly insisted on certain "participants in resistance movements" and "freedom fighters" being treated as prisoners of war, yet resolution 2674 (XXV) did not speak here of a principle, though the term was employed in a closely related context in the same resolution and also in another resolution dealing with similar problems[50].

(2) *Principles and rules. Generality of principles.* Sir R. *Jennings* writes that some declarations adopted by the Assembly "embody principles, and not rules, of law"[51]. Mr *Zemanek* notes that "principles are not norms directly applicable", which could mean that none the less they are a kind of norm; he weakens the latter conclusion by calling them "abstractions, to be implemented by norms"[52]. M. *Virally* says that "les principes ne représentent que des règles de droit incomplètes"[53], and he places them in the framework of the "processus de concrétisation croissante" of legal rules. He further makes the following point: "L'expression de 'principes' est commode pour désigner les normes les plus générales et les plus abstraites qui se trouvent au début de ce processus et fixent le cadre dans lequel il se développera"[54]. Mr *Castañeda,* speaking as Chairman of the Working Group which prepared the draft of the Charter of Economic Rights and Duties of States, described it "as a general basic document embodying the major principles of economic relations

[49] *Cf.* observations by the British delegate in response to the Polish delegate, A/AC.125/SR.113.

[50] *Cf.* paras 3 and 4 of res. 2674 (and the recital of "basic principles" in res. 2675 (XXV).

[51] R.Y. Jennings, The United States Draft Treaty on the International Seabed Area - Basic Principles, ICLQ, vol. 20, 1971, p. 433, at p. 438.

[52] K. Zemanek, The United Nations and the Law of Outer Space, Yearbook of World Affairs, vol. 19, 1965, p. 199, at. p. 210.

[53] M. Virally, Le rôle des " principes " dans le développement du droit international, Recueil d'études de droit international en hommage à Paul Guggenheim, Genève 1968, p. 531, at p. 553.

[54] *Ibid.*, p. 533.

between States". The Charter "was intended to be a kind of basic code and not a complete and exhaustive set of rules"[55].

Some resolutions name "principles" beside "norms", which might suggest that principles are not norms (this *exposé* equates the latter with "rules"). Thus resolution 2467 A (XXIII) refers to "the legal principles and norms" (para. 2 (a)) and resolution 2832 (XXVI) mentions "the norms and principles of international law" (para. 3 (b)). It would, however, be difficult to contend that these formulas deny the character of norm to the principle. Rather, they point to the existence in addition to principles of other norms. Resolutions reciting principles are fairly numerous and it cannot be always shown that the Assembly considers them as something else than a category of norms. And there is little doubt that some resolutions were adopted with the intention of making the principles therein enumerated immediately applicable to specific situations or conflicts.

There are also resolutions which speak of "principles and rules of international law", e.g. the declaration annexed to resolution 2625 (XXV)[56]. Nevertheless, this *exposé* uses the word "rule" as a generic term. Principles are one class of rules, and they should be contrasted not with rules in general, but with specific rules, especially those which flow from principles and can be deduced from them.

Generality is a feature of principles in whatever meaning the term "principle" is used. When principles are imprecise or ambiguous the process of formulating detailed rules becomes more difficult, but not impossible or futile. One cannot say that some U. N. declarations of principles produce very little effect[57] until the maturing of specific rules prove unsuccessful.

One consequence of their generality is that U. N. declarations of principles usually command consensus, unanimity or at any rate large voting majorities[58]. Some would emphasize the value of general

[55] GAOR, 29th Sess., 2nd Cttee, 1638th Mtg, 25 November 1974, p. 385, para. 13.

[56] In the penultimate para. devoted to the principle of non-use of force.

[57] Such criticism is voiced in: Les résolutions dans la formation du droit international du développement, Genève 1971, p. 12. See also critical observations by Schwebel, in: *op. cit.* note 8, p. 493.

[58] R. Higgins, Compliance with United Nations Decisions on Peace and Security and Human Rights Questions, in: *op. cit.*, note 8, p. 32, at p. 34: "Indeed, these large majorities are in part achieved because the requirements of the decision have deliberately been left imprecise".

resolutions, because they are carried in circumstances of greater objectivity, they are not concerned with particular issues and interests, and they are acts whereby Governments may express their views on law more objectively than when they are confronted with a dispute or incident[59]. But others would reply that the absence of linkage to specific situations constitutes the very weakness of declarations of principles: "It is very difficult indeed for governments to be asked to adhere to general propositions of a policy-oriented kind, related to no particular case and the application of which to particular situations in the future is completely unpredictable, and might be highly prejudicial to their interests"[60].

(3) *Generation of rules by principles.* In the practice of the United Nations application of principles to specific situations was not rare. In other words, several Members would not agree with the view that a "declaration of principles is fine as it goes, but it does not commit anybody to any specific action"[61]. If one criticises the generality of principles, which is their essence, one criticises the very phenomenon of principles.

On the plane of law-making principles are but one, usually the first, stage. To quote Mr *Zemanek*, "[t]hey are abstractions, to be implemented by norms of contractual or customary international law, or by a judgment in a given case". Writing on the principles contained in resolution 1962 (XVIII) he added: "The principles do not [...] *regulate* the behaviour of States in outer space and on celestial bodies, but trace the lines along which the law of outer space, whether contractual or customary, is to develop. It is here that their real importance is to be found"[62]. Legal principles,

[59] *Cf.* D.H.N. Johnson, The Effect of Resolutions of the General Assembly of the United Nations, BYBIL, vol. 32, 1955-56, p. 97, at pp. 118-119.

[60] Ph. Allott, Language, Method and the Nature of International Law, BYBIL, vol. 45, 1971, p. 79, at. p. 111. He adds: "The work of the United Nations Committees on the Principles of Friendly Relations between States and on the Question of Defining Aggression illustrates this difficulty".

[61] W. Friedmann, Selden *redivivus* - Towards a Partition of the Seas, AJIL, vol. 65, 1971, p. 757, comment made in connection with res. 2749 (XXV).

[62] Zemanek, *op. cit.* note 52. According to Mr *Lachs* (who, being the representative of Poland, spoke as Chairman of the Legal Sub-Committee, U.N. Committee on the Peaceful Uses of Outer Space) the principles of res. 1962

observes M. *Virally*, constitute rules of law which are not self-executing[63]. A principle is the rationale for detailed rules. The latter follow from the former, and the principle finds its necessary application and execution in the specific rules. In those branches of law in which they generate various rules, principles are a factor of coherence.

In other words, detailed rules derive from principles. The U.N. organs which drafted, or prepared the drafting, of resolutions embodying principles were aware of this meaning of the term[64].

If one accepts the view that a principle should always be translated into detailed and precise rules, one may agree with the proposition that it is not important whether a principle is laid down in a treaty or in a non-binding resolution[65]. What is decisive is that the specific rules be legal.

In resolution 2018 (XX) the Assembly explicitly recommended that Members "adopt such legislative or other measures as [might] be appropriate to give effect" to the principles enumerated therein and relating to marriage. But it is not necessary that the Assembly expressly invites Members to implement principles or to use them as guiding lines in any further development of law. Whenever the Assembly enunciates principles, the process of elaboration is implied (cf. the statement by Mr *Lachs* quoted in note 62).

A different approach has been adopted by resolution 3314 (XXIX)

(XVIII) "obviously constitute a framework which will have to be filled in by detailed stipulations". "Many of the principles involved will have to be elaborated upon [...]", UN doc. A/5549/Add. 1, Annex, pp. 3 and 4. During the debate in the Committee it was repeatedly said that a declaration of principles could not, "by definition, go into all the details of the subject", *ibid.*, p. 19 (United Kingdom). C.W. Jenks, Space Law Becomes a Reality, in: Space Law. Some Current Problems, London 1965, p. 15, at p. 16, saw in res. 1962 (XVIII) "a solid core of generally accepted principle around which the law [could] develop".

[63] Virally, *op. cit.* note 53. By saying that principles can be "implemented" by a court of justice, Mr *Zemanek* admits that they are self-executing (in one sense of the term).

[64] UN doc. A/7622, p. 16, para. 18.

[65] *Cf.* Ch. Tomuschat, Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten. Zur Gestaltungskraft von Deklarationen der UN-Generalversammlung, ZaöRV, vol. 36, 1976, p. 444, at pp. 478-479.

which formulates "basic principles as guidance for [the] determination" of the existence of an act of aggression. The Assembly thus assumes that specific decisions can be arrived at without the necessity of these principles being spelled out in more detailed rules. This assumption is made in spite of the fact that the resolution has left several matters unresolved. Consequently, prior to the elaboration of further rules the resolution's role as a reliable guide in specific situations is or may be doubtful.

(4) *Principles as particularly important rules.* Principles figuring in the Assembly's resolutions can have a meaning different from that indicated in subpara. (3) above and § 7 (3) below. The Assembly may describe certain rules as principles simply because it regards them as particularly important in view of the objective the Assembly seeks to achieve.

§ 7. *Categories of Principles*

(1) *Various criteria of distinction.* The language of Assembly resolutions permits the distinction of different categories of principles within one or another meaning of the term.

The elementary categorization is the division of principles into those which are part of law and those which are not. The latter are formulated with a view to influencing relationships within the international community and gradually acquiring legal force. Principles of interpretation and "principles" laid down in connection with the definition of terms (subpara. (5) below) can be fitted into this dichotomy, though their binding force, or otherwise, is of lesser significance.

Some resolutions suggest further distinctions. There are resolutions which speak of "generally accepted" principles, e.g., resolution 2674 (XXV) in para. 2 mentions the "generally accepted" principles of the Geneva Protocol of 1925 and the Geneva Conventions of 1949. In para. 3 it omits those words and simply refers to "principles" of those instruments. The context seems to show that "generally accepted" principles are those of customary law, in particular as codified in multilateral treaties, "Generally accepted" principles constitute a category of legal principles or are synonymous with them.

On the other hand, the notion of "basic principles" seems to be broader. One can imagine a "basic principle" that is still part of *legis ferendae*. In resolution 2675 (XXV) the Assembly affirmed a number of "basic principles", and with one possible exception they are all principles of law. Nevertheless, the adjective "basic" has no necessary legal connotation, in contradistinction to "generally accepted". Is there any difference between "basic principles" and "principles" *tout court?* Is the adjective "basic" a mere pleonasm or does it permit the distinction of a separate class within the wider genus? In resolution 2675 (XXV) the "basic principles" are enunciated "without prejudice to their future elaboration within the framework of progressive development of international law of armed conflict". This phrase does not clarify the issue, for the absence of such a preserving clause would in no way prevent any subsequent elaboration. On the contrary, elaboration is called for, the more so as the principle is (only) a "basic" one.

(2) *Principles of law.* The General Assembly often refers to, or states, a principle which is already one of law. Sometimes the Assembly does not enumerate the principles but cites the instruments in which they are to be found. For instance, in para. 3 of resolution 2674 (XXV) the Assembly spoke generally of "the principles of the Geneva Protocol of 1925 and the Geneva Conventions of 1949" and in para. 4 it referred, also in a general way, to the principles of the latter Conventions and the Hague Convention of 1907. The generality of these formulas raises the problem of the determination of the principles in question. Resolution 2675 (XXV) listed several "basic principles for the protection of civilian populations in armed conflicts". In the preamble the Assembly recalled the four Geneva Conventions of 1949 and in particular the Convention relative to the Protection of Civilian Persons in Time of War. The Assembly spoke of the "future elaboration" of the principles it affirmed "within the framework of progressive development of the international law of armed conflict". This formula conveys the idea of change, though there is little doubt that the enumerated principles are legal, perhaps with the exception of para. 1 which is rather a postulate.

(3) *Principles of law as rules of a higher order?* In general international law certain rules are called principles mainly because of their function in the workings of the international legal system (§ 6 (2)-(4)). Most rules of international law are autonomous in the sense that they are not related to each other in any order of hierarchy. Certain rules, however, have a place higher than other rules, at least in some respects. This may be due to the prohibition of derogation from them (peremptory norms of general international law or *jus cogens*). There are, indeed, resolutions in which the Assembly affirmed some principles in such a categorical way that one can assume the intention to exclude any possibility of derogation. Examples are to be found in instruments relating to de-colonisation, prohibition of racial discrimination, non-intervention, friendly relations and co-operation among States, and their economic rights and duties.

Under its Article 103, the U. N. Charter prevails over other agreements of Member States. Hence the Charter provisions, including its principles, will always have a higher place among the treaty obligations of Members, irrespective of the concept of *jus cogens*. Resolutions often repeat the principles of the Charter, e.g. res. 2625 (XXV).

M. *Virally* denies that principles have a hierarchic place in international law ("les 'principes' ne constituent pas une catégorie juridique particulière en droit international"); nor does the process of concretisation (see § 6 (3) above) imply a hierarchy that would confer " une autorité supérieure aux normes les plus abstraites et leur subordonnant les plus concrètes"[66].

(4) *Principles* de lege ferenda. The Assembly resolutions do not limit themselves to embodying principles of positive law. They also enunciate principles of future law. The activity of the Assembly abounds in examples; a recent one is the Charter of the Economic Rights and Duties of States.

In resolution 1721 A (XVI) the Assembly commended to States "for their guidance in the exploration and use of outer space" some principles. The principle that outer space and celestial bodies were

[66] Virally, *op. cit.* note 53, pp. 533 and 552.

not subject to national appropriation was then still a postulate. After two years, resolution 1962 (XVIII) declared that principle a legal one. However, in spite of the adjective employed, the shift on to the plane of positive law did not seem to have been consummated. For the latter resolution declares that "States should be guided" by this and other principles. The choice of this phrase, and especially the word "should", seems to show that the level of legal duty had not yet been reached. (The principle in question was soon included into treaty law, and today it is also part of customary law.)

Another formula for the expression of principles *de lege ferenda* is to be found in resolution 2037 (XX) whereby the Assembly "[p]roclaims this Declaration [...] and calls upon Governments [...] to recognize the principles set forth therein and to ensure their observance by means of appropriate measures".

There are resolutions which start the process of law-revision and recite a number of principles without distinguishing between those *de lege ferenda* and those *de lege lata*, e.g. resolution 2749 (XXV). Other resolutions, though they concentrate on the former category, introduce a different kind of confusion: they speak of principles while in fact they mean purposes or ideas; resolution 2037 (XX) is a case in point. Resolution 2832 (XXVI) says that it contains "principles and objectives", but it does not sort out the former from the latter. Para. 4 of the Declaration on the Establishment of a New Economic Order (res. 3201 (S-VI)) enumerates what it describes as principles: some of them are legal, most of them are not, while the rest are not principles but purposes. None the less, in so far as it demands that the "new international economic order should be founded on full respect" for para. 4, the Declaration puts all the elements of that para. on an equal footing.

(5) *Principles of interpretation Definition of terms by the Assembly.* This category, well known in the law of treaties, is not foreign to the Assembly resolutions.

The annex to resolution 3314 (XXIX) contains the definition of aggression. In adopting the definition the Assembly expressed the belief that it was "desirable to formulate basic principles as guidance" for the determination whether an act of aggression had been com-

mitted. The "guidance" is not obligatory. Para. 4 of the resolution calls the attention of the Security Council to the definition: the Assembly "recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression". The definition is expressed in eight articles; it is in these articles that one must seek to find the "basic principles". Though they no doubt remain in some relationship to a number of principles of international law, they are elements of definition, while some are directives of interpretation.

In several earlier resolutions the Assembly defined the terms it used, without qualifying the matter (and rightly so) under the head of "principles". In resolution 96 (I) there is the definition of genocide. Resolution 381 (V) gives some elements of the notion of "propaganda against peace". In resolution 2131 (XX) "armed intervention" has been declared "synonymous with aggression". In resolution 2832 (XXVI) one can find some indications on what is meant by "a zone of peace" in the high seas. The Assembly definitions can and occasionally do exercise some influence on the respective clauses of treaties. To that extent they may raise problems similar to those of legislative definitions in municipal law.

§ 8. *Some Other Questions of Terminology*

While the Assembly resolutions use language that often permits to establish the meaning in which they employ the term "principle" (§§ 6 and 7), they are less instructive when some other questions of terminology are explored.

(1) *Norms.* In § 6 (2) above attention has been drawn to the use of the word "norm" in its legal connotation.

(2) *Provisions.* When the Assembly refers to the "provisions" of its resolutions, the term acquires a meaning different from the provisions in treaties or other binding international acts. In resolution 2880 (XXVI) the Assembly reaffirmed "all the principles and provisions" of the Declaration on the Strengthening of International Security. Some of the principles of that Declaration qualify as legal ones, while "provisions" are here nothing more than postulates and exhortations. On the other hand, the "provisions"

of the Charter of Economic Rights and Duties of States are given a normative meaning in view of the general regulative tendency of that instrument; this is particularly borne out by such expressions as "its provisions shall also apply" etc. (Article 12, para. 2; cf. also Article 33).

(3) *Standards.* Standards of conduct[67] are non-obligatory, though later they might undergo a transformation and become rules of law. The General Assembly proclaimed the Universal Declaration of Human Rights "as a common standard of achievement".

During the oral proceedings in the *South West Africa Cases, Second Phase,* the agent for Ethiopia and Liberia spoke of the resolutions of the United Nations and other organizations which had evolved standards relating to human rights, especially to non-discrimination and non-separation of persons differing in ethnic, racial or other background; in his opinion these standards had ripened into an international legal norm of the same content and scope[68]. Judge *Jessup* went less far; he distinguished "new rules of law" and "standards" which were not yet law: "the accumulation of expressions of condemnation of apartheid [...], especially as recorded in the resolutions of the General Assembly of the United Nations, are proof of the pertinent contemporary international community standard"[69].

The name of standard is sometimes given to the whole of the instrument, which does not mean that what is stated in it must therefore automatically bear the stamp of non-obligation. The rights and duties of States which figure in the draft Declaration annexed to resolution 375 (IV) are part of international law. During the discussion in the International Law Commission it was rather the whole instrument, i.e. the draft Declaration as such, that was qualified as a "common standard of conduct", and not its several

[67] The notion of standard is analysed in *op. cit* note 8, pp. 442-447.

[68] *Cf.* ICJ Pleadings 1966, vol. 9, p. 348.

[69] ICJ Reports 1966, p. 441. The learned judge referred to the resolutions as proof of a standard, as that standard was involved in the special situation of the Mandate of South West Africa. The formulation we find in the Dissenting Opinion may not be applicable to other situations. Judge Jessup explicitly denied that the resolutions were law-making, see § 3 and note 33 above.

principles. The codifying treaty was contrasted with an Assembly resolution, but the status the principles had in law remained unchanged[70].

(4) *Rights and duties.* These terms appear frequently in the Assembly resolutions. The non-binding nature of the resolutions is not an obstacle[71] for stating legal rights and duties: in such statements the Assembly simply repeats what already exists by virtue of a rule of international law. But the Assembly can also speak of rights and duties *de lege ferenda.* Indeed, it sometimes uses language that rather disguises the latter meaning and creates the impression that the resolution reflects positive law (in the Charter of Economic Rights and Duties of States one finds both these meanings). Only an analysis of the contents of the rules stated permits to qualify the right (or duty) in question as one *de lege lata* or *de lege ferenda*[72]. Further, there are resolutions which speak of rights and duties in a political or moral sense and thus avoid any legal connotation.

All these variations show that there is no uniform use of these terms by the Assembly. At any rate, when the resolution speaks of a right or a duty, these expressions do not automatically justify the conclusion that legal relationships are involved.

If the word "should" (and not "shall") is employed, the rule stated is a recommended, and not a legal, one. Examples are to be found in para. 6 of resolution 2158 (XXI), para. 4 of resolution 2674 (XXV) and in several articles of resolution 3281 (XXIX) - articles 8, 11, 13, paras. 2-4, 14, 17-24, 26 and 27, para. 2[73]. The use of the

[70] *Cf.*, in particular, the observations by M.O. Hudson, R. Córdova and R.J. Alfaro, ILC Yearbook, 1949, pp. 65 and 66. See also the discussion in the Sixth Committee of the General Assembly in 1949, e.g., 170th Mtg, 20 October 1949, p. 174, para. 2 (Belgium) and p. 177, para. 26 (Brazil).

[71] For a contrary view, see, *e.g., ibid.*, p. 181, para. 73 (Israel).

[72] Several commentators analyse the Charter from this angle, *e.g.*, Tomuschat, *op. cit.* note 65, pp. 461-465.

[73] *Cf.* the observations by R.J. Dupuy, Droit déclaratoire et droit programmatoire : de la coutume sauvage à la "soft law", in: L'Elaboration du droit international public, Paris, 1975, p. 132, at pp. 144-146, particularly on the Stockholm Declaration: " Rédigée au conditionnel, elle reste en deçà de ce type [...] ", *i.e.* the Declaration is not " une résolution-accord ", p. 144.

term "shall" reveals that the Assembly considers that Members have the obligation to follow the rule so indicated (cf. res. 1514 (XV), paras. 5 and 7). The source of the obligation which, in the rapporteur's opinion, is exterior to the resolution, usually remains undefined. The majority may well know that the process of making the (new) law is far from finished, yet the States composing it are pressing for the new regulation and this can be the reason for using the word "shall" instead of "should"; the point is illustrated by resolution 2574 D (XXIV) and by several articles in resolution 3281 (XXIX).

III. *Classification of Resolutions*

Any definite classification of the Assembly resolutions (if at all feasible) must await the conclusion of our study. For the time being, it seems useful to say a few words of the categorization of resolutions according to their addressees, for this approach will throw some light on the scope of the rules laid down by the Assembly (§ 9). More important, of course, is a classification that focuses on the role of the resolutions in the process of law-making. Hence one may ask whether there is any particular type of resolution that is suited better than others to serve that process (§ 10). And as one should first of all inquire into the connection between resolutions and sources of law, that connection can become another criterion of classification (§ 11). Finally, there is the problem of a typology of resolutions based on procedures that serve their elaboration (§ 12).

§ 9. *Classification According to Addressees*

Rules of conduct laid down in a resolution, whether the Assembly proclaims them *de lege lata* or *de lege ferenda*, are often addressed not only to Members but to States at large. The resolutions speak of "States", "all States", "a State", "every State" or "any State". Declarations (§ 10) are addressed to "States", but this class of addressees appears also in other resolutions, e.g. res. 378 (V). The use of the term "States", instead of the narrower one "Members" (though the numerical difference is at present minimal), is particularly justified when the resolution repeats or formulates principles or rules of general law, or when it recites the rights and duties of

States. Now and then the term "every nation" instead of "every State" has been employed, for instance in some paragraphs of resolution 290 (IV). "Governments" as addressees of the rules must be identified with "States". However, the explicit mention of "Governments" may be an indication that in spite of the normative language the resolution limits itself to formulating not rules of conduct but rather aims and purposes, and it will be up to the Governments "to ensure their observance by means of appropriate measures" (ultimate preambular para. in res. 2037 (XX)).

When "all States" are addressees of the resolution as the act of the Organization (e.g., para. 7 of res. 1514 (XV)), in contradistinction to being addressees of the rules it endorses, the question is one of the Organization's powers with regard to non-Members. The latter are under no duty to give the resolutions "due consideration in good faith"[74].

Some resolutions on human rights embrace the widest possible range of addressees (the Universal Declaration), while others do not define them at all, though they use language that covers not only States. For instance, resolution 2263 (XXII) stresses the necessity "to ensure the universal recognition in law and in fact" of the principle involved. Certain resolutions explicitly mention addressees other than States, e.g. res. 2037 (XX). In resolutions on human rights individuals are of course the beneficiaries. So are "peoples" in numerous instruments concerning the right of self-determination and related problems[75].

§ 10. *Declarations and Other Resolutions*

Some Assembly resolutions bear the name of declarations. Are they a different class among the acts of that body? In particular, is this distinction of any consequence for law-making?

In 1962 the Office of Legal Affairs of the U.N. Secretariat published a brief memorandum in which it made some comments on the

[74] This is how Judge Lauterpacht described the duty of Members, *op. cit.* note 4, p. 119.

[75] Higgins, *op. cit.*, note 58, pp. 35-36, discusses the problem of the addressees of UN resolutions.

use of the terms "declaration" and "recommendation"[76]. The memorandum contrasted the two, but made it clear that absence of binding force was their common feature (para. 4)[77]. In this sense (and *qua* Assembly acts) declarations are also recommendations. The question, then, is whether they really differ from each other.

(1) *Features other than the purported normative quality of declarations.* One of them is said to be the formal nature of a declaration. The U.N. memorandum describes the declaration as "a formal [...] instrument", while a "recommendation is less formal" (para. 3). However, the memorandum does not explain the nature of this lesser formality. The same rules of procedure regulate the drafting and adoption of both types of resolutions, and in both cases the voting is governed by the same provisions of the Charter.

Then there is the element of solemnity. The U.N. memorandum refers to the declaration as a "solemn instrument" (para. 3) and speaks of its "greater solemnity" (para. 4), but it fails to elaborate on its exact meaning. Is the act's name solemn or is it the inclusion of "principles"? While Mr *Monaco* also points to the solemn nature of declarations, he directs our attention to yet another point: declarations are addressed exclusively to States[78], and other resolutions sometimes have a wider circle of addressees. There are, however, well known exceptions. It would, indeed, be difficult to imagine a group of addressees wider than in the case of the Universal Declaration of Human Rights: "all peoples and all nations", "every individual and every organ".

[76] Note 35. M. Decleva, Le dichiarazioni de principi delle Nazioni Unite, Annuario di diritto internazionale, vol. 1, 1965, p. 63; O.Y. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations, The Hague 1966. J. Lador-Lederer, Legal Aspects of Declarations, Israel Law Review, vol. 12, 1977, p. 202, at pp. 224-228. R. Monaco, Fonti e pseudo fonti del diritto internazionale, Rivista di diritto internazionale, vol. 61, 1978, p. 740, at pp. 752 *et seq.* *Cf.* I. Seidl-Hohenveldern, The Charter of Economic Rights and Duties of States, Studi in onore di Giorgio Balladore Pallieri, Milano 1978, vol. 2, p. 550, at. p. 551, who criticises the very use of the terms "declaration" and "charter" by the Assembly.

[77] The respective passages have been quoted in § 3 above where the question of the binding force of declarations has also been briefly commented upon.

[78] R. Monaco, Cours général de droit international, RC, vol. 125, 1968-III, p. 93, at p. 192. *Cf.* Bueckling, *op. cit.* note 41.

Nevertheless, declarations, as a rule, are limited to States. This can be a sign of their law-making aspirations.

(2) *Normative quality?* The U.N. memorandum conceives a declaration as laying down rules of conduct ("principles", para. 3). Mr *Monaco* observes that declarations "contiennent des prescriptions et non pas seulement des invitations à tenir une certaine conduite "[79]. The memorandum envisages the possibility that under the influence of factors other than the decision of the Assembly these rules may later become binding upon States. Let us add that to have this effect, i.e. to become the fabric of a future law-making process, the declaration must fulfil certain requirements: it must use normative language. Though most declarations do it, some are limited to setting out goals, expressing opinions or making exhortations. But on the whole the very name of "declaration" indicates that the instrument contains rules. Of course, one finds similar normative language in other resolutions too, including "programmes". The programme annexed to resolution 3057 (XXVIII) uses imperative language that might be regarded as displaying a rule-making tendency. However, para. 8 (a) of the resolution puts it in a different framework by providing that it is to serve "for such action as [the Governments and some other bodies] may undertake in order to give effect to the suggestions contained therein".

The nature of the rules embodied in a declaration should be distinguished from the nature of the act itself[80]. The inclusion of rules into a recommendatory resolution (whether termed "declaration" or not) does not automatically signify that they are equally recommendatory. The rules can already be part of international law (§ 5 (2)). The U. N. memorandum implies that a declaration embodies rules that are not obligatory, though their character may change in

[79] Monaco, *op. cit.* note 78.

[80] Arangio-Ruiz, *op. cit.* note 15, p. 458, note 32, distinguishes resolutions (declarations) which formulate rules *in abstracto* and resolutions (declarations) which "formulate general or abstract rules or principles but do so within a concrete context, namely in view of an actual, relatively immediate need", p. 459. He notes that in the latter case we face "a different kind of generality or abstraction". The Rapporteur doubts whether this distinction is helpful in ascertaining the nature of the rules proclaimed in declarations.

the future: "a declaration may by custom become recognized as laying down rules binding upon States" (para. 4). The practice of the Assembly knows of several declarations which already recite well-established principles or other rules of international law.

On the other hand, the declaration can make it clear that what it contains is not *lex lata*. Various formulas are here possible: rules are proclaimed as a standard to be progressively achieved; rules are explicitly recommended or commended to Members; the resolution says that its addressees "should" abide by the rules; etc.

Yet such language need not be conclusive. For example, resolution 375 (IV) contains in an annex a draft Declaration on Rights and Duties of States. The word "draft" relates to the act itself, and not to its contents, so it need not tell us anything about the nature of the rules embodied in the resolution. In para. 2 of the resolution the Assembly "commends" the draft Declaration "to the continuing attention of Member States". Mr *Castañeda* observed that the Assembly implied that "it did not attribute to it the character of a set of rules in force"[81]. None the less most of the articles were and remain *lex lata*[82], though formulated in rather general language[83]. The statement that the instrument itself is not a source of law is obviously true[84], but it does not dispose of the other problem, viz the nature of the rules involved. That nature is not, or may not be, uniform; in one and the same declaration there sometimes figure,

[81] Castañeda, *op. cit.* note 42, p. 46.

[82] *Cf.* GAOR, 4th Sess., 6th Cttee, 170th Mtg, 20 October 1949, p. 177, para. 26: "there could be no doubt that the draft declaration was based almost entirely on existing law" (Brazil). According to another opinion there were in the draft both principles of "positive law" and "rules of conduct which [...] could not be considered as obligatory", *ibid.*, p. 174, para. 3 (Belgium).

[83] Speaking as the delegate of the United Kingdom Mr (later Sir Gerald) *Fitzmaurice* emphasized that "much more definition would none the less be needed before the declaration could be said to lay down precise rules of international law. The draft declaration could be considered an excellent guide to the conduct of nations but not to the formulation of international law". *ibid.*, 179th Mtg, 31 October 1949, p. 249, para. 79.

[84] *Ibid.*, 179th Mtg, 31 October 1949, p. 246, para. 44 (Poland). But the view was also expressed that the draft Declaration "was indeed a source of law which could serve as a basis for the further development of international law on the subject", *ibid.*, 172nd Mtg, 25 October 1949, p. 201, para. 47 (Ecuador).

side by side, legal principles and rules that have not yet acquired legal force (§ 11 (1)).

Whether a declaration is the right kind of instrument to embody rules of international law, is another problem. During the debate on the draft Declaration on Rights and Duties of States a delegate said that a "declaration did not seem to be the proper vehicle for stating existing law"[85]. According to another opinion, the proliferation of non-binding instruments (which constitute "a standard of international conduct") "should be avoided since it tended to debase the currency of international law and to make for further confusion"[86].

Finally, the factor of importance can be mentioned here. A declaration, says the U. N. memorandum, is "suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration of Human Rights" (para. 3). The significance of a declaration is "greater" than of other resolutions: "it may be considered to impart [...] a strong expectation that Members of the international community will abide by it" (para. 4). Perhaps the effect is here taken for the cause. If the significance of declarations is indeed greater, the reason thereof is probably the said expectation, and not the other way round. The opinion that declarations can or will have more influence has been reflected in writings[87].

§ 11. *Classification Based on Sources*

Resolutions of the General Assembly are acts imputable to that organ, and they are adopted in the exercise of its competence. This competence does not comprise enactment of law for States (the internal law of the Organization is another matter). Consequently, when resolutions are analysed in order to assess their significance in the operation of the sources of law, one explores them not as manifestations of the "will" of the Organization, but as an expression of attitudes taken by States.

[85] *Ibid.*, 176th Mtg, 28 October 1949, p. 225, para. 34 (New Zealand).

[86] *Ibid.*, p. 226, para. 50 (Australia).

[87] *Cf.* Arangio-Ruiz, *op. cit.* note 15, p. 450, commenting on the U.N. memorandum: "declarations *may* deserve, *de facto*, more compliance ".

(1) *Difficulties inherent in the use of the criterion of sources.* The constitutional position of the General Assembly (§§ 2 and 3), i.e. absence of legislative powers, in no way excludes an influence which its resolutions may have on the process of international law-making.

In his earlier writings the rapporteur has already had recourse to the pattern of sources in analysing the meaning and effects of non-binding resolutions of international bodies[88]. More recently Edvard *Hambro* raised the question whether the Assembly declarations could "be classified under any of the acknowledged categories of sources"[89]. Some other writers were also aware either of the links between the resolutions and the sources or of the necessity to analyse the former in conjunction with the latter in order to elucidate the former's possible law-making role[90]. The topic, however, was never fully studied along these lines, and it is proposed to devote to it considerable space in the provisional report.

The relevance of this type of approach may be subject to doubt, and in any case the analysis itself presents a number of difficulties. The nature of at least some resolutions is opaque. Mr *Monaco* emphasizes that it is not feasible to fit the resolutions into a single framework[91]. This is mainly because they contain a variety of elements, a phenomenon which has been noted, *inter alia*, by Messrs. *Castañeda* and *Mosler*[92]. In particular, Mr *Castañeda* compared the different "shadings" of such resolutions as 95 (I), 375 (IV) and 1262 (XIII). Resolution 1514 (XV) "contains disparate elements with regard to its degree of legal validity". These examples show "the

[88] Polish YIL, vol. 2, 1968-69, p. 80 and Annales d'Etudes Internationales, 1973, p. 237.

[89] Hambro, *op. cit.* note 34, p. 84. C. Schreuer, Recommendations and the Traditional Sources of Int'l Law, GYIL, vol. 20, 1977, p. 103.

[90] *Cf.* I. Detter, Law-Making by International Organizations, Stockholm 1965, pp. 212-213; G. Jaenicke, in *op. cit.* note 14; P. De Visscher, Cours général de droit international public, RC, vol. 136, 1972-II, p. 1, at pp. 127-128; H.W.A. Thirlway, International Customary Law and Codification. An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law, Leiden 1972, p. 45; Simma, *op. cit.* note 29, p. 96; R. Bernhardt, in *op. cit.* note 19, p. 105.

[91] Monaco, *op. cit.* note 78.

[92] H. Mosler, in: *op. cit.* note 19, p. 127.

difficulties in determining with any certainty the legal value of declaratory resolutions"[93]. What one faces in "this legal sector" is an "amorphous and mobile reality" [94].

It is not unfrequent that Governments or writers differ in choosing one category or another for the same resolution. The reason is that they rely on different elements thereof, which they regard as preponderant and most characteristic. Resolutions 1962 (XVIII)[95] and 2625 (XXV)[96] can serve as examples. The choice is always in some measure subjective, but the reason why the resolution is important or otherwise may change in time.

Resolutions 2749 (XXV) and 3281 (XXIX) are further instances of acts of complex contents which rather elude any clear cut classification. In commenting on the latter resolution M. *Virally* notices that "la valeur juridique des 'droits et devoirs économiques des Etats' proclamés par l'Assemblée générale ne peut faire l'objet d'un jugement d'ensemble, de portée générale, mais seulement de jugements particuliers, qui peuvent être fort différents suivant le droit ou le devoir considéré"[97]. This opinion can be generalized

[93] Castañeda, *op. cit.* note 36, p. 173.

[94] *Ibid.*, p. 176.

[95] *Cf.* the view of Australia: "a Declaration of legal principles by the General Assembly, especially if universally adopted and adhered to in practice, may be valuable evidence of international custom, which in turn is a most important source of law", UN doc. 5549/Add. 1, Annex, p. 15. On the other hand, according to France, the declaration "will, in point of fact, merely represent a declaration of intent", *ibid.*, p. 17. *Cf.* also the differing views of C.W. Jenks, Space Law, London 1965, p. 186 and H. Guradze, Zur Rechtsnatur normativer Entschliessungen der Vollversammlung der Vereinten Nationen, Zeitschrift note 41, vol. 19, 1970, p. 49, at pp. 55-56. For further comments on the attitude of States, see M. Lachs, The Law of Outer Space. An Experience in Contemporary Law-Making, Leiden 1972, p. 138.

[96] See varied characterizations of the resolution as a draft in UN doc. A/8018, pp. 73 (Chile), 80 (Rumania) and 85 (Italy). See also GAOR, 25th Sess., 6th Cttee, 1180th Mtg, 24 September 1970, p. 19, para. 21 (U.S.A.), 1182nd Mtg, 25 September 1970, p. 29, para 22 (Ukraine) and p. 30, para 36 (U.S.S.R.). The Dutch delegate described the resolution as "a heterogeneous document", *ibid.*, 1183rd Mtg, 28 September 1970, p. 38, para. 30. For Arangio-Ruiz, *op. cit.* note 15, p. 523, the resolution is "an instrument of purely hortatory value". *Cf.* also Tunkin, *op. cit.* note 20, pp. 150-152.

[97] M. Virally, La Charte des droits et devoirs économiques des Etats. Notes de lecture, AFDI, vol. 20, 1974, p. 57, at. p. 58.

in two senses. First, various provisions of one and the same resolution can be qualified under different heads; consequently, the resolution will not fit any single category. Second, the links that evolve between resolutions and the sources of the law of nations are of differing nature and intensity; therefore, a definition embracing, no matter how roughly, all the resolutions and qualifying them under a category is not possible

Mr *Schachter* perceives the difficulty of approaching our subject from the simple angle of either custom or treaty[98]. The Hague Court's occasional references to some Assembly resolutions make him conclude that "even within the conservative frame of article 38 of the statute, legal effect may be given to the collective pronouncements of the General Assembly and of international conferences despite their formally non-binding character". But "there is no general formula or single principle to decide particular cases. [...] We do not get very far by choosing sides on the basis of a preference for collective decisions or for traditional sources of law[99]. Finally, Mr *Rosenne* draws the attention of the Thirteenth Commission to resolutions "where close examination of the travaux préparatoires will disclose the intention to avoid precise determination of the status of the instrument in the thesaurus of legal sources, and even a desire on the part of many to avoid sharp legal categorization of the instrument in legal terms"[100].

However, in order to assess whether and if so, to what extent the Assembly resolutions open up new vistas in international law-making - a question to be considered in the provisional and final

[98] *Op. cit.* note 28, p. 12. C.A. Stavropoulos, L'Organisation des Nations Unies et le développement du droit international de 1945 à 1970, ONU Chronique Mensuelle, vol. 7, 1970, No. 6, p. 85, at p. 87, thinks that it is " difficile de rattacher l'effet de ces résolutions à telle ou telle catégorie et de les faire entrer dans l'une quelconque des subdivisions classiques des instruments normatifs ".

[99] O. Schachter, The Evolving International Law of Development, Columbia Journal of Transnational Law, vol. 15, 1976, p. 1, at p. 5. Various writers emphasize that resolutions should be analysed separately as no uniform qualification of their nature is possible, see, *e.g.*, R.A. Falk, On the Quasi-Legislative Competence of the General Assembly, AJIL, vol. 60, 1966, p. 782, at p. 786 and Tomuschat, *op. cit.* note 65, pp. 460-461.

[100] *Op. cit.* note 1, pp. 77-78.

reports - one has to define as exactly as possible their function in the operation of the sources.

(2) *The Hague Court and the relationship between resolutions and sources.* The International Court of Justice has applied some Assembly resolutions[101]. When the Court dealt with problems regulated in the internal law of the Organization and applied that law, the matter was of a kind different from the subject of this *exposé*, for it was a domain in which the Assembly possessed regulative powers. In the *Administrative Tribunal*[102] and *Expenses*[103] cases the Court decided some of the issues by referring to, and by basing itself on, certain rules laid down by the Assembly; these rules were part of the internal law of the Organization. There is qualitative change when the Assembly endorses rules to be followed by States in their mutual relations, i.e. outside the internal sphere of the Organization, and the Court finds these rules relevant for deciding questions submitted to it.

Unless the Court decides *ex aequo et bono*, a rule, before it can be applied by the Court, must qualify under one of the categories of Article 38, para. 1, of the Court's Statute. The Court "is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form"[104]. *Mutatis mutandis* this dictum comprises rules laid down by the Assembly: the resolution itself does not suffice to make its rules applicable by the Court.

The Court was rather cautious in the choice of language when it referred to the Assembly resolutions bearing on inter-State relationships and on rights and duties of States; besides, such references were until now not too frequent. In the *Namibia* case the Court saw in resolution 1514 (XV) an "important stage" in the development of international law regarding territories under colonial régime, *viz.* in the application of the principle of self-determination to all

[101] A. Basak, Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice, Wroclaw 1969.

[102] ICJ Reports 1954, p. 47.

[103] *Ibid.* 1962, p. 151.

[104] South West Africa Cases, Second Phase, *ibid.*, 1966, p. 6, at. p. 34, para. 49.

of them and the expansion of the concept of the sacred trust[105]. The Court did not explicitly link this resolution to a source of law, though it spoke of "the subsequent development of law, through the Charter of the United Nations and by way of customary law". Judge *Jiménez de Aréchaga* thinks that "[i]t is clear from the context of the Opinion that this reference to customary law is meant to include Resolution 1514 (XV) of the General Assembly"[106]. In the *Western Sahara Case* the Court explained the right of self-determination of peoples by citing resolutions 1514 (XV) and 2625 (XX), yet in conclusion it described them as "the basic principles governing the decolonization policy of the General Assembly"[107]. This phrase seems to place the resolutions on the plane of policies rather than establishing a more direct connection between them and a source of law.

(3) *Custom.* In a resolution Members may state what in their opinion constitutes practice which has matured into usage, and whether such usage has been accepted as binding, i.e. has become a custom. Such resolutions, in view of their potential role in ascertaining the existence of custom, can be distinguished as a separate category.

Some, however, would go further and see in resolutions not only the evidence of State practice or *opinio juris* (or both) but the very existence (in contradistinction to mere evidence thereof) of the composite elements of custom. In this hypothesis resolutions are regarded as constituting State practice and/or the *opinio juris*.

The provisional report will explore all these problems. In so far as categorization of resolutions is concerned, our study will show whether it is feasible and useful to differentiate among them depending on their function with regard to custom.

(4) *Treaty.* A resolution embodying rules may be preparatory to the conclusion of a treaty. This has often been the case in the

[105] *Ibid.* 1971, p. 16, at. p. 31, para. 53.

[106] Jiménez de Aréchaga, *op. cit.* note 34, p. 33.

[107] ICJ Reports 1975, p. 12, at pp. 31-33, paras 54-59; the quotation is from p. 34, para. 60. The Court also referred to several resolutions regarding specifically Western Sahara, which are not of interest to this *exposé*.

United Nations, e.g. in the field of human rights. A category within that class is resolutions which States have undertaken to respect until the treaty is concluded. A frequently cited example of such procedure is resolution 1962 (XVIII): during the discussion preceding its adoption the U.S.A. and the U.S.S.R. announced that they would abide by its principles.

It is very rarely that Members of the United Nations will conclude an agreement in the form of an Assembly resolution. Such resolutions would constitute a distinct category. Resolution 24 (I) and 1903 (XVIII) could here be considered.

Another pattern of procedure within the framework of treaties is suggested by the case of the former Italian colonies.

Further, Assembly resolutions sometimes elucidate the meaning and effect of the provisions of the U. N. Charter and occasionally other treaties. Interpretation by resolution may be regarded as yet a different class of acts bearing on the operation of treaties.

The whole gamut of problems relating to resolutions and treaties will be analysed in the provisional report.

(5) *General principles of law.* If resolutions can become a means of articulating general principles of law (in contradistinction to general principles of *international* law), then another category emerges. Provided certain conditions were fulfilled, Mr *Zemanek* viewed resolutions 1721 (XVI) and 1962 (XVIII) as expressing general principles of law[108]. Alfred *Verdross* (citing Mr *Zemanek*) admitted that States could recognize such principles in the form of an Assembly resolution[109]. During the discussion in the Special Committee that drew up what subsequently became res. 2625 (XXV), it was said that the principle embodied in the Declaration on the Inadmissibility of Intervention (res. 2131 (XX)) "could be regarded as applicable

[108] Zemanek, *op. cit.* note 52, p. 210.

[109] A. Verdross, Kann die Generalversammlung der Vereintein Nationen das Völkerrecht weiterbilden?, ZaöRV, vol. 26, 1966, p. 690, at pp. 694 and 695; same writer, Les principes généraux de droit dans le système des sources du droit international public, Recueil Guggenheim *op. cit.* note 53, p. 521, at pp. 525-526. *Cf.* his earlier views, Les principes généraux du droit dans la jurisprudence internationale, RC, vol. 52, 1935-II, p. 195, at p. 228. See also Castañeda's view quoted in note 42 and Tomuschat, *op. cit.* note 65, p. 473.

under the provisions of Article 38 of the Statute of the International Court of Justice as a general principle of law"[110]. Resolution 2625 (XXV) was similarly characterized by one delegate: "it would fall into the category of general principles of law and, as such, would be recognized under the Statute of the International Court of Justice"[111].

The instances adduced might rather qualify under the head of principles of *international* law. However, the essential point here is not the choice of examples, but the admission that resolutions can have evidential value for the general principles of law.

(6) *Resolutions as "subsidiary means"*. Though Article 38, para. 1 d, of the I.C.J. Statute does not mention the Assembly resolutions among the "subsidiary means for the determination of rules of law", there seems to be no obstacle to treat them as such. At the very most the silence of Article 38 could limit the Court alone, but not other agencies, not to speak of States, in the choice of evidence of law.

The Court did not feel that it was so limited. In several cases, including *Namibia* and *Western Sahara* cited in subpara. (2) above, the Court adduced certain resolutions to determine the contents of the applicable rules, or at least to elucidate and to interpret them[112]. This was an operation that fell under the provision of subpara. d in Article 38. Writers agree that Assembly resolutions could or do find their place in the framework of this provision[113]; opinions to the contrary are more than rare[114].

There was some discussion on whether the draft Declaration on Rights and Duties of States could be subsumed under the class of

[110] UN doc. A/6230, p. 134, para. 295.

[111] GAOR, 25th Sess., 6th Cttee, 1179th Mtg, 24 September 1970, p. 14, para. 33 (Hungary).

[112] Basak, *op. cit.* note 101, pp. 184 *et seq.*

[113] Johnson, *op. cit.* note 59, pp. 116-117 and 121-122, who observes that they are "very 'subsidiary' indeed", p. 117; Gross, *op. cit.* note 30, p. 557; C. Parry, The Sources and Evidences of International Law, Manchester 1965, p. 21. *Cf.* also I. I. Lukaschuk, Über die juristische Verbindlichkeit von Resolutionen internationaler Organisationen, Wissenschaftliche Zeitschrift der Karl-Marx-Universität Leipzig, vol. 17, 1968: Gesellschafts- und Sprachwissenschaftliche Reihe, Heft 1, p. 91, at p. 93, col. 1.

[114] *Cf.* M. Bothe, in: *op. cit.* note 19, p. 117.

subsidiary means according to Article 38. Perhaps this instrument is not a good illustration of the problem, for it was merely a draft, i.e. not a final and definitive statement by the Assembly. In particular, France had some doubts regarding the relevance of Article 38; she pointed out that the draft was the result of a compromise within the International Law Commission and it was "an attempt of a technical body to synthesize various juridical theories"[115]. Other delegates saw in the draft an expression of teachings of publicists. The representative of the United Kingdom put the matter as follows[116]: "The draft declaration should be accepted as an important contribution by a group of independent experts to the sources of existing law, as an authoritative statement of the principles of law on those matters. It should not be considered as a final and complete codification of all the rules of law, but as an authoritative document on the subject". The Dutch delegate added that the instrument "had no greater authority than the writings of scholars"[117]. During the debate it was said repeatedly that as a text elaborated by the International Law Commission and not yet approved by the General Assembly the draft would easily fall under subpara. d of Article 38[118].

§ 12. *Classification Based on Procedure*[119]

The G. A. Rules of Procedure governing the drawing up and adoption of the resolutions leave little room for classification based on the method of elaboration. Besides, in the light of the Rules that method is largely uniform, whatever the contents and consequences of the act in question.

[115] GAOR, 4th Sess., 6th Cttee, 172nd Mtg, 25 October 1949, p. 197, para. 10.

[116] *Ibid.*, 159th Mtg, 12 October 1949, p. 106, para. 35.

[117] *Ibid.*, 173rd Mtg, 25 October 1949, p. 206, para. 53.

[118] *Cf. Ibid.*, 168th Mtg, 18 October 1949, p. 167, para. 87 (U.S.A.) and 176th Mtg, 28 October 1949, p. 223, para. 21 (Egypt).

[119] The subject matter of §§ 12-14 has been originally reserved by the Rapporteur for the provisional report. These paras. have been written, and included into the *exposé*, as a result of the exchange of views that took place at the meetings of the Commission held in Athens on 4th and 10th September, 1979. This applies also to items 22-29 of the questionnaire.

None the less, procedure as criterion of categorization should not be excluded *a priori*. There are resolutions which distinguish principles from (other) rules (§§ 6 and 7). The process of elaborating the former may prove long and tortuous - as shown by the experience of the Special Committee that worked out resolution 2625 (XXV). But does the process itself differ from the elaboration of other rules? Further, there are declarations and other resolutions (§ 10). Does the making of a declaration follow a specific pattern?

In fact, these questions can be generalized: to what extent do the contents and the effects of the resolution influence the choice of procedure (where such choice is open to the Assembly)? In other words, if procedural solutions are determined by the results sought, *i.e.* by the nature of the resolution, one arrives at a classification of procedures according to resolutions, and not *vice versa:* a classification of resolutions on the basis of procedures.

In the latter hypothesis it is the procedure, *i.e.* a specific procedure, that can be regarded as having the capacity of equipping the resolution with a significance which it would not otherwise have (or, conversely, depriving it of such significance).

For instance, the question may be asked whether the nature of the organ that works out the resolution influences the result obtained. The Assembly is free to designate the organ charged with the preparation of the draft. That organ may be composed of representatives of States, and their number may differ, while the representation of the main groups of Members and their interests remains a stable factor of such composition. Or the task can be given to a body composed of independent experts, e.g. the International Law Commission. The organ may be created especially for the purpose of elaborating the text, or the matter may be placed from the outset on the agenda of one of the existing subsidiary organs.

If procedural devices, such as the choice of the organ, influence the result achieved, then we can have a typology of resolutions which is based on procedure.

IV. *Elaboration of Resolutions*

§ 13. *Procedure and Substance*

The mandate of the 13th Commission refers to the "elaboration" of treaties and other instruments. This implies a study of procedures and methods whereby Assembly resolutions come into being.

However, the Commission would engage in a highly descriptive exercise, had it undertaken the task of presenting a picture of how resolutions are drawn up and adopted. The procedural framework which serves that purpose is well established, and the Commission need not write a commentary thereon. The "institutionalization" of recommendations through "accomplished procedural provisions" (to repeat the words used by a writer[120]) is a notorious phenomenon of the United Nations. The elaboration of resolutions is regulated by the G. A. Rules of Procedure; there is a certain order of conducting the business of the Assembly and Members must comply with it: there are patterns that have to be followed.

Hence, instead of giving an overall review or analysis of the procedures and methods of making the resolutions the Commission might concentrate on some selected subjects only. The selection should be governed by the primary interest of the Commission, which is law-making. Therefore, the Commission should study the relationship between procedures and the results obtained, in particular the influence of different procedural solutions on the normative function and role of the resolutions. The link existing between procedure and substance has been mentioned in the Commission's definite report on the method of its work: "la Commission estime qu'elle devrait étudier aussi les questions de *fond* et plus particulièrement l'effet des procédures sur les problèmes de fond"[121]. And the Commission has already agreed to charge the rapporteur with a study that combined the two elements: "Résolutions, à vocation normative, de l'Assemblée générale des Nations Unies — procé-

[120] H. Nagel, Einige rechtsvergleichende Bemerkungen zu den Empfehlungen der Vereinten Nationen, des Europarates und des Nordischen Rates, Internationales Recht und Diplomatie, 1958, p. 223, at p. 235, "verfeinerte Verfahrensvorschrifte ".

[121] *Op. cit.* note 1, p. 96.

dure de leur élaboration, signification et valeur juridique des règles qu'elles énoncent"[122].

§ 14. *The Process of Drawing up the Text*

This process is regulated by the Assembly's Rules of Procedure, and the Commission need not go through all its details, mostly non-controversial. There are, however, certain points which might deserve the Commission's attention in view of their implications for the wider aspect of our topic.

In § 12 above reference has already been made to the choice of the organ in which the text of the resolution is being elaborated. The composition and procedure of the organ, as well as the time-limits under which it works, exert influence upon the final result. Whether the potential role of these factors in the realm of law-making can be more precisely defined is another question.

The draft of the Declaration on Rights and Duties of States has been prepared by the International Law Commission and directly submitted to the Assembly, without being first circulated among Members for comments. This procedure met with some criticism[123]. On the other hand, the ILC did not participate in the making of the Declaration of Principles embodied in resolution 2625 (XXV); the matter became the responsibility of a Special Committe which had worked on it for six years. The membership of that body underwent changes during that time; it was noted that "there were bound to be defects in the drafting of a document that had been negotiated by different groups of members at different sessions"[124].

The degree and measure of negotiation (as distinguished from, and preceding, the decision by the organ) is another element of

[122] *Ibid.*, p. 98.

[123] See GAOR, 4th Sess., 6th Cttee, 168th Mtg, 18 October 1949, p. 165, para. 62 *et seq.*

[124] GAOR, 25th Sess., 6th Cttee, 1183rd Mtg, p. 38, para. 32 (Netherlands). For a discussion of the reasons which prompted the Assembly to entrust a special organ (and not the ILC) with the task of drafting the Declaration, see Arangio-Ruiz, *op. cit.* note 15, p. 521 *et seq.* and I. M. Sinclair, Principles of International Law concerning Friendly Relations and Co-operation among States, in: Essays on International Law: In Honour of Krishna Rao, Leyden 1976, p. 107, at pp. 138-140.

procedure that permits the differentiation among resolutions and their effects; that element remains closely connected with the problem of voting which will be discussed in the provisional report. The first draft usually originates with a Member or group of Members, a procedure which guarantees direct State influence from the outset. The preparation of the first draft by a body composed of independent experts is rather exceptional: the procedure followed with regard to the draft Declaration on Rights and Duties of States[125] was not imitated[126]. Now, if the first draft, or a draft that will soon follow it, already represents a concept behind which there stands a majority, the very idea of negotiating an agreed text may be put in jeopardy. For here the constitutional position creates a temptation: the resolution constitutes the act of an organ (the Assembly) and not of States assembled in that organ. The majority in the organ can successfully press for the adoption of its version of the resolution. The Charter of Economic Rights and Duties of States is an example.

One is confronted with a different method when the majority does not take advantage of its preponderance and does not seek a vote before all the reasonable possibilities for the negotiation of an agreed text have been exhausted. The Members may even decide to act on the premise that the discussion must continue until a virtually unanimous consent is reached. The resolution is then a compromise or constitutes an amalgam of various proposals. However, though the text might not have been forced through by means of a majority vote, pressure for a last minute compromise might none the less be present in view of a tendency to have a resolution ready at the end of the session. In such circumstances consent has

[125] The ILC had before it a draft submitted by Panama, but it produced its own text.

[126] The ILC was entrusted with the formulation of the Nuremberg principles, but that formulation never reached the stage of an Assembly resolution. For critical observations on the handling of this issue, see R.R. Baxter, The Effects of Ill-Conceived Codification and Development of International Law, Recueil d'études de droit international en hommage à Paul Guggenheim, Genève 1968, p. 146. For a general plea to increase the role of the ILC "in the entire process of international legislation", see H.H. Han, International Legislation by the United Nations: Legal Provisions, Practice and Prospects, New York 1971, p. 166.

its limits, notwithstanding the fact that the differences might not have found their expression in the voting.

There is in the United Nations no procedure of general application to facilitate or to guarantee the drawing up of fully agreed texts of resolutions. The amount of time and effort to achieve such an effect varies from organ to organ. The UNCTAD has been equipped with procedures "designed to provide a process of conciliation to take place before voting and to provide an adequate basis for the adoption of recommendations with regard to proposals of a specific nature for action substantially affecting the economic or financial interests of particular countries" (para. 25, first sentence, of res. 1995 (XIX)). The words used show that conciliation is not applicable to resolutions which are of interest to this *Exposé*. Para. 25, subpara. (e) (ii) makes it abundantly clear: "Recommendations and declarations of a general character not calling for specific action" are listed among subjects in regard to which conciliation is "excluded" or, at any rate, they "shall not require conciliation". However, in evaluating the UNCTAD procedure one should remember that it has not been used; according to one view it exists "not so much to encourage negotiations as to delay, and perhaps avoid, voting"[127]. The Rules of Procedure of the Third U.N. Conference on the Law of the Sea also provide for conciliation before a matter of substance is put to the vote (Rule 37). And the discussion on structural changes in the United Nations regarding economic co-operation included the consideration of new "consultative procedures" to promote agreement among Members. But again these procedures would apply to "a specific action proposal or related action proposals in the field ot development and international economic co-operation"[128].

When the Assembly takes up a subject on which it has already enunciated some rules, the question may arise whether departures from them are possible and, if so, advisable. Is there room for reconsidering the rules when the resolution has been adopted without a negative vote? This particular question is raised as a procedural

[127] TD/194, p. 17, n. 21.
[128] E/AC.62/9, para. 103 (a).

issue, viz. one concerning the freedom, or otherwise, of the organ to adopt a new drafting in spite of the previous decision.

A departure from an existing resolution may prove difficult. The history of the provisions on non-intervention in resolution 2625 (XXV), in connection with resolution 2131 (XX), is instructive. In 1966 some Members of the Special Committee which was drafting what later became resolution 2625 (XXV), expressed the view that the Committee was "free to elaborate, amplify and clarify the wording of General Assembly resolutions"[129]. They "were not treaties binding on Member States and none of them was sacrosanct for the Special Committee". Other Members did not share this opinion and they prevailed, for the Committe formally decided (by 22 votes to 8, with 1 abstention) that with regard to the principle of non-intervention it would "abide" by resolution 2131 (XX). However, this approach was softened by the simultaneous instruction addressed to the Drafting Committee: "without prejudice" to the decision to abide by resolution 2131 (XX), it was "to direct its work [...] towards the consideration of additional proposals, with the aim of widening the area of agreement" of that resolution[130]. In fact, the final result was that resolution 2625 (XXV) did not repeat verbally all the provisions of resolution 2131 (XX)[131]; in particular, it changed the

[129] A radical change behind which there was a determined majority, is illustrated by the Assembly's statements on compensation in case of nationalization or expropriation of foreign property. The rules stated in para. 4 of res. 1803 (XVII) have been drastically modified by para. 3 of res. 3171 (XXVIII) and Article 2, para. 2 (c) of res. 3281 (XXIX).

[130] A/6230, paras. 292-300 and 334-355. The quotations are from paras 298 and 341. For a comment, see S. Bastid, Observations sur une " étape " dans le développement progressif et la codification des principes du droit international, Recueil d'études de droit international en hommage à Paul Guggenheim, Genève 1968, p. 132. See also Sir K. Bailey, Making International Law in the United Nations, ASIL Proceedings, 1967, p. 233, at p. 238. During the debate on res. 2131 (XX) the delegate of France said that he would "vote in favour of the draft resolution on the clear understanding that it should not in any circumstances be invoked as a precedent in the Sixth Committee or in the Special Committee on the Principles of International Law concerning Friendly Relations and Co-operation among States", GAOR, 20th Sess., 1st Cttee, 1422nd Mtg, 20 December 1965, p. 432, para. 34.

[131] See, *e.g.*, the observations by Canada, GAOR, 25th Sess., 6th Cttee, 1178th Mtg, 23 September 1970, p. 8, para. 29.

scope of the prohibition contained in para. 2 of the latter. This modification was maintained, in an even more stringent formulation, by Article 32 of resolution 3281 (XXIX)[132].

There are also instances of a different kind where one resolution will determine the contents of another. The Declaration on the Establishment of a New International Economic Order stipulated that it would "provide an additional source of inspiration" for the preparation of the Charter of Economic Rights and Duties of States (para. 6). The negotiations on the Charter had already been well under way when this directive was adopted; it preceded only the last session of the Working Group which drafted the Charter. None the less the Declaration exercised some influence on the drafting of the Charter. Resolution 3202 (S-VI) containing the Programme of Action on the said order has equally had some impact. The Programme constitutes the political and economic side of a long-term operation for which the Charter could have been regarded as the "juridical action"[133].

Another component of the process of elaboration is drafting, including the related problems of formulation and language; the latter have been discussed in Section II above. Several commentators have pointed out the defective drafting of a number of resolutions[134]. Compromise often results in a lack of precision of the language. During the debate on the final text of resolution 2625 (XXV) the imperfections of its drafting were frequently referred to[135]. Yet no other version would win the support of all the Members. While some problems of formulation and language are connected with the purported normative role of the resolutions, other difficulties are common to all types of the Assembly pronouncements[136].

[132] *Cf.* Tomuschat, *op. cit.* note 65, pp. 456-457.

[133] *Cf.* Virally, *op. cit.* note 97, p. 63.

[134] See, *inter alia*, the remark made by Mr *De Visscher*, *op. cit.* note 90, p. 129, note 29.

[135] See, *e.g.*, GAOR, 25th Sess., 6th Cttee, 1179th Mtg, 24 September 1970, p. 11, para. 1 (Finland, represented by E. *Castrén:* "the wording left much to be desired"); 1181st Mtg, 25 September 1970, p. 25, para. 37 (Mali); 1183rd Mtg, 28 September 1970, p. 35, para. 2 (Trinidad and Tobago).

[136] Some have been said to be unavoidable; see observations on res. 3281 (XXIX) by A. Garcia Robles, ASIL Proceedings, 1975, at p. 245.

In conclusion, a few words should be said on the more general aspect of elaboration. In his special report prepared for the centenary session of the Institute Sir Gerald *Fitzmaurice* outlined a scheme intended to make the elaboration and adoption of resolutions juridically rigorous and, consequently, "to cause any true legislative results to flow from resolutions"[137]. Whether one thinks in terms of bringing about such an effect or wishes to leave the resolutions' recommendatory status unchanged, it is not difficult to agree that the present process of elaboration could certainly be improved. The plan envisaged by Sir Gerald *Fitzmaurice* is one possible solution; it was discussed by the Institute in 1973[138]. During the debate Sir Humphrey *Waldock* mentioned the possibility of the participation by parliamentary organs in the ratificaton or approval of controversial resolutions[139]. His comment could serve as the starting point for a specific proposal which might aim at making the resolutions more acceptable and, eventually, more effective.

As one writer observed, States do not believe "in the specific necessity that the General Assembly perform a legislative function"[140]. M^me^ *Bastid* doubts whether "on puisse jamais faire accepter par les Etats un traité qui transformerait fondamentalement l'élaboration du droit dans l'ordre juridique international"[141]. Even if one does not strive at equipping the Assembly with law-making powers and remains at the level of recommendations, actual practice shows that States are not interested in improving the machinery for the elaboration of resolutions.

21st July 1979.

§§ 12-14: 12th November, 1979 (see note 119).

[137] Fitzmaurice, *op. cit.* note 12, pp. 271-275, the quotation at p. 274, para. 79. See also his additional explanations at pp. 382-383.

[138] *Ibid.*, pp. 375-379, 381, 384-385, 387, 389-391. *Cf.* the concluding remarks by Judge *Ago*, pp. 390-391.

[139] *Ibid.*, p. 384.

[140] Arangio-Ruiz, *op. cit.* note 15, p. 455. Tomuschat, *op. cit.* note 65, pp. 487-489, goes further as he generally questions the Assembly's qualifications to fulfil the law-making function.

[141] *Op. cit.* note 12, p. 385.

Questionnaire

(The term "resolution", whether used in singular or in plural, means resolution of the General Assembly of the United Nations as explained in § 1 of the preliminary *exposé*.)

1. Do you think that the maintenance of the distinction between obligatory and non-obligatory acts is relevant for our study, at least as its starting point?

2. Are resolutions means for the determination of rules of law? If so, are they only "subsidiary" in the sense of Article 38, para. 1 (d), of the I.C.J. Statute?

3. Can resolutions be regarded as State practice, in contradistinction to being merely its evidence? If so, under what conditions and circumstances? Or can they be only regarded as evidence of State practice?

4. Do resolutions influence (by e.g. initiating) State practice that eventually leads to the creation of custom?

5. Do resolutions accelerate the making of custom? Can they constitute the *opinio juris* or can they only be evidence thereof?

6. What is the meaning and effect of a statement in the resolution that the latter reflects customary law? How does such statement compare with a similar reference in a treaty?

7. Is the resolution a proper instrument for confirming or restating the law in a field where it seems uncertain or controversial?

8. Is the resolution suitable as a codification instrument?

9. Are resolutions a desirable form for agreements of States?

10. What is the usefulness of adopting, in a resolution, certain principles or other rules prior to their incorporation into a treaty? Does such adoption bind treaty negotiators?

11. What is the meaning and effect of "reservations" which States make, during the discussion or while explaining their votes, with regard to resolutions?

12. If a resolution interprets legal rules other than those of the U.N. Charter, what is the significance of such interpretation? Should the Thirteenth Commission deal with resolutions interpreting the Charter?

13. Have the resolutions evidential value with regard to the general principles of law?

14. In view of the recommendatory nature of the resolutions, is there any disadvantage in incorporating legal rules into them (in contradistinction to rules *de lege ferenda*)?

15. What is the meaning and effect of the repetition or re-citation of a rule that is not (yet) one of law?

16. Should resolutions limit themselves to enunciating principles or should they also venture into the field of detailed and specific regulation?

17. Does there exist any type of resolution that is particularly suitable for enunciating legal rules? Is "declaration" a case in point?

18. Is there any obstacle to the Assembly addressing its rules to "all States" instead of "all Members" of the Organization? Is the competence of the General Assembly different if one recognizes that it acts, or can act, as the organ of the international community?

19. Are voting majorities relevant for the determination of the significance of the resolution in the process of law-making? Has unanimity any special effect? What is the value of consensus in adopting law-declaring or law-proposing resolutions?

20. Can resolutions have, or do they occasionally exercise, a law-making influence or effect irrespective of the operation of custom or treaty as sources of law? What is your opinion on the view which finds expression in some writings, including the most recent ones, that resolutions are a new source of law?

21. What should constitute the subject of a resolution of the Institut de Droit International resulting from, and summing up, our study of the problem? Should the Institut make any observations or suggestions regarding the contents, procedure and drafting of resolutions?

22. In particular, should the Institut (1) heed the suggestion implicit in the comments by Mme *Bastid*, i.e. "entreprendre [...] l'examen des résolutions qui prétendent établir de nouvelles règles de droit pour s'efforcer de réaliser l'entreprise que Sir Gerald Fitzmaurice voudrait confier à un consortium de juristes" (*op. cit* note 12, pp. 384-385) and/or (2) make any proposals on changes (improvements) to be introduced into the procedures governing the elaboration of resolutions, including the relevant provisions in the G.A. Rules of Procedures?

23. Should the Commission explore the terminology of resolutions beyond what has already been said on the matter in Section II of this *exposé*?

24. Does the method of elaborating the resolutions influence their role in the process of law-making? If it does, what are the relevant procedural factors?

25. Does the nature of the organ that works out the draft exert influence upon the result achieved? For instance, is the composition of the organ pertinent?

26. What, if any, is the role of one resolution with regard to the drafting of another when the former has already dealt with the subject to be again regulated by the latter (concordance between resolutions)?

27. What is the value of conciliation (or similar devices promoting agreement) for the process of drawing up the text?

28. What is the meaning of a resolution for a Member State which (1) voted against it or (2) abstained from voting?

29. What other questions relating to the elaboration of resolutions should be discussed by the Commission?

The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective

L'élaboration des grandes conventions multilatérales et des instruments non conventionnels à fonction ou à vocation normative

(*Thirteenth Commission*)[1]

Resolutions of the General Assembly of the United Nations

Provisional Report

Krzysztof Skubiszewski

The Rapporteur offers his best thanks to those Confrères who have so helpfully responded to the Questionnaire and have thus made the preparation of the present Report possible. Their illuminating replies constitute a decisive step in the progress of our work.

The Provisional Report was submitted on 7th June 1983 and circulated among the Members of the Commission for comments.

[1] The Commission is now composed of Messrs Lauterpacht and Skubiszewski, *Rapporteurs*, Abi-Saab, Bindschedler, Blix, Bowett, Jessup, McDougal, McWhinney, Monaco, Mosler, do Nascimento e Silva, Rosenne, Rousseau, Schachter, Seyersted, Suy, Torres Bernárdez, Ustor, Virally, Yankov and Zemanek, Members.

Messrs Pescatore, Valticos and Yasseen were Members of the Commission till the end of 1981. Mr Blix rejoined the Commission during the Dijon session after a break of two years. Messrs Abi-Saab, Bowett and Torres Bernárdez became new Members in January 1982 and Mr Yankov was admitted in February 1984. These four Confrères joined the Commission after the deadline set for sending replies to the Questionnaire.

The abbreviation *PE note* indicates a note in the Preliminary *Exposé*.

At the begining of 1984 the Rapporteur was told that in the opinion of the Bureau the Report was too long for the purposes of discussion and publication and, therefore, its size should be reduced considerably. After some correspondence the Rapporteur came to the conclusion that he had no other choice than to make the Report much shorter. Consequently, §§ 1-2 and Sections I-VI (§§ 3-21) have been cut down by half their original size; this operation resulted in the elimination of a great many references to source materials and writings. On the other hand, the cuts in Section VII (§§ 22-28) were small as some Members of the Commission emphasized the importance of devoting more space to the procedure and methods of the elaboration of rules. Section VIII (§§ 29-30) remained unchanged.

Within the Commission's mandate this Rapporteur is responsible for the non-contractual instruments, and among these it has been decided first to consider the resolutions of the General Assembly of the United Nations[2]. The reasons for this choice have been briefly explained in § 1 of the Preliminary *Exposé*. What has been said in § 3 of that *Exposé* permits the inclusion of G. A. resolutions in the category of instruments which, in the words of our mandate, have a normative calling (*vocation normative*). This term implies an inquiry into the creative role of the resolutions. Actually, their impact is manifold and to show the whole gamut the Provisional Report proceeds gradually from the more static to the more dynamic functions of the resolutions.

The ramifications of this Report follow from the Questionnaire, but not from it alone. During the two meetings of the Thirteenth Commision at the Athens Session in 1979 (at Dijon in 1981 the Commission debated other items) there was some discussion on the general direction of our inquiry. The incisive comments then made were at the back of the Rapporteur's mind when he was writing the present text. In particular he wishes to recall the interventions

[2] ICJ Reports 1971, p. 16, at p. 50, para. 105. *Cf.* Judge Gros, Separate Opinion, Interpretation of the Agreement between the W.H.O. and Egypt, *ibid.* 1980, p. 99, at p. 103.

by Messrs *Rousseau* and *Virally* which aimed at some modification of the perspective suggested by the Preliminary *Exposé* and Questions 1-20. Further guidance on the scope of the Provisional Report was to be found in the replies to Question 21. Some of these stress the necessity of dealing with the broader issues of law-making in the context of General Assembly resolutions, in contradistinction to a more restrictive understanding of the word "elaboration" that figures in the Commission's name. Thus Judge *Jessup* points out that we should occupy ourselves with "the legal effect of the Resolutions". "Our principal task [writes Mr *McDougal*] [...] is to try to clear up some of the current confusion about how international law is made". The introductory observations in the replies by Mr *McWhinney* leave no doubt that he is in favour of going beyond the "positivistic terms" in which, in his opinion, the mandate of the Thirteenth Commission is couched. Judge *Mosler* wants our study to bring into focus the norm-stating or norm-creating effect of the resolutions. With Mr *do Nascimento e Silva* the emphasis is also on "the principal legal consequences of UN resolutions". Mr *Valticos* defines our assignment very broadly indeed, and Mr *Zemanek* explicitly mentions the need for a theoretical approach: we "should remain within the realm of realistic but scholarly theory". But it is Mr *Virally* who, continuing his Athens remarks, commented most extensively on the aim of our study. He thinks that the Thirteenth Commission should go behind the formal façade of the act of an international organ, in our case the General Assembly. For the political reality is that the resolution constitutes the outcome of a decision-making process, especially of negotiations by Member States which often do not follow the normal U. N. rules of procedure governing the elaboration of the organ's acts. This process, Mr *Virally* notes, can or does lead to an agreement among the States concerned. Our Confrère then puts a series of questions (to be considered by the Commission) which concentrate upon the legal nature and effects of the agreement so reached.

In their replies to Question 29 Messrs *McDougal, do Nascimento e Silva, Suy, Virally* and *Zemanek* proposed the consideration of some topics additional to those which were set down in the Questionnaire.

All these observations and suggestions have prompted the Rapporteur to adopt the following plan.

By way of introduction, the Report takes up a problem already investigated in the Preliminary *Exposé*, viz. rule-making through the General Assembly resolutions (§ 1). Next it deals with the resolutions as a means for the determination of law (§ 2). Then comes a more detailed analysis of the main themes. Section I is devoted to the evidentiary role of the resolutions with regard to custom and its component elements (§§ 3-5). This brings the Rapporteur to codification and restatement of law in resolutions (Section II, §§ 6 and 7), while in Section III (§§ 8-10) he writes about the more creative role of the resolutions in the realm of custom. Further, the Report examines the various relationships between the resolutions and treaties in the perspective of the former's law-creating effect (Section IV, §§ 11-13) and the contribution which the resolutions make to the evidence or emergence of the general principles of law (Section V, §§ 14 and 15). Having thus passed in review the place and function which resolutions could have in the framework of the recognized law formative agencies, the Report proceeds to discuss the more independent role of the Assembly enactments. Section VI (§§ 16-21) covers a range of questions that revolve round the issue of a new source of law and obligations. Section VII (§§ 22-28) concentrates on those methods and procedures of the decision-making process which are relevant to the laying down of principles and other rules by way of the General Assembly resolutions and to their inclusion into the *corpus juris gentium*. The conclusions of the Report figure in Section VIII (§§ 29 and 30).

§ 1. *Rule-Making Resolutions*

In accordance with the Commission's terms of reference our subject, as explained in § 1 of the Preliminary *Exposé*, is not any and every resolution of the U. N. General Assembly, but only those resolutions which lay down general and abstract rules of conduct addressed to States. Apart from the internal law of the Organization, the Assembly has no power to enact legal rules. This legal position is not changed by the authority of the Assembly to adopt, "in specific cases within the framework of its competence, resolutions which make determinations or have operative design" (*Namibia*

case); what the International Court of Justice described as the "formulation of a legal situation" does not amount to law-making[2].

The General Assembly must always keep within its constitutional limits under the U.N. Charter. The investment of the Assembly with law-making functions in regard to States could be operated through a revision of the Charter (*cf.* Judge Sir Gerald *Fitzmaurice* and Mr *Lauterpacht*[3]). Some jurists admit the possibility of a customary development leading to the conferment of such functions, e.g. Alfred *Verdross*, Mr *Virally* and Mr *Wengler*[4]. On the other hand, no legislative powers can originate in the interpretation of the Charter.

While the Assembly cannot enact law for States, Article 13, para. 1 (a), and also Articles 10, 11 and 14, permit the adoption of resolutions that in various ways bear on international law. Now and then States were at variance whether a particular resolution overstepped or not the bounds of these provisions (e.g., resolution 2603 (XXIV)). Resolutions which are adopted under one of these Articles and enunciate general and abstract rules of conduct for States are recommendatory in nature. The extent of the resulting limitations is not always clear. On the one hand, one may repeat Judge *Gros*'s words (used by him in a more specific context) that "we have here recommendations which are eminently worthy of respect, but which do not bind member States legally to any action, collective or individual"[5]. On the other hand, Mr *Schachter* thinks that "statements in resolutions that confirm or restate the law are not, in themselves, recommendatory. They are declaratory or determinative (constatations)". There are, in particular, resolutions which declare or confirm principles of law. Mr *Schachter* is aware of various

[3] Fitzmaurice, *op. cit.*, PE note 16; E. Lauterpacht, The Development of the Law of International Organization by the Decisions of International Tribunals, RC, vol. 152, IV-1976, p. 377, at pp. 436 and 461.

[4] A. Verdross, Die Quellen des universellen Völkerrechts. Eine Einführung, Freiburg 1973, pp. 35-36 and 138; M. Virally, Reply to the Questionnaire, general comments; W. Wengler, Rechtstheoretische und rechtssoziologische Betrachtungen zur Unterscheidung zwischen völkerrechtlich verbindlichen und völkerrechtlich unverbindlichen Äusserung völkerrechtlicher Organe, ÖZöRV, vol. 33, 1982, p. 173, at p. 187. See also PE note 15.

[5] Dissenting Opinion in the Namibia case, p. 323, at p. 339.

doubts regarding the effect of such resolutions. He maintains, however, that "such statements of law tend to be given evidentiary value and actually have greater legal effect than recommendations", though "the conclusions of law are not *ipso jure* binding and [...] their evidentiary value may be rebutted" (Question 7).

The Preliminary *Exposé* maintained the distinction between obligatory and non-obligatory acts and rules and briefly explained the reasons therefore. Not unfrequently States underlined the recommendatory nature of resolutions. Their assent was often forthcoming only because they knew that they did not thereby incur any obligations. "One could not just argue that particular reality away", Judge *Schwebel* remarks[6].

The great majority of the Commission think that the maintenance of the distinction between obligatory and non-obligatory acts is relevant for our study, at least as its starting point (Question 1). Only two Confrères, *viz.* Messrs *McDougal* and *McWhinney*, bypass the dichotomy. Mr *McDougal* wishes the Commission to address itself to the question "what expectations are created in the general community about the course of future decision".

Whether binding and non-binding rules form one "system", however conceived[7], need not be explored here. For to say that the Assembly resolutions are recommendatory and do not constitute a source of law is merely to state the initial position. The rules may be non-binding at the moment of their adoption by the Assembly. But in its inquiry the Commission must look into the process of their elaboration in order to see their multifarious relationships to law. The mandate of the Commission is clear: if we are to study the instruments "à vocation normative" we must see whether they live up to this kind of calling. In this respect the replies to Question 1 by Judge *Mosler* and Mr *Schachter*, and the introductory comment by Mr *Valticos*, are highly relevant.

[6] S.M. Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary International Law, ASIL Proceedings, 1979, p. 301, at p. 332.

[7] *Cf.* the notion of the "international juridical system" in Tunkin, *op. cit.*, PE note 20, pp. 60 ff.

§ 2. *Means for the Determination of Law*

The manner in which the International Court of Justice referred to some resolutions might provide a case for regarding them as means for the determination of law (Preliminary *Exposé*, § 11 (6)). But until now the Court has not cited Article 38, para. 1 (d), of its Statute in the context of any resolution nor has it explicitly described them as constituting such means[8].

In *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *The Government of the Libyan Arab Republic* (Award on the Merits) the International Arbitral Tribunal (Mr *Dupuy*, Sole Arbitrator) stated that it was "necessary to determine precisely the content of positive law" on the basis of which it intended to rule. The Tribunal added that it was necessary "to ascertain the place which resolutions by the General Assembly of the United Nations could occupy therein"[9]

When an official statement refers simultaneously to both subpara. (b) and subpara. (d) of Article 38, it is clear that while the Government in question does not exclude a restriction of the resolution's role to that under (d), it is ready to go further[10]. On the other hand, a suggestion to revise subpara. (d) to include an express mention of resolutions[11] may mean that there are difficulties in placing resolutions even under that (modest) rubric.

Judge *Jessup* discusses the application of Article 38, para. 1 (d), and remarks that the "pleadings may well invoke also Resolutions of the UN General Assembly and these also may be cited in the written notes of the judges".

In reply to Question 2 several Members of the Commission agree that resolutions can serve as a means for determining the existence of a rule or rules of law. They are Messrs *Bindschedler* and *Monaco*, Judge *Mosler*, Messrs *Rosenne*, *Schachter*, *Ustor* and *Zemanek*. Two

[8] *Cf.*, on the other hand, Judge Ammoun, Separate Opinion, Barcelona Traction Case (Second Phase), ICJ Reports 1970, p. 286, at p. 302.

[9] Award of 19 January 1977, ILR, vol. 53, p. 422, at p. 484, para. 80.

[10] *Cf.* GAOR, 29th Sess., 6th Cttee, 1486th Mtg, 28 October 1974, p. 133, paras. 5 *in fine* and 6 (Mexico).

[11] The idea of such a revision was entertained by Austria, A/8382, p. 26, para. 66.

Members go considerably further as they are critical of the prefix "subsidiary" (Messrs *McDougal* and *McWhinney*).

On the other hand, Messrs *do Nascimento e Silva* (with some qualification), *Seyersted, Suy* and *Valticos* do not think that resolutions are "subsidiary means". Yet the negative answers (with the possible exception of Mr *Seyersted*'s) should be read against the background of other comments by these Confrères. They do not deny that resolutions have evidentiary effect.

I. *Resolutions and Evidence of Customary Law*

§ 3. *Evidence of State Practice*

This paragraph considers State practice as the initial element of customary law. It explores the evidentiary value of resolutions in regard to practice alone, without inquiring whether they are also evidence of practice that has already been "accepted as law" (Article 38, para. 1 (b), of the I.C.J. Statute).

To be custom-creating State practice must be uniform, extensive and constant. Also, it must be shaped according to a specific pattern which, as Mr *McDougal* has explained, consists of the interaction of claims and responses given thereto; it is "a process of reciprocal interaction"[12].

Mr *Dupuy*, sole Arbitrator in the *Texaco case*, compared the practice of States with the provisions of Article 2 (c) of resolution 3281 (XXIX). He concluded that the practice was in conformity not with this provision, "but with the exception stated at the end of this paragraph"[13]. The necessity of such verifying comparison shows that in the view of the learned arbitrator the resolution itself could not establish its own evidentiary value; it remained to be proved.

However, there is little doubt that the functioning of the United Nations has enlarged the area within which evidence of State practice can be found. Judge Kotaro *Tanaka* noted: "A State [...] has the

[12] M.S. McDougal, The Hydrogen Bomb Tests and the International Law of the Sea, AJIL, vol. 49, 1955, pp. 356 and 357.

[13] Note 9, p. 493, para. 89.

opportunity, through the medium of an organization, to declare its position to all members of the organization and to know their reaction on the same matter"[14].

With the exception of Messrs *McDougal* and *Rosenne* the Members who replied to Question 3 generally admit that the G. A. resolutions can be regarded as evidence of State practice. Various other writers, among them Sir Kenneth *Bailey*[15] and Messrs *Bos*[16] and *Brownlie*[17], also admit that resolutions are a tool for ascertaining State practice. On the other hand, Mr *Rosenne* replies in the negative[18]. So does Mr *McDougal*, though for different reasons. The opinion of Sir Gerald *Fitzmaurice*, expressed in his Special Report for the Centenary Session (para. 74), should also be noted here.

§ 4. *Evidence of Opinio Juris.*

(1) *Judicial decisions.* International tribunals have not pronounced specifically on the resolutions as being evidence of *opinio juris*. Their view on the matter could possibly be deduced from some of their more general *dicta*, few as they are, devoted to the significance of the resolutions. In the *Fisheries Case* Judge Alejandro *Alvarez* noted: "The further means by which the juridical conscience of peoples may be expressed at the present time are the resolutions of diplomatic assemblies, particularly those of the United Nations [...]"[19].

[14] Dissenting Opinion, South West Africa Cases, Second Phase, ICJ Reports 1966, p. 250, at p. 291. On the other hand, the Respondent in these cases explained at length his doubts regarding the G.A. resolutions as evidence of practice, ICJ Pleadings, vol. 10, in particular pp. 6 and 14.

[15] In: Schwebel (ed.), *op. cit.* PE note 8, p. 373. *Cf. id., op. cit.*, PE note 130, p. 237.

[16] M. Bos, The Recognized Manifestations of International Law. A New Theory of "Sources", German YIL, vol. 20, 1977, p. 9, at p. 69. *Cf.* also pp. 31 and 68.

[17] I. Brownlie, Principles of Public International Law, 2nd ed., Oxford, 1973, p. 674. *Cf.* also p. 2.

[18] One could, however, understand his negative answer as relating primarily to the identification of resolutions with practice (§ 8 (2)), and not necessarily to resolutions as mere evidence of practice.

[19] Individual Opinion, ICJ Reports 1951, p. 145, at p. 149.

In the *LIAMCO* case the Arbitral Tribunal (Sole Arbitrator: S. *Mahmassani*) considered various resolutions of the General Assembly and concluded that they, "if not a unanimous source of law, [were] evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources [...]"[20]. These words seem to point to an *opinio juris* in the process of formation rather than to an already existing one.

(2) *Attitude of States.* Now and then Governments would admit that resolutions were relevant in seeking evidence of *opinio juris.* For instance, during the debate on the Charter of Economic Rights and Duties of States the representative of Australia observed that while that instrument "could not create law, it might help to determine or influence the *opinio juris* [...]"[21].

(3) *Replies to the Questionnaire and other opinions.* Messrs *McDougal, McWhinney, Monaco, Mosler, do Nascimento e Silva, Schachter, Seyersted, Suy, Ustor, Valticos* and *Zemanek* agree that resolutions can be regarded as evidence of the *opinio juris* (Question 5). Mr *Virally* may be included in that majority[22]. Some of these Members add different qualifications and explanations. Messrs *Bindschedler* and *Rosenne* reply in the negative.

Many writers admit that resolutions can constitute evidence of the *opinio juris,* e.g. Sir Robert *Jennings*[23], Mr *Seidl-Hohenveldern*[24] and Max *Sœrensen*[25]. However, it is not possible to state any general rule: the evidential value of the Assembly resolutions varies from case to case[26].

[20] Libyan American Oil Company (LIAMCO) v. The Government of the Libyan Arab Republic (Petroleum Concessions 16, 17 and 20), 12 April 1977, ILM, vol. 20, 1981, p. 1, at. p. 53 (p. 103 of the report reproduced therein).

[21] GAOR, 29th Sess., 2nd Cttee, 1650th Mtg, 9 December 1974, p. 450, para. 14.

[22] *Op. cit.*, PE note 53, p. 550. Id., Droit international et décolonisation devant les Nations Unies, AFDI, vol. 9, 1963, p. 508, at p. 540.

[23] *Op. cit.*, PE note 51, p. 438.

[24] I. Seidl-Hohenveldern, International Economic "Soft Law", RC, vol. 163, 1979-II, p. 165, at pp. 189 ff.

[25] *Op. cit.*, PE note 32, p. 99. For an analysis of Sœrensen's views, see Thirlway, *op. cit.*, PE note 90, pp. 68-70.

[26] For a cautious approach, *cf.* De Visscher, *op. cit.*, PE note 90, p. 130; Schachter, *op. cit.*, PE note 99, p. 6; Bos, *op. cit.*, note 16, p. 68.

Sometimes it may be easier to prove a negative effect: a resolution, or a vote on it, may deprive a hitherto existing rule of its *opinio juris* and, consequently, terminate the rule's universal or general application. Thus resolution 1803 (XVII) " may be deemed to have administered the *coup de grâce* to the alleged international standard" of prompt, adequate and effective compensation for nationalization, expropriation or requisitioning of foreign property[27]. Mr *Castañeda*'s view is much more radical: if the Assembly rejects a customary rule, "it is evident that that rule lacks the element of *opinio juris*"[28].

Another type of negative effect is when the resolution states the existence of *opinio juris* and some States oppose this; an example is the vote on resolution 2603 (XXIV)[29].

(4) *Determination by the U.N. itself.* The practice of the United Nations knows of an instance where an organ determined that a G. A. resolution reflected "a universal legal conviction". The organ was the 1966 Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States and the decision was embodied in its resolution of 18 March 1966 adopted by 22 votes against 8 with one abstention[30]. In preambular paragraph (c) the resolution says that the G. A. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, i.e. resolution 2131 (XX), " by virtue of the number of States which voted in its favour, the scope and profundity of its content and, in particular, the absence of opposition, reflects a universal legal conviction which qualifies it to be regarded as an authentic and definite principle of international law". It is beyond doubt that the prohibition of intervention is a peremptory rule of general international law. However, the absence of negative votes, to which para. (c) refers, is inconclusive because some U. N. Members did not regard resolution 2131 (XX) as law-declaring[31]. Also, the very opposition by some Members of the Special Committee to the state-

[27] Gross, *op. cit.*, PE note 30, pp. 556-557.

[28] *Op. cit.*, PE note 36, p. 172.

[29] See the interpretation of that vote by the delegate of Denmark, GAOR, 24th Sess., 1st Cttee, 1717th Mtg, 10 December 1969, para. 154.

[30] A/AC.125/3; A/6230, p. 152, para. 341.

[31] *Cf. ibid.*, p. 153, para. 342 (France).

ment regarding the existence of "a universal legal conviction" deprives that conviction of its purported universal nature and effect[32].

(5) *Repetition.* Whether repetition of resolutions results in a stronger evidence of *opinio juris* is debatable (if not doubtful, *cf.* the view of Mr *Weil*[33]).

Mr *Suy* links re-citation to evidence of *opinio juris.* So does Mr *Schachter* (replies to Question 15). However, the effect of repetition is sometimes the opposite. Re-citation "may only evidence non-compliance", Mr *Schachter* remarks. In Mr *Ustor's* view "repetition can increase the doubts surrounding the rule's binding force ". Mr *De Visscher* emphasizes a certain vagueness of the reiteration procedure, while Mr *Arangio-Ruiz* adds: " reiteration may weaken the credibility of a rule and its effectiveness" and Mr *Seidl-Hohenveldern* expresses a similar idea[34].

(6) *Affirmation of rules applied or proclaimed by other organs.* The Assembly sometimes affirms or re-affirms principles or other rules which have been applied by an organ or which have been proclaimed in a non-binding instrument by an international body other than the Assembly.

The first case, which is rather exceptional, is illustrated by resolution 95 (I), on which, in particular, Emile *Giraud* and Richard R. *Baxter* commented. The latter wrote: "a vote of this character is highly persuasive evidence of universal acceptance of the law that the Tribunal applied"[35].

The second type of affirmation occurs more frequently, e.g. resolutions 2086 (XX), 2131 (XX) and 3129 (XXVIII); *cf.* also resolution 2995 (XXVII).

[32] *Cf. ibid.*, pp. 158 (Sweden) and 159 (U.S.A.).

[33] P. Weil, Towards Relative Normativity in International Law, AJIL, vol. 77, 1983, p. 413, at p. 417.

[34] De Visscher, *op. cit.*, PE note 90, p. 132, n. 33; Arangio-Ruiz, PE note 15, p. 528; I. Seidl-Hohenveldern, Das Recht der Internationalen Organisationen einschliesslich der Supranationalen Gemeinschaften, 3rd ed., Köln 1979, p. 225, para. 1514 b.

[35] E. Giraud, Le droit international public et la politique, RC, vol. 110, 1963-III, p. 419, at pp. 739-743; Baxter, *op. cit.*, PE note 126, p. 151. Baxter criticized the subsequent formulation of these principles by the General Assembly.

§ 5. *Evidence of Customary Law*

A law-declaring resolution usually limits itself to stating the relevant rule without mentioning the constitutive elements of custom. Governments and writers, whether they accept or reject the evidentiary value of resolutions, often do not speak separately of practice and/or *opinio juris* but refer generally to law and its evidence. Of course, a general statement of this kind implies the admission that the two elements are there, in particular the *opinio juris*.

(1) *Judicial decisions.* In resolution 3232 (XXIX), to which Messrs *Rosenne* and *Suy* direct our attention, the General Assembly recognizes that "the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice" (eighth preambular paragraph). Whether the Court needed such a reminder is another question.

In the *South West Africa Cases, Second Phase*, the Court did not express any view on the contention of the Applicants that with "the growth of an organized international community" it was "increasingly reasonable to regard the collective acts of the competent international institutions as evidence of general practice accepted as law"[36]. In the *Namibia* case the reference to customary law can be understood to include resolution 1514 (XV), and in the *Western Sahara Case* the Court explained the right of self-determination of peoples by citing that resolution and resolution 2625 (XX)[37].

The arbitral decision in the *Texaco* case is also relevant here (subpara. (4) below).

Several municipal courts, using diverse language, invoked some General Assembly resolutions, e.g. res. 95 (I), 96 (I), 217 A (III) and

[36] ICJ Pleadings, vol. 9, p. 347. What the Court said about moral principles and their "sufficient expression in legal form" did not concern the problem of evidence, ICJ Reports 1966, p. 34, para. 49.

[37] Preliminary *Exposé*, § 11 (2), notes 105-107. On the former case, cf. E. Suy, Innovations in International Law-Making Processes, in: R. St. J. Macdonald and others (eds), The International Law and Policy of Human Welfare, Alphen aan den Rijn 1978, p. 187, at p. 191.

626 (VII), in a manner which amounted to treating them as evidence of law[38].

(2) *Attitude of States.* Various Governments, particularly those belonging to the Group of 77, espouse the view that some resolutions reflect international custom and the Hague Court has to take account of, or draw upon, them in applying Article 38, para. 1 (b). During the review of the role of the I.C.J. by the General Assembly five Governments sponsored the inclusion into the resolution on that subject of a preambular paragraph which was more categorical than the text finally adopted by the Assembly[39]. The position of Ethiopia and Liberia in the *South West Africa Cases* has already been noted (subpara. (1) above). In the *Nuclear Tests Case* Australia cited several G. A. resolutions as evidence for the "maturing of national and international attitudes towards atmospheric testing of nuclear devices"[40].

Resolution 3232 (XXIX) with its eighth preambular paragraph (subpara. (1) above) was adopted by consensus. Nonetheless several Governments voiced their opposition to, or doubts on, this paragraph. Some of them declared that had there been a separate vote on it, they would not have supported it.

On the whole, however, Governments do not deny that some resolutions can have evidentiary value. The object of the resolution (or of the relevant part of it) must be to declare law, and States which elaborate the resolution must be aware of this[41]. Further, the circumstances and method of the elaboration must be such as to permit for a reasonably safe conclusion regarding the customary nature of the rule or rules so stated. If after the adoption of the resolution, and taking into account all the preparatory work, doubts

[38] C. Schreuer, Decisions of International Institutions before Domestic Courts, London, Rome, New York 1981.

[39] A/C.6/L.989.

[40] ICJ Pleadings, vol. 1, pp. 12, 478, 486, 506-509, 514 and 519. See also the Joint Dissenting Opinion in this case, ICJ Reports 1974, p. 312, at p. 361.

[41] R. Higgins, The Development of International Law by the Political Organs of the United Nations, ASIL Proceedings, 1965, p. 116, at p. 121, distinguishes two categories: "resolutions deliberately declaratory of existing law" and resolutions "confirmatory of existing law, where perhaps areas of doubt have existed" such as res. 95 (I).

persist and to dispel them a "vertical" assessment[42] of the text is still necessary, the instrument has little if any evidentiary value.

(3) *Replies to the Questionnaire and other opinions.* In their replies to Question 6 Messrs *McDougal, McWhinney, Monaco, do Nascimento e Silva, Schachter, Suy, Ustor, Valticos* and *Zemanek* place some reliance on the resolutions as evidence of custom. A similar view is taken by many other writers; they include Sir Kenneth *Bailey*, Judge *Jiménez de Aréchaga*, Mr *Röling* and Mr *Wengler*[43]. Some jurists emphasize that this evidence is rebuttable. On the other hand, Mr *Castañeda* defends the proposition that the G. A. resolutions constitute conclusive evidence of customary law[44].

(4) *Factors influencing the evidentiary role of resolutions.* A single factor is here rarely decisive. It is the varying combination and interplay of different factors that provide evidence of custom.

The *intention* of the Governments and, consequently, the *purpose* of the resolution or its relevant part must be to state the law. The Australian representative spoke of "the specific juridical intention of the resolution"[45]. During the debate on the nature of resolution 2131 (XX) the representative of France pointed out that the Assembly had not had "the intention [...] of giving a legal definition to the principle of non-intervention [...]"[46].

The *organ* which elaborates the resolution and the *way* it proceeds are important factors. According to a Government opinion the resolution's "value as evidence of the consensus of the official juridical opinion of States would depend upon the manner and quality of the study which had preceded its formulation"[47]. The "quasi-

[42] See Arangio-Ruiz, *op. cit.*, PE note 15, p. 523.

[43] Bailey, *op. cit.*, PE note 130, p. 237; Jiménez de Aréchaga, *op. cit.*, PE note 34, p. 31; Röling, in: Annuaire IDI, vol. 55, 1973, p. 596; Wengler, *op. cit.*, note 4, pp. 191-193, 195 and 197-198.

[44] *Op. cit.*, PE note 36, pp. 171-172.

[45] GAOR, 17th Sess., 6th Cttee, 766th Mtg, 26 November 1962, p. 172, para. 21. *Cf.* Seidl-Hohenveldern, *op. cit.*, note 24, p. 190.

[46] A/6230, p. 153, para. 343.

[47] Note 45 (Australia).

judicial forms of support"[48] no doubt enhance the significance of the resolution. Hasty procedures, absence of care, and lack of legal expertise militate against the conclusiveness of the instrument.

Another factor is *voting*. Unanimity or at least absence of opposition are said to point to the evidentiary effect of the resolution, while express opposition and, generally, majority decisions show the act in a different light. The importance of voting was recognized in the *Texaco* case[49]. Now and then Governments admit that voting is significant, though there are various shades of opinion. Occasionally there were references to the requirement of unanimity, "substantial unanimity", vast or overwhelming majority or absence of opposition.

Among the Members of the Commission Judge *Jessup* mentions the factor of "a sufficient number of States". He attaches "special weight" to the unanimous adoption of a resolution declaratory of custom (reply to Question 6). Mr *Ustor* equally emphasizes the role of unanimity in the context of the evidence of custom (Question 3; in § 25 below we revert to the significance of voting in the broader context of replies to Question 19). The views of Messrs *Seidl-Hohenveldern*[50] and *Wengler*[51] should also be noted here. Mr *Tunkin* refers to declaratory resolutions which received the consent of the two "systems" ("capitalist" and "socialist")[52].

But unanimity does not turn the resolution into irrebuttable evidence[53]. For the value of this or any other factor indicative of evidence is far from absolute. When in spite of the existence of any such factor or factors it must still be "shown that the rule or principle was generally observed in the practice and intercourse of States"[54], or the evidentiary effect to the resolution depends, *inter alia*, on what results from "the analysis of the provisions concerned",[55] one is

[48] R. Higgins, The Development of International Law through the Political Organs of the United Nations, London, New York, Toronto 1963, p. 5, citing Mr Schachter. She gives, *inter alia*, the example of the I.L.C.

[49] Note 9, pp. 484, 487, 491 and 492, paras. 80, 83, 86 and 87.

[50] *Op. cit.*, note 34, p. 224, para. 1514 b.

[51] *Op. cit.*, note 4, p. 195.

[52] G.I. Tunkin, Völkerrechtstheorie, Berlin 1972, pp. 207-208.

[53] De Visscher, *op. cit.*, P.E. note 90, p. 130.

[54] The official view cited in note 45.

[55] Texaco case, note 9, p. 487, para. 83; see also p. 491, para. 86.

inevitably back at the start of the whole process and the resolution itself is not very helpful in providing a guide to the existence of custom.

(5) *Factors negating the evidentiary role of resolutions.* It is probably easier to say when the resolution is *not* declaratory of custom than to state positively that it is. There are several negative indicators.

If a resolution or some of its provisions result from a *compromise* their role in determining custom is problematical or none at all. In particular, the *consensus* procedure is not conducive to exact statements of customary law. Compromise or haste, or both, are often the cause of faulty drafting, inaccuracies, or even "gross material errors"[56]. Such provisions do not carry any weight as an expression of custom and they diminish the (potentially) evidentiary force of the remaining parts of the resolution. Mr *Bindschedler* notes: "La résolution est en général le résultat d'un compromis politique et, par conséquent, ambiguë et souvent mal rédigée [...]" (Question 7).

An express *omission* of an otherwise intended *reference to international law* or its deletion from the draft creates a presumption against the law-declaring nature of the instrument. For instance, there was opposition to the statement that the Charter of Economic Rights and Duties of States was to serve as a first measure of codification and progressive development of the law in question. Consequently, the relevant formula was struck out, though it had been originally sponsored by the Group of 77. Mr *Virally* cites this modification of the draft and concludes that the definitive text does not purport to express the rules of customary law[57].

The effect of unanimity, evidentiary as it might be, can be destroyed by some particular provisions of the instrument so voted. In Mr *Seidl-Hohenveldern*'s opinion the said Charter "cannot be used as evidence of existing customary international law even in respect of those of its articles which were approved unanimously"[58]. He bases his conclusion on Article 33 which establishes an interrelation

[56] Arangio-Ruiz, *op. cit.*, PE note 15, p. 606, in regard to res. 2625 (XXV).
[57] *Op. cit.*, PE note 97, p. 59.
[58] *Op. cit.*, PE note 76, p. 555.

among all the provisions of the Charter. As "each provision should be construed in the context of the other provisions", the articles which otherwise might be regarded as stating customary rules, must nonetheless be interpreted and applied in conjunction with the rules *de lege ferenda*, which process inevitably changes the status of those articles.

Sometimes the issue is decided by *the resolution itself:* there are phrases which obviously deprive the resolution of any law-declaring effect. The Universal Declaration of Human Rights has been proclaimed "as a common standard of achievement"; the French version, by using the term "ideal", is even more explicit ("comme l'idéal commun à atteindre"). What remains to be achieved, is not yet law, though one day the ideal might be turned into reality.

Finally, the resolution itself may be silent on its evidentiary nature, but *declarations by individual States* will leave no doubt that they refuse to regard it as evidence of law.

(6) *Criteria of the Special Committee.* The Special Committee referred to in § 4 (4) above stated the criteria which in its opinion made resolution 2131 (XX) reflect a principle of international law. They were: "the number of States which voted in its favour, the scope and profundity of its contents and, in particular, the absence of opposition".

(7) *Determination by the U. N. itself.* A case in point is the decision by the Special Committee discussed in the preceding subpara. and in § 4 (4) above.

(8) *Repetition.* Does repetition constitute better (stronger) evidence than a statement made once and thereafter not repeated? Whether a series of resolutions create an effect that goes beyond the function of mere evidence is a matter to be considered in §§ 8 (2) *in fine* and 10 (3) below. Here we are exclusively concerned with the question of evidence.

In 1955 Judge *Lauterpacht* noted the significance of "a succession of recommendations"[59] in a context which, though different from our problem, did present some analogies to it. More than a decade later

[59] PE note 4, p. 120.

Judge *Tanaka* identified repetition of resolutions with the "repetition of the same practice" which is required for the emergence of custom. But he did not limit the effect of reiteration to the sphere of practice alone: "the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc. concerning the interpretation of the Charter" could "be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (b)"[60]. On the other hand, Judge *Jessup* saw in the accumulation of resolutions proof of a standard (as distinguished from proof of a rule of law): "the accumulation of expressions of condemnation of apartheid [...], especially as recorded in the resolutions of the General Assembly of the United Nations, are proof of the pertinent contemporary international community standard"[61].

Mr *Bindschedler* remarks that repetition could constitute a proof (among others) that the rule has become one of customary law (Question 15)[62].

(9) *Resolutions and treaties.* This subpara. deals with those facets of the relationship between resolution and treaty which concern custom; others belong to Section IV below.

There is, in particular, the question of the weight to be attributed to a resolution which states that a treaty is declaratory of customary international law. An example is resolution 2603 (XXIV); it says that the Geneva Protocol of 17 June 1925 "embodies the generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments". Among the Members of the United Nations there was understanding for the endeavours to strengthen the Geneva Protocol. Nonetheless doubts arose whether the procedure which led to the adoption of resolution

[60] Note 14, p. 292. See also p. 291. For a comment on Judge Tanaka's opinion, see A. D'Amato, On Consensus, Canadian YIL, vol. 8, 1970, p. 104, at. p. 112.

[61] PE note 33, p. 441.

[62] In the context of Question 26 Mr Bindschedler is critical of repetition. *Cf.* also the observations of Messrs Virally and Zemanek. S.A. Bleicher, The Legal Significance of Re-citation of General Assembly Resolutions, AJIL, vol. 63, 1969, p. 444, at p. 455, contends that re-citation of the G.A. resolutions "reinforces the claim that the resolution enunciates legally binding principles".

2603 (XXIV) was "an appropriate one under international law"[63]. One delegation expressed "grave misgivings about the procedural wisdom of acting in the way proposed"[64]; and they were shared by a number of Member States. They argued that the interpretation of any treaty, including the assessment of the treaty as evidence of custom, should be left with the parties while the Assembly was not competent to interpret a treaty and to declare that such an interpretation should be regarded as a rule of international law.

Another problem has been raised in the Questionnaire: how does a resolution that purports to state customary law compare with a treaty fulfilling the same function (Question 6, second part)? The Members of the Commission are to some extent divided in their views.

First, there is the opinion which treats the two instruments, for this particular purpose, on a footing of equality. Judge *Jessup* does not think that it matters whether States voice their views on custom in a resolution or in a treaty. The difference consists in something else: the effect of a statement made in a treaty depends on ratification, which would not be the case if the statement were formulated in a resolution. However, the status of the latter will undergo a change "if a certain number of States forthwith repudiate their delegates' votes in favor of the Resolution" - - "the Resolution loses its force in the sense here considered". Apart from such a modification, Judge *Jessup* thinks that unanimous resolutions have "special weight"; he may thus be understood as not excluding a greater importance for a particular resolution. Mr. *Suy*, who "in principle" sees "no difference between such reference in a treaty or in a resolution", observes that ratification is relevant only with regard to the existence of the contractual relationship, not with regard to evidence of custom. While Judge *Jessup* mentions the "special weight" of some resolutions, Mr *Suy* gives the example of a category of treaty that would compare favourably with the resolution: it is "the text of a treaty adopted in a specialized conference of plenipotentiaries duly accredited to that effect on the

[63] GAOR, 24th Sess., 1st Cttee, 1716th Mtg, 9 December 1969, para. 144 (Canada).

[64] *Ibid.*, para. 171 (Australia)

basis of a draft prepared by the ILC". In Mr *Schachter's* opinion the resolution, like the treaty, is "one element of evidence to be weighed with other relevant factors"; a reference to custom in a treaty "would have no greater evidentiary value" than a similar phrase in a resolution. Nor do Messrs *McDougal, Seyersted* and *Valticos* have any *a priori* preference. Mr *McDougal* points out that what should be taken into account is "the number and characteristics of the parties subscribing to the different recitals and other variables in the context". Mr *Seyersted* maintains that a declaration on custom made in a treaty serves a purpose which is different from a similar declaration made in a resolution. According to Mr *Valticos* a resolution by 150 States would be more important than a statement on custom in a bilateral treaty, yet a multilateral treaty would have greater weight.

The second opinion puts the treaty before the resolution. Judge *Mosler* thinks that a declaration on custom made in a resolution "is to a lesser degree conclusive than a similar statement in a multilateral law-making treaty". Mr *Ustor* says that the statement in a resolution creates "a strong presumption" while "in a treaty the presumption turns into firm law between the parties". The obligatory force of a treaty statement on custom is emphasized by Messrs *Bindschedler* and *Zemanek;* the former contrasts it with the non-binding nature of a resolution. Mr *Monaco* also stresses the difference in favour of the treaty, though he refers to the notion of *efficacité,* and not obligation. On the other hand, what Mr *Suy* says, particularly on the role of ratification, leads one to believe that he regards the difference in obligatory force as irrelevant. Mr *McDougal* does not specify whether that force is one of the variables to be taken into consideration.

II. *Codification and Restatement of Law by Resolutions*

§ 6. *Codification*

The Thirteenth Commission is divided on the issue whether a G. A. resolution is a suitable instrument of codification (Question 8). The majority reply either in the negative or are sceptical. For various reasons Messrs *Bindschedler, Jessup, Monaco, Schachter* and *Valticos*

reject this form of codification, though the two last named Members admit of exceptions. To Mr *Zemanek* resolutions "do not seem particularly well suited to the task". Mr *McWhinney* is ready to give a positive answer on the abstract plane, but when he considers the practical side he adduces the reasons which militate "against the success of the whole exercise". Mr *Suy* discusses the problem in the wider context of the "authoritative procedures" leading to the emergence of legal rules. He reminds the Commission of certain decisions taken at the San Francisco Conference, which corroborate the absence of law-making powers on the part of the Assembly (Question 8). One of the reasons why Mr *Suy* thinks that "resolutions are not the most suitable kind of instrument" for codification "is a growing tendency to adopt resolutions by consensus", and "only broad principles lend themselves to this adoption procedure"(reply to Question 16).

There are, however, Members of the Commission who adopt a different attitude. Messrs *McDougal* and *Seyersted* unreservedly accept the suitability of the resolution for the purposes of codification, though Mr *McDougal* observes that the answer to the question whether "resolutions are more easily obtained than other forms must again depend upon many variables". Some other Members do not exclude that role for the resolution (Judge *Mosler*, Messrs *do Nascimento e Silva*, *Rosenne* and *Ustor*).

The Commission is also divided on whether there exists any type of resolution that is particularly suitable for enunciating legal rules, and especially whether a "declaration" could be such an instrument. Messrs *Mosler*, *do Nascimento e Silva*, *Schachter*, *Seyersted* (who expressly speaks of "restatement of existing law"), *Suy*, *Ustor* and *Zemanek* agree that the declaration is a suitable and appropriate form in which to enunciate legal principles. However, these Confrères do not link this form with codification. To Judge *Jessup* the "prime model is probably" resolution 95 (I) which did not bear the name of declaration. On the other hand, Messrs *Bindschedler*, *McDougal*, *McWhinney*, *Monaco*, *Rosenne* and *Valticos* reply to Question 17 in the negative, and some of these Members specifically deny that declarations have any particular role in the enunciation of law. (Other problems covered by Question 17 are discussed in § 22 (3) below).

Members of the Commission are almost unanimous in admitting

that the recommendatory nature of the resolutions is not an obstacle to, or constitutes any disadvantage in, incorporating legal rules into them (Question 14). Only Mr *Monaco* holds a different opinion. Judge *Jessup* does not give a direct reply; he has doubts regarding the assumption that all resolutions are recommendations, and Mr *McDougal* seems to share a similar position. But that is a different though pertinent point, and in Question 14 the reference to "recommendatory nature" was simply a reminder that the resolutions dealt with in this Report do not result from any exercise of law-making powers (§ 1). To avoid confusion the resolution should use language that removes any uncertainty regarding the *lex lata* character of the rules it enunciates; Messrs *Schachter, Seyersted* (though he refers to treaties alone) and *Ustor* draw the Commission's attention to this aspect of the problem. In any case, the positive reply to Question 14 eliminates one obstacle in the way of using resolutions for the purpose of codification.

Finally, we may revert to the dichotomy of codification and development of law. Mr *Valticos'* reply to Question 8 is negative, but his view is not far from what Mr *do Nascimento e Silva* says about the resolution "as a preliminary stage" of codification; Mr *Valticos* observes that the resolution could, under certain conditions (see his reply to Question 7), constitute "une étape utile" in the process of codification.

The role of "stage" or "étape" seems to be linked more to the process of development of law than to codification pure and simple. The discussion of resolution 2181 (XXI) by Madame *Bastid* sheds some light on this problem[63].

§ 7. *Restatement of Law*

Question 7 refers to confirmation or restatement of law "in a field where it seems uncertain or controversial". Mr *Suy* finds this formula somewhat confusing. He reminds the Commission that "a

[63] Bastid, *op. cit.*, PE note 130, pp. 138 and 143-144. *Cf.* H. Golsong, Das Problem der Rechtsetzung durch internationale Organisationen (insbesondere im Rahmen der Vereinten Nationen), in: Berichte, *op. cit.*, PE note 14, p. 1, at pp. 38-39. The notion of the "étape" embracing both the development and codification figures also in res. 2463 (XXIII), penultimate preambular paragraph.

'restatement of the law' by definition implies a restatement of the *existing* law, particularly if such a restatement is cast in a non-conventional instrument such as a resolution". If the function of the resolution is to confirm or restate the law, the resolution cannot avoid repeating it "*with its* uncertainties and controversies". It is, Mr *Suy* adds, "less proper [...] to pretend that in international law a 'restatement of the law' may modify, fill gaps or develop the existing law".

The Rapporteur's understanding of restatement of law is not different and he assumes that within the Commission there are no substantial divergencies on the limitations inherent in the notion of restatement (cf. in particular the comment by Mr *McWhinney*). The query is directed at a problem which arises in connection with restatement. The approach of "a static nature" (to borrow Mr *Suy*'s words) reveals more often than not areas of uncertainty or controversy. Should the Assembly enter these areas? If it did not, would not its confirmation or restatement of unquestioned principles and rules become largely redundant? The Commission deals only with those resolutions which explicitly lay down general and abstract rules of conduct (Preliminary *Exposé*, § 1). The exercise would easily become futile had the Assembly limited itself to stating the rules to which nobody objected; thus there was some criticism regarding resolution 37/10. The meaning of restatement is different when the unquestioned rule or rules are confirmed or repeated for the purpose of applying them to a specific dispute or situation. But that type of resolution is not of concern to the present Report.

No consensus of opinion emerges from the replies to Question 7. Those in the positive are qualified (Messrs *do Nascimento e Silva, Rosenne, Schachter, Seyersted, Suy* and *Ustor*). There are some clearly negative answers (Messrs *Bindschedler, Monaco* and *Mosler*), though perhaps Mr *Bindschedler* might be understood as not entirely excluding that role for the resolution provided the instrument would not display the features he mentions. Mr *Zemanek* does not unequivocally express a denial, yet he has doubts. Judge *Jessup* and Mr *Valticos* reply in the negative, but they admit of exceptions. In Mr *McDougal*'s view the solution "depends upon how much support can be obtained for the resolution", while Mr *McWhinney* favours

the dropping of the "'restatement' fiction" to acknowledge that the resolution is "in fact seeking to make new law".

Question 7 raises the point whether the resolution is a "proper" instrument for the purpose involved. The term "proper" leads Mr *Schachter* to distinguish between "legality" and "suitability". The present paragraph is not concerned with the Assembly's legal competence or powers; the matter has been discussed in § 2 of the Preliminary *Exposé* and in § 1 above. Our problem is whether the task indicated in Question 7 is a suitable one for the Assembly to perform.

"The objections on grounds of suitability are familiar", Mr *Schachter* says. He lists the political nature of the Assembly, its procedure which does not "as a rule allow for the proper assessment of the state of the law", and the fact that even "many" consenting or non-objecting Governments "do not take the determination of law [by the Assembly] seriously". "These objections", he continues, "cannot be lightly dismissed. However, their force and relevance vary with particular cases and issues". Judge *Jessup* points to the predominance of the political factor: "political rather than legal or juridical considerations usually determine the content of a Resolution. There may be exceptional cases in which the Resolution could be 'a proper instrument'". And Mr *Bindschedler* notes that the resolution generally results from a political compromise.

Specific resolutions may overcome these various obstacles and, consequently, declare the law correctly, in spite of the difficulty that is inherent in the composition of the Assembly and in its procedure. The role of the resolution may be regarded as a subsidiary one: it can become a means whereby the law would be identified in a field where it seems uncertain or controversial whenever other instruments, in particular judicial decisions and treaties, have not fulfilled that role. A carefully prepared resolution permits to avoid many ambiguities which usually arise if the rule is to be stated on the basis of an analysis that concentrates exclusively on the practice of individual States.

Some writers speak of the reinforcement of customary rules by the Assembly. Again, there is room for it in areas of doubt only. Resolutions 95 (I) and 1803 (XVII) have been cited in this context.

III. *Resolutions and the Growth of Customary Law*

§ 8. *State Practice*

(1) *Generation of State practice.* Messrs *McWhinney, Mosler, Schachter, Seyersted* and *Suy,* in their replies to Question 4, confirm that resolutions of the General Assembly influence State practice that eventually leads to the creation of custom. Mr *Seyersted*'s comment on Question 2 is also relevant here.

Other Confrères affirm that such an influence is a possibility (Messrs *Bindschedler*[66], *Jessup, McDougal, Monaco, do Nascimento e Silva* (who speaks generally of custom, not specifically practice), *Rosenne, Ustor* and *Valticos*). Their answers have different shadings - from emphasizing the possibility of influence and its importance to merely registering it while underlining that "the focus must be on the practice of States" (Mr *Rosenne*). Mr *Zemanek* does not take a direct stand on the matter, but the tenor of his comment permits the conclusion that he does not reject this eventuality.

The initiation of State practice on the basis of the Assembly resolutions found expression in legal writings, and several Members of our Institute commented on the subject[67].

When a certain practice is already in progress, the resolution

[66] See also another contribution by Mr Bindschedler, Rechtsakte der internationalen Organisationen, in: Berner Festgabe zum Schweizerischen Juristentag 1979, Bern und Stuttgart 1979, p. 361, at p. 364.

[67] See, in particular, Giraud, *op. cit.*, note 35, pp. 373-738; Jennings, *op. cit.*, PE note 51, p. 392; A. Verdross, Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?, ZaöRV, vol. 26, 1966, p. 690, at p. 693; id., *op. cit.*, note 4, pp. 116 and 139; Bastid, *op. cit.*, PE note 130, p. 134; Arangio-Ruiz, PE note 15, p. 478; R.J. Dupuy, Droit déclaratoire et droit programmatoire : de la coutume sauvage à la "soft law", in: Société française pour le droit international. Colloque de Toulouse. L'Elaboration du droit international public, Paris 1975, p. 132, at pp. 144 and 145 ; Tunkin, *op. cit.*, PE note 20, p. 147 ; Jiménez de Aréchaga, *op. cit.*, PE note 34, p. 31 ; M. Bedjaoui, Pour un nouvel ordre économique international, Paris 1979, pp. 140 and 193 ; I. Brownlie, Legal Status of Natural Resources in International Law (Some Aspects), RC, vol. 162, 1979-I, p. 245, at pp. 260-261.

can contribute to its consolidation. Mr *Dupuy* takes note of this development[68].

But a negative influence cannot be excluded. It has been observed that by declaring that the sea-bed and ocean floor beyond the limits of national jurisdiction constitute the common heritage of mankind, resolution 2749 (XXV) has led to the extension of these limits[69]. The resolution is said to have generated a practice that stood in opposition to, or at any rate restricted, the legal regime it sponsored or tended to create.

Implementing procedure, including the setting up of an organ that brings the resolution and its rules into effect, helps to form a practice that, in a subsequent development, creates new law.

(2) *Identification of resolutions with State practice.* The preponderant majority of the Commission reject the view that resolutions of the General Assembly can or do constitute State practice. In particular, a negative reply to the first part of Question 3 is given by Messrs *Jessup, McDougal, Monaco, Rosenne, Seyersted, Suy, Ustor* and *Zemanek*, though their motives are not always the same. Judge *Jessup* is ready to make an exception "perhaps in regard to the internal law of the United Nations", but he realizes that this law and its problems have been excluded from the present Report. Messrs *Bindschedler, Mosler* and *do Nascimento e Silva* limit the resolution's role in this context to that of evidence of practice; therefore, it can be said that they implicitly reject any identification of resolutions with practice.

While Mr *Valticos* expresses no opinion, Messrs *McWhinney* and *Schachter* are ready to admit that resolutions could constitute State practice. But they restrict this possibility. According to Mr *McWhinney*, it may happen in "certain cases" only and with regard to "particular parties" (he gives the example of res. 1884 (XVIII)

[68] *Op. cit.*, note 67, p. 138; *id.*, Communauté internationale et disparités de développement, RC, vol. 165, 1979-IV, p. 9, at p. 175. Other writers speak of consolidation of the second element of custom, viz. the *opinio juris*, see § 9 (1) below.

[69] P. Charpentier, Tendances de l'élaboration du droit international public coutumier, in : Colloque de Toulouse, *op. cit.*, note 67, p. 105, at p. 116, who also gives the example of the UNCTAD principles: their influence was nil.

involving the U.S.A. and the U.S.S.R.). Mr *Schachter* sees this possibility "in special circumstances"; the examples he cites relate to the United Nations.

Turning to the Confrères who are not part of our Commission, Mr *Tunkin*[70] and Judge *Schwebel*[71] do not regard resolutions as identical with State practice. On the other hand, Clive *Parry* writes that there is no need to ascribe to the Assembly resolutions a binding effect or to force them into the shape of treaty, and he then notes:

> "All falls very adequately into place as part of the practice of States. Sometimes that practice results in the conclusion of treaties [...]. Sometimes, more often indeed, it does not, but produces political agreements [...] or simply expressions of view"[72].

Mr *Arangio-Ruiz* says that the "Assembly resolutions are only part of States' practice in the United Nations [...]"[73]. Mr *Bos* admits that resolutions can be a kind of "actions of States"[74].

These opinions, like those of Messrs *McWhinney* and *Schachter*, are still rather cautious. Clive *Parry* does not link practice in the form of resolutions to custom. To say as he does that resolutions are *part* of State practice means that they alone would not suffice to constitute that component of custom. There are pertinent comments on this point in Mr *Arangio-Ruiz*'s Hague lectures of 1972. But some writers quite clearly identify resolutions with practice[75].

If resolutions are practice, their reiteration acquires particular importance. Repetition introduces consistency and frequency, and practice that leads to the creation of custom must be, *inter alia*, consistent and settled. Judge Kotaro *Tanaka* said:

[70] In his theory of international law, here cited the German translation: Völkerrechtstheorie, Berlin 1972, p. 206.

[71] Schwebel, *op. cit.*, note 6, p. 302. See also B. Simma, Zur völkerrechtlichen Bedeutung von Resolutionen der UN-Generalversammlung, in: Fünftes deutsch-polnisches Juristen-Kolloquium, Baden-Baden 1981, vol. 2, p. 45, at pp. 53-54.

[72] *Op. cit.*, PE note 113, p. 113.

[73] *Op. cit.*, PE note 15, p. 479.

[74] *Op. cit.*, note 16, p. 68. *Cf.* p. 31.

[75] *E.g.*, Asamoah, *op. cit.*, PE note 76, pp. 46, 52 ff., 159 and 242.

> "Of course, we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the organization. What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse, organizations must take place repeatedly".

But the learned judge equally spoke of "the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc." which could be "characterized as evidence of the international custom referred to in Article 38, paragraph 1 (b)"[76]. Obviously, the evidence of practice is something else than the practice itself, and the role of repetition with regard to evidence of practice has already been discussed in § 5 (8) above. Judge Ammoun includes "resolutions [...] of international bodies" into "a group of precedents which contribute [...] to the elaboration of the material elements of custom"[77].

"If states repeatedly give utterance to a legal norm in the General Assembly, can this be regarded as part of practice?" Edvard *Hambro* asked. He was aware of the fact that some gave a clearly negative answer. But his own opinion was more *nuancé:* "in view of the need of the world community to generate new norms, it might be unwise to be too dogmatic on this point"[78]. On the other hand, Mr *De Visscher* is quite explicit in his denial; writing of the resolutions which have been adopted by consensus and which affirm a rule of general international law he says that "les votes, même unanimes et répétés, de telles résolutions ne constitueront jamais la pratique interétatique qui est l'élément premier de toute coutume"[79].

No doubt, the attitudes that find expression in a resolution are

[76] *Op. cit.*, note 14, p. 292.

[77] Separate Opinion, North Sea Continental Shelf Cases, ICJ Reports 1969, p. 100, at p. 105, para. 5.

[78] *Op. cit.*, PE note 34, p. 88.

[79] P. De Visscher, Observations sur les résolutions déclaratives de droit adoptées au sein de l'Assemblée Générale de l'Organisation des Nations Unies, Festschrift für Rudolf Bindschedler, Bern 1980, p. 173, at p. 189.

part of State policies and, therefore, can be part of State actions out of which custom-creating practice is built. Commenting on the "principles of ideological origin" (*principes d'origine idéologique*) that have not yet acquired binding force Mr *Virally* notes that "leur proclamation dans un acte de portée internationale constitue également un précédent qui, s'il est suivi d'autres, suffisamment nombreux et généraux, peut contribuer à la formation d'une coutume par laquelle ces principes pénétreront dans l'ordre juridique international positif"[80].

State practice is not composed exclusively of actions *sensu stricto*. Words, whether found in non-binding resolutions or in another instrument, also belong to the conduct of States. But there are limits to their custom-contributing effect. They can establish State practice only in an indirect way: they initiate an activity on the part of States or uphold a conduct already *in statu nascendi*.

When a State votes in favour of a resolution it remains to be seen whether its conduct will conform to the resolution. The casting of a favourable vote is not *per se* conclusive of practice. Equally, when a State has voted against a resolution, its attitude cannot be regarded as automatically amounting to a protest whereby that State prevents, as far as it is concerned, the birth of a practice or, if the practice is already in existence, its relevance for that State's legal position. For the State may reject the resolution because of reasons which need not be connected with its custom-creating influence. In other words, the State may otherwise follow a course of action that would not be contrary to the pattern of behaviour laid down in there solution, though there is a different cause which prompts it to vote against the specific resolution. The same, *mutatis mutandis*, can be said of the States which abstained from voting on the resolution.

Nor does repetition of resolutions bring about any qualitative change: through reiteration words do not become actions that are necessary for the emergence of a custom-creating practice.

(3) *Resolutions as a substitute for State practice.* To regard resolutions as such a substitute is to go still further than the opinion

[80] *Op. cit.*, PE note 53, p. 549.

discussed in subpara. (2) above, though the substitution concept can be said to constitute a logical extension of the identification view. That concept was developed by the Applicants in the *South West Africa Cases, Second Phase*[81].

In relation to customary law the idea of the resolution as a substitute for State practice amounts to a new understanding of how that law can be born. Practice becomes redundant: it is replaced by resolutions, not identified with them. If, on the other hand, one rejects the possibility of such a substitution and, consequently, of the resulting modification of the notion of custom, the idea boils down to recognizing that the Assembly has legislative powers.

§ 9. *Opinio Juris*

(1) *Influence on the emergence of* opinio juris. Some Governments have expressly recognized that a resolution can do more than merely evidence an already existing *opinio juris*. A resolution can influence the emergence of the *opinio juris*, particularly by contributing to its creation. The Dutch Government has stated: "A certain amount of law-creating power cannot be denied to the General Assembly, because in those cases which might give rise to doubt whether a rule belongs already to international law or is still *jus constituendum*, a formal declaration of the General Assembly might make the rule concerned one of recognized positive international law"[82]. In the course of the debate on the Charter of Economic Rights and Duties of States the representative of Australia quoted its Article 34 and declared: "The resolution might have a significant part in the development of international economic law; while it could not create law, it might help to determine or influence the *opinio juris*"[83].

Max *Sœrensen*[84], Edvard *Hambro*[85], Alfred *Verdross*[88] and Judge

[81] ICJ Pleadings, vol. 9, pp. 348 and 350-352. For the rejection of the concept by the Respondent, see *ibid.*, vol. 10, pp. 17-19 and 30.

[82] A/1338/Add.1, Part. A, para. 1, reprinted in GAOR, 6th Session, Annexes, Agenda Item 48, p. 9.

[83] GAOR, 29th Sess., 2nd Cttee, 1650th Mtg, 9 December 1974, p. 450, para. 14.

[84] *Op. cit.*, PE note 32, p. 100.

[85] *Op. cit.*, PE note 34, p. 92.

[88] Max Planck Institute for Comparative Public Law and International Law, Judicial Settlement of International Disputes. An International Symposium, Berlin, Heidelberg, New York 1974, p. 60; *op. cit.*, note 4, p. 139.

Jiménez de Aréchaga[87] have pointed out that resolutions could help to "crystallize" customary law. Richard R. *Baxter* emphasized the importance of resolution 95 (I): "it was now difficult to question the proposition that individual criminal responsibility for [the crimes against humanity and the crimes against peace] had passed into customary international law binding upon all nations"[88]. Messrs *De Visscher*[89] and *Virally*[90] also see a role for the resolutions in the formation of the *opinio juris*.

Mr *Tunkin* admits that a resolution can be "the first stage of the customary process of creating norms of international law. There is still no *opinio juris*. It comes later in the course of practice when States gradually recognise a norm contained in a resolution-recommendation as legally binding"[91]. Other writers would rather reverse the order and place the resolution's impact in the *final* stage of custom formation; the resolution would then consolidate an emerging custom.

(2) *Identification of resolutions with* opinio juris. If an Assembly resolution or resolutions play a creative role in the emergence of the *opinio juris* (subpara. (1) above), the next step in our inquiry is the question of the limits of that role. In particular, can it totally control the process, i.e. can a statement on law made in a resolution or in a series of resolutions be identified with the *opinio juris?* In other words, can resolutions be said to constitute that *opinio,*

[87] *Op. cit.*, PE note 34, p. 31. E. Schwelb, Neue Etappen der Fortentwicklung des Völkerrechts durch die Vereinten Nationen, Archiv des Völkerrechts, vol. 13, 1966-1967, p. 1, at p. 51, concludes that a G.A. declaration can produce the *opinio juris*.

[88] *Op. cit.*, PE note 126, p. 151.

[89] De Visscher, *op. cit.*, note 79, p. 182.

[90] M. Virally, Sur la notion d'accord, Festschrift für Rudolf Bindschedler, Bern 1980, p. 159, at pp. 162-163; *id.*, La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales). Annuaire IDI, vol. 60, 1983, Part I, p. 166, at pp. 252-253, paras. 203-205, where he also speaks of the crystallisation or consolidation of the rule.

[91] *Op. cit.*, PE note 20, p. 148. *Cf.* J. Monnier, Nodules et principes. Réflexions sur la portée de la résolution 2749 (XXV) de l'Assemblée générale des Nations Unies, Festschrift für Rudolf Bindschedler, Bern 1980, p. 129, at p. 133.

in contradistinction to being merely its evidence (§ 4) or a factor of influence?

The majority of the Commission seem to reject this hypothesis (Question 5). One should say "seem" because only Messrs *Bindschedler, Monaco, do Nascimento e Silva, Rosenne* and *Schachter* deny it clearly. Messrs *Suy, Ustor* and *Valticos* are silent on this specific problem, but the tenor of their replies permits to infer that such is their position. Nor does Mr *McDougal* expressly reject the identification of the resolution with the *opinio juris*, yet what the learned Confrère says at the end of his answer would place him in the same group. On the other hand, Messrs *McWhinney, Mosler* and *Seyersted* are ready to admit that the resolution could constitute the *opinio juris;* the two latter Members do it under some conditions. Judge *Jessup* and Mr *Zemanek* do not commit themselves either way, though Judge *Jessup* emphasizes the high relevance of voting majorities (reply to Question 19).

(3) *Is practice redundant?* If it is, i.e., if the expression of the *opinio juris* by the General Assembly suffices to bring a custom into existence, we face a new mode of creating customary law. In this mode, the resolution would become the decisive instrumentality.

The problem is not absent from Judge Kotaro *Tanaka*'s Dissenting Opinion in the *South West Africa Cases, Second Phase.* Rule-declaring or standard-declaring resolutions differed, he said, from "the traditional process of custom making". Such resolutions belonged to a "collective, cumulative and organic process of custom-generation"[92].

To Emile *Giraud* and Alfred *Verdross* resolutions reverse the sequence in which customary law is created. The *opinio juris* (*Rechtsüberzeugung*) appears first, and it is later confirmed by the practice.

Mr *Dupuy* has commented on the position of the developing countries regarding the role of resolutions in the birth of custom. The *opinio juris* comes here to the foreground: "dans la structure interne de la coutume, l'élément volontaire l'emporte sur le facteur historique. Cette antériorité de la conscience sur le fait est au cœur

[92] *Op. cit.*, note 14, p. 292.

de la coutume révolutionnaire". "Si l'on reprend les éléments structurels de la coutume, l'élément intellectuel précède encore ici la pratique des Etats et des hommes"[93]. These opinions do not amount to saying that practice is redundant. As Edvard *Hambro* observed: "It is also unnatural to speak of the formation of customary law where in fact there has been hardly any practice at all outside the declarations in the United Nations"[94].

One cannot deny that there are situations in which it is difficult to show the existence of State practice because most States are not in a position to develop it, and yet legal rules have to be made. The example usually given is the law of outer space. In this field, however, things were not left to customary development alone; soon after the proclamation of the G.A. principles treaty law on outer space came into existence. Are rules on seabed another instance of the emergence of customary law in spite of absence of practice? It seems not, though the legal experts of the Group of 77 contended that several States which abstained in the voting on resolution 2749 (XXV) subsequently adhered to its principles on deep seabed mining. Like in outer space, only very few States are in a position to develop a practice that would be relevant to the birth of a custom conforming to res. 2749 (XXV). At the moment of writing it cannot be said that these States comply with the principles of that resolution[95].

When the Assembly proclaims a rule, the requirement of the uniform, extensive and constant practice is neither weakened nor dispensed with. Without the actual activity of States which is concordant with the rule a new custom will not come into existence. Mr *Wengler* also emphasizes the indispensability of practice[96].

[93] Giraud, *op. cit.*, note 35, p. 737; Verdross, *op. cit.*, note 4, p. 116. See also A.A. D'Amato, The Concept of Custom in International Law, Ithaca and London 1971, pp. 76, 79 and 86; De Visscher, *op. cit.*, PE note 90, p. 132; Dupuy, *op. cit.*, note 67, pp. 137 and 144; *id.*, *op. cit.*, note 68, p. 182.

[94] *Op. cit*, PE note 34, p. 88.

[95] Letter of 24 April 1979 by the Group of Legal Experts on Legislation, Group of 77, 3rd UNCLOS, A/CONF. 62/77; R.Y. Jennings, Law-Making and Package Deal, Mélanges offerts à Paul Reuter. Le droit international : unité et diversité, Paris 1981, p. 347, at pp. 354-355; Monnier, *op. cit.*, *note* 91, pp. 140-141 and 144.

[96] *Op. cit.*, note 4, pp. 196-197. So do many other writers.

A resolution can help to establish the *opinio juris* and, depending on circumstances, it can even be the decisive element in proving it. The transformation of practice into a legal rule operates through the conduct of States whereby they accept the legal nature of the rule engendered in their practice. This acceptance can find expression in an Assembly resolution. Besides having an exclusively declaratory function, i.e. stating an acceptance already in existence, the resolution can play a more creative role with regard to the *opinio juris*[97]. In particular, when the acceptance of the rule as law is still doubtful, the resolution may contribute to the consolidation of the rule and remove the doubts. The *opinio juris* (as the composite element of custom) cannot precede custom-creating practice; by definition, it follows practice, or at least some part of it. The *opinio juris* results from State practice but, in the final stage of the process leading to the birth of customary law, it is also part of State practice[98]. For the transformation of practice into a legal rule or rules operates through the conduct of States consisting in claiming a right and submitting to it as a matter of obligation[99]. In other words, the resolution is not a substitute for practice accompanied by *opinio juris*.

§ 10. *Generation of Customary Law*

It follows from §§ 8 and 9 that General Assembly resolutions can and do play a role in generating State practice or the *opinio juris* or both. However, various evidences and materials do not always treat these two elements separately but rather concentrate on the final result and globally consider the impact of resolutions on customary law, i.e. without distinguishing between the two ingredients.

(1) *A general look at the problem.* In the *Namibia* case the In-

[97] *Cf.* Bleicher, *op. cit.*, note 62, p. 450.

[98] *Cf.* R.Y. Jennings, General Course on Principles of International Law, RC, vol. 121, 1967-II, p. 323, at p. 335; A. Verdross, Les principes généraux de droit dans le système des sources du droit international public, in: Recueil d'études de droit international en hommage à Paul Guggenheim, Genève 1968, p. 521, at p. 526.

[99] *Cf.* I.C. MacGibbon, Customary International Law and Acquiescence, BYBIL, vol. 33, 1957, p. 115, at p. 117.

ternational Court of Justice found that resolution 1514 (XV) was a "further important stage" in "the subsequent development of international law in regard to non-self-government territories". The Court considered "the concepts embodied in Article 22 of the Covenant" of the League of Nations and referred to "the subsequent development of law, through the Charter of the United Nations and by way of customary law". "In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched [...]"[100]. Judge *Jiménez de Aréchaga* concludes that in the Court's view resolution 1514 (XV) has become part of customary law[101]. In the *Western Sahara Case* the Court explained the right of self-determination of peoples by citing resolutions 1514 (XV) and 2625 (XV). In conclusion the Court described them as "the basic principles governing the decolonization policy of the General Assembly"[102].

The Court's references to resolutions in the context of custom are both rare and cautious. This reticence is not surprising. The Court tells us that the transformation of a rule that is "conventional or contractual in origin" into one of general international law "is not lightly to be regarded as having been attained"[103]. It is logical that at least the same prudence accompanies the Court's assessment of the influence which non-binding resolutions exercise on the emergence of new customary law.

In particular, the Court did not explain the mechanism whereby the principles or other rules embodied in a resolution would pass into general international law. The subject was mentioned, albeit very generally, by Judge Kotaro *Tanaka* in his Dissenting Opinion in the *South West Africa Cases, Second Phase:* "The appearance of organizations such as the League of Nations and the United Nations, with their agencies and affiliated institutions, [...] is bound to influence the mode of generation of customary international law". The

[100] ICJ Reports 1971, p. 16, at p. 31, paras. 52 and 53.

[101] PE note 106. *Cf.* Suy, *op. cit.*, note 37, p. 190; H. Thierry, Les Résolutions des organes internationaux dans la jurisprudence de la Cour Internationale de Justice, RC, vol. 167, 1980-II, p. 385, at p. 442.

[102] ICJ Reports 1975, p. 12, at p. 34, para. 60. Thierry, *op. cit.*, note 101, p. 444.

[103] North Sea Continental Shelf Cases, *ibid.*, 1969, p. 3, at p. 41, para. 71. Thierry, *op. cit.*, note 101, pp. 439 and 440, speaks of the reserved attitude of the Court.

learned judge referred to "the method of 'parliamentary diplomacy'" which, it may be added, was analysed by Judge *Jessup* in his Hague lectures in 1956; "the formation of a custom through the medium of international organizations is greatly facilitated and accelerated [...]"[104]. These words point to the corporate[105] nature of the contribution made to the custom-creating process by the Assembly. On the other hand, in his Separate Opinion in the *Barcelona Traction* case (Second Phase), Judge *Ammoun* spoke of the significance of individual positions: "the votes expressed in the name of States [...] amount to precedents contributing to the formation of custom"[106].

The resolutions of the General Assembly helped to bring about customary legal rules on human rights, emancipation of colonial peoples, economic and social development, control over natural resources, and outer space. To this list Mr *Suy* adds the principles on the sharing of waters of international rivers and the guidelines on the question of mercenaries[107].

Among the Members of the Commission Mr *McWhinney* is most outspoken in arguing for a greater role of the G. A. resolutions in generating customary law (see his introductory comment and his reply to Question 4). The influence of resolutions on the development of customary law was recognized, to varying extent and under various conditions, by several Confrères[108] and other writers[109].

[104] *Op. cit.*, note 14, p. 291.

[105] See the opinion of some writers invoked by C. Rousseau. Droit international public, Paris 1970, vol. 1, p. 433.

[106] *Op. cit.*, note 8, p. 303.

[107] *Op. cit.*, note 37, p. 193. On the possibility of developing "a special new branch of the customary law on the interpretation of treaties", see the remarks by the U.N. Secretary-General: D. Hammarskjöld, International Law and the United Nations, Philippine Law Journal, vol. 30, 1955, p. 555, at. p. 558. Higgins, *op. cit.*, note 48, p. 4.

[108] S. Rosenne, United Nations Treaty Practice, RC, vol. 86, 1954-II, p. 275, at pp. 431-436; Bailey *op. cit.*, PE note 130, p. 236; Jenks, *op. cit.*, PE note 36. p. 203; *id.*, The Laws of Nature and International Law, in: Varia Iuris Gentium. Questions of International Law. Liber Amicorum Presented to Jean Pierre Adrien François, Leyden 1959, p. 160, at. p. 168; Hambro, PE note 34, pp. 90 and 92; G.I. Tunkin, Voprosy teorii mezhdunarodnogo prava, Moskva 1962, here cited the German translation, pp. 110-111; *id.*, *op. cit.*, note 69, p. 207; Suy, *op. cit.*, note 37, p. 190; Bos, *op. cit.*, note 16, pp. 68 and 70; Wengler, *op. cit.*, note 4, p. 186. *Cf.* also Virally, *op. cit.*, note 90, Annuaire IDI.

[109] J.A. Frowein, Der Beitrag der internationalen Organisationen zur Entwick-

Some, however, limit that role considerably[110].

(2) *Acceleration of the process.* In his Dissenting Opinion in the *South West Africa Cases, Second Phase,* Judge Kotaro *Tanaka* spoke of the time element in the creation of custom in conjunction with the Assembly resolutions: "In the contemporary age [...] the formation of a custom through the medium of international organizations is greatly facilitated and accelerated; the establishment of such custom would require no more than one generation or even far less than that"[111].

The Commission agrees that resolutions accelerate the making of custom (Question 5). Some Members qualify their positive answers. Judge *Jessup* admits the acceleration "as an hypothesis". Messrs *Monaco* and *Valticos* speak respectively of certain circumstances and conditions. Mr *do Nascimento e Silva* does not mention the speeding up of the process but refers generally to the influence of the resolutions. Mr *Rosenne* says that they "possibly" accelerate the making of custom. Only Mr *Bindschedler* replies in the negative, while Mr *Zemanek* does not seem to express an opinion on the subject.

The possibility of acceleration has also been noted by other Confrères. Sir Robert *Jennings* mentions "the power of Article 13 (a) procedures assisting and accelerating a change of practice and the *opinio juris*"[112]. Edvard *Hambro* believed that resolutions would

lung des Völkerrechts, ZaöRV, vol. 36, 1976, p. 147, at pp. 150 and 154-155. He gives the example of the law relating to wars of liberation. H. Strebel, Quellen des Völkerrechts als Rechtordnung, *ibid.*, p. 301, at p. 325. R. Zacklin, The Right to Development at the International Level: Some Reflections on Its Sources, Content and Formulation, in: Le Droit au développement au plan international. Colloque 1979, Académie de Droit International, Université des Nations Unies, Alphen aan den Rijn 1980, p. 115, at p. 118, mentions the influence of the resolutions through their "integration in a customary process".

[110] Fitzmaurice, *op. cit.*, PE note 12, p. 269. U. Scheuner, in: Judicial Settlement, *op. cit.*, note 86, p. 61: "At most, they constituted firm indications for the development of customary law". Jennings, *op. cit.*, PE note 29, p. 630. Tomuschat, *op. cit.*, PE note 65, pp. 480-481, Weil, *op. cit.*, note 33, p. 417.

[111] *Op. cit.*, note 14, p. 291.

[112] *Op. cit.*, PE note 51, p. 392.

"help to create or crystallize customary law in a shorter time than would otherwise be deemed necessary"[113].

Some writers go much further. They envisage such a compression of the time element that they speak of "instant" customary law resulting from resolutions[114]. Usage is here nothing more than evidence of the *opinio juris* and of the contents of the rule: the only constitutive element of custom is *opinio juris*[115]. We thus come back to the view that practice becomes redundant (§ 9 (3) above).

The idea of instant custom through resolutions found little support. Various writers rejected it, among them Edvard *Hambro*[116], Sir Robert *Jennings*[117] and Mr *Virally*[118].

(3) *Repetition or re-citation of rules.* Is repetition or re-citation of a rule *de lege ferenda* instrumental in transforming it into one *de lege lata?* The problem is covered by Question 15. It has been analysed in legal writings and did not pass unnoticed in official statements. In the *Voting Procedure* case Judge Sir Hersch *Lauterpacht* attached some significance to the "repeatedly expressed judgment of the Organisation"[119], but the context was different than generation of customary law. In the *Western Sahara* case Judge *Dillard* referred to the conflicting views on "the cumulative impact of many resolutions when similar in content"[120].

Some Members of the Thirteenth Commission reduce the effect of repeated resolutions primarily (Mr *Schachter*) or even exclusively (Mr *Bindschedler*) to the realm of evidence (§§ 4 (5) and 5 (8)). Other Members see in it a factor which contributes to the making of law, but they express this in different and rather general terms

[113] *Op. cit.*, PE note 34, p. 92.

[114] Cheng, *op. cit.*, PE note 31. Referring to para. 1 of res. 2162 B (XXI) H. Meyrowitz, Les Armes biologiques et le droit international, Paris 1968, p. 100, spoke of " un effet immédiat ".

[115] Cheng, *op. cit.*, PE note 31, pp. 36, 45 and 46.

[116] *Op. cit.*, PE note 34, p. 88 and in: Judicial Settlement, *op. cit.*, note 86, p. 58.

[117] *Op. cit.*, note 98, p. 334.

[118] *Op. cit.*, PE note 53, p. 551 and *id.*, L'Organisation mondiale, Paris 1972, p. 330.

[119] PE note 4, p. 120; Fitzmaurice, *op. cit.*, PE note 9, p. 8.

[120] Separate Opinion, ICJ Reports 1975, p. 116, at. p. 121.

(Messrs *Jessup, McDougal, McWhinney, Mosler, Suy, Ustor, Valticos* and *Zemanek*). In particular, Judge *Jessup* speaks of a "confirmatory and therefore strengthening" effect. Mr *McDougal* makes the following comment: "Repetition could, depending upon various features of the context, create expectations required for a rule of law". Judge *Mosler* points to different factors which might influence the role of repetition (answer to Question 1). Mr *Suy* sees here the acceleration of custom-making, while Mr *Valticos* regards this as a possibility.

But the opposite opinion has also been voiced: reiteration need not necessarily have a positive influence or be a factor at all. According to Mr *Ustor* "repetition can increase the doubts surrounding the rule's binding force". Messrs *Schachter* and *Valticos* realize that recitation may be simply meaningless. And the view that it has no effect is supported by Messrs *Monaco, do Nascimento e Silva* ("very little" effect) and *Rosenne* (repetition is an expression of "diplomatic inertia").

The differing opinions have been reflected in earlier writings. Thus Madame *Bastid* does not think that repetition of declarations embodying principles is by itself a factor in the making of customary law; the exercise is of a political nature[121]. Mr *Weil* also expresses a negative opinion[122]. On the other hand, Emile *Giraud* wrote that one of the criteria that pointed to the existence of a "real general will" was repetition[123]. Mr *Seidl-Hohenveldern* equally inclines to acknowledge a role for the reiteration of resolutions: "By dint of repetition, some of them become customary rules which are compulsory"[124].

(4) *Some indicators.* To generate customary law a resolution must meet certain requirements. Emile *Giraud* wrote that the rules had to be formulated in a manner that made their application pos-

[121] *Op cit.*, PE note 130, p. 134.

[122] *Op. cit.*, note 33, p. 417.

[123] *Op. Cit.*, note 35, p. 737.

[124] In : Le Droit au développement, *op. cit.*, note 109, p. 137. In *op. cit.*, note 24, p. 191, he denies that recitation is custom-creating. But on p. 196 he writes that it "may lead to a certain fading into oblivion of disclaimers made when States voted for the original resolution".

sible without any further elaboration or re-drafting. He excluded resolutions which limited themselves to recommending a certain policy only. Mr *Dupuy* also points to the importance of drafting and formulation. Another indicator which the two jurists emphasize, is voting. In particular, reservations can prevent the birth of new customary law on the basis of the resolution[125]. Further, Emile *Giraud* referred to the "will" or intention to bring about the customary development by means of the G. A. resolution[126].

IV. *Resolutions and Treaties*

This Section does not deal with the whole gamut of questions relating to the role of the General Assembly in the elaboration of treaties. Nor is it concerned with the Assembly's own treaty practice and its particular issues. In his Hague lectures of 1954 Mr *Rosenne* has commented on the treaty practice of the United Nations, including the General Assembly. The present Section is much more selective. The various aspects of treaties in the United Nations belong normally to the treaty sector of our Commission rather than to the elaboration of legal rules by virtue of non-contractual acts. Nonetheless, there are facets of the problem which should be taken up here, for they show some possibilities inherent in, and some particularities of, the procedures discussed in this Report.

§ 11. *Treaties in Force*

(1) *Resolutions repetitive of treaty contents.* A rare example of this type of act is resolution 2018 (XX) which bears the explicit name of "Recommendation". This resolution repeats and complements three principles which constitute the gist of the Convention

[125] J.F. Flauss, Les réserves aux résolutions des Nations Unies, RGDIP, vol. 85, 1981, p. 5, at p. 22.

[126] Giraud, *op. cit.*, note 35, pp. 734-738; Dupuy, *op. cit.*, note 68, pp. 183-184. In addition, Giraud speaks of the requirement of general practice that conforms to the rules formulated in the resolution, and Mr Dupuy lays stress on the effective application of the resolution. However, in the opinion of the Rapporteur, such practice and application belong to a different sphere: though linked to the resolution, they are extraneous to it. The same is true of the *opinio juris* which States can express in a resolution, Giraud, *ibid.*, p. 378 and § 4 above.

on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962, annexed to resolution 1763 (XVII).

(2) *Interpretation of treaties other than the U. N. Charter.* Three categories of treaties fall under this head: treaties to which the United Nations is a party; treaties which confer a function or functions on the Organization though it is not a contracting party; and other treaties.

Resolutions 76 (I), 160 (II) and 239 (III) are examples of the interpretation of the treaties that belong to the first group. Resolution 368 (IV) fits in with the second. An important group of treaties in the third category are multilateral treaties of general interest. The debate which led to the adoption of resolution 2603 (XXIV) illustrates well the controversy on the interpretation of such treaties by the General Assembly. Resolution 2603 (XXIV) interprets the prohibition stipulated in the Geneva Protocol of 1925 on the use of gases and bacteriological methods of warfare. During the debate various arguments have been adduced against the interpretation of treaties by the Assembly. Other interpretative statements by the Assembly also met with official censure, e.g. paragraph 4 of resolution 2674 (XXV).

Question 12 raises the issue of the significance of interpretation of legal rules (other than those of the U. N. Charter) by a resolution; the term "legal rules" is general and covers any category of law, not only treaties. Judge *Jessup* points to the link with Question 6 which concerns customary rules alone. The present subparagraph considers the comments by the Confrères in the context of treaty interpretation.

Some replies are negative. To Mr *Rosenne* the significance of the interpretation given in a resolution is none "unless consented to by all the parties to the treaty". In Mr *Valticos'* opinion resolutions do not seem to be an appropriate means of interpretation; the only exception is the interpretation of a previous resolution.

Other Members of the Commission emphasize that the interpretation by the Assembly is not binding (Messrs *Bindschedler, Schachter* and *Zemanek*). This does not mean that its interpretative statements are deprived of any significance. Mr *Schachter* thinks that "if widely accepted they would carry weight", and Mr *Zemanek* observes that they "have no different effect" than other interpretations. According to Mr *McWhinney* the "legal significance" of

the interpretation made in a resolution is "clear, but the exact amount and weight cannot be decided in abstract but only in concrete cases". Judge *Mosler* refers to the "persuasive value" and Mr *McDougal* notes that interpretative resolutions "may, in appropriate contexts, create expectations about the future application of [legal] rules".

Interpretation of treaties should be distinguished from the elaboration of standards of interpretation by the Assembly. Such standards have a more general origin and bearing. They are not established in connection with a particular treaty, but can be used in aid of interpretation if they happen to be relevant. Here the views of Judge *Jessup* in the *South West Africa Cases, Second Phase,* should be noted[127].

(3) *Interpretation of the U. N. Charter*[128]. Interpretation of the Charter often involves more than the elucidation of the meaning of its provisions. For to explain them one must interpret various norms of general international law[129]. Examples are Article 1, 2, 39, 51 or 55. This makes Mr *Schachter* observe that "a series of Charter interpretations which are generally supported by or acquiesced in by the community of states would be customary law, even though the interpretations have been put forward on treaty grounds". The present subparagraph does not discuss the links between custom and interpretation; in a larger context that problem has been dealt with in Section III. Besides, Mr *Schachter* rightly adds that the notion of custom does not fit the case of authentic interpretation[130]. What the contracting parties, i.e. U. N. Members, have agreed upon in their

[127] *Op. cit.*, PE note 33, p. 441. See also pp. 432-433.

[128] Question 12 left this problem open. The majority of the Commission favour a study of G.A. Resolutions that interpret the U.N. Charter. Messrs Monaco and Ustor are of an opposite opinion, while Mr do Nascimento e Silva, speaking generally on the subject of Question 12, feels that "the Commission will be treading dangerous ground here". Messrs Suy, Valticos and Virally expressed no view on the inclusion of such a study into the Commission's agenda.

[129] Higgins, *op. cit.*, note 48, p. 4. She adds: "even the decisions taken on the internal workings of the United Nations, on its constitutional powers under the Charter, ultimately reflect on general international law, and not only on the Charter itself". Among various examples we may cite res. 742 (VIII).

[130] O. Schachter, Book Review, AJIL, vol. 59, 1965, p. 168, at p. 169.

interpretation, will inevitably prevail over any previous practice, including practice as element of custom.

Below, two questions will be considered: (a) the scope of the Assembly's power to interpret the Charter, and (b) the nature of the interpretation contained in the resolutions.

(a) The Charter is silent on any competence of the Assembly in regard to interpretation. Nor does the representative character of the organ confer on it any particular rights in this respect. The report on interpretation adopted by Committee IV/2 of the San Francisco Conference is too well known to be quoted here. The General Assembly can elicit the meaning of the provisions of the Charter that govern its functions and powers, and thus establish an interpretation to be followed in the future when specific questions arise. In particular, the Assembly can and does interpret the principles and other general provisions of the Charter without any relation to a specific question submitted to it.

Occasionally States support some limitation of the scope of the Assembly's interpretative function. When the Assembly was about to start its work on the declaration of principles of international law one Government "did not favour the method of stating subsidiary principles or corollaries of the principles of the Charter. That procedure would weaken the Charter, especially when the statements referred to transitory or changing situations and, above all, to political or ideological notions foreign international law". The delegation of that Government "was also opposed to the method of annotating a general text by special commentaries which might restrict or even distort its meaning"[131]. But in the view of another Government the formulation of corollaries was already an exercise in restraint: the Member States of the Committee that prepared the declaration "must carefully confine themselves to those elements of the principles which were universally acknowledged to be necessary and direct corollaries of the Charter principles"[132].

It may be debatable whether a specific resolution falls under the

[131] GAOR, 18th Sess., 6th Cttee, 810th Mtg, 13 November 1963, p. 159, para. 17 (France).

[132] A/AC.119/SR.16, p. 11 (United Kingdom).

head of interpretation or belongs to a different category. Examples are resolutions 217 A (III), 1514 (XV), 1803 (XVII) and, generally, declarations on principles.

(b) Turning to examine the nature of Charter interpretation by the Assembly it is convenient to draw the Commission's attention to the distinction made by Mr *Schachter*. The learned Confrère differentiates between the recommendatory nature of the resolution and the interpretation it contains. In his opinion interpretative assertions which accompany recommendations submitted to Governments are not themselves recommendatory[133]. Referring to Judge *Jessup*'s concept of "pertinent international community standard" of interpretation (subpara. (2) above) Mr *Schachter* mentions the Charter and observes that he is not "unduly troubled by the tendency [...] in some circumstances to look to international assemblies for evidence of contemporary standards as to what is permissible and obligatory"[134]. There are also resolutions which say what is contrary to the Charter. However, as Sir Humphrey *Waldock* commented[135], the issue becomes more complicated in case of majority interpretations.

It follows from the San Francisco report that if the Assembly's interpretation "is not generally acceptable it will be without binding force". In other words, only acceptance by all Members can make the Assembly's interpretation authoritative ("authentic"). Some commentators do not insist on universality *sensu stricto*. They speak of overwhelming majorities or of almost all Members including the five great powers.

[133] O. Schachter, The Relation of Law, Politics and Action in the United Nations, RC, vol. 109, 1963-I, p. 165, at p. 185. See also Mr Schachter's reply to Question 7 and the statements by the U.N. Secretary-General in the Namibia case, ICJ Pleadings, vol. 1, p. 75, at p. 87, para. 50 and vol. 2, p. 30, at. p. 36.

[134] O. Schachter, The Generation Gap in International Law, ASIL Proceedings 1969, p. 230, at pp. 231 and 233.

[135] Sir Humphrey Waldock, General Course on Public International Law, RC, vol. 106, 1962-II, p. 1, at pp. 33-34. Among many examples of controversial interpretations see paragraph 3 of res. 3016 (XXVII) and paragraph 5 of res. 3171 (XXVIII) and their voting history. *Cf.* H. Reinhard, Rechtsgleichheit und Selbstbestimmung der Völker in wirtschaftlicher Hinsicht. Die Praxis der Vereinten Nationen, Berlin, Heidelberg, New York 1980, pp. 272-273.

The essential problem in this Report is whether a unanimous interpretative resolution equals the acceptance by States in the sense of the San Francisco report or whether the existence of the acceptance depends on factors other than the resolution itself. In the latter hypothesis the resolution can or does evidence State acceptance but is not identical with it. There are writers in whose view the unanimity behind the resolution makes the interpretation authoritative, while others, in search of authoritativeness, look beyond the resolution.

In particular, some commentators admit that the resolution may embody the agreement between Member States regarding the interpretation of the Charter (Article 31, para. 3 (a), of the Vienna Convention on the Law of Treaties). Madame *Bastid* considers this eventuality[136], and so does Mr *Arangio-Ruiz*[137].

The evidentiary value of the resolution - as proof of the acceptance of the interpretation by States - depends on the meaning and significance of individual votes. A State's vote may merely reflect a political preference or convenience, in contradistinction to an interpretation of the Charter law. In particular, the consensus procedure[138] is apt to blur the differences among States and to conceal the actual absence of agreement.

Declarations on human rights, colonial countries and principles of international law were described by some as authoritative interpretations of the Charter.

In the view of one Government the definition of aggression adopted by the Assembly in resolution 3314 (XXIX) "was merely the interpretation of an expression used in the Charter"; "that definition must be binding on all States and even on the Security Council"[139]. On the other hand, some States argued that "the General Assembly could not make the definition binding on the

[136] *Op. cit.*, PE note 130, p. 136.

[137] *Op. cit.*, PE note 15, pp. 515 and 517.

[138] Which in this context is mentioned by Madame Bastid, note 136.

[139] GAOR, 29th Sess., 6th Cttee, 1478th Mtg, 16 October 1974, p. 75, para. 14 (Iraq, represented by Mustafa Kamil Yasseen).

Security Council" and the "text did not [...] rank as an authentic interpretation of the Charter"[140].

The San Francisco report envisages a situation in which it might be desirable or even necessary to embody an interpretation in a Charter amendment. However, interpretation is one thing and treaty revision another. So is the development of Charter law through customary practice, though there is room for the view that such practice and treaty interpretation might occasionally merge very closely[141]. Nonetheless, they are distinct notions.

If a General Assembly resolution expresses practice which, in the words of Judge Sir Percy *Spender*, "is of a peaceful, uniform and undisputed character accepted in fact by all current Members" [142], then this practice is at least an important criterion of interpretation. Depending on circumstances it may even constitute "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31, para. 3 (b), of the Vienna Convention on the Law of Treaties), and its universal acceptance can give it the rank of authoritative interpretation. Other resolutions have no particular probative value of their own. No doubt, they throw light on the attitude of the majority which made their adoption possible. But they cannot be equated with the subsequent conduct of all the parties[143].

(4) *Supplementation or development of treaty provisions.* Unlike the position in the International Labour Organization, the resolution is rarely used in the United Nations to supplement and/or develop treaty provisions. Fifteen general principles adopted at the first session of the U.N.C.T.A.D. (1964) were said to supplement and develop

[140] *Ibid.*, 1477th Mtg, 15 October 1974, p. 70, para. 18 (United Kingdom) and 1480th Mtg, 18 October 1974, p. 93, para. 55 (Israel, represented by Mr Rosenne) respectively.

[141] Speaking of the rule that abstention by a permanent member of the Security Council did not constitute a veto, the representative of the Secretary-General admitted that an alternative classification came into account: "a rule of customary law, or a binding interpretation", Namibia case, ICJ Pleadings, vol. 2, p. 40.

[142] Separate Opinion, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), ICJ Reports 1962, p. 182, at p. 195.

[143] *Ibid.*, pp. 192-197.

the General Agreement on Tariffs and Trade [144]. A resolution which supplements or develops a treaty is not meant to modify it. The resolution is parallel to the treaty, and the operation of the treaty is not affected. The contracting parties are invited to do more than to fulfil their treaty obligations.

(5) *Modification of treaties.* The Charter does not confer on the Assembly any general powers in this respect. Nevertheless, the Assembly's competence to make recommendations is wide enough to permit it to deal with the eventual modification of a treaty or treaties. In particular, its resolutions may in this way encourage "the progressive development of international law" in the sense of Article 13, paragraph 1 (a), or lead to "the peaceful adjustment" of a situation as defined in Article 14.

Specific treaties expressly provide for some participation by the General Assembly in their review and/or amendment. The extent of the Assembly's involvement varies, but it never entails a revision that would be binding for the contracting parties by virtue of the G. A. resolution alone: unlike some other international organs, the Assembly has not been given such a right in any instance. In agreements to which the United Nations is a party, the Assembly, if given the power of their final approval[145], also decides on their revision but it is not a unilateral (quasi-legislative) competence, because the consent of the other party is equally needed.

The Assembly has a role to play under Articles 108 and 109 of the Charter. Some of the treaties elaborated by, or drafted on the initiative of, the General Assembly provide that any amendment to them requires its approval[146]; ratification by the contracting parties will be the next step. Other treaties use a more general formula: the Assembly shall decide upon the steps, if any, to be taken in

[144] S. El-Naggar, The Recommendations of the United Nations Conference on Trade and Development as a Means of Creating International Norms, in: Les Résolutions dans la formation du droit international du développement, Genève 1971, pp. 165 and 166.

[145] *E.g.*, Article 85 of the Charter. See also Section 36 of the Convention on the Privileges and Immunities of the United Nations concerning "supplementary agreements adjusting the provisions of this convention", res. 22 (I).

[146] Article 29, International Covenant on Economic, Social and Cultural Rights; Article 51, International Covenant on Civil and Political Rights, res. 2200 A (XXI).

respect of a request, by a contracting party, for the revision of the treaty[147].

In resolution 1903 (XVIII) the Assembly dealt with the revision of the participation clauses in twenty-one general multilateral treaties of a technical and non-political character concluded under the auspices of the League of Nations[148]. The revision aimed at the adaptation of these clauses to the change-over from the League to the United Nations. The resolution followed the solution proposed by the International Law Commission[149]. The resolution decided that the Assembly was "the appropriate organ of the United Nations to exercise the power conferred" by the said treaties "on the Council of the League of Nations to invite States to accede to those treaties" (para. 1). Thus the normal procedure of protocols amending the treaties was rejected. However, this did not mean that the modification of the participation clauses could take place without the consent of the contracting parties. In paragraph 2 of the resolution the Assembly

> "*Records* that those Members of the United Nations which are parties to the treaties referred to above assent by the

[147] Article XVI, Convention on the Prevention and Punishment of the Crime of Genocide, res. 260 (III); Article XII, Convention on the International Right of Correction, res. 630 (VII); Conventions I, II, III and IV on the Law of the Sea of 1958, Articles 30, 35, 20, and 13, respectively; Article 23, International Convention on the Elimination of All Forms of Racial Discrimination, res. 2106 (XX); Article IX, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, res. 2391 (XXIII); Article XVII, International Convention on the Suppression and Punishment of the Crime of Apartheid, res. 3068 (XXVIII).

[148] Some of these treaties might have ceased to be in force. Doubts regarding the status of the treaties were expressed during the debate in the Sixth Committee, and para. 3 (c) of the resolution reflects them. See GAOR, 18th Sess., 6th Cttee, pp. 69 ff. For a different method applied to a political treaty, viz. the General Act for the Pacific Settlement of International Disputes (1928), LNTS, vol. 93, p. 343, see res. 268 A (III) and the remarks in the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, Nuclear Tests Case (Australia v. France), ICJ Reports 1974, p. 312, at pp. 480-482.

[149] Report of the ILC covering the Work of Its Fifteenth Session, GAOR, 18th Sess., Supp. No. 9 (A/5509), Chapter III, especially paras. 49 and 50.

> present resolution to the decision set forth in paragraph 1 above and express their resolve to use their good offices to secure the co-operation of the other parties to the treaties so far as this may be necessary".

In the words of the Australian representative, "the very adoption of the resolution would be regarded as recording the assent of those parties to the treaties in question which were Members of the United Nations [...]"[150]. This view was not unanimously shared. During the discussion in the Sixth Committee the procedure of amendment protocols was defended[151] and doubts were raised regarding the possibility of resolving the matter by a resolution[152]. Whether the recording in paragraph 2 was true depended on the attitude of the contracting parties. The Australian representative was explicit:

> "I emphasize the central importance, in the whole scheme of the draft resolution, of obtaining the consent to the scheme, at the outset, of the parties to the old treaties, and make clear that, having regard to the effects of the draft resolution, it forces treaty relations on no State, neither on the existing parties nor on any new State"[153].

There is no evidence that the parties agreed on the revision of the treaties outside the General Assembly proceedings. On the contrary, the language of paragraph 2 indicates that their accord has been brought about by, and is to be found in, the resolution. In the Sixth Committee no vote was cast against the draft resolution. yet twenty-two States abstained[154]. In view of the debate some of the abstentions could mean that the States involved did not in fact

[150] GAOR, 18th Sess., 6th Cttee, 795th Mtg, 17 October 1963, p. 69, para. 3 (Sir Kenneth Bailey).

[151] *Ibid.*, 796th Mtg, 18 October 1963, pp. 74-75, especially para. 16 (Italy, represented by Mr Sperduti). Earlier, participation provisions of some of the League of Nations treaties were amended by means of protocols, *e.g.* res. 794 (VIII).

[152] *Cf. ibid.*, 798th Mtg, 22 October 1963, p. 88, para. 23 (Venezuela); 799th Mtg, 23 october 1963, p. 91, para. 18 and p. 93, para. 38 (Iran).

[153] GAOR, 18th Sess., Pl., 1258th Mtg, 18 November 1963, para. 117 (Sir Kenneth Bailey).

[154] *Ibid.*, 6th Cttee, 801st Mtg, 28 October 1963, p. 106, para. 54.

give the assent to which paragraph 2 refers[155]. On the other hand, the polemics of the plenary debate did not touch on the problem of the parties' assent; they concentrated on other issues. In the voting the twenty-two abstentions were repeated[156], but they cannot be linked to any earlier doubts on paragraph 2 and the exactness of what it records.

We may also revert to resolution 2603 (XXIV) which has been discussed under the heads of evidence of custom (§ 5 (9)) and treaty interpretation (this paragraph, subparagraph (2)). Could it not be additionally considered in the framework of treaty modification? Some Member States argued forcefully that there was a discrepancy between the contents of the material treaty, i.e. the Geneva Protocol of 1925, and the declaratory statement on these contents as made by the resolution. The Assembly might thus have been said to aim at an actual revision of the Protocol. Yet both the sponsors of the draft and the Member States which voted for it denied this hypothesis. Nor did the opponents of the resolution subsume it under modification of treaties; they discussed it mainly in terms of interpretation which, in their view, the Assembly was not authorized to give. On the other hand, modification was invoked in regard to certain reservations to the Protocol.

While the substitution of the General Assembly for the Council of the League of Nations in the participation clauses of the treaties covered by resolution 1903 (XVIII) was operated through their revision, problems of accessibility to some other treaties were solved either by an interpretative decision on the part of the Assembly or directly by the exercise of the more or less discretionary powers which the Assembly was given by the relevant clause. Resolutions 368 (IV), 603 (VI) and 793 (VIII) are cases in point; the earlier practice of the Organization in this respect has been analysed by Mr *Rosenne*[157].

[155] Only two Member States explained their abstention, and the reasons were other than opposition to the revision of participation clauses, *ibid.*, 802nd Mtg, 29 October 1963, p. 107, paras. 3 and 4.

[156] Note 153 above, 1259th Mtg, para. 64.

[157] Rosenne, *op. cit.*, note 108, pp 350-353.

§ 12. *Future treaties*

The present paragraph is not concerned with the resolutions whereby the Assembly merely decides that a treaty on a particular subject should be concluded, and organizes the work on its text. What is of interest here is the resolutions in which the Assembly deals with the substance of the future treaty, viz. it lays down some principles or other rules which should figure in the treaty or it maps out the general course of treaty regulation.

(1) *Two-stage procedure.* In this procedure, which is referred to by many writers, including Mr *Arangio-Ruiz*[158], Judge *Lachs*[159] and Mr *Virally*[160], the resolution constitutes the first step leading to the elaboration of the treaty. The negotiations on the text of the treaty begin as a result and after the adoption of the resolution which contains a number of substantive (and not only procedural) provisions. The matter is covered by Question 10.

Judge *Mosler* does not think that the method is always suitable and, therefore, of general application. But he refers to the Universal Declaration of Human Rights and admits that "this two-stage procedure is useful if the subject is appropriate to be dealt with first in the form of a more general outline of principles in a resolution and later, within the framework of these principles, in the precise terms of a treaty". Mr *Schachter* says: "The resolution would in some cases prepare the way for treaty negotiations since it would serve to convey both a sense of the importance of the matters dealt with (as in the human rights field) and an expression of the policies for which general international support has been evidenced". Mr *Ustor* also sees in the resolution a stimulus for the development of treaty law, while Mr *Zemanek* links the two-stage process to the wider problem of creating "legal consciousness" which influences both treaty and custom making. Of course, as Mr *Bindschedler* remarks, the utility of the procedure depends on the quality of the

[158] Arangio-Ruiz, *op. cit.*, PE note 15, p. 448.

[159] *Op. cit.*, PE note 95, p. 137.

[160] M. Virally, Rapport No. 1 (Rapport introductif), in: Les Résolutions, *op. cit.*, note 144, p. 49, at p. 57.

first stage, i.e. the resolution. Some Members of the Commission generally agree that the procedure can be useful (cf. Judge *Jessup* and Messrs *McWhinney* and *Monaco*). Mr *Seyersted* sees the usefulness of the resolution in that the fate of the prospective treaty is uncertain. This view seems to emphasize the resolution's autonomous role, a problem which is explored in subparagraph (5) below. On the other hand, Mr *Valticos* limits the significance of the resolution to that of "un ballon d'essai, une première approximation, un pis-aller [...], parfois une manœuvre".

Needless to say, opposition, whether in the form of negative votes, abstentions or reservations, deprives the resolution of any role as a first stage of law-making or diminishes that role. Recent examples are resolutions 37/7 and 37/92.

(2) *Resolution as part of preparatory work.* In the two-stage procedure the resolution becomes part of the preparatory work on the treaty and therefore a supplementary means of its interpretation. But that status of the resolution must be assessed in each particular case, for it depends on the course and outcome of the second stage, i.e. the elaboration of the treaty by a diplomatic conference or by a U. N. organ.

(3) *Can the treaty deviate from the resolution?* This is the essential problem of the two-stage procedure, and the word "can" covers various possibilities, legal and other. The query is justified by the strong normative tendency of the resolutions discussed here.

The reading of certain treaties would suggest a negative answer. For instance, the International Covenants on Human Rights did not repeat any and every article of the Universal Declaration; there are some gaps in comparison with the Declaration and also some departures from it, while on the whole the Covenants contain a much more detailed regulation.

The problem attracted some attention in connection with the adoption, by resolution 2749 (XXV), of the Declaration of Principles on sea-bed. There were Member States which thought that the future treaty on the subject would have to follow the Declaration[161].

[161] GAOR, 25th Sess., 1st Cttee, 1780th Mtg, 2 December 1970, para 77 (Kuwait); GAOR, 26th Sess., 1st Cttee, 1854th Mtg, 15 December 1971, para. 4 (Iran). *Cf.* also the position of Canada, GAOR, 26th Sess., Suppl. No. 21 (A/8421), p. 205.

But several other States referred to it in terms which implied a certain freedom for the negotiators[162].

The problem re-emerged during the Third U. N. Conference on the Law of the Sea. At the seventh session of the Conference the United States upheld its earlier attitude; in particular, it argued in favour of the right of any country to enact national legislation on the mining of deep sea manganese modules pending the conclusion of the new convention on the law of the sea[163]. On the other hand, the Chairman of the Group of 77 maintained that the Declaration had "the effect of creating the basis for the legal regime this Conference was entrusted to formulate". "Unilateral legislation", i.e. national legislative action preceding the establishment of a treaty regime for the exploration and exploitation of the sea-bed, would be contrary to international law. That law, in the Group's view, had been authoritatively expressed by the Declaration. The Group spoke of "an international regime in conformity with the Declaration of Principles within the framework of an International Convention"[164]; this formula left little doubt that the provisions of the resolution had to be included in the treaty.

The Members of the Thirteenth Commission agree that the resolution of the type discussed in the present paragraph does not bind the negotiators of the treaty. There are, however, certain differences among the individual negative replies. While some Members deny the existence of a legal obligation, others add various qualifications. Mr *McDougal* reminds the Commission that "a resolution could hinder treaty negotiations only if it expressed customary law of *ius cogens* character". Mr *do Nascimento e Silva* assumes that the State which

[162] GAOR, 25th Sess., 1st Cttee, 1774th Mtg, 26 November 1970, para. 24 (USA); 1777th Mtg, 30 November 1970, para. 50 (Australia) and para. 92 (Brazil); 1781st Mtg, 2 December 1970, paras. 15-16 (El Salvador) and para. 44 (India); 1799th Mtg, 15 December 1970, para. 3 (UK); A/PV.1933 (Belgium and UK).

[163] Plenary Session, 15 September 1978. Extracts quoted by B.H. Oxman, The Third United Nations Conference on the Law of the Sea: The Seventh Session (1978), AJIL, vol. 73, 1979, p. 1, at. p. 35, n. 119. *Cf.* the view of the United Kingdom during the debate on the G.A. Declaration, GAOR, 25th Sess., 1st Cttee, 1799th Mtg, 15 December 1970, para. 4. See also note 95 above.

[164] Statement by the representative of Fiji, extracts quoted by Oxman, *op. cit.*, note 163, p. 36, n. 120.

accepted "certain rules in a resolution is not averse to its future incorporation in a treaty". The resolutions "may influence the treaty-makers greatly" (Mr *Seyersted*); they "constitute a framework for the negotiators: they are guidelines" (Mr *Suy*). Mr *Ustor* feels that the principles of the resolution exercise "a strong moral pressure" on treaty negotiations. Mr *Valticos* refers to political or moral influence, especially if the negotiators have shortly before voted in favour of the resolution. But it is Mr *Schachter* who is most outspoken in recognizing the impact of the resolution.

(4) *Methods of incorporation.* The incorporation of resolutions into treaty law can be operated through various methods.

One method consists in the acceptance of the resolution (or of some of its rules) by the treaty. The treaty acknowledges the existence of a body of rules laid down in the resolution and makes them part of its provisions. There is no need for the treaty to repeat the resolution literally: an appropriate treaty clause brings about the incorporation. This method is rarely resorted to. Some treaties made use of it with regard to the Universal Declaration of Human Rights, e.g. Article 5 of the General Convention of 3 June 1955 between France and Tunisia[165].

Another method results in the material identity of the treaty with the resolution, or of some treaty provisions with the corresponding rules of the resolution. In contradistinction to the first method, the treaty here repeats the resolution. It happens that the preamble to the treaty or the act whereby the Assembly approved the text of the treaty refer to the resolution, e.g. resolution 2200 A (XXI) and the preambles to the International Covenants on human rights; or the preamble to the space treaty of 1967[166]. In this method such references are not essential, though they can prove helpful in the interpretation of the treaty.

The I.L.O. Convention No. 121 concerning Benefits in the Case of Employment Injury (1964)[167] incorporates in its annex the In-

[165] C.A. Colliard (ed.), Actualité internationale et diplomatique 1950-1956, Paris 1957, p. 35. See also Trusteeship Agreement for the Territory of Somaliland under Italian Administration, Annex, Article 10, UNTS, vol. 118, p. 255.

[166] Res. 2222 (XXI).

[167] UNTS, vol. 602, p. 259.

ternational Standard Industrial Classification of All Economic Activities, i.e. a text which has been drawn up and approved by the U. N. Economic and Social Council[168] (the Council discharges the functions set forth in Chapter IX of the Charter "under the authority of the General Assembly", Article 60).

(5) *The role of the resolution in the second stage of the procedure.* In the two-stage procedure as defined in subparagraph (1) above the role of the resolution comes to an end once the second stage has been reached. In this procedure the resolution is treaty-oriented and will normally have no other function than that of shaping the treaty.

There are, however, circumstances in which the resolution will have some autonomous prescribing effect, in spite of its link to the treaty.

Thus there is room for a continuous influence of the resolution when the conclusion of the treaty is being delayed and the resolution proves useful in filling in the regulatory lacuna. A case in point is the Universal Declaration of Human Rights adopted in 1948 along with the decision "to give priority [...] to the preparation of a draft Covenant on Human Rights and draft measures of implementation" (resolution 217 E (III)). But the two Covenants were opened for signature as late as 1966 and their entry into force was postponed until 1976. In the meantime the Universal Declaration ceased to be, for the Organization and for many of its Members, a mere standard or ideal that could attain the rank of law only through a treaty or treaties. Neither the perspective nor later the existence of the two Covenants prevented the Declaration from exercising an important law-creating influence of its own.

One may even envisage circumstances in which the role of the resolution will not be terminated after the conclusion of the treaty, and the two instruments will reinforce each other in their normative effect. Sir Robert *Jennings* considers this possibility with regard to

[168] F. Wolf, Note sur le rapport introductif (Rapport No. 1) in : Les Résolutions, *op. cit.*, note 144, p. 147, at p. 150.

the Declaration of Principles on sea-bed (res. 2749 (XXV)).[169]. His comments seem to be generally relevant in the situation where the resolution has been unanimously approved, or at least represents the opinion of an overwhelming majority, and the subsequent treaty has not been universally ratified.

However, it should not be taken for granted that an unsatisfactory number of ratifications automatically increases the normative function of the preparatory resolution. Nor does this function automatically acquire a new dimension when the treaty has not at all been concluded. Here the fate of resolution 1653 (XVI) is instructive. This resolution declared that the use of nuclear and thermo-nuclear weapons constituted "a direct violation of the Charter of the United Nations" and was "contrary to the rules of international law and to the laws of humanity" (para. 1 (a) and (b)). At the same time the Assembly envisaged "the possibility of convening a special conference for signing a convention on the prohibition of the use of nuclear and thermo-nuclear weapons for war purposes". The law-declaring statement met with opposition (20 votes against the resolution) or doubts (26 abstentions). This showed that for many States, and they included the majority of the nuclear powers, the prohibition was not yet part of positive law but could only result from a treaty. And some of the adherents of the resolution also regarded the treaty as the definite means of bringing about the desired prohibition[170]. Ethiopia, which was one of the sponsors of the resolution, said that "its adoption would be an effective first step towards the ultimate prohibition by treaty"[171], an indication that conventional rules were

[169] *Op. cit.*, PE note 51, pp. 439-440; *id., loc. cit., note* 95. It may be said, *mutatis mutandis*, that Sir Robert Jennings' line of reasoning finds some corroboration in a dictum of the I.C.J. The dictum referred to a non-binding resolution which supported preferential rights for the coastal State in a situation of special dependence on coastal fisheries and to the recognition of these rights by subsequent treaties, Fisheries Jurisdiction Case (U.K. v. Iceland), Merits, ICJ Reports 1974, p. 3, at p. 26, para. 58.

[170] *Cf.* GAOR, 16th Sess., 1st Cttee, 1193rd Mtg, 13 November 1961, p. 160, para. 32 (U.S.S.R.). See also *ibid.*, 1190th Mtg, 9 November 1961, p. 146, para. 13 *in fine* (Czechoslovakia). The Soviet delegate spoke of the Declaration as "a suitable basis for solving the problem of prohibiting the use of nuclear weapons", *ibid.*, 1189th Mtg, 8 November 1961, p. 142, para. 13.

[171] *Ibid.*, p. 141, para. 4.

indispensable. Another sponsor, Tunisia, reduced the Assembly's role to the realm of morality: the resolution "was intended as a moral condemnation of nuclear war" and the aim was "to declare the use of nuclear weapons to be morally reprehensible"[172]. This approach, again, seemed to shift the legal regulation on to the plane of treaty. In these circumstances resolution 1653 (XVI) could not and, in fact, did not go beyond its role of the first step leading to the conclusion of the treaty. There was no second step as the treaty did not materialize, and the resolution did not play any further (and autonomous) role. Here the limits inherent in the first stage of the procedure could not have been surmounted.

Finally, one may ask what happens to a postulate, formulated in the resolution, which has not been incorporated into the treaty[173].

If the treaty failed to secure a number of ratifications or accessions that would give it the status of general law, while the resolution achieved universal or almost universal backing, there may still be room for the development of law along the lines of the resolution. If, on the other hand, the application of the treaty has become general, one can presume that the unfulfilled postulate has been rejected, though the force of the presumption will vary from case to case.

Resolution 96 (I) includes the destruction of political groups into the notion of genocide. It also states that genocide "results in great losses to humanity in the form of cultural and other contributions". Both the political nature of the group and the reference to culture are passed over in silence by the Convention on the Prevention and Punishment of the Crime of Genocide[174]. If any of the acts enumerated in Article II of the Convention is perpetrated against a political group, States may recognize it as genocide and thus widen the concept in its present conventional connotation. However, this can be operated either through the revision of the Convention or by way

[172] *Ibid.*, 1191st Mtg, 10 November 1961, p. 153, para. 27.

[173] The question has been raised in legal writings, *cf.* Guradze, *op. cit.*, PE note 95; *id.* Are Human Rights Resolutions of the United Nations General Assembly Law-making? Human Rights Journal, vol. 4, 1971, p. 453, at pp. 461-462; Lador-Lederer, *op. cit.*, PE note 76, p. 225, n. 78.

[174] Res. 260 (III). UNTS, vol. 78, p. 278. Lador-Lederer, *loc. cit.*, note 173.

of customary development. In each of these hypotheses the point of departure will be a new initiative by States, not resolution 96 (I).

The International Covenants on human rights, though much more detailed than the Universal Declaration, do not comprise any and every right that figures in the latter. The protection of private property is an often cited example (Article 17 of the Declaration). This and other omissions in no way remove the right or rights in question from the catalogue of human rights. They are not protected by the International Covenants, but they could have acquired either the status of regional customary law or they already find corroboration in other treaties (cf. Article 1 of the first Protocol, 1952, to the European Convention; Article 21 of the American Convention, 1969[175]). The silence of the Covenants is no bar to its parties abiding by the omitted rule or rules of the Declaration either by way of another treaty or treaties or through customary practice.

However, there are types of regulation which exclude the possibility of such a parallelism. In resolution 2465 (XXIII) the General Assembly made the following declaration: "the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and [...] the mercenaries themselves are outlaws [...]" (para. 8). The statement was repeated in resolutions 2548 (XXIV) and 2708 (XXV). In resolution 3103 (XXVIII) the Assembly formulated a number of "basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes". Among them figures a principle regarding mercenaries (para. 5): "The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and the mercenaries should accordingly be punished as criminals".

The foregoing rules have not been incorporated into Protocol I of 1977 additional to the Geneva Conventions of 1949[176]. Article 47,

[175] UNTS, vol. 213, p. 262, and ILM, vol. 9, 1970, p. 673, respectively.

[176] ILM, vol. 16, 1977, p. 1391. On the other hand, it may be noted that this Protocol refers to res. 2625 (XXV) in defining some of the armed conflicts to which it applies: the meaning of self-determination as part of the relevant definition is to be determined, *inter alia*, in accordance with this resolution, see Article 1, para. 4. *Cf.* Frowein, *op. cit.*, note 109, p. 154.

paragraph 1, of the Protocol provides that "[a] mercenary shall not have the right to be a combatant or a prisoner of war". But this Article does not state that the mere fact of being a mercenary constitutes a crime nor does it deprive a mercenary of the fundamental guarantees of the Protocol (Article 75)[177]. The parties to the Protocol are free to prohibit mercenariness and make it a punishable offence. Yet the humanitarian treatment provided for in Article 75 is mandatory and must be accorded to all persons in the power of a party to the conflict, whether they committed criminal acts or not. This basic protection limits the concept of mercenaries as "outlaws" and in this sense it prevents the consolidation of the full normative implications of the concept.

§ 13. *Resolutions Approaching or Having the Status of Treaties*

The resolutions discussed in the present Report usually result from negotiations conducted both outside and within the procedural framework of the General Assembly. Through their negotiations Member States reach agreement without which the subsequent adoption of the resolution would not be possible. Mr *Virally* notes that "une résolution ou une recommandation n'acquiert de signification juridique que dans la mesure [...] où elle exprime un minimum d'accord auquel participent tous ceux qui sont les destinataires de cette résolution ou de cette recommandation [...]"[178]. In his comment on the Preliminary *Exposé* Mr *Virally* puts the question: " Quelle est la nature juridique de cet accord, sur quoi porte-t-il exactement [...] ? ".

This paragraph deals with the problem exclusively in the context of treaty obligations.

It must be said at the outset that the agreement behind the resolution does not normally amount to an entry into contractual relationships regulated by the law of treaties.

But States may agree to bestow upon a resolution the status of a binding commitment. One possibility is that a specific treaty

[177] H.C. Burmester, The Recruitment and Use of Mercenaries in Armed Conflict, AJIL vol. 72, 1978, p. 37, at p. 55. On p. 54 he discusses the relevant U.N. resolutions.

[178] In: Les Résolutions, *op. cit.*, note 144, p. 30.

provision makes the resolution obligatory (subparagraph (1)). Another possibility is that States conclude a treaty by using for this purpose the instrumentality of an Assembly resolution (subparagraph (2)).

The presumption is against a resolution constituting a treaty. States, however, are free to choose this method of incurring contractual obligations. Actually, they do it rarely. In two cases the Hague Court found the existence of the conventional link resulting from the acceptance by two States of a decision of an international organ[179].

(1) *Treaty obligation to abide by a resolution*[180]. The parties to a treaty may agree to accept a resolution or resolutions as binding. In his reply to Question 9 Mr *Bindschedler* envisages such a possibility. The obligation may cover an existing or a future resolution or both.

In the trusteeship agreements the administering authority agreed to apply the recommendations of, *inter alia*, the General Assembly[181]. Another example is the Peace Treaty with Italy of 1947 (Annex XI, paragraph 3)[182], whereby the Assembly assumed the competence regarding the disposal of the former Italian colonies and exercised it in a series of resolutions[183].

(2) *Resolutions as a form for the making of international engagements.* Such resolutions occur more often in the practice of other bodies, but they are also known to the U.N. General Assembly.

[179] Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina), PCIJ, Series B, No. 8, p. 30; Railway Traffic between Lithuania and Poland (Railway Sector Landwarów - Kaisiadorys), *ibid.*, Series A/B, No. 42, p. 116.

[180] This Section concentrates on treaties and, therefore, does not discuss the acceptance of resolutions by virtue of unilateral acts. On the latter problem, see § 20 (3) below.

[181] For instance, the agreements for Tanganyika, Articles 7 and 16; Togo, Article 6; or Somaliland, Articles 3, 5 (1), 12 and 16. On the agreement for Togo, see the comment by M. Virally, La valeur juridique des recommandations des organisations internationales, AFDI, vol. 2, 1956, p. 66, at p. 85.

[182] UNTS, vol. 49, p. 3.

[183] Libya: res. 289 A (IV), 387 (V) and 388 A (V); Eritrea: res. 390 A (V) and 530 (VI); Italian Somaliland: res. 289 A (IV). See also res. 392 (V).

Mr *Castañeda* writes: "Only when it may be interpreted that the resolution (understood as an act of the organ and not of the members) has as its objective to register and express the coincident consent of the members to bind themselves, because of the circumstances under which it was adopted, can it be affirmed that the resolution incorporates a binding agreement for those who concluded it through their votes"[184]. Mr *Virally* notes that "dans ce cas le vote des Etats a une double signification et produit un double effet : adoption de la résolution et approbation des accords et des engagements que cette résolution enregistre"[185].

Mr *Dupuy* speaks of "conventional resolutions" (*résolutions conventionnelles*). A resolution of this type is adopted when a full treaty is still premature, yet the resolution incorporates the agreement of States. In his opinion it presents the advantages of an agreement in simplified form. "La résolution peut aussi annoncer une convention différée qui interviendra après l'expérience acquise dans l'application que les Etats lui auront donnée ; elle constitue alors une manière d'essai ou de 'tentative agreements'". He gives the examples of resolutions on road transport adopted by the Economic Commission for Europe, resolution 1962 (XVIII) and - citing Mr *Virally* - resolution 2626 (XXV). The latter act, even for the States which did not formulate any reservations, still required further elaboration through multilateral or bilateral treaties. Consequently, Mr *Dupuy* remarks that "la résolution-accord présente un contenu normatif aux plans des finalités et des principes dont le respect doit permettre de les atteindre ; elle en reste encore, au niveau des moyens, à des formules trop vagues, susceptibles d'interprétations divergentes et impuissantes par elles-mêmes à dicter des actions concrètes"[186].

[184] *Op. cit.*, PE note 36, p. 155. In his monograph, Mr Castañeda devoted the whole of Chapter 6 to "Resolutions that Express and Register Agreement among the Members of an Organ".

[185] *Op. cit.*, PE note 39, p. 27. See also *id., op. cit.*, Annuaire IDI, note 90, p. 178, paras. 28 and 29.

[186] Dupuy, *op. cit.*, note 67, pp. 139-144, quotations at pp. 141 and 143 respectively. *Id., op. cit.*, note 68, pp. 177-181.

Each resolution is the outcome of negotiations leading to an agreement on the text of the resolution, and some resolutions use terms that might suggest the existence of a contractual engagement. The latter point is illustrated by Article 12, paragraph 2, and Article 33, paragraph 1, of resolution 3281 (XXIX).[187]. None of this, of course, suffices to justify the conclusion that a contractual relationship has been established through the instrumentality of the resolution. Such a relationship can be found to exist only if States declare the intention to create it; the intention may be expressed in the resolution or follow from the preparatory work on it. In any case, it must be clear that what the States made is an agreement, governed by international law, from which rights and duties result, and not only an agreement the content of which is nothing but recommendations.

An early example of a resolution containing contractual engagements is resolution 24 (I) dealing with the transfer of certain functions, activities and assets of the League of Nations. Its Section I, paragraph 2, records that "those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary". The instruments mentioned are treaties *sensu largo* under which the League of Nations exercised various functions[188]. Resolution 1903 (XVIII), which concerns a similar subject, has been discussed in § 11 (5) above.

In resolution 1884 (XVIII) the Assembly welcomes (and thereby puts on record) "the expressions by the Union of Soviet Socialist Republics and the United States of America of their intention not

[187] *Cf.* the remark by the delegate of Luxembourg, GAOR, 29th Sess., 2nd Cttee, 1650th Mtg, 9 December 1974, p. 449, para. 3: "Under the terms of article 33, paragraph 1, the text adopted was a recommendation within the meaning of the Charter of the United Nations, and his delegation would have preferred a formulation more in conformity with that basic requirement of the Charter of the United Nations ".

[188] Asamoah, *op. cit.*, PE note 76, p. 64; Monaco, *op. cit.*, PE note 78, p. 175. The resolution refers to "various treaties and international conventions, agreements and other instruments". The mention of "parties" leaves no doubt that also the latter word covers contractual acts alone.

to station in outer space any objects carrying nuclear weapons or other kinds of weapons of mass destruction" (paragraph 1). Judge *Lachs*[189] and Mr *McWhinney* in his reply to Question 9 direct attention to this resolution.

The position of some other resolutions is more doubtful. One instance is resolution 1962 (XVIII), i.e. the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space. Both the United States and the Soviet Union stated that they "intended to respect" the legal principles contained in the Declaration[190]. Whether the two Powers thereby created a contractual link between themselves is debatable. For they also said that the principles "reflected international law as accepted by the Members of the United Nations"; in other words, the source of obligation, if any, might have been other than contractual. Judge *Lachs* views the Declaration "within the framework of a wider phenomenon reflecting a visible trend towards dispensing with traditional forms of decision-making in international relations"[191].

Resolution 2626 (XXV) on the International Development Strategy for the Second United Nations Development Decade makes ample use of the terminology that would, *prima facie*, indicate the existence of contractual engagements, not mere recommendations. This impression is reinforced by many reservations which accompanied the adoption of the Strategy. Yet that resolution is not a treaty.

Paragraph 3 in part A and paragraph 3 in part B of resolution 1991 (XVIII) on the equitable representation on the Security Council and the Economic and Social Council are examples of agreed solutions arrived at by the U.N. Members. Matters relating to the internal functioning of the Organization (a subject not discussed in the present Report) are probably better suited for agreement in the form of an Assembly resolution. In reply to Question 9 Mr *Zemanek* speaks of this category.

Finally, interpretation agreements that find expression in resolutions have been mentioned in § 11 (3) (b) above.

[189] Lachs, *op. cit.*, PE note 95, p. 137.

[190] GAOR, 18th Sess., 1st Cttee, 1342nd Mtg, 2 December 1963, p. 159 and 161 respectively.

[191] *Op. cit.*, PE note 95, p. 138.

In their replies to Question 9 several Members of the Thirteenth Commision assume the possibility and/or the existence of resolutions that constitute binding agreements of States (see subparagraph (3) below).

(3) *Desirability of resolution as a form of inter-State agreements.* The fact that agreements of States are very seldom expressed, formulated or recorded in a resolution of the General Assembly seems to indicate that States are reticent on having recourse to this procedure. Nonetheless the Thirteenth Commission remains divided on the issue of desirability as raised in Question 9.

Incidentally, to Mr *Rosenne* this Question is "quite irrelevant". The tenor of the replies shows that the Members of the Commission do not share this attitude. While Judge *Jessup* thinks that it is not possible to generalize, several Confrères give a positive answer, though occasionally it is qualified (Messrs *McDougal, McWhinney, Rosenne, Suy* and *Ustor;* Mr *Seyersted* also replies in the positive, but he has in mind resolutions that are different from those which the Assembly is normally competent to adopt). Other Members of the Commission deny the desirability of this particular form (Judge *Mosler,* Messrs *do Nascimento e Silva, Schachter, Valticos* and *Zemanek*). The answers by Messrs *Bindschedler* and *Monaco* should, too, be counted here, though they address themselves to other aspects of the problem. Mr *Bindschedler* says that essentially the resolution cannot be the form of an inter-State agreement, thus eliminating the issue of desirability. Mr *Monaco* finds the whole question premature. It may be added that Mr *Schachter* envisages the possibility of a resolution that embodies an agreement which does not constitute a treaty within the meaning of the Vienna Convention; such an agreement might pave the way for a treaty. Mr *Valticos* mentions a similar eventuality. This, however, is a category that rather belongs to § 12 above.

V. *Resolutions and the General Principles of Law*

§ 14. *Evidence of the General Principles of Law*

Only two Members of the Thirteenth Commission, viz. Messrs *Rosenne* and *Seyersted,* deny that the resolutions of the General As-

sembly have evidential value with regard to the general principles of law (Question 13); Mr *Seyersted*, however, admits of an exception.

Among the majority of the Commission some Members answer Question 13 in the positive, without any qualification (Messrs *McWhinney*, *Suy*, *Ustor* and *Zemanek*). Others regard the evidentiary role of the resolutions only as a possibility (Mr *Bindschedler*, Judge *Jessup*, Messrs *McDougal* and *Monaco*, Judge *Mosler*, Messrs *do Nascimento e Silva*, *Schachter* and *Valticos*). The existence of this possibility depends on various factors. They are: the quality of the resolution, the majority which is behind it, and the composition of that majority (Mr *Bindschedler*); "the text and the context" (Judge *Jessup*); or, generally, "the circumstances" in which the principles were considered and which "provide a basis for inferring that the Assembly's decision rested on an adequate foundation" (Mr *Schachter*).

Whether the Assembly resolutions are a useful instrument for expressing the existing general principles of law is another problem. Mr *Suy* says that "[i]t is [...] difficult to conceive that States would have recourse to resolutions for such a purpose". Indeed, resolutions rarely "make reference to uniformities in national authoritative decision" (the phrase is borrowed from Mr *McDougal*'s reply). Actually, in the activities of the Assembly, manifold as they are, there is not much opportunity for stating principles that are common to the main legal systems of the world and are applicable in the international legal order. The field which offers some opportunity of such enunciation is human rights. Mr *do Nascimento e Silva* mentions "[s]ome articles of the Universal Declaration of Human Rights [...] and [...] some other resolutions such as that on territorial asylum".

§ 15. *Emergence of the General Principles of Law*

Can resolutions go beyond the function of evidence and in one way or another contribute to the emergence of a general principle of law? Most of the principles under consideration were formed *in foro domestico*. Yet one cannot exclude that at the present time, when doctrinal and ideological divisions among States are particularly strong and acute, the acceptance, on the international plane, of certain common values, can lead to the birth of general principles of law.

The Hague Court refers to the "principles which are recognized by civilized nations" in connection with resolutions 96 (I), and Judge Alejandro *Alvarez* counts the resolutions of the United Nations among the "means by which the juridical conscience of peoples may be expressed at the present time"[192].

A memorandum of the United States links "certain fundamental human rights" to the general principles of law and mentions the influence which the Universal Declaration of Human Rights exercised on the municipal laws and on the decisions of domestic courts This Declaration and resolution 3452 (XXX) were cited to show the universal condemnation and prohibition of torture. The latter instrument "not only confirms that international custom outlaws torture", which would fit the more limited role of the resolution of being evidence of law, "but also supplies a precise definition of the conduct proscribed"[193].

Alfred *Verdross* has noted that Article 38 of the I.C.J. Statute did not stipulate that the recognition of the general principles of law should have a municipal source alone[194]. An Assembly resolution is also an instrumentality. Mr *Zemanek* discusses the matter in connection with the beginnings of the law of outer space[195]. Alfred *Verdross* has written that the general principles "peuvent être aussi acceptés par les Etats au moyen d'une reconnaissance expresse des principes de droit proclamés dans une déclaration de l'Assemblée générale des Nations Unies"[196].

[192] Advisory Opinion on Reservations to the Convention on Genocide, ICJ Reports 1951, p. 15, at p. 23 and *loc. cit.*, note 19, respectively.

[193] Memorandum for the United States as amicus curiae submitted to the Court of Appeals for the Second Circuit in Filartiga v. Peña-Irala, ILM, vol. 19, 1980, p. 585, at pp. 593 and 598, citation at p. 599.

[194] *Op. cit.*, note 98, p. 525.

[195] *Op. cit.*, PE note 52, pp. 208-209. An ILA Working Group directed by D.P. O'Connell has also acknowledged the creative role of the Assembly resolutions, ILA Report, 58th Conference, 1978, p. 186, at p. 197. On the other hand, O. Schachter, Alf Ross Memorial Lecture: The Crisis of Legitimation in the United Nations, Acta Scandinavica Juris Gentium, vol. 50, 1981, p. 3, at p. 12, n. 32, citing Zemanek, limits the Assembly's role to the "declaratory" function (which fits into § 14 above) and this only in "exceptional cases".

[196] *Op. cit.*, note 98, pp. 525 and 526. See also A. Verdross and B. Simma, Universelles Völkerrecht. Theorie und Praxis, Berlin 1976, p. 312.

Judge *Mosler* admits that besides the function of evidence a resolution may promote the development of a general principle of law (reply to Question 2 *in fine*). A case in point seems to be the principle (or standard) of non-discrimination in the realm of human rights and fundamental freedoms, especially racial non-discrimination. The influence of the Universal Declaration on the national regulation and implementation of human rights shows that today certain general principles or standards of law can have an origin that is not exclusively domestic. The General Assembly can fulfil a role in this process.

VI. *Looking beyond the Recognized Categories*

§ 16. *Formation of Legal Policies*

The analysis undertaken in Sections I-V above has shown that the relationships between the General Assembly resolutions and the sources of international law are varied and manifold. One such relationship consists in charting the course which the development of law should take, while the actual making of law is left to the operation of one of the sources. Some specific aspects of this topic have already been discussed in §§ 10, 12 and 15. The present paragraph tries to give a more general view of the problem.

There are resolutions which lay down legal policies that determine the substance of future law. They aim at the revision of law or lead to the birth of entirely new law. The resolution may fulfil this task by formulating ready principles or even detailed rules, but it may confine itself to expressing the main ideas and concepts of prospective law.

In the mass of the Assembly pronouncements such resolutions are not frequent. A careful inquiry is necessary to select those which belong to the sphere of legal policies in the foregoing sense. Practically every resolution has got some links with politics but this does not automatically classify it under our heading. And there are texts that can be misleading in this respect: they contain "an element of political opportunism, not of broad legal policy"[197].

[197] Israel, represented by Mr Rosenne, during the debate on the review of multilateral treaty-making processes, GAOR, 32nd Sess., 6th Cttee, 49th Mtg, 17 November 1977. *Cf.* remarks by Arangio-Ruiz, *op. cit.*, PE note 15, p. 457. By way of example, one may recall res. 3034 (XXVII) and 31/103 which met with much criticism.

The deficiencies of the United Nations are well-known, yet it is not some more efficient and more effective regional groupings that today express and reveal the tendencies of legal development. Whether one likes it or not, one must look to the world organization, and especially the General Assembly, including its network of organs and their decisions. These tendencies have been articulated by the resolutions on human rights and their various facets, self-determination, the liquidation of colonialism, disarmament and related problems[198], nuclear weapon tests, economic relations and development[199], outer space, or sea-bed and ocean floor. Here reiteration and repetition were significant. Also, there were resolutions which did not form part of any longer series of generally uniform content and yet they left their imprint on the shaping of law, e.g. resolution 598 (VI) on reservations to multilateral treaties.

Governments admit that resolutions have an influence on international law, but the language Governments use is rarely clear.

Do conflicting opinions of States on what the resolution is necessarily eliminate its role as a platform for formulating legal policies? The point is illustrated by the diverging definitions of the function of the Charter of Economic Rights and Duties of States. The Chairman of the Working Group which elaborated the draft of the Charter, Mr *Castañeda*, contrasted it with the programmatic resolutions such as 2626 (XXV) or 3202 (S-VI) and emphasized that the Charter "set down rights and duties; in other words, it was intended to govern relations between States by establishing an objective and universal order"[200]. That, of course, was something else, and much more, than legal policies. To others, however, the instrument did not reach even the stage of those policies, not to speak of rights and duties.

[198] See, *e.g.*, res. 1148 (XII), paragraph 1.

[199] Reinhard, *op. cit.*, note 135, systematically analyses the resolutions bearing on the economic component of the principles of equality and self-determination. His inquiry permits the identification of several resolutions as belonging to the realm of legal policies and future law-creation.

[200] GAOR, 29th Sess., 2nd Cttee, 1638th Mtg, 25 November 1974, p. 385, para. 14. J. Castañeda, La Charte des droits et devoirs économiques des Etats. Note sur son processus d'élaboration, AFDI, vol. 20, 1974, p. 31, at pp. 36-37.

Of course, a certain perspective is necessary before a resolution or a series of resolutions can be said to lay down legal policies for States. Here, as already noted, the repetition of resolutions is helpful. It permits the verification of the constancy of the Assembly's attitude. If the contents of the resolutions are changing it is impossible to speak of a legislative policy; at most, it is still in the making. An example is the pronouncements on compensation to be paid as a result of expropriatory actions taken in the exercise of sovereignty over natural resources. The comparison of the relevant resolutions points to an evolution of views on the part of the majority of U.N. Members: while resolutions 1515 (XV), paragraph 5, and 1803 (XVII), part I, paragraph 4, mention law, in resolution 3171 (XXVIII), paragraph 3, 3201 (S-VI), paragraph 4 (e), and 3281 (XXIX), chapter II, Article 2, paragraph 2 (c), any reference to international law has been dropped. Another example is the evolution of the concept of equality of States and of equal rights: from the classical approach of the draft contained in resolution 375 (IV) to the ideas of preferential equality or compensatory inequality in resolution 3281 (XXIX).

Hesitations and compromises, especially on elementary legal principles, not only destroy the programmatic value of the resolution, but bring harm to any future law-making process. The legal aspects of terrorism have been so blurred in resolution 3034 (XXVII) that its possible influence on the development of law is highly questionable if not outright negative. In resolution 31/103 the General Assembly recalls the prohibition of the taking of hostages in various treaties, but it itself does not say that such taking is unlawful. It limits itself to recognizing that "the taking of hostages is an act which endangers innocent human lives and violates human dignity". This reticence did not augur well for law to be adopted on the subject.

§ 17. *Consensus*

This paragraph and § 26 below concentrate on those aspects of consensus which can or do make it relevant for the elaboration of legal rules by way of the Assembly resolutions.

(1) *Various meanings of consensus*[201]. The original and most general meaning of consensus is that of a concord, accord, or agreement. It seems that it is in this sense that the term has been used in the replies of Messrs *McDougal* and *McWhinney* to Question 19. In the language of international law and diplomacy the term acquired more than one connotation, and this variety is, no doubt, confusing.

For the purpose of our study three meanings should be borne in mind.

The first is consensus understood as a method of adopting the resolution. Both State practice and writers speak here of the principle or rule of consensus. It belongs to the wider subject of procedural problems covered by Section VII and is discussed in § 26 below.

The second meaning is consensus in the sense of a kind of agreement, often loosely formulated, which concludes the deliberations, usually conducted in an organ or by a conference. In contrast with its first meaning, consensus here is not a mere procedure but it is also (and primarily) an act. Hence in this case one refers to the "adoption" of a consensus. As one writer puts it, "le consensus devient alors une quasi-résolution plus 'floue' dans son texte, moins précisément adoptée, donc plus vague dans sa portée, et à laquelle il paraît expédient d'avoir recours lorsqu'on juge trop difficile ou trop long de faire adopter une résolution classique"[202]. And Mr *Monaco* adds: "Il est évident que l'on ne peut pas comparer un tel consensus à une véritable résolution"[203]. Hence this type of con-

[201] C.W. Jenks, Unanimity, the Veto, Weighted Voting, Special and Simple Majorities and Consensus: Modes of Decision in International Organisations, in: Cambridge Essays in International Law. Essays in Honour of Lord McNair, London 1965, p. 48; G. de Lacharrière, Consensus et Nations Unies, AFDI, vol. 14, 1968, p. 9; R. Monaco, Les principes régissant la structure et le fonctionnement des organisations internationales, RC, vol. 156, 1977-III, p. 79, at p. 139; E. Suy, The Meaning of Consensus in Multilateral Diplomacy, in: R.J. Akkermann, P.J. van Krieken and C.O. Pannenberg (eds), Declarations of Principles: A Quest for Universal Peace, Leyden 1977, p. 259, especially at pp. 269-272. For a discussion of the consensus procedure in connection with res. 3314 (XXIX), see T. Bruha, Die Definition der Aggression. Faktizität und Normativität des UN-Konsensbildungsprozesses der Jahre 1968 bis 1974 zugleich ein Beitrag zur Strukturanalyse des Völkerrechts, Berlin 1980, especially pp. 79-94.

[202] de Lacharrière, *op. cit.*, note 201, p. 14.

[203] Monaco, *op. cit.*, note 201, p. 140.

sensus is of little if any use when the aim is to draft and adopt a normative resolution.

Finally, in its third meaning consensus is said to perform the role of a law-formative agency other than custom or treaty. It is convenient to explore this meaning, and the possibility it conveys, in two stages. First, one must concentrate on the purported dichotomy between consensus and consent and on the relationship between consensus and the existing sources (subpara. (2)). Next one has to answer the question regarding the law-creating effect of resolutions that express the consensus of States irrespective of the interplay of custom or treaty (subpara. (3)).

(2) *Consensus and consent.* There are writers who draw a sharp distinction between the two, and some of them speak even of a trend or shift from consent to consensus[204]. Consensus is said to express the will of the international community, while consent is linked to a sovereignty-centered conception of obligation[205].

The relevance of the dichotomy must first be checked in relation to the undisputed sources.

Consensus may be preparatory to, or a condition of, the elaboration of rules that are to figure in a law-making treaty. Here it would be difficult to contrast consensus with consent as the former is meant to facilitate the latter. Some writers perceive the blurring of the line between the treaty and the resolution if the latter is adopted by, or constitutes, consensus. Now, a measure of agreement among the participants in the decision is part and parcel of consensus, whatever its particular meaning. But that agreement is not necessarily of a treaty nature. Consensus as a G. A. procedure (§ 26) results in the adoption of a resolution. In case the resolution contains contractual engagements and becomes the form of a treaty, factors other than the application of the consensus procedure bring about this result (§ 13 (2)).

Turning to custom, the distinction between consensus and consent is relevant, "except in the opinion of those [as Mr *Arangio-Ruiz*

[204] *E.g.*, Falk, *op. cit.*, PE note 99, p. 785.

[205] *Cf.* Falk, *op. cit.*, PE note 99, p. 784; R. Higgins, The United Nations and Law-Making: The Political Organs, ASIL Proceedings, 1970, p. 37, at p. 61.

reminds us] who identified custom with 'tacit agreement', subject to the requirement of consent, in the sense of unanimity". Our Confrère does not share this approach: "Consensus as opposed to consent, in other words, was already deemed sufficient for the formation of international custom"[206]. Judge *Schwebel* is quite emphatic: "Consensus is at the root of customary international law"[207]. Some writers equate consensus with *opinio juris* or at least see the former as an element in the making of the latter. But consensus is not the exclusive factor in creating customary rules, unless one reduces custom to *opinio juris*. Nor do some of those writers who tend to see consensus as an autonomous basis of legal obligations deny the importance of "the extent to which particular resolutions influence behaviour" and the significance of "the prospects for *effective* implementation"[208].

(3) *Law-creating consensus.* Can States make international law by a consensus that is neither customary nor contractual? In particular, can the General Assembly resolutions express such consensus?

The problem remains largely one of doctrinal debate. Official opinions are rare. In the *South West Africa Cases, Second Phase*, the Applicants seemed to integrate consensus into the customary process. But another statement they made, though it cited Article 38, could mean that consensus created law by itself[209].

The query has not been explicitly addressed to the Members of the Thirteenth Commission. Those who touched the problem arrived at conclusions that were either negative or at least cautious: Messrs *McDougal*[210], *McWhinney* and *Zemanek* (reply to Question 19).

Some jurists recognize the law creating nature of consensus, including the Assembly resolutions, but they do it in a different sense than Alfred *Verdross* (*cf.*, in particular, Mr *Schachter*[211]). *Verdross* distinguished formal sources of law from informal law making,

[206] *Op. cit.*, PE note 15, p. 481.
[207] *Op. cit.*, note 6, p. 309.
[208] Falk, *op. cit.*, PE note 99, pp. 786 and 787.
[209] ICJ Pleadings, vol. 9, pp. 345 and 351-352.
[210] In: ASIL Proceedings, 1979, p. 328.
[211] In: Schwebel (ed.), *op. cit.*, PE note 8, pp. 370-371.

though he was aware of some interpenetration between them, one being able to change the norms that were brought into effect by the other. Informal inter-State consensus could take place today, viz. in the U.N. General Assembly, to give birth to a new principle of law. This would lead to an autonomous role of the resolution. Yet Alfred *Verdross* emphatically distinguished between this type of consensus and the resolution as acts of a collective organ. He negated the autonomous significance of a normative declaration by integrating it into the category of Article 38[212].

§ 18. *A New Source of Law?*

The eighth preambular paragraph of resolution 3232 (XXIX), quoted in § 5 (1) above, induced several States to deny that the resolutions of the General Assembly could be or were a distinct source of international law. Some of these denials were quite definite in excluding the resolutions from the category of sources. And the Sixth Committee was assured that the sponsors of that paragraph "were not trying to introduce any other source of law than was already covered by Article 38 of the Statute of the Court"[213].

This statement is worthwhile noting because it emanates from developing countries which on other occasions would place the resolutions among the sources. In fact, they envisaged the hypothesis of a source of law from the early days of the United Nations in spite of the clear stand taken by the San Francisco Conference (Preliminary *Exposé*, § 2).

It is also possible to point to some statements by the Comecon States that seem to gravitate towards the idea of the source, though normally their attitude is different. Thus the Soviet Union maintained that through the declaration on outer space the U.N. Members "would assume highly specific legal obligations". It distinguished the declaration from other Assembly resolutions which being merely

[212] *Op. cit.*, note 4, pp. 20, 37, 119 and 139-140; *op. cit.*, note 196, p. 258. Verdross's idea has been elaborated by Simma, *op. cit.*, PE note 29, pp. 97-100 and note 71, pp. 57-67.

[213] GAOR, 29th Sess., 6th Cttee, 1486th Mtg, 28 October 1974, p. 134, para. 11 (Mexico).

recommendations "lacked the binding force which the joint declaration proposed by the Soviet Union would possess"[214].

One may equally quote the delegate of a Western country, viz. the Netherlands, who characterized the resolution on the definition of aggression as "an important document which, if endorsed in that form by the General Assembly, would constitute a valuable new source of international law"[215]. Among Western Governments this opinion is rather isolated, but its conceptual roots are not foreign to Western thought. In the past the West enhanced the powers of the General Assembly, and these policies found ample support and justification in most of the contemporary Western writings. No doubt, it is the writers from the developing countries who have taken the most radical stand in the question under consideration; the views of Mr *Castañeda*[216] and Judges *Elias*[217] and *Bedjaoui*[216] are a case in point.

However, the treatment of the Assembly resolutions under the heading of sources is not a monopoly of the writers from the Third World.

Resolutions on human rights, liquidation of colonialism, outer space or new economic order and development have been and are being cited in the context of sources. They are said to be the sources of "new international law", a theme that had often been elaborated upon by Judge *Alvarez*. On the other hand, up till now the Hague

[214] GAOR, 17th Sess., 1st Cttee, 1289th Mtg, 3 December 1962, p. 215, para. 17. *Cf.* also Czechoslovakia, *ibid.*, 1294th Mtg, 7 December 1962, p. 237, para. 4. Soviet remarks in the Sixth Committee seem to be in the same vein, *ibid.*, 6th Cttee, 754th Mtg, 6 November 1962, p. 105, para. 33. For the Soviet proposal, see A/5181, Annex III, Section A.

[215] GAOR, 29th Sess., 6th Cttee, 1473rd Mtg, 10 October 1974, p. 50, para. 2. *Cf.* also the Dutch view quoted at the beginning of § 9 (1) above.

[216] *Op. cit.*, PE note 42, p. 44. GAOR, 29th Sess., 2nd Cttee, 1638th Mtg, 25 November 1974, p. 385, para. 14.

[217] *Loc. cit.*, PE note 34; T.O. Elias, Africa and the Development of International Law, Leiden, Dobbs Ferry, N.Y. 1972, pp. 74-75.

[218] *Op. cit.*, note 67, pp. 140 and 142. O.M. Garibaldi, The Legal Status of General Assembly Resolutions: Some Conceptual Observations, ASIL Proceedings, 1979, p. 324 at p. 325, writes: "Although it is the Third World that advocates these new doctrines, and which chiefly benefits from them, they were conceived and born, I suspect, in Western universities".

Court did not confer the status of a source on any specific resolution or group of resolutions. The dicta of the Court are few and they rather integrate the resolutions into the existing sources. When the Court admits that a resolution constitutes an "important stage" in the development of law[219], it is still far from recognizing any autonomous role for the resolution.

In distinguishing resolutions from custom and treaties some speak of international legislation. Diplomatic practice and legal writings use this term in several and often conflicting senses. With regard to our subject it would mean enactment of law for U.N. Members by the General Assembly which would, therefore, acquire the status of a legislature. But most States reject the purported legislative competence of the Assembly.

The majority of the Members of the Thirteenth Commission deny that the resolutions considered in this Report are a source of international law. Suffice it to refer to the replies to Question 20 by Mr *Bindschedler*, Judge *Jessup*, Mr *Monaco*, Judge *Mosler*, Messrs *Rosenne*, *Schachter*, *Seyersted*, *Ustor*, *Valticos* and *Zemanek*. The Preliminary *Exposé* (§ 3) has already quoted Judge *Jessup*'s clear position in the *South West Africa Cases, Second Phase*. In his present reply the learned judge says: "In my opinion, there is currently exaggerated assertion regarding the status of Resolutions as of themselves constituting new sources of law". In particular, he quotes resolution 2574 D (XXIV) and rejects its purported source nature. Mr *Monaco* does not exclude the possibility of future developments leading to the resolutions becoming a new source of law; but at the present moment, he says, they cannot be compared to the classical sources. Mr *Schachter* recognizes that "resolutions are a 'material source' of law contributing to the content of emerging customary law, as well as to treaty law and general principles of law". This role of the resolutions has already been considered in §§ 10, 12 and 15 above. Mr *Schachter* also writes on legal effects produced by the resolutions, a matter which the Rapporteur takes up in § 21 below. Mr *Seyersted* mentions the resolutions' influence on practice or the restatement by them of existing law. These subjects have been

[219] Namibia case. ICJ Reports 1971, at p. 31, para. 52. For further references, see § 10 (1) above.

discussed in §§ 7 and 8 (1) above, and our *Confrère* would no doubt agree that neither of the two roles he specifies bestows the status of a source on the resolutions. Mr *Zemanek* singles out resolutions on "organizational matters" which "may [...] be considered as a specific source of law". But they do not fall within the category defined in § 1 of the Preliminary *Exposé*.

Probably Mr *Suy* also belongs to the majority of the Commission though he does not expressly negate the source nature of the resolutions. He notes "a tendency to consider resolutions as a formal source of law but only to the extent that they reflect a solid *opinio iuris* which is confirmed by practice". These two requirements bring us back to one of the recognized sources, viz. custom, and therefore eliminate the possibility of an autonomous or new source.

However, there are Members of the Thirteenth Commission who admit the possibility of considering the G.A. resolutions as a source of law. Their views have various shades and nuances, and they do not amount to a straightforward statement that resolutions *are* a source. Mr *McDougal* avoids the term "source" and tells us that the "law-making effect of resolutions derives from their effect upon expectation". He further makes the following remark: "The procedures for the clarification and communication of shared expectations are certainly of somewhat more recent origin than those we associate with custom and agreement". On the other hand, in Mr *Schachter's* opinion the proposition that the "resolutions may reflect the expectations of States concerning what is lawful and unlawful and therefore are one means of ascertaining such expectations [...] does not provide specific criteria for determining which resolutions carry such expectations and what precisely they are. Accordingly, it is still necessary to seek criteria in the formal 'sources' of Article 38 or in the special (and limited) role of the accepted principle of good faith [...]".

Within the Commission it is Mr *McWhinney* who gives the greatest support to the idea of the resolutions as a source, yet he does it "in the special context and under the conditions set out" in his comments on the various points raised by the Questionnaire. Mr *do Nascimento e Silva* speaks of the resolution as a source in the broad sense.

Stated in theoretical terms the basic problem is whether the

making of an international legal rule has to follow the established channels, in particular whether the operation of one of the existing sources is the only way in which a new source of international law can come into being. The issue has already been touched upon in § 17 (3) above.

In the *South West Africa Cases, Second Phase* the Hague Court has reminded the parties that

> "[i]t is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered"[220].

In this judgment the Court did not explicitly address itself to the question of the possible law-creating effect of the Assembly resolutions. But in the context of what the Applicants contended the dictum would seem to convey the view that to exist international rights and obligations must have their basis in a customary or treaty rule or in a general principle of law recognized by civilized nations. Usually the position of Governments is that to become international law a rule enunciated by the Assembly has to be made the object of a custom or a treaty. The U.N. Memorandum discussed in § 9 of the Preliminary *Exposé* notes that "in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States". Here again the setting in motion of an existing source - the custom - is required. That source turns the norms of the declaration into law. In other words, the declaration itself becomes a source of law, not merely a factor generating customary law, but an established source had first to be activated to achieve that result.

In his reply to Question 8 Mr *Suy* writes: "In international law, as in any legal system, legal rules to come into being *as such* must follow certain authoritative procedures prescribed or provided for by the legal system concerned. In international law such author-

[220] ICJ Reports 1966, p. 34, para. 49.

itative procedures are mainly two, the 'conventional procedure' and the 'customary law procedure'". Mr *Virally* points out that a resolution cannot be considered in isolation because it is part of a continuous decision-making process[221]. This process may consist in linking the resolution to the birth of a customary rule or to the conclusion of a treaty. Mr *De Visscher*, in discussing binding interpretation of the U.N. Charter, distinguishes between the effects produced by the resolutions as such and those which general international law attaches to the conduct and will of States: the latter could be brought about "à l'occasion ou au départ d'une résolution de l'Organisation"[222].

The doctrine remains divided. While several writers have maintained that the operation of one of the existing sources is a prerequisite for any addition to their list, others, in particular the adherents of the law-creating consensus (§ 17 (3)), defend a contrary position. The views of Mr *McWhinney* should again be noted here[223].

§ 19. *Between Interpretation and Law-Making*

In § 11 (2) and (3) this Report has discussed the role of resolutions in the interpretation of treaties, including the U.N. Charter. The resolutions can also clarify the meaning of customary law, and especially the various norms that are termed "principles" or "general principles" of international law. Mr *Virally* has emphasized the importance of this task by pointing to the "secteurs du droit international, où subsistent trop d'incertitudes sur des 'principes' aisément proclamés, mais dont la validité et le contenu restent à déterminer"[224].

But the Assembly can and often does go further. There is room for the view that the Assembly's resolutions are an instrumentality for deducing principles or specific rules from international law. These are cases when the principles (or other rules) have not yet been articulated and the Assembly is the first agency that formulates the norm; the clarification of its content is a subsequent stage in

[221] Les Résolutions, *op. cit.*, note 144, pp. 11 and 57.

[222] *Op. cit.*, PE note 90, p. 128.

[223] E. McWhinney, The World Court and the Contemporary International Law-Making Processes, Alphen aan den Rijn 1979, p. 3. He refers to the legal realist approach and emphasizes the law-as-fact approach.

[224] Virally, *op. cit.*, PE note 53, p. 554.

this process. Courts of justice undertake the task of making such deductions and base their judgments, or parts thereof, on them. The operation no doubt goes beyond mere application of treaty or customary law[225].

In admitting the foregoing role for the Assembly one comes close to the concept of a distinct source of law. If, on the other hand, one classifies it under the rubric of interpretation, the latter notion acquires here a meaning so broad that one again approaches the realm of law-making. In any case, there is no constitutional obstacle for the Assembly to draw normative inferences.

To say that one moves here between interpretation and enactment of law is obviously true, but it is still not very illuminative. Is a more precise description possible? Soft law and similar labels say little if anything; besides, they are usually misleading. Yet the justified rejection of this ingenious terminology does not mean that one questions the peculiarities of the contribution which the G.A. resolutions make to the development of law. Mr *McWhinney* observes: "as 'soft' law, they have a habit of turning out to be the international law-in-action of today, and the 'hard' law of tomorrow or the day after tomorrow"[226].

§ 20. *Resolutions as Part of Law*

The present paragraph does not consider the resolutions in the context of custom, treaties or general principles of law -- matters to which ample attention has been paid in the preceding Sections, but continues the theme of an autonomous source of law.

(1) *The old dichotomy.* In the Preliminary *Exposé* (§ 3) the Rapporteur has drawn the attention of the Commission to some views that question a clear delimitation between obligatory and non-obligatory instruments or at any rate point to the difficulties of a precise distinction between the two in at least some areas of international activity. The Members of the Thirteenth Commission

[225] See the remarks by Jaenicke, *op. cit.*, PE note 17, pp. 220-221, who refers to the North Sea Continental Shelf cases.

[226] *Op. cit.*, note 223, p. 6. See also *ibid.*, pp. 12 and 16 . He gives the example of resolutions on decolonisation and national ownership of natural resources. *Cf.* Schachter, *op. cit.*, PE note 99, p. 4.

do not raise any objection against the maintenance of the dichotomy (replies to Question 1 and § 1 above). Mr *McDougal* makes the distinction dependent on the criteria which he defines. Speaking of the "U.N. machinery" he said that "the concept of 'binding obligation' became little more than meaningless noise if it omitted expectations of the community concerning authority (i.e., who is competent to make decisions) and control (i.e., what sanctions are in fact available to carry out decisions)"[227]. Expectations, as understood by Mr *McDougal*, involve necessarily a certain amount of practice. But State conduct that conforms to the resolution may be no more than part of the process which leads to the emergence of customary law.

Does the political significance of the resolutions influence their legal status and, in particular, diminish the relevance of the distinction between what is obligatory and what is not?

In the *South West Africa Cases, Second Phase* the Hague Court spoke of the political side of the resolutions and contrasted it with legal force. "The persuasive force of Assembly resolutions can indeed be very considerable, -- but this is a different thing. It operates on the political not the legal level: it does not make these resolutions binding in law"[228].

There are statements by Governments which maintain the dichotomy and deny that the political role could have effect upon the legal status of the resolutions[229].

Many writers stress the recommendatory nature of the resolutions and contrast them with obligatory instruments. Some explicitly distinguish between legal and moral force of the resolutions, though the meaning of the latter description is rarely clear.

Other writers have elaborated on factors that tend to compensate for the lack of obligation. A resolution can have "a moral and political motivating force which makes it more effective than many a legal norm"[230]. According to another opinion a rule may not be "formally binding" but it may nonetheless be subject to "functional

[227] *Loc cit.*, note 210.

[228] ICJ Reports 1966, pp. 50-51, para. 98.

[229] *Cf.* Canada on res. 2160 (XXI), A/AC.125/SR.66, p. 18.

[230] A. Ross, Constitution of the United Nations: Analysis of Structure and Function, Kœbenhavn 1950, p. 60.

operation as law"[231]. The "*formal* authority of the General Assembly to legislate" is "very limited", but "it is important to realize the extent of its *actual* power [...] to set standards for state behaviour that will be complied with by the designated actors"[232].

There is no need to reject the relevance of the binding force in order to speak of the "authority" of the resolution as a more cogent way of approaching our problem[233]. Paraphrasing a comment by Mr *Schachter*[234] it is possible to say that the question is not one of the General Assembly imposing its rules on States but one of States viewing the resolution as authoritative. Sir J. *Fawcett* notes that "the fact that [...] all General Assembly resolutions are formal recommendations only, does not prevent a few resolutions from embodying directive principles or agreed standards, which may, by reason of their content, purpose and form of adoption secure as great international observance as a treaty. That the provisions of such resolutions do not rank as legal obligations, is then immaterial"[235].

(2) *Binding resolutions.* The Charter of the United Nations provides for the adoption by the General Assembly of a number of resolutions that are binding or at least contain obligatory rules.

There are resolutions which lay down the internal law of the Organization; they are beyond the scope of the present Report.

We have already analysed resolutions that codify or restate the law (§§ 6 and 7). *Qua* Assembly acts they are not binding; nonetheless what they express in law.

Some resolutions, though not binding for individual States, must be complied with by the United Nations organs.

[231] Falk, *op. cit.*, PE note 99, p. 783.

[232] R.A. Falk and S.H. Mendlovitz (eds), The Strategy of World Order, vol. 3: The United Nations, New York 1966, p. 247.

[233] Judge Mosler's reply to Question 1. H. Miehsler, Zur Autorität von Beschlüssen internationaler Institutionen, in: C. Schreuer (ed.), Autorität und internationale Ordnung. Aufsätze zum Völkerrecht, Berlin 1979, p. 35. Schreuer, *op. cit.*, note 38, pp. 59 ff.

[234] *Op. cit.*, PE note 28, p. 20. He speaks of the "degree of probable compliance".

[235] Sir J. Fawcett, The Development of International Law, International Affairs: A Special Issue to Mark the Fiftieth Anniversary of Chatham House, 1970, p. 127, at p. 131.

Still another category was singled out in the proceedings in the *Namibia* case. In his oral statement the representative of the Secretary-General referred to "international declarations and resolutions which, although they may not be legally binding on States in the exercise of their independent sovereign powers, nevertheless constitute binding directives in the performance of an international function on behalf of the international community"[236]. Mr *Castrèn*, who took part in the proceedings on behalf of Finland, spoke of the obligatory force of the "constatations de faits ou de situations" made in the resolutions[237].

Yet the greater part of resolutions fall under the limitation specified in the Memorandum of the U.S.S.R. Government in the *Expenses* case: "the resolutions of the UN General Assembly, as it is stipulated in Article 10 of the Charter, are of the nature of recommendations and are not binding upon States. The UN Member States themselves determine their attitude to these resolutions"[238]. In particular, individual States may decide that they will abide by the rule or rules laid down in a resolution. We have thus come to the problem of acceptance of resolutions.

(3) *Acceptance or recognition as binding.* Such acceptance or recognition is extraneous to the resolution itself. If the latter states that the principle or other rule it formulates is obligatory, the statement can be true in the declaratory sense only: the immediate effect of the resolution is no more than that of evidence of law (§§ 4 and 5). In other words, the statement does not confer on the rule any binding force, and the law-creating recognition is to be looked for beyond the instrument itself.

Nor is the picture basically different when a subsequent G. A. resolution affirms that a previously formulated rule has become binding. This is only one piece of evidence, not by itself conclusive, that the non-obligatory status of the earlier resolution has changed

[236] ICI Pleadings, vol. 2, p. 30, at p. 36.

[237] *Ibid.*, p. 64, at p. 85. The obligation arose also for those who voted against the resolution. *Cf.* the Court's view, ICJ Reports 1971, p. 50, para. 105 *in fine.*

[238] ICJ Pleadings, p. 270, at pp. 273-274.

in the meantime. A case in point could be the Universal Declaration of Human Rights[239].

In the *Texaco* case the Tribunal (Sole Arbitrator: Mr Dupuy) has said: "the absence of any binding force of the resolutions of the General Assembly of the United Nations implies that such resolutions must be accepted by the members of the United Nations in order to be legally binding". The Tribunal then noted that resolution 1803 (XVII) "was supported by a majority of Member States representing all the various groups", while other resolutions it considered lacked the support of "any of the developed countries with market economies which carry on the largest part of international trade". This language appears to suggest that in the Tribunal's view the acceptance of the resolution, which makes it "legally binding", can be or is brought about through the support of a representative majority. However, it is not clear whether the Tribunal indeed wanted to go that far. For in the next paragraph of the award it distinguishes between statements confirming (and not creating) a custom and statements de l*ege ferenda*. The Tribunal might therefore be said to have reflected upon the "legally binding" effect only with regard to the existence of what was already law and not with regard to making new law. The Tribunal did not consider the example of a resolution which (in its opinion) would introduce "new principles [...] having nothing more than a *de lege ferenda* value" but which nonetheless would have the approval of "the generality of the States" or the "consensus of a majority of States belonging to the various representative groups". The Tribunal contrasted a generally approved law-declaring resolution with *de lege ferenda* resolutions "rejected by certain representative groups of States"[240].

In his Dissenting Opinion in the *Fisheries Jurisdiction Case* (*United Kingdom* v. *Iceland*) *Merits* Judge *Petrén* did not go into the question whether a G. A. resolution could create new law, yet he felt obliged to "stress one prerequisite of such creation, namely

[239] See res. 1514 (XV), para. 7; res. 1904 (XVIII), Article 11. L.B. Sohn, in: ASIL Proceedings, 1970, p. 61. Waldock, *op. cit.*, note 135, pp. 32-33. According to the Proclamation of Teheran (1968), para. 2, the Declaration "constitutes an obligation for the members of the international community", A/CONF. 32/41.

[240] Award on the Merits, *op. cit.*, note 9, pp. 491 and 492, paras. 86 and 87.

that the States voting for the resolution must truly have envisaged and accepted the possibility of its immediately acquiring binding force"[241].

To make the resolution obligatory, acceptance has to be unequivocal, i.e. the State must clearly say or show by its conduct that it considers itself to be bound by the resolution. States may conclude a treaty in the form of a resolution (though it is rather exceptional, § 13 (2)) or they may incorporate the rules of the resolution into a treaty. The resolution is then binding *qua* treaty and this binding force, as between the parties, is regulated by the law of treaties. On the other hand, acceptance expressed in a treaty, which is a possibility envisaged by Mr *Bindschedler*[242], will not necessarily subject the rules of the resolution to that law, though it will make them obligatory (§ 13 (1)). Other forms of explicit acceptance result in obligations that are similar to those which follow from unilateral acts of States. Messrs *Bindschedler* (in the Hague lectures cited above) and *Schachter* (in his reply to Question 20) have commented on the latter aspect. And various writers have generally admitted that acceptance or recognition can turn the resolution into a binding instrument. In particular, one should note Mr *Suy*'s comment on Question 28.

Mere voting in favour of the resolution does not mean that the State considers itself bound by the resolution[243]. Acceptance is an act separate from voting, and voting is only one of the indicators which permit one to assess the chances for transforming the resolution into an obligatory instrument.

Nor can the fact that a resolution is the outcome of negotiations be identified with the acceptance of it as mandatory. Negotiations lead to an agreed text which is not yet binding on the participants in the arrangement. One should, however, remember that Governments sometimes use language that blurs the difference between the acceptance of the text of the resolution and its acceptance as law.

[241] ICJ Reports 1974, p. 150, at p. 162. The learned judge came to the conclusion that res. 3016 (XXVII) did not meet this prerequisite.

[242] R.L. Bindschedler, La délimitation des compétences des Nations Unies, RC, vol. 108, 1963-I, p. 305, at pp. 349 ff. and his reply to Question 9.

[243] There are contrary views. *Cf.*, in particular, Elias, *op. cit.*, PE note 34.

Acceptance of the resolution as mandatory need not be express; it may reveal itself in a conduct that conforms to the resolution.

When implicit, acceptance must leave no doubt whatsoever that the State intends to be bound by the rules of the resolution. It cannot be excluded that by implementing the resolution the State will show, in one way or another, that it has such an intention and that is why it is putting the resolution into effect. Normally, however, implementation of the G. A. resolutions remains voluntary and cannot lead, by itself, to their acquiring obligatory force. A State which subjects itself to the recommendation can stop doing so. The creation of implementing machinery to enhance and supervise the carrying out of the resolutions has proved, on occasion, a successful means in attaining the ends of the resolution. But that need not necessarily turn the resolution into a binding act, though it can contribute to the growth of practice that might prove law-creating (§ 8 (1)). Practice which results in the acceptance of resolutions that interpret the U. N. Charter makes such interpretations authoritative (§ 11 (3) (b)).

§ 21. *Some Relevant Effects*

The absence of binding force is not synonymous with the lack of any legal effects. Though the distinction is elementary in the vocabulary of the theory of law, it has often been blurred in our subject. Judge Sir Hersch *Lauterpacht* makes the distinction quite explicit in his Separate Opinion in the *Voting Procedure* case[244]. Binding force is no doubt the fullest legal effect of a resolution but other legal consequences are still possible even when there is no obligation to conform to the resolution. In other words, the absence of obligation does not exclude more limited legal effects[245]. As a result, this Report should look at those effects which may exercise an influence on the resolution acquiring obligatory force and its rules becoming legal.

(1) *The duty to consider the resolution.* In the *Voting Pro-*

[244] *Op. cit.*, PE note 4, pp. 115 and 119.

[245] *Cf.* Judge Lauterpacht's use of the terms "full legal effect" and "limited legal effect", *ibid.*, pp. 115, 116 and 118.

cedure case Judges *Klaestad*[246] and *Lauterpacht*[247] spoke on the U.N. Member's duty to consider in good faith a recommendation adopted by the General Assembly.

This duty implies the obligation to inform the Organization of the result of the examination. The resolution may expressly impose a farther reaching obligation, viz. the duty to report on what the State has done to implement the resolution. The fact that the State must explain its position can exercise some influence on its conduct, including abidance by the rules of the resolution.

(2) *Limitation on freedom of conduct.* Does the duty to consider the resolution in good faith limit the Members' freedom of action? If it does, it would constitute the first step towards a normative function of the resolution on the legal plane. Judge Sir Hersch *Lauterpacht* concluded that the discretion vested in the administrator of a trust or similar territory in respect of the G. A. resolutions "is not a discretion tantamount to unrestricted freedom of action"[248]. There is room for this view in the particular situation of the administering State which has several obligations under the Charter, and the resolutions can specify them. But it is not a view that could automatically apply to other categories of resolutions, including those analysed in the present Report.

In Mr *Virally*'s opinion there may come a moment when it appears that the addressees of the resolutions can no longer back out of the engagements they have incurred, "sans avoir à justifier ce dégagement"[249]. Without entering into the nature of the engagements envisaged by our Confrère, the obligation to explain one's position is no doubt a certain restriction (cf. also the closing sentence of subpara. (1) above). In his answer to Question 20 Mr *Schachter* speaks, *inter alia*, of "the general principle of good faith as applied to declarations by states of their legal obligations" and he compares "collective declarations of legal rules embodied in resolutions" to unilateral declarations. The effects of the two types of declarations can be or are the same. But our Confrère stresses that here all

[246] ICJ Reports 1955, p. 84, at. p. 88.
[247] *Op. cit.*, PE note 4, pp. 118, 119 and 120.
[248] *Ibid.*, p. 120.
[249] In : Les Résolutions, *op. cit.*, note 144, p. 31.

depends on the intention to be bound by the declaration. While agreeing with Mr *Schachter*'s line of reasoning, the Rapporteur wishes to add that the existence of this intention is just the requirement we are trying to prove: only if the intention is present, the principle of good faith begins to operate. In other words, by itself the principle is not helpful in elucidating the effects of the resolution.

To Sir Kenneth *Bailey* "a resolution purporting to declare what constitutes a breach of international law calls for special legal consideration". He gave the example of resolution 2160 (XXI) which fits into our analysis because it lays down general and abstract rules of conduct. But resolutions which make a similar determination in regard to specific disputes or situations are also relevant, for they equally show how the Assembly understands a rule or rules of international law, including the Charter principles (e.g., resolution 288 (IV), para. 1, or resolution 505 (VI)). The same can be said of resolutions which positively define the legal nature or the legal characteristics of a situation. Mr *Wengler* doubts whether the General Assembly is competent to declare that the non-application of a recommendation amounts to conduct contrary to international law. But he also shows that in international organizations the non-implementation of recommendations can have consequences similar to those of a treaty breach[250]. In that case the restriction of the Member States' freedom of action is very real indeed.

(3) *Rights under the resolutions.* Mr Virally discusses the directive principles to be found in resolutions which lay down programmes of technical co-operation. No new obligations can follow for Member States from such principles. But our Confrère raises the question whether they can confer rights, e.g. the right to be a beneficiary

[250] Bailey, *op. cit.*, PE note 130, p. 237. On resolutions defining the legal nature or characteristics of a situation, *cf.* the ICJ dictum relating to res. 2145 (XXI), Namibia case, ICJ Reports 1971, at p. 50, para. 105. See also *ibid.*, p. 47, para. 95. Lachs, *op. cit.*, PE note 95, p. 138. W. Wengler, Die Abgrenzung zwischen völkerrechtlichen und nichtvölkerrechtlichen Normen im internationalen Verkehr, in: Legal Essays. A Tribute to Frede Castberg, Oslo 1963, p. 332, at pp. 343-344; *id.*, Völkerrecht, Berlin - Göttingen - Heidelberg 1964, vol. 1, pp. 325-326. See also id., *op. cit.*, note 4, p. 184.

of aid, to present requests and to have them considered without discrimination[251].

(4) *Authorization to act.* Judge Sir Hersch *Lauterpacht* noted that while recommendatory resolutions did not impose obligations, "on proper occasions they provide[d] a legal authorization for Members determined to act upon them individually or collectively [...]"[252]. Mr *Dupuy* also perceives authorization in the resolutions: "Non encore contraignantes, elles sont déjà justifiantes. L'Etat qui conforme son attitude à la recommandation, puise dans celle-ci un titre juridique"[253]. Mr *Schachter* considers a resolution "proposing standards for voluntary compliance. In adopting that resolution, a logically necessary assumption is that the states have the right under international law to take the proposed action" (reply to Question 20).

Some, including Mr *Schachter* (reply to Question 20), speak here of a presumption of legality. However, that presumption is rebuttable. Obviously, the General Assembly tends to adopt the attitude that conduct authorized by its resolutions cannot be said to be in breach of law. Nonetheless the position of a State could be the other way round. What, then, should the solution be? One answer is suggested by Mr *Röling:* "although the General Assembly has no authority to legislate, it has the authority to authorize behaviour in specific circumstances, even if this behaviour in general would be forbidden by international law"[254]. But this opinion does not solve the problem of the limits of the authorization; Sir Gerald *Fitzmaurice* considers the question how far an Assembly resolution might constitute an authority to take an action to which States would not ordinarily have been entitled[255]. Another view is that compliance with the G.A. resolutions cannot exempt U.N. Members from obser-

[251] M. Virally, La notion de programme. Un instrument de la coopération technique multilatérale, AFDI, vol. 14, 1968, p. 530, at p. 551.

[252] *Op. cit.*, PE note 4, p. 115. Johnson, *op. cit.*, PE note 59, p. 102.

[253] *Op. cit.*, PE note 73, p. 146.

[254] Annuaire IDI, vol. 55, 1973, p. 595.

[255] Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure, BYBIL, vol. 34, 1958, p. 1, at p. 5.

vance of their obligations under customary international law or treaties[256]. Between these two extremes there is room for contending that the resolution, without definitely deciding the issue, can serve as one of the supporting arguments in favour of lawfulness or, to put is somewhat differently, as a means of legitimizing the conduct in question[257].

(5) *Weakening the law.* Several writers, among them our Confrères *Schwebel*[258], *De Visscher*[259], *Virally*[260], *Stone*[261] and *Weil*[262], discuss the danger of weakening the law when resolutions proclaim views or standards that deviate from recognized rules or when resolutions declaratory of such rules meet with opposition. Resolution 3281 (XXIX) has been cited as an example.

(6) *Protest.* Judge *Petrén* rejected the possibility of identifying G. A. resolutions with protests by specific States. In the *Nuclear Tests* cases he considered the question whether States on whose territories radio-active fall-out from the atmospheric tests had been deposited, protested to the Powers engaging in nuclear tests: "The resolutions passed in the General Assembly of the United Nations

[256] B. Cheng, International Law in the United Nations, Year Book of World Affairs, vol. 8, 1954, p. 170, at p. 181.

[257] Res. 626 (VII) seems to be a case in point. Guatemala relied on it as a supporting argument for the taking of the property of the United Fruit Company, Department of State Bulletin, vol. 29, 1953, pp. 357-360. See also the decision by the Civil Court of Rome of 13 September 1954 in Anglo-Iranian Oil Company Ltd. v. S.U.P.O.R. Company (Unione Petrolifera per l'Oriente, S.p.A.). In the opinion of the Court the resolution "constitutes a clear recognition of the international lawfulness of the Persian Nationalization Laws", ILR, vol. 22, 1955, p. 23, at p. 41. The two instances are cited by J.N. Hyde, Permanent Sovereignty over Natural Wealth and Resources, AJIL, vol. 50, 1956, p. 854, who, referring to the Italian case, speaks of the "recognition of the international legitimacy of that law". Schreuer, *op. cit.*, note 38, p. 259, refers to the "limited significance" of such dicta.

[258] In: *op. cit.*, PE note 8, p. 494.

[259] *Op. cit.*, PE note 90, p. 132.

[260] M. Virally, La Charte des droits et devoirs économiques des Etats. Notes de lecture, AFDI, vol. 20, 1974, p. 57, at pp. 58-59.

[261] J. Stone, Conscience, Law, Force and the General Assembly, in: Jus et Societas: Essays in Tribute to Wolfgang Friedman, The Hague, Boston, London 1979, p. 297, at. p. 336.

[262] *Op. cit.*, note 33, p. 416.

cannot be regarded as equivalent to legal protests made by one State to another and concerning concrete instances. They indicate the existence of a strong current of opinion in favour of proscribing atmospheric nuclear tests. That is a political task of the highest urgency, but it is one which remains to be accomplished"[263].

VII. *Elaboration of Resolutions: Methods and Procedures*

In their replies to Question 24 the Members of the Commission recognize that the method of working out the resolutions influences the role which they play in the making of law. The replies represent various shades of opinion. Some Members give an expressly positive answer. They are Messrs *Bindschedler, Rosenne, Valticos, Virally* and *Zemanek;* the latter is emphatic on the "paramount importance" of the elaboration procedure. Mr *McDougal* couches his thought in the form of a possibility: the method "could affect the degree to which *opinio juris* is communicated". Some other Members, viz. Judge *Mosler,* Messrs *do Nascimento e Silva, Schachter*[264], *Seyersted* and *Ustor,* do not react explicitly to the first interrogative sentence in Question 24, but they indicate the relevant factors and thereby admit the significance of procedure. Mr *Monaco* generally holds procedures to be very important.

On the other hand, according to Mr *Suy* "the methods are a negligible factor". Nonetheless our Confrère mentions certain procedures. Mr *McWhinney* is the only Member of the Commission who replies in the negative, yet the caveat he adds makes his position less absolute than it might seem at first sight. Judge *Jessup* withholds his opinion.

Though the distinction between substance and procedure is an elementary one, and it has already been signalled in the Preliminary *Exposé* (§ 13), problems of method and procedure cannot be confined to only one part of our study. They inevitably permeate the whole of it. In the preceding Sections the Rapporteur has often referred

[263] Separate Opinion, Nuclear Tests Case (Australia v. France), ICJ Reports 1974, p. 298, at p. 306; Separate Opinion, Nuclear Tests Case (New Zealand v. France), *ibid.*, p. 483, at p. 490.

[264] See his published writings, in particular *op. cit.*, note 195.

to various modalities which influence the resolutions' role on the plane of the sources of law. That, however, did not, as it could not, give a full picture. It is, therefore, necessary to proceed now more systematically and to pass in review the different procedural means that bring about the birth of a normative resolution. Such a review would permit a better assessment of the elaboration of norms by the General Assembly.

The Commission must look at method and procedure from the standpoint of rule-making. This approach finds corroboration in the replies to Question 24. Messrs *Virally* and *Zemanek* consider the procedural problems in the larger context of the agreement of States to subject themselves to certain rules of conduct. Mr *Schachter* refers to the "minimal procedural standards" which allow one to ascertain whether the norms of the resolution are backed by a genuine agreement of States[265]. It may be assumed that Mr *McWhinney* proceeds along the same lines when he introduces the factor of "political balance (Western, Soviet bloc, Third World)" in the application of procedural devices.

The general consent within the Thirteenth Commission that it should inquire into the methods and procedures does not mean that the Commission finds it proper or useful to "make any proposals on changes (improvements) to be introduced into the procedures governing the elaboration of resolutions, including the relevant provisions in the G. A. Rules of Procedure" (Question 22 (2) which develops the second sentence of Question 21). Only Messrs *McDougal, Ustor* and *Valticos* favour the making of such proposals. Some Members react negatively or have doubts, and others do not reply at all or adjourn the answer. Mr *Rosenne* gives an example which pertinently illustrates the preference for not undertaking any effort *de lege ferenda* in the field of G. A. procedural rules.

§ 22. *The Language of the Resolutions*

This paragraph does not present a full picture of the subject but is rather in the nature of a supplement to Section II (§§ 4-8) of the Preliminary *Exposé*.

[265] *Ibid.*, p. 18.

"Terminology is frequently a highly delicate politico-diplomatic matter" remarks Mr *Rosenne*. Depending on the point of view, this could speak for or against a study of terminological problems by the Thirteenth Commission. A perusal of the replies to Question 23 shows that the Commission is not keen on exploring the terminology beyond what has already been said in the Preliminary *Exposé*. Messrs *Bindschedler, Monaco, Rosenne, Suy, Ustor* and *Valticos* are definitely against a re-examination. Messrs *McDougal* and *McWhinney* are not explicit either way, but their replies attest to a rather modest interest in the matter. According to the latter, terminology "is surely not [...] the key question". "The literary quality and/or succinctness of the actual formulation of a resolution may, of course, be marginally relevant" to the question how resolutions "are generally perceived and acted upon in the World Community at large".

While Judge *Jessup*, Messrs *Schachter* and *Suy* abstain from expressing an opinion, Judge *Mosler*, Messrs *do Nascimento e Silva, Virally* and *Zemanek* favour a further exploration of the terminology of resolutions.

In particular, both Judge *Mosler* and Mr *do Nascimento e Silva* think that the Commission could suggest some improvements, especially to make the language of the resolutions more precise, though Mr *do Nascimento e Silva* is sceptical on "the practicability of such an endeavour". On the other hand, to Mr *Virally* the purpose of our inquiry would be different: we should look into the terminology in order to see what it could tell about the "real intentions" of the drafters. It is perhaps convenient to begin by this very point.

(1) *Terminology of the resolutions: in what measure does it reflect their legal contents and effects?* Mr Virally attaches a greater importance to the vocabulary of the resolutions than the Rapporteur was ready to admit in § 4 of the Preliminary *Exposé*. Our Confrère notes that the language used always contains some indications on the will or intention of the authors of the text. Mr *Zemanek* also discerns a link between the language of the resolutions and their different functions.

The Rapporteur agrees that § 4 of the Preliminary *Exposé* is probably too sceptical in dismissing various phrases used in the resolutions as often inconclusive. It must be recognized that the language

of the resolutions is an indicator. Mr *Lauterpacht* reminds us that in the *Expenses* case the International Court of Justice "examined in detail the wording of the relevant General Assembly resolutions"[266]. When a resolution uses normative vocabulary, this can reveal the tendency to go beyond mere recommendations.

The influence of the recommendatory language on the effects of the resolutions has been considered in § 5 of the Preliminary *Exposé*. There was some discussion on the significance of the term "should" and the omission of the qualification "legal" coupled with the use of the word "guided" in the ultimate preambular paragraph of resolution 1962 (XVIII). Normally the term "should" is a sufficient indication that the rule is no more than recommendatory. Hence the choice of "shall" is usually significant. The matter has been briefly discussed in § 8 (4) of the Preliminary *Exposé*, including some examples; additional ones are resolution 2625 (XXV) and 37/92.

As to the language that goes beyond mere recommendation the material presented in the Preliminary *Exposé* should be supplemented by the saving clauses one finds in Article 33, paragraph 1, of resolution 3281 (XXIX) or Article 8 of resolution 36/55. They display a particularly strong normative tendency on the legal plane. Otherwise any impairment of, or derogation from, the U. N. Charter (in the case of the former resolution) and any restriction of, or derogation from, the International Covenants on Human Rights (which is the latter's formula) would not arise. (The sceptic might ask how such possibilities could be envisaged at all).

Neither the Preliminary *Exposé* nor the Questionnaire refers to the multiplicity of language versions of the resolutions. The subject is incidentally mentioned by Mr *Rosenne*. Until now, in so far as the Rapporteur is aware, this kind of variety has not caused any problems which would be comparable to complications that are often brought about by multilingual treaties.

(2) *Principles.* The considerations on principles contained in §§ 6 and 7 of the Preliminary *Exposé* should be supplemented by recalling Judge *Mosler*'s opinion that principles belong to the same normative category as rules and that some principles are self-

[266] ICJ Reports 1962, pp. 172-178; Lauterpacht, *op. cit.*, note 3, p. 456.

executing. When the Rapporteur wrote that the principle was the rationale for detailed rules (Preliminary *Exposé*, § 6 (3)) he did not thereby negate the principle's normative nature. Several legal principles are directly enforceable by public organs and constitute the source of rights and/or duties of natural and juristic persons[267].

It has been pointed out in the Preliminary *Exposé* that resolutions also use the term "principle" in the non legal sense; a recent example is resolution 37/7 which constitutes a series of recommendations (cf. its paragraph 14).

Judge *Jessup* thinks that the Thirteenth Commission should not occupy itself with Question 16, viz. whether resolutions are to limit themselves to enunciating principles or should also lay down detialed and specific rules. "It involves political questions of parliamentary tactics and it is not for the Institut to advise States how to act in the great variety of situations which involve many disparate factors".

Some Members say that no general or abstract answer is here possible (Messrs *Bindschedler, McDougal, McWhinney,* Judge *Mosler* and Mr *Rosenne*). Messrs *do Nascimento e Silva, Schachter* and *Valticos*[268] take the position that a resolution can spell out both principles and detailed rules. Messrs *Seyersted* and *Ustor* also seem to share this view. On the other hand, Mr *Monaco* maintains that, "en règle générale ", resolutions should proclaim principles and avoid the sphere of specific regulation; the restriction is dictated by the nature and procedures of the functioning of the Assembly. Mr *Suy* equally lays stress on the procedural aspect: "As there is a growing tendency to adopt resolutions by consensus, only broad principles lend themselves to this adoption-procedure". According to Mr *Zemanek,* in the type of resolutions discussed by the Commission specific regulation appears "superfluous or even harmful", though he generally states that all depends on "the function of the resolution". Both

[267] H. Mosler, The International Society as a Legal Community, RC, vol. 144, 1974-IV, p. 1, at pp. 89-90, where he takes issue with Sir Gerald Fitzmaurice on the purported fundamental differences between principles and rules. For the opinion of Messrs Virally and Zemanek, see Preliminary *Exposé*, § 6 (2).

[268] Though he would have some preferences for the inclusion of the principles in the first place.

he and Mr *Suy* refer to other sources for the working out of detailed or specific rules.

However, not only detailed regulation but also the proclamation of principles has on occasions evoked doubts. Mr *Schachter* mentions the "considerable scepticism about the value of stating highly amorphous concepts as authoritative or binding, since while they seem to be platitudes they also lend themselves to political manipulation and propaganda". He remarks that the "serious problems" caused by this type of U. N. pronouncement "cannot be met by the ostrich approach". Though "a measure of ambiguity is inevitable" he rejects the view that "general principles of a vague character should not be treated as legal rules but as political principles". While "the process of treaty making often tends to generate and to stimulate national demands", "principles should be formulated insofar as possible to transcend individual national interests [...]"[269].

To fall under the category of principle, whether of positive or future law, a norm must display a minimum of normative precision. The General Assembly sometimes employs the term in a looser sense denoting a postulate of legal policy (§ 16 above) rather than a ready standard of State conduct. An example is some of the items in Chapter I of resolution 3281 (XXIX).

(3) *Declarations.* In § 10 of the Preliminary *Exposé* the Rapporteur considered the question whether declarations constituted a separate category among the G. A. resolutions.

It may be recalled that declarations *qua* acts of the Assembly are non-obligatory, though on occasions, rare as they were, Governments used language that might imply something else. It is also possible to cite official statements which contrasted declarations with "mere" recommendations[270], without, however, contending that the former were binding. The U. N. Memorandum which distinguished between the two has already been commented upon in the *Exposé*.

[269] O. Schachter, The Prospects of a Regime in Outer Space and International Organization, in: M. Cohen (ed.), Law and Politics in Space, Montreal 1964, p. 95, at pp. 96-99.

[270] *Cf.* the delegate of Hungary, Mr Ustor, in GAOR, 18th Sess., 6th Cttee, 806th Mtg, 6 November 1963, p. 131, para. 2, and the statement by the Ukrainian representative therein cited.

A declaration may, and often does, contain principles or other rules of positive law. Such a declaration states the law; it does not make it. If it lays down norms *de lege ferenda*, it is but one factor in the law-creating process. The representative of the United Kingdom observed that "in certain new and unknown fields where Member States wished to break new ground, declarations could be a useful method of making progress towards the development of new law", and he gave the example of resolution 1962 (XVIII)[271].

The Commission is divided on the problem whether the declaration is a type of instrument that is particularly suitable for enunciating legal rules (Question 17). The matter has already been reported in § 6 above.

Some of the negative replies point out that the appellation is largely irrelevant or unimportant (Messrs *McDougal, McWhinney* and *Rosenne*). *Mr Bindschedler* observes that a declaration can have a purely political content. Mr *Valticos* equally refers to the political sphere: "Quant aux 'déclarations', elles sont simplement le type le plus solennel des résolutions et leur valeur morale ou politique, mais non juridique, peut être plus grande ou peut être voulue telle". Some G. A. declarations, no doubt, lay down standards as vague as those one finds in certain resolutions which do not bear that name[272].

However, there are Confreres (and other writers, too) who attach some importance to this particular form. So does the U.N. Office of Legal Affairs (Preliminary *Exposé*, § 10).

Mr *Monaco* distinguishes two kinds of declarations. First, there are declarations which have a limited object and therefore do not influence the international legal order, though they may have great political significance. Second, there are declarations "qui touchent aux bases mêmes de la communauté internationale, en tant qu'ordre qui se développe sans cesse, et qui par conséquent tendent à donner une nouvelle structure à cet ordre". Yet this result is not brought about by the declarations alone: "les déclarations présupposent qu'à la suite de leur émanation on arrive à poser des règles juridiques correspondant à leur contenu et aux motifs qui les ont inspirées ;

[271] A/AC.119/SR.16, pp. 10-11.

[272] An example is the Declaration on Social Progress and Development, res. 2542 (XXIV).

cela prouve qu'elles ne sont pas capables, en tant que telles, de donner vie à des normes juridiques[273]. "The styling of a resolution as 'declaration'", Judge *Mosler* replies to Question 17, "may be an appropriate means of making evident that the intention of the General Assembly was to state" what our Confrère describes as the "fundamental principles and rules to be applied by all members of the international community". According to Mr *do Nascimento e Silva* the States' decision "to give a more solemn status of a resolution" by calling it a declaration "exercises an influence" on the drawing up of the instrument (reply to Question 24). Mr *Schachter* does not think that "the only alternative to customary law is treaty law". He says that it seems to him that

> "declarations adopted with general approval by the United Nations General Assembly which purport to set in terms of legal authority standards of conduct for States, can be regarded as an expression of 'law' which is regarded as authoritative by governments and peoples throughout the world. The formalist may say these declarations are "only" evidence of international custom, but whether one characterizes the declarations in these therms or in terms of accepted law the effect is substantially the same. We have seen this manifested in regard to resolution 1721 dealing with outer space".

In contrast to treaty making "States feel themselves more readily able to adopt general declarations precisely because they have the character of general statements and because they do not appear to circumscribe the activities of States as much as most detailed treaty provisions do"[274]. Mr *Seyersted* observes that declarations have a role as "introductory texts", which the Rapporteur understands to mean acts preparatory to the adoption of other instruments, viz. treaties. In Mr *Seyersted's* view this particular name is "important" if the reso-

[273] R. Monaco, Observations sur la hiérarchie des sources du droit international, in: Völkerrecht als Rechtsordnung - Internationale Gerichtsbarkeit - Menschenrechte. Festschrift für Hermann Mosler, Berlin, Heidelberg, New York 1983, p. 599, at pp. 605 and 606.

[274] *Op. cit.*, note 269, pp. 98-99.

lution restates existing law. Mr *Suy* sums up his views in the following way:

> "The General Assembly, through its solemn declarations, can [...] give an important impetus to the emergence of new rules, despite the fact that the adoption of declarations *per se* does not give them the quality of binding norms"[275].

And in his reply to Question 17 he remarks: "'Declaration' is certainly a suitable title for the resolutions purported to formulate legal rules or guiding principles". Mr *Ustor* also thinks that "resolutions enunciating legal rules should normally be called declarations".

Finally, the Rapporteur wishes to recall the view of Mr *Arangio-Ruiz* that "declarations *may* deserve, *de facto*, more compliance" than other non-binding instruments[276].

Some Members of the Commission favour the introduction of a measure of uniformity in the use of the name "declaration". Mr *do Nascimento e Silva* would limit it to "the enunciation of legal rules", and so would Mr *Schachter* ("legal rules of general importance"). Mr *Suy* adds the category of "guiding principles".

§ 23. *Some Other Points Regarding the Text*

Like the subject of the preceding paragraph, the two topics discussed below go beyond mere drafting. They also concern the function and the implementation of the resolution. But we first encounter them when the resolution is being drawn up, so it is convenient to deal with them now. They are the addressees of the resolutions and the relationships between resolutions.

(1) *Addressees of the resolutions.* The personal scope of the resolutions has been briefly presented in § 9 of the Preliminary *Exposé*. The examples cited therein show that the Assembly did not hesitate to address its enactments to all States. The Rapporteur has asked the Commission whether there was any obstacle to this practice (Question 18, first sentence). Judge *Jessup* is uncertain of the meaning of the term "obstacle" in this context. By mentioning Article 2, paragraph 6, of the U.N. Charter the learned judge raises

[275] *Op. cit.*, note 37, p. 190.
[276] *Op. cit.*, PE note 15, p. 450.

the constitutional problem: is there anything in the law of the Organization that would prevent the general decisions of the Assembly to be addressed to Members and non-Members alike? Apart from the Charter there is still the possibility of a bar following from universal international law, especially from the analogous application, *mutatis mutandis*, of the principle *pacta tertiis nec nocent nec prosunt* (the word *acta*, denoting for our purpose the G. A. resolutions, would replace *pacta*).

The Members of the Commission see no impediment to the General Assembly addressing its rules to all States instead of restricting the scope of the rules to the States which belong to the Organization[277]. Only Judge *Jessup* seems to have some hesitations because even the "assertion of general authority" which is contained in Article 2, paragraph 6, "is limited to what 'is necessary for the maintenance of international peace and security'". It is submitted that the doubts of Judge *Jessup* are met when one realizes that the view accepted by the Commission in no way prejudges the effects of the resolution with regard to non-Members of the United Nations. This is corroborated by the observations of Judge *Mosler* and Mr *do Nascimento e Silva*.

Mr *Bindschedler* remarks that it is the recommendatory nature of the resolutions which makes it possible to address them to all States. Mr *Valticos* adduces the same reason, and he moreover points to the almost universal character of the Organization and to the universal calling of a resolution that concerns the state of international law and the general principles of law. Mr *Zemanek* does not see much difference between the two groups of addressees, nonetheless he recognizes the role of the "all States" formula for the possible creation of "a global consensus through acquiescence".

At the end of its § 2 the Preliminary *Exposé* touches upon the position of the General Assembly in the international community and cites some views on the matter. Resolution 3171 (XXVIII), therein quoted, supplies a partial answer to the query raised by Mr *Rosenne*. He implicitly and several Confrères explicitly reject the possibility of considering the Assembly as an organ of the international community (Messrs *Bindschedler, Monaco, Seyersted, Suy,*

[277] Messrs Monaco and Virally did not express an opinion.

Ustor and Valticos). While some Confrères do not comment on this problem, Mr *McDougal* is, on our Commission, the only one for whom "[i]n any empirical sense, the General Assembly is clearly an organ of the international community". Judge *Jessup*, on the other hand, would not go that far: " The 'Organization' of the United Nations also equals the 'organization' of the international community in a certain sense but the General Assembly without the Security Council has a limited authority".

(2) *Relationships between resolutions.* The Rapporteur shares Mr *Rosenne*'s opinion that it is probably impossible to generalize on the role which one resolution plays with regard to the drafting of another (Question 26). However, one may try to draw some conclusions from the disparate practice of the Assembly, though our analysis will not be so detailed as Mr *Virally* would like it to be.

The significance of one resolution in the process of drawing up another, Mr *McDougal* tells us, "[d]epends upon the combined communication coming out of the two resolutions, which could be affected by many variables". Mr *Bindschedler* indicates one negative possibility: repetition of resolutions diminishes the value of what they say; hence one should avoid too many instruments on the same subject. In a somewhat similar line of reasoning Mr *Zemanek* explains that repetition usually results from inertia or even laziness, not from legal considerations. The Rapporteur submits that these remarks do not necessarily detract from the effect which repetition can have with regard to evidence of custom (§ 5 (8) above). On the other hand, Mr *Virally* sees a different aspect in repeated resolutions: "les résolutions successivement adoptées sur le même sujet peuvent être considérées comme une série d'étapes dans le cadre d'une négociation en progression".

Both the practice of the Assembly and legal opinion reflect a variety of attitudes.

There were domains in which the Assembly did not hesitate to change its position in adopting a series of new resolutions. The instruments on the taking of foreign property and compensation are a case in point.

Several delegations argued, not quite successfully in this very instance, that the declaration on non-intervention "should not in any

circumstances be invoked as a precedent" (France), "constitute a precedent" (Italy) or "prejudice the work" (Sweden)[278] to be later undertaken on the same principle.

"Depending upon the circumstances [Mr *Suy* observes], a later resolution could indicate changes in the perception and hence in the *opinio iuris* ". Mr *Valticos* explains why there is freedom of action, i.e. of modification, in what he calls the formal aspect, in contradistinction to the substance, of the resolution: "une résolution ne constitue pas chose jugée mais chose décidée". A change is possible, and the resolutions could not be more unalterable than laws. On the plane of substance, however, the position is more complex, and Mr *Valticos* cites resolutions which state a custom or contribute to its formation. Obviously, they cannot be followed by instruments which say something else. Mr *Virally* looks at the matter from still a different angle. The freedom to modify a previous resolution can serve the purpose of reaching a broader agreement: the original text imposed by a majority is now being revised to give it a larger support.

So much for the capacity to change and revise resolutions.

In other instances, without saying expressly that it was bound by its previous pronouncements, the Assembly has based itself on existing resolutions. In the field of decolonisation[279] and human rights, including racial segregation, the recalling or recitation of resolutions has been frequent and systematic. Apart from the effect on the birth of custom (§ 5 (8)) repetition may be a means of pressure on the opposing minority or the sole dissenter (cf. Mr *Virally*'s observations). The Assembly adopted the Declaration on the Principles of International Law "taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles" (sixteenth preambular

[278] GAOR, 20th Sess., 1st Cttee, 1422nd Mtg, 20 December 1965, p. 432, para. 34; p. 433, para. 43; and p. 434, para. 48, respectively. *Cf.* Canada, *ibid.*, p. 433, para. 41. For a negative opinion on the role of repetition in regard to custom, see I. MacGibbon, Means for the Identification of International Law. General Assembly Resolutions: Custom, Practice and Mistaken Identity, in: B. Cheng (ed.), International Law: Teaching and Practice, London 1982, p. 10, at pp. 15-17.

[279] *Cf.* GAOR, 20th Sess., 1st Cttee, 1403rd Mtg, 9 December 1965, p. 303, para. 34 (India) on the necessity of taking into account res. 1514 (XV).

paragraph)[280]. The Preliminary *Exposé* (§ 14) has given the example of a resolution which the Assembly expressly regarded as a "source of inspiration" for the preparation of another resolution. In this context Mr *do Nascimento e Silva* speaks of the function of "guidance".

Finally, we have the hypothesis of self-imposed restriction: the hands of the Assembly are bound by its previous resolution or resolutions. The point is illustrated by the attitude which the majority of the Special Committee that prepared resolution 2625 (XXV) took toward resolution 2131 (XX). This example has already been discussed in the Preliminary *Exposé* (§ 14) and the present Report (§ 4 (4) above). Mr *Valticos* refers to another kind of restriction, viz. one which results from the link between the resolution and customary law. Mr *Rosenne* does not expressly speak of any limitation of the Assembly's freedom, yet he employs the term "precedent". But he himself resorts to inverted commas and adds the caveat that such a precedent "works in several ways". Some resolutions contain saving clauses which prevent any derogation from the former instrument, e.g. Article 8 of resolution 36/55. They may be said to indicate that otherwise there would be no obstacle to depart from a previous text. Also, the absence of a saving clause would seem to permit of an analogous application of the rule *lex posterior derogat priori*. The replies of Mr *McWhinney*, Judge *Mosler* and Mr *Ustor* are relevant here. The position is different with regard to resolutions of other bodies. If the Assembly affirms or reaffirms the (non-binding) rules adopted by them, as it did in resolutions 2444 (XXIII), 2996 (XXVII) or 3129 (XXVIII), or, in particular, if it declares that its resolutions cannot affect certain norms accepted by another body (resolution 2996 (XXVII), preamble), no difficulties should arise. In other instances, if there is a conflict between a G.A. resolution and a resolution adopted by another body or organization the rule *lex posterior* is not helpful. In recent times the U.N.E.S.C.O. and the I.L.O. have complained of U.N. encroachments on their field

[280] *Cf.* A/AC.125/SR.114, p. 58 (Poland) and p. 62 (Australia). GAOR, 25th Sess., 6th Cttee, 1178th Mtg, 23 September 1970, p. 9, para. 36 (Australia).

of action[281]. The problem, no doubt, is more acute with regard to convention-making than passing of resolutions.

§ 24. *Organ*

It may be said that on the whole the Thirteenth Commission are agreed that the nature, and especially the composition, of the organ that works out the resolution exert influence upon the result achieved (Question 25). Only Mr *Rosenne* is doubtful, though he recognizes the value of the techniques applied by such bodies as the International Law Commission or the UNCITRAL. Mr *Suy* equally acknowledges the significance of the methods followed by those organs (in the context of Question 24), yet he finds Question 25 superfluous. If the implication is that a positive answer to this Question constitutes a truism, then Mr *Suy* is no doubt right. But the intention of the Rapporteur was to examine the various procedural possibilities which are inherent in the selection of an organ charged with the elaboration of the resolution.

Messrs *Monaco* and *Schachter* did not express an opinion.

Mr *Bindschedler*, Judge *Jessup*, Messrs *McWhinney* and *Valticos* mention the requirement of legal expertise, and so do Messrs *Rosenne* and *Suy*[282] within the limits of their qualified replies. Some Confrères point explicitly at the International Law Commission and the United Nations Commission on International Trade Law. These two examples illustrate the choice between an organ that is composed of independent experts (a solution favoured by Mr *Bindschedler*[283]) and an organ which consists of States or their representatives (Mr *Zemanek*'s preference).

In its practice the General Assembly clearly opted for the latter type of organ. This permits the Governments to have direct and continuous control over the preparation of the text. But exceptions are not excluded and a case in point is the drawing up by the

[281] T. Meron, Norm Making and Supervision in International Human Rights: Reflections on Institutional Order, AJIL, vol. 76, 1982, p. 754, at. p. 760. *Cf.* also the remarks of F. Morgenstern, International Legislation at the Cross-roads, BYBIL, vol. 49, 1978, p. 101, at pp. 111-112.

[282] See also their replies to Question 24.

[283] See also his reply to Question 24.

International Law Commission of the draft Declaration on Rights and Duties of States annexed to resolution 375 (IV). In the opinion of the Netherlands Government the I.L.C. might establish a better "definition of positive international law"[284]. During the debate on what organ should be entrusted with the study of four principles of international law enumerated in resolution 1815 (XVII) the arguments in favour of the I.L.C. were its competence[285], its character as a "highly qualified" body and its "carefully regulated drafting procedure"[286]. As to the latter, it was said that if another organ was given the task, "the method used should be that described in articles 19 to 23 of the statute of the International Law Commission" [287]. The arguments against, some of them recognized expressly by States which would otherwise back up the transmission of the matter to the I.L.C., were its "somewhat heavy programme of work"[288] and the opinion that "the subject is more political than legal"[289]. There was also, as Sir Ian *Sinclair* admitted, the "desire on the part of the Sixth Committee, reinforced by the advent of new States from Africa and Asia, to play a more active part in the process of progressive development and codification of international law", and the position of "the vast majority of governments [...] anxious to retain direct control over the manner" in which the task would be undertaken[290] (our Confrère participated in the debate).

[284] Note 82.

[285] GAOR, 18th Sess., 6th Cttee, 822nd Mtg, 29 November 1963, p. 231, para. 15 (Peru).

[286] *Ibid.*, 802nd Mtg, 29 October 1963, p. 113, para. 46 (Italy, represented by Mr Sperduti).

[287] *Ibid.*, 815th Mtg, 20 November 1963, p. 190, para. 23 (Guatemala).

[288] Note 286. In other words, it was thought that another organ would accomplish the work more quickly. This expectation did not materialize. Sinclair, *op. cit.*, PE note 124, p. 139.

[289] Note 285. Sinclair, *loc. cit.*, note 288. On the reasons for excluding the ILC, see also J.N. Hazard, New Personalities to Create New Law, AJIL, vol. 58, 1964, p. 952; E. McWhinney, the "New" Countries and the "New" International Law: The United Nations' Special Conference on Friendly Relations and Co-operation among States, *ibid.*, vol. 60, 1966, p. 1, at. p. 3; Arangio-Ruiz, *loc. cit.*, PE note 124; and H. Neuhold, Internationale Konflikte-verbotene und erlaubte Mittel ihrer Austragung, Wien, New York 1977, pp. 28-29.

[290] Sinclair, *loc. cit.*, note 288.

Judge *Jessup* mentions the Sixth Committee and contrasts it with bodies that lack legal expertise. It is, however, a truism that among organs which occupy themselves with law and legal matters and which are composed of jurists, there are inevitable differences of measure and degree regarding that expertise. Suffice it to compare the Sixth Committee with the I.L.C. or UNCITRAL. It is neither possible nor advisable that the Sixth Committee's procedures duplicate those of any of the organs of the latter kind[291].

Several of the resolutions that are of interest to this Report are a product of one of the main committees of the General Assembly. Not unfrequently voices were heard that it was regrettable that resolutions setting forth norms *de lege lata* or *de lege ferenda*[292] did not pass through the Sixth Committee. Indeed, various important texts relating to the law of human rights, outer space, sea-bed or economic rights and duties of States remained outside its reach. In some instances the main committee itself worked out the resolution and submitted a draft to the plenary meeting of the Assembly. In this manner the committee would fairly quickly accomplish its task. But this method has all the disadvantages of speedy procedure. Usually studies and research are required especially in the initial stage and they cannot be effectively carried out by so large an organ[293]. The relevance of careful preparation finds expression in some replies to Question 24. Thus Mr *Rosenne* points to "the initial research and determination of attainable objectives". Mr *Seyersted* says that resolutions "must be based upon studies of practice and not merely reflect a political compromise". In Mr *Ustor*'s words "[l]aw-making deserves and needs special care, i.e. expert advice, circumspection, patience, time". It is obvious that leaving the matter in the hands of a main committee alone, without the assistance of another organ, particularly when a deadline is set, the requirements listed by our Confrères will not be met. Governments

[291] On duplication of the I.L.C., *cf.* GAOR, 18th Sess., 6th Cttee, 811th Mtg, 14 November 1963, p. 162, para. 7.

[292] On this category, *cf.*, *e.g.*, the statement of Italy, *loc. cit.* in note 286, para. 50.

[293] *Cf.* M.K. Yasseen as representative of Iraq, GAOR, 18th Sess., 6th Cttee, 808th Mtg, 11 November 1963, p. 143, para. 4.

occasionally warned against "hasty formulation without due preparation"[294].

To illustrate these dangers we may again cite the declaration on non-intervention. Some delegations expressed reservations concerning the speed with which the First Committee was drawing up this resolution. They suggested that the matter be considered by the Special Committee which was already dealing with the principles of international law under resolutions 1966 (XVIII) and 2103 A (XX) or by a committee created specifically for the purpose of studying the various proposals and of preparing a single draft[295]. The U.N. Members had not been given sufficient time to consider the declaration and some even had not seen the text. There was little time for the submission of amendments and for discussion[296]. One State linked the procedure applied to the result achieved: "In the circumstances, the document should be regarded as a declaration of political intent, rather than as a precise legal definition of the principles underlying non-intervention"[297]. Other examples can be cited: in the course of drafting the Charter of Economic Rights and Duties of States the majority refused to allow more time to work out a text that might be more acceptable to the minority. A recent instance of over-hasty drafting and adoption is resolution 36/103.

The main committee will improve the conditions for the elaboration

[294] *Ibid.*, 806th Mtg, 6 November 1963, p. 136, para. 27 (Sweden, represented by Mr Blix). See also *ibid.*, 816th Mtg, 20 November 1963, p. 199, para. 28 (Italy, represented by Mr Monaco). *Cf.* Neuhold's observations on the influence of the time factor on the results achieved, *op. cit.*, note 289, p. 43.

[295] The former solution was more often mentioned during the debate. For the latter, see the statement by Tunisia, note 296 below.

[296] GAOR, 20th Session, 1st Cttee, 1392nd Mtg, 1 December 1965, p. 224, para. 27 (Costa Rica); 1402nd Mtg, 8 December 1965, p. 291, para. 4 (Tunisia); 1403rd Mtg, 9 December 1965, p. 304, para. 43 (Philippines); 1404th Mtg, 9 December 1965, p. 308, para. 27; 1422nd Mtg, 20 December 1965, pp. 430-431, paras. 23-25 (United Kingdom); p. 432, para. 33 (Australia); para. 39 (New Zealand); p. 433, para. 41 (Canada); p. 434, para. 47 (Philippines). For a contrary view, see 1395th Mtg, 3 December 1965, p. 245, para. 21 (U.S.S.R.), citing the example of res. 1514 (XV) which was "adopted [...] in a very short time". That view prevailed. An informal working group worked out a draft that was supported by 57 States. The draft was not discussed and the delegations could only explain their votes.

[297] Philippines, second citation in note 296 above.

of a law-declaring or law-proposing resolution if it creates a working group or another special body for the purpose. This method permits the main committee to keep the process under control. At the same time the committee is relieved from the pressure of deadlines were it to accomplish the work by itself and during one session of the Assembly. Several Governments supported the application of the working group method to the elaboration of the instrument on the Charter principles of international law[298], subsequently adopted in the form of resolution 2625 (XXV). The Assembly decided to set up not a working group or groups but a Special Committee which functioned between 1964 and 1970. States were members of that body, and the Assembly tried to infuse it with legal expertise by recommending that they appoint jurists as their representatives (resolution 2103 A (XX), paragraph 5). However, in spite of the presence of several competent and qualified lawyers[299] the impact of their expert knowledge was not always felt. The Rapporteur of the 1970 Special Committee, Mr *Arangio-Ruiz*, concluded that the Committee's method of work "had not at any session been such as to ensure an adequate study and evaluation of proposals and suggestions from the legal point of view. That had prejudiced the technical perfection of the draft"[300]. This unsatisfactory state of things may have its explanation in the statement by the Chairman of the Special Committee that its work "largely consisted of negotiations between restricted groups of members"[301]. Consequently, the declaration which crowned the long labours of the Committee was a work of political compromise rather than an achievement of legal craftsmanship. The opinion of one Government, expressed

[298] At the 18th Session of the Assembly, see in particular the Czechoslovak proposal, A/C.6/L.528 and the explanation of the method by M.K. Yasseen (Iraq), GAOR, 18th Sess., 6th Cttee, 808th Mtg, 11 November 1963, p. 144, paras. 5 and 6.

[299] On this point, however, *cf.* the criticisms by L.T. Lee, The Mexico City Conference of the United Nations Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, ICLQ, vol. 14, 1965, p. 1296, at pp. 1307-1308 and McWhinney, *op. cit.*, note 289, pp. 3-4. Sinclair, *op. cit.*, PE note 124, p. 139, n. 70, replies to these criticisms.

[300] A/AC.125/SR.114, p. 42.

[301] A/AC.125/SR.113, p. 17. See also the representative of France (Mr Virally) on the role of "informal discussions", A/AC.125/SR.112, p. 13.

before the Committee started its activity, that "a careful, scientific, systematic and exhaustive study" should be undertaken and that "a scientific procedure was the only possible way in which the special committee could successfully make recommendations" remained a largely unfulfilled postulate[302].

Half way between an organ of the I.L.C. type and a body controlled by a main committee of the Assembly is a commission composed of Government experts. It combines expertise with the representation of State interests and its relative independence is enhanced when individuals serving on it are appointed by the Organization, e.g. the Secretary-General. Mr *Blix*, speaking as representative of Sweden, recalled the expert committee on the economic consequences of disarmament and spoke of the possibility of having a committee consisting of Government experts to deal with the principles of international law[303].

Whether independent of Governments or not the elaborating organ must be representative both geographically and in the coverage of the principal legal systems. This requirement is stated expressly in the replies to Questions 24 and/or 25 by Mr *McWhinney*, Judge *Mosler*, Messrs *Ustor*, *Valticos* and *Zemanek*. Mr *McDougal* emphasizes the importance of the drafting committee. Now, the very nature of the function of this organ imposes a numerical restriction on its composition; hence the solution adopted for the Drafting Committee of the Special Committee on Principles of International Law where there were more delegations than seats and, consequently, in some cases, three countries shared two seats or two countries one seat[304].

In his reply to Question 25 Judge *Mosler* maintains that "the very first stages of the preparatory work can be decisive". The Secretariat has here an important role to fulfil, and it can only be regretted that States, in sponsoring various normative resolutions, did not

[302] GAOR, 18th Scss., 6th Cttee, 829th Mtg, 6 December 1963, p. 271, para. 1 (Guatemala).

[303] *Ibid.*, 806th Mtg, 6 November 1963, p. 136, para. 27. See also 815th Mtg, 20 November 1963, p. 190, paras. 23-25 (Guatemala) and 820th Mtg, 27 November 1963, p. 218, para. 11.

[304] A/AC.125/SR.112, p. 11. *Cf.* also the U.K. suggestion regarding "a small representative group", p. 13.

take more advantage of this unique instrumentality for preparing introductory papers and undertaking studies. Mr *Schachter* has emphasized "the necessity of providing for more adequate means of obtaining data for clarifying future problems so that international political organs would be in a better position to adopt wise principles and rules"[305].

As to later stages, the circulation of the draft or drafts for comment no doubt contributes to a more careful preparation of, and facilitates the agreement on, the definite text. It permits the avoidance of haste and helps to arrive at more mature decisions. Recent examples of the application of this procedure are resolutions 35/7, paragraph 3, and 36/61, paragraph 2.

§ 25. *Voting*

The Thirteenth Commission generally finds that voting majorities are relevant ("highly relevant" according to Judge *Jessup*) for the determination of the significance of the resolution in the process of law-making[306]. Only Mr *do Nascimento e Silva* gives a negative reply to the first sentence of Question 19. The matter has already been touched upon in the context of evidence of customary law (§ 5 (4) above). This context now re-emerges in the reply of Mr *Valticos*[307].

(1) *The meaning of voting.* A State which participates in the voting on an Assembly resolution acts in a double capacity. First, the State expresses its view and takes a position on the subject matter of the resolution. Voting permits one to identify the attitudes of individual States[308]. Commenting upon resolution 3281 (XXIX) Mr *Castañeda* has noted: "chaque article et même chaque paragraphe ont fait l'objet de votes séparés par appel nominal qui permettent d'établir avec précision quels articles furent contestés, par qui, dans quelles circonstances, et en certaines occasions, grâce aux explica-

[305] *Op. cit.*, note 269, p. 100.

[306] Messrs Monaco, Suy and Virally did not comment expressly on this matter.

[307] See also Mr Suy's reply to Question 6.

[308] *Cf.* Thirlway, *op. cit.*, PE note 90, p. 66.

tions de vote, pour quels motifs"[309]. Voting on specific rules or standards set forth in the resolution is particularly important because it can give a better insight into State attitudes than voting on the whole text.

Second, the State participates in the making of the act of the Organization. As such the resolution is attributed to the United Nations alone and not to the Members taken individually or collectively[310]. As an act of the United Nations the resolution remains a recommendation. Sir Francis *Vallat* lays stress on this constitutional limitation; the Members' vote concerns nothing more than a recommendation[311]. It is true that the U.N. voting system has its negative sides and occasionally yields bad results[312]. That system does not always sufficiently protect the interests of the outvoted States[313]. But one thing is certain: the majority cannot obligate the minority. The contrary opinion has been expressed by Judge *Elias* who invokes "the democratic principle that the majority view should always prevail"[314]. In any case, the passing of a resolution is not equivalent to its being accepted as law (§ 20 (3) above). In his reply to Question 28 Mr *Suy* elaborates on this point (cf. also Mr *do Nascimento e Silva*'s observation). Nor can the positive votes be identified with State practice, including law-creating practice (§ 8 (2) above) [315].

[309] Castañeda, *op. cit.*, note 200, p. 39. Bedjaoui, *op. cit.*, note 67, pp. 195-196, is critical of any "dissection" of this and, it seems, other resolutions. In his opinion any " appréciation parcellisatrice de la Charte perd nécessairement de vue la volonté des Etats [...] ".

[310] *Cf.* the observations by Mr Zemanek, in: *op. cit.*, PE note 14, p. 232. See also E. Yemin, Legislative Powers in the United Nations and Specialized Agencies, Leyden, 1969, pp. 8 and 12-13.

[311] F.A. Vallat, The Competence of the United Nations General Assembly, RC, vol. 97, 1959-II, p. 203, at p. 230. *Cf.* also Guradze, *op. cit.*, PE note 95, p. 56 and MacGibbon, *op. cit.*, note 278, p. 14.

[312] *Cf.* R.L. Bindschedler, Die Schweiz in der Völkergemeinschaft von morgen, Bern 1969, pp. 14 and 15.

[313] Higgins, *op. cit.*, note 205, p. 37, and observations on p. 58.

[314] T.O. Elias, Africa and the Development of International Law, Leiden and Dobbs Ferry, N.Y. 1972, p. 75. See also *ibid.*, p. 74 and his contribution cited in PE note 34, p. 51. *Cf.* also Asamoah, *op. cit.*, PE note 76, p. 43. For criticism, see Frowein, *op. cit.*, note 109, p. 153, n. 26.

[315] Golsong, *op. cit.*, note 65, p. 23.

Usually Governments are aware[316] of the basic limitation inherent in the rule-making by the Assembly, and this awareness often influences the way they cast their votes. The Preliminary *Exposé* has already quoted Sir Gerald *Fitzmaurice* to this effect (§ 3)[317]. However, a contrary view is possible: Judge *Schwebel* contended that "States failed to realize what they were doing, at least from the legal point of view, when they voted for such resolutions", i.e. declarations[318], though he recently expressed an opinion that clearly played down the very significance of the voting record[319].

The vote for a resolution is sometimes dictated by reasons of political expediency[320] or even opportunism[321]. Edvard *Hambro* and Judge *Schwebel* recognized that a dangerous degree of confusion would then creep into the process[322]. But even in those instances legal effects cannot be eliminated. As Sir Kenneth *Bailey* observed: "A vote may be given on purely political grounds, and for purely political purposes. But it may have important consequences in the development of international law just the same"[323]. These consequences, however, do not go so far as to turn an affirmative vote into the consent to be bound by the resolution. Mr *Schachter* says that

[316] *Cf.* Arangio-Ruiz, *op. cit.*, PE note 15, p. 510.

[317] *Cf.*, however, his views on the importance of voting in the context of resolutions considered in the Expenses case, ICJ Reports 1962, at pp. 201-202 and 211-212. See also W. Rudolf, in: Kewenig (ed.), *op. cit.*, PE note 19, p. 121 and MacGibbon, *op. cit.*, note 278, pp. 14-15. Hence voices that one need not attach too much importance to how the State votes, K.J. Partsch, in: Berichte, *op. cit.*, PE note 14, p. 227.

[318] In: Judicial Settlement, *op. cit.*, note 86, p. 66.

[319] *Op. cit.*, note 6, pp. 332-333. *Cf.* the critical remarks of D.H.N. Johnson, The New International Economic Order (I), Year Book of World Affairs, vol. 37, 1983, p. 204, at pp. 221-222.

[320] Higgins, *op. cit.*, note 48, p. 6: "voting patterns to some extent conform to political pressures rather than legal beliefs".

[321] L. Di Qual, Les effets des résolutions des Nations Unies, Paris 1967, p. 254. U. Scheuner, in: Judicial Settlement, *op. cit.*, note 86, p. 61: the State "might have voted for political reasons, or perhaps its representative had voted in the heat of the moment".

[322] *Ibid.*, pp. 57-58 and 65-66 respectively. *Cf.* also E. Hambro's statement on behalf of Norway, GAOR 26th Sess., 6th Cttee, 1279th Mtg., 11 November 1971, p. 187, para. 18.

[323] *Op. cit.*, PE note 130, p. 237.

"a vote for a resolution may not be intended to signify agreement on the legal validity of the asserted norm. There is evidence that governments do not always have that intent when they vote for a resolution or fail to object to it"[324].

A U.N. declaration may receive many votes, while a treaty on the same subject will be ratified by a much smaller number of States[325]. This might be regarded as corroborating the basic difference between the two instruments and support the point made by Sir Gerald *Fitzmaurice*. Perhaps it is more relevant to take into account not the number of ratifications but the number of States which voted for the adoption of the text of a treaty without thereby expressing their consent to be bound by it. According to Sir Kenneth *Bailey* "the government has at least the same freedom from the duty to comply with a recommendation as it has to ratify a treaty signed by its representatives"[326].

On the other hand, Member States can attach to the resolution consequences that go beyond a mere recommendation; Mr *Tunkin*[327], among others, admits this possibility. In such a case they act not as co-creators of an Assembly instrument but they express their individual attitudes. Edvard *Hambro* wrote:

> "Statements must be judged individually; but the least that can be said is that it is not excluded that a delegation may become bound by a declaration put forward by itself and by its vote in the General Assembly. If many, or even a majority of the delegations act in this way, the declarations adopted by the Assembly may indeed become documents with binding force"[328].

[324] *Op. cit.*, note 195, p. 9, footnote omitted. See also Johnson, *op. cit.*, PE note 59, p. 122 and MacGibbon, *op. cit.*, note 278, p. 14.

[325] J.J. Lador-Lederer, Proposed Simplifications of Convention-Making Procedures (A Comment on Articles 5 and 9 of the Vienna Convention on the Law of Treaties), Israel Law Review, vol. 7, 1972, p. 496, at p. 503.

[326] In: Schwebel (ed.), *op. cit.*, PE note 8, p. 389.

[327] G.I. Tunkin, Das Völkerrecht der Gegenwart. Theorie und Praxis, Berlin 1963, p. 105. MacGibbon, *op. cit.*, note 278, p. 26.

[328] *Op. cit.*, PE note 34, p. 87.

To sum up, the act of the Organization and the act or acts of its Members are two sides of the same resolution. Mr *Monaco* in replying to Question 19 moves on the plane of the "will" of the Organization and on that of its decisions. This is a fully legitimate approach. But there is always the other side. Mr *Virally* lays stress on it and thinks that the Thirteenth Commission should concentrate on the decision-making process. The various modalities of voting are part of this process and they must be explored. The Rapporteur, of course, does not overestimate the role of voting. He agrees with C. Wilfred *Jenks* on the importance of negotiation "before matters are submitted for a simulacrum of decision by a majority vote"[329]. And he equally concurs with Mr *Virally* who states: "La plupart des résolutions (sinon toutes) sont le résultat d'un processus de négociation qui [...] a conduit à la réalisation d'un accord [...]".

(2) *Unanimity.* In considering the role of unanimity one should realize that it can have different shades and intensity. There are situations in which unanimity is more apparent than real. Abstentions can be significant either because of their number or because they reflect the attitude of States which are in a position to influence the application of the resolution. And even if there are no abstentions, States can show that their consent is only partial. They do it by explaining their votes[330] or by making reservations (§ 27).

Below the Rapporteur concentrates on actual unanimity, i.e. one which is unaccompanied by abstentions, reservations or other qualifying factors.

Unanimity does not change the resolution's recommendatory nature; Madame *Bastid* elaborates on this point[331]. Nonetheless the Assembly sometimes reminds the Member States that they acted unanimously, for instance in resolution 1962 (XVIII) (penultimate preambular paragraph).

Some official opinions on the role of uanimous resolutions as evidence of customary law have been reported in § 5 (4) above. It

[329] *Op. cit.*, PE note 36, p. 248.

[330] Seidl-Hohenveldern, *op. cit.*, note 24, p. 185.

[331] *Op. cit.*, PE note 130, p. 137. See also Lukaschuk, *op. cit.*, PE note 113, p. 92 col. 2 and p. 94, cols 1-2.

is now useful to quote a number of views which concern a broader context.

During the discussion of the proposed declaration of rights and duties of States some U.N. Members emphasized that unanimity would not lead to any binding effect. The delegate of India said: "Even if it received the unanimous approval of the General Assembly, the declaration would not bind the Member States as would a treaty or a convention"[332]. The attitude of the Netherlands was similar: "Adoption, even unanimous adoption, of the draft declaration would not give it the authority of a law"[333]. However, speaking of another resolution the Netherlands Government admitted some role for the factor of unanimity: "General Assembly resolutions supported by virtually all Member States could have a law-confirming and perhaps even a law-creative function"[334]. During the debate on the declaration on non-intervention the representative of Tunisia maintained that "the declaration must be adopted unanimously if it was to be effective"[335]. The debate on the law of outer space also supplies some indications on how States view the significance of unanimous vote in the process of law-making. The delegate of the United States said: "When a General Assembly resolution proclaimed principles of international law - as resolution 1721 (XVI) had done - and was adopted unanimously, it represented the law as generally accepted in the international community"[336]. According to the British representative, though not binding on Member States,

> "a resolution, if adopted unanimously, would be most authoritative and would have some advantages over an agreement in view of the possibility that all States might not accede to an agreement or that delays in ratification or

[332] GAOR, 4th Sess., 6th Cttee, 171st Mtg, 24 October 1949, p. 190, para. 32.

[333] *Ibid.*, 173rd Mtg, 25 October 1949, p. 205, para. 46.

[334] GAOR, 25th Sess., 6th Cttee, 1183rd Mtg, 28 September 1970, p. 38, para. 32. The French delegate spoke of the recognition of the declaration "by the international community as a whole", *ibid.*, 1179th Mtg, 24 September 1970, p. 12, para. 8. This implies some acceptance that manifests itself not only in unanimous voting.

[335] GAOR, 20th Sess., 1st Cttee, 1402nd Mtg, 8 December 1965, p. 291, para. 4.

[336] A/AC.105/C.2/SR.20, p. 11. See also the American statement in the Assembly, GAOR, 18th Sess., 1st Cttee, 1342nd Mtg, 2 December 1963.

> failure to ratify might considerably reduce its scope [...]. Such a resolution, unanimously accepted, would be an important contribution to the development of the law of outer space"[337].

On the other hand, some delegations were hesitant over the role of unanimity[338], while the representative of the Soviet Union put the matter in a different perspective. His country, he said, "undertook also to respect the principles enunciated in the draft declaration if it were unanimously adopted"[339]. Here unanimity was a condition of the voluntary acceptance by the State of the obligation to conform to the resolution; by itself, the resolution, unanimous as it was, could not and did not, according to this position, bring about the effect of obligation.

In their replies to Question 19 Judge *Jessup*, Messrs *McDougal* and *McWhinney*, Judge *Mosler*, Messrs *Rosenne*, *Schachter* and *Seyersted* all recognize the significance of unanimous resolutions. Messrs *Ustor* and *Valticos* do it in particular, though not necessarily exclusively, with regard to evidence of custom. Mr *Monaco* is ready to admit the importance of unanimity "seulement au plan des faits"[340]. On the other hand, Mr *do Nascimento e Silva* is sceptical: "Unanimity is often an empty victory". And Mr *Schachter* sees the two sides of unanimous voting:

> "Unanimity would be a highly significant factor but even unanimous resolutions must be assessed in the light of past and anticipated behaviour of the states concerned. A resolution, though unanimous, may be so contrary to actual practice and expectations of future compliance that it could not be regarded as persuasive evidence of a recognized legal obligation".

[337] A/AC.105/C.2./SR.17, p. 9 and SR.24, p. 13.

[338] Cheng, *op. cit.*, PE note 31, p. 34 cites the example of India.

[339] GAOR, 18th Sess., 1st Cttee, 1342nd Mtg, 2 December 1963, p. 161, para. 17.

[340] Mr Bindschedler acknowledges the role of unanimity for the political weight of the recommendation, *op. cit.*, note 66, p. 364.

Nonetheless our Confrere perceives "the greater acceptability of normative declarations which are unanimous or nearly so" [341].

In analysing resolutions 1721 (XVI) and 1962 (XVIII) Mr *Zemanek* writes that their unanimous adoption "implies that they are an expression of the universal legal conscience". He refers to the possibility of protests, habitual non-observance, different stipulations in subsequent conventions or divergent evolution of customary rules which would prove the absence of that conscience. "But as long as such acts are not forthcoming, the act of unanimous adoption by the General Assembly creates a legal presumption that such universal recognition exists, and that the principles set out in Resolutions 1721 (XVI) and 1962 (XVIII) are binding as General Principles of Law Recognized by Civilized Nations" [342].

Mr *Virally* notes that "les déclarations contenues dans des résolutions de l'Assemblée générale des Nations Unies peuvent provoquer la formation de règles de droit international général, si elles bénéficient de l'appui unanime des membres de l'Organisation" [343].

Mr *Castañeda* [344] and Judge *Lachs* [345] have also acknowledged the importance of unanimity. To Daniel P. *O'Connell* "the unanimity of the voting is strong evidence in favour of a tendency towards the crystallisation of a customary rule" [346]. Mr *Tunkin* emphasizes the role of unanimity in assessing the contribution which resolutions can make to the creation of new custom [347]. "If a resolution is accepted by unanimity and is generally followed in practice, it may quickly acquire obligatory character", Sir Kenneth *Bailey* has noted [348].

[341] *Op. cit.*, PE note 28, p. 19.

[342] *Op. cit.*, PE note 52, pp. 208-209 and 210.

[343] *Op. cit.*, PE note 53, p. 551.

[344] *Op. cit.*, PE note 42, pp. 44-48.

[345] M. Lachs, Le rôle des organisations internationales dans la formation du droit international, in : Mélanges offerts à Henri Rolin. Problèmes de Droit des Gens, Paris 1964, p. 157, at pp. 165-166 and *id.*, The Law-Making Process for Outer Space, in: E. McWhinney and M.A. Bradley (eds), New Frontiers in Space Law, Leyden 1969, p. 13, in particular at p. 18.

[346] D.P. O'Connel, International Law, 2nd ed., London 1970, vol. 1, p. 146 (in commenting on the League of Nations resolution on Manchuria).

[347] Tunkin, *op. cit.*, note 52, pp. 206-207.

[348] *Op. cit.*, PE note 130, p. 235.

Several other writers have equally stressed the special place of unanimous resolutions, though doubts were also expressed whether unanimity played a role.

(3) *Majority vote.* Resolutions discussed in this Report would normally fall under Article 18, paragraph 3, of the United Nations Charter, i.e. they are adopted by a majority of the Member States present and voting. If, rather exceptionally, paragraph 2 of that Article becomes applicable, then a two-thirds majority of those present and voting is required. According to both the letter of the Charter and the practice based on it there is no room for the view that resolutions adopted by a two-thirds majority have a different constitutional standing.

The Members of the Thirteenth Commission agree, though not all of them say this expressly, that the numerical count alone is not decisive: one must inquire into the composition of the majority. The Rapporteur wishes to refer in particular to the replies to Question 19 by Mr *Bindschedler*[349], Judge *Jessup*[350], Mr *McWhinney*, Judge *Mosler*, Messrs *Rosenne* and *Schachter*. The criteria the Confrères apply are complementary and they boil down to the "representative character" (as Mr *Schachter* puts it) of the majority. It must include all the States which have a direct concern and/or are particularly interested in the matter. Others express the same idea by laying stress on the concurrence of the great powers (Mr *Bindschedler*[351] and Judge *Jessup*, the latter mentions the permanent members of the Security Council), of the Third World (Judge *Jessup*) and, generally, of all the "worlds". In the latter hypothesis we are, in fact, back at the issue of actual unanimity. In particular, Mr *McWhinney* is emphatic on the "tri-bloc (Soviet, Western and Third World) inter-systemic consensus".

During the debate on the declaration on non-intervention the delegate of the United Kingdom said: "A declaration by the General Assembly could be useful only if it commanded general support, for only thus could it command general respect [...]"[352]. Speaking of

[349] See also his reply to Question 13.

[350] See also his reply to Question 20.

[351] *Op. cit.*, note 66, p. 364. He also mentions the criterion of interest.

[352] GAOR, 20th Sess., 1st Cttee, 1398th Mtg, 6 December 1965, p. 261, para. 2.

the same text the representative of Australia indicated that "an important consideration was whether it had the backing of the major Powers represented in the United Nations. It would be of doubtful value if the permanent members of the Security Council did not agree to give it their support"[353]. Deciding controversial issues by a majority vote is, as Mr *Rosenne* observed, "an unsatisfactory procedure for international law-making"[354]. Resolution 2603 (XXIV) seems to be a case in point; it led to the remark that "it would be improper for the General Assembly to try to force the issue here and now by adopting a declaration involving complex questions of the interpretation of rules of international law"[355]. Judge *Schwebel* stated clearly that "if a major power or powers voted against a General Assembly resolution, that resolution could not *ipso facto* be considered declaratory of international law, or constitutive of what international law was"[356]. Mr *Tunkin* emphasizes the important contribution made to the formation of new principles and other norms of international law by resolutions which received the consent of the States belonging to the two "systems", "capitalist" and "socialist"[357]. Mr *McWhinney* equally refers to the "consensus of the main competing and social systems"[358]. In analysing certain resolutions Sir J. *Fawcett* inquires whether the majorities were substantial

[353] *Ibid.*, 1422nd Mtg, 20 December 1965, p. 431, para. 30. Some statements made during the plenary meetings of the Assembly in 1974, including those on res. 3281 (XXIX), are also pertinent here. They pointed to the decisive role of the outvoted minority in implementing the resolutions under discussion.

[354] S. Rosenne, The Role of the International Law Commission, ASIL Proceedings, 1970, p. 24, at. p. 33.

[355] GAOR, 24th Sess., 1st Cttee, 1717th Mtg, 10 December 1969, para. 15 (Netherlands). *Cf.* also *ibid.*, para. 85 (Malta).

[356] In: ASIL Proceedings, 1979, pp. 331-332. *Cf.* Falk, *op. cit.*, PE note 99, p. 788; Dupuy, *op. cit.*, note 67, p. 146; Schreuer, *op. cit.*, PE note 89, p. 116.

[357] *Op. cit.*, note 52, pp. 206-207.

[358] E. McWhinney, International Law and World Revolution, Leyden 1967, p. 80. See his critical remarks on "the new Third World majority" in forcing the adoption of res. 3281 (XXIX), *id.*, The International Law-Making Process and the New International Economic Order, Canadian YIL, vol. 14, 1976, p. 57, especially at pp. 62-67.

or sufficient to make them effective[359]. And Mr *Lauterpacht* adds that conduct is not "lawful merely because it pleases the majority"[360].

The "non representativeness of the majority behind a particular resolution" has led to the suggestion that "the United Nations computer which tabulates the votes might be programmed to include data relating to each state's population and gross national product". The General Assembly could then authorize the Secretary-General to announce the respective percentages of world population and world gross product along with the voting figures[361].

(4) *Negative vote and abstention.* If one pierces the majority veil and lays down certain requirements regarding the composition of the majority (subpara. (3)), negative votes or abstentions are inevitably of consequence. This is one of the problems covered by Question 28.

Some Confrères point out that once validly adopted, the resolution becomes an act of the Organization and in legal terms its status for the Member States cannot depend on the voting figures. It is a recommendation for all (Mr *Bindschedler*[362]), it has "the same effect for all" (Mr *Seyersted*), it possesses "la même valeur juridique pour tous les Etats Membres, quel qu'ait été le vote de ceux-ci" (Mr *Valticos*). Mr *Monaco*'s comment also implies the identity of the position of all with regard to the resolution. On the other hand, Mr *do Nascimento e Silva* seems to differentiate: "in the case of those States that voted against or abstained, the link is minimal", and Mr *Virally* is quite clear on this point: for those voting against or abstaining the resolution "est évidemment dépourvue d'effet" (in the context which our Confrère described in his observations).

Judge *Mosler* points out that the effect of voting against a resolution (which has nevertheless been adopted) depends on the type of the act. He is primarily interested in the resolution as an

[359] J.E.S. Fawcett, Impacts of Technology on International Law, in: Cheng (ed.), *op. cit.*, note 278, p. 94, at pp. 98 and 104.

[360] *Op. cit.*, note 3, p. 395.

[361] L.B. Sohn, Due Process in the United Nations, AJIL, vol. 69, 1975, p. 620, at p. 622.

[362] The recommendatory nature of the resolution is strongly emphasized by Mr Suy.

expression of individual attitudes, not as an act of the Organization. Judge *Mosler* says: "A negative vote of a member against a resolution which pretends to formulate existing international law means probably, subject to another possible interpretation of this vote under the actual circumstances, that the State concerned does not recognize the correctness of the statement". Express opposition to a resolution that purports to state existing custom (§ 5, especially subparas. (4) and (5)) or a general principle of law (§ 14 (1)) deprives it of evidentiary value *erga omnes*. But that is a limited effect only. Though existing law is not unchangeable, no State is in a position to free itself from a rule of general or treaty law by merely voting against a law-declaring resolution. The point is made by Mr *Ustor*, and Mr *Schachter* cites the example of apartheid[363] (to some writers this example remains debatable[364]). On the other hand, if the resolution proclaims a new rule or contains a strong element of novelty by deducing a rule from law, and the rule so deduced is not the only possible or uncontroversial one, then the opposition of the directly concerned or interested State has all the chances of being effective. In his reply to Question 19 Judge *Mosler*, by way of analogy, refers to the I.C.J. dictum on the position of such a State in the *North Sea Continental Shelf* cases[365]. Commenting on Question 28 Judge *Mosler* writes:

[363] *Op. cit.*, note 195, pp. 14-15.

[364] *Cf.* T. Oppermann, in: *op. cit.*, PE note 14, p. 213 and especially D'Amato, *op. cit.*, note 60, p. 121, for whom dissent by the interested State destroys the norm.

[365] ICJ Reports 1969, pp. 43-44, paras. 75 and 76. Golsong, *op. cit.*, note 65, p. 37 and in: *op. cit.*, PE note 14, p. 239, refers to the "significant majority" (majorité significative). The usefulness of this notion has been questioned by T. Oppermann, *ibid.*, p. 213. The analytic framework proposed by I.I. White, Decision-Making for Space: Law and Politics in Air, Sea and Outer Space, West Lafayette, Ind. Purdue 1970, p. 13, for determining what he terms "international law-in-action" includes the question whether the majority accepting a particular international legal rule comprises "a majority of the major users, participants, or other nation-states which might have a relevant special interest" and the question of the observance of such a rule by the subjects of international law in practice. Schachter, *op. cit.*, note 195, pp. 14-15. Schreuer, *op. cit.*, PE note 89, p. 116.

> "A negative vote against a resolution recommending the application of new principles or of precisely defined rules may mean that the State concerned does not intend to comply with the recommendations. Since no legal obligation is involved such a vote diminishes the non-legal authoritative effect of the resolution".

"If adopted by a majority [Mr *Zemanek* notes], resolutions [discussed in this Report] evidence only the *opinio iuris sive necessitatis* of that majority".

However, negative votes or abstentions do not always have such a restrictive effect. The resolution, Mr *McDougal* says, may be "more generally accepted as having communicated law. Unanimity has never been a requirement for the creation of the expectations that we call international law". Mr *McWhinney* refers "to certain resolutions that approach a *jus cogens* character in World Community terms" where "a state may argue in vain that it is not legally bound by them, even though it may have voted against them or abstained from voting".

On the other hand, Mr *Suy* opts for freedom irrespective of the type or nature of the recommendatory resolutions: "Member States remain in principle free, independently of the way their votes were cast, to draw the legal consequences of their vote as well as of the recommendation contained in the General Assembly resolution concerned".

Turning now more specifically to abstention, in the long-standing practice of the Assembly the formula "Members present and voting" (Article 18, paras. 2 and 3) means that abstentions are not counted in the total number of votes cast. Thus abstentions do not prevent the attainment of unanimity or majority. This procedure, so far unchanged[366], could dispense the Thirteenth Commission with the discussion of the role of abstention. However, if we are to heed Mr *Virally*'s suggestion that the Commission determine the modalities of the agreement (l'accord) reached by means of, or the true will (la véritable volonté) expressed in, the resolution, abstention

[366] Rule 86 of the G.A. Rules of Procedure. For a suggestion by the U.S.A. that the General Assembly rules be modified to comprise the abstaining States among those present and voting, see A/9128, p. 25.

cannot be written off. For it remains part of the substance of the decision-making process. Consequently, if the scale of abstention is numerically large or important in the sense that though it comprises only a few States they happen to have a key position, the law-contributing effect of the resolution can easily be weakened or even eliminated. Mr *Rosenne* observes that abstention "may mean that the State concerned wishes to leave all its options open and is indifferent to the passage of the resolution, especially if it is directly affected by the resolution [...]". Mr *Suy* says that the "abstaining States [...] reserve their position vis-à-vis the resolution concerned". Mr *Rosenne* cites the dictum of the International Court of Justice in the *Namibia* case on the meaning of abstention by a permanent member of the Security Council[367]. The practice generally accepted within and by the Organization is that such an abstention does not constitute a veto; this shows that abstention here is not a manifestation of a negative attitude. On the other hand, abstention elsewhere, including the General Assembly, cannot be excluded as a form of opposition to the resolution, though it is always milder than a negative vote. Whether it is a covert way of saying no depends on what the State concerned said during the debate. The point is illustrated by the objections of Spain regarding resolution 3292 (XXIX); she finally decided to abstain instead of voting against it. The Court's interpretation of the Spanish position is worthwhile noting[368], and Mr *Rosenne* draws the attention of the Commission to the relevant dictum in the *Western Sahara* case.

It may be concluded that the negative meaning of abstention cannot be taken for granted, though there are opinions to the contrary. Nor is the other extreme valid, viz. that abstention always constitutes an acquiescence in the resolution. Probably abstention does not detract from the evidentiary value of a custom-stating resolution[369], unless it has been expressly declared to have a negative sense. Depending on circumstances abstention may mean different things and, therefore, its consequences cannot be established once and for all.

[367] ICJ Reports 1971, p. 22, para. 22.

[368] *Ibid.* 1975, p. 23, para. 29.

[369] Bleicher, *op. cit.*, note 62, p. 451, is quite positive about it.

(5) *Conciliation before voting.* The Preliminary *Exposé* has drawn the attention of the Thirteenth Commission to the provisions on "a process of conciliation" in resolution 1995 (XIX) establishing the United Nations Conference on Trade and Development. The *Exposé* has recalled the well-known fact, to which Mr *Virally* refers in his reply to Question 27, that the U.N.C.T.A.D. conciliation procedure has not been used in practice. However, the non-recourse to such or similar devices in one organ does not eliminate the possibility of its being employed elsewhere. Question 27 raises the issue with regard to the General Assembly as a matter of future development and perfection of its norm-creating techniques. In this connection one should bear in mind the recommendation of a Group of Experts appointed by the U.N. Secretary-General to formulate proposals on structural changes in the United Nations system to increase its effectiveness in dealing with problems of international economic co-operation. The Group considered a new system of consultative procedures and recommended arrangements for the setting - up of negotiating groups to seek agreement before a vote on a resolution[370].

The subject-matter of the present subparagraph, like that of the whole § 25, is voting. Consequently, this subparagraph does not discuss conciliation or similar devices in situations where no voting takes place, e.g. procedural consensus (§ 26 below). In fact, some Members of our Commission speak of conciliation in the context of reaching consensus.

The very use of the term can be debatable. Thus Mr *Rosenne* recommends the dropping of it because what we "really have here [is] a special instance of normal diplomatic processes working, processes centered on the time-honored techniques of negotiation [...]". Mr *Suy* fails "to see the role of conciliation"; "the texts are the result of negotiations through consultations". Mr *Valticos* distinguishes various meanings of the term, and one of them is negotiation. Mr *Virally* is emphatic on the value of the unofficial or unregulated framework for negotiation ("cadres officieux") where we have no rules which would constrain or organize it in accordance with a pre-established model. Mr *Zemanek* equally sees the problem as part of "the negotiating process".

[370] E/AC.62/9, pp. 5 and 30-32, paras. 18 and 97-103.

On the other hand, in case conciliation is not identified with negotiations in general but is conceived as a full-fledged procedure, some Confrères have doubts on its usefulness or even reject it outright. The opinions of Messrs *Suy* and *Virally* have already been cited. Mr *Bindschedler* maintains that, on the whole, conciliation is (in our context) harmful because it favours ambiguity and imprecision of the instrument which, as a result, simply conceals divergencies. Mr *Zemanek* sees no particular role for conciliation or similar devices: all that aims at reaching agreement is "an integral part of the negotiating process". Judge *Jessup* and Mr *do Nascimento e Silva* refer to the Third Law of the Sea Conference and its procedure. Judge *Jessup* limits his negative appraisal to the situation where the result is "a compromise text which does not purport to be declaratory of international law". Mr *do Nascimento e Silva* speaks generally of "an excess of conciliation or abuse of consensus" the effect being "a resolution devoid of substance". This report has already mentioned the destructive influence of compromise and consensus on the evidentiary function of resolutions with regard to custom (§ 5 (5) above). Mr *Valticos* observes that the main domain of conciliation, apart from particular roles it plays in some specialized agencies like the I.L.O. or the U.N.E.S.C.O., is conflicts of interests, while it is not an appropriate procedure for stating law: "La conciliation n'est pas conçue comme une procédure appropriée lorsqu'il s'agit de dire l'état du droit".

Several Confreres, however, take a positive view of conciliation in the process of drawing up norm-setting resolutions, though they may have doubts regarding the term itself or, like Judge *Jessup*, or Mr *Valticos*, see the advantages of the procedure in some situations alone. Mr *McWhinney* thinks that in "strictly *political* terms [conciliation] may affect the quality and representativeness of the consensus accompanying the adoption of a particular resolution". According to Mr *Monaco* conciliation could facilitate the drafting of the text, and Judge *Mosler* notes that it "may play a role in the attempt to formulate uncertain or disputed rules". Mr *Rosenne* observes that the value of the procedures referred to in Question 27 "is essential". And Mr *Ustor* adds that though the success of conciliation cannot be predicted, resort to it "has its merits".

Probably there is no definite answer to Question 27, and in some replies one discerns the element of relativity. Mr *McDougal* clearly excludes the possibility of a general statement.

§ 26. *Consensus Procedure*

The present paragraph considers consensus as a method of adopting resolutions by the General Assembly[371]. The method consists in the absence of voting linked to the absence of any objection that would constitute opposition to the adoption of the instrument. Objections of a different order are not a bar to consensus. This distinction is fundamental and it is part of the practice of the bodies, including the United Nations, which have recourse to the consensus procedure. The Director of the General Legal Division, U.N. Office of Legal Affairs, explained: "In United Nations organs, the term 'consensus' was used to describe a practice under which every effort is made to achieve unanimous agreement; but if that could not be done, those dissenting from the general trend were prepared simply to make their position or reservations known and placed on the record"[372]. According to the Rules of Procedure of the European Conference on Security and Co-operation consensus means "the absence of any objection" that would be submitted "as constituting an obstacle to the taking of the decision in question"[373]. Objections which do not amount to the disapproval and rejection of the instrument appear under various names: reservations, comments, explanations, etc.

The consensus method in the foregoing sense is usually referred to as the principle or rule of consensus. It is not equal to the rule of unanimity, a point made *inter alia*, by Messrs *Suy* and *Vignes*[374]. Were there no objections whatsoever, the result would

[371] For other meanings of consensus, see § 17 above.

[372] U.N. Juridical Yearbook, 1974, p. 163, at p. 164.

[373] Rule 69.4. For other examples of provisions defining consensus, see Suy, *op. cit.*, note 201, pp. 263-265.

[374] Suy, *op. cit.*, note 201; D. Vignes, Will the Third Conference on the Law of the Sea Work According to the Consensus Rule?, AJIL, vol. 69, 1975, p. 119, at pp. 120-121. States occasionally contrasted consensus with unanimity, *e.g.* Romania, A/AC.121/SR.1, p. 16, or the United States, Secretary of State, Report to the President on Reform and Restructuring of the United Nations System, Department of State Publication No. 8940, Washington 1978, pp. 27-28.

actually be identical with a unanimously passed resolution. But in that case States would certainly resort to voting instead of the consensus procedure. For the very reason for the application of this procedure is the fact that various parts of the resolution are unacceptable to some States or at least are subject to doubts, while at the same time a higher interest dictates a general agreement on the instrument. Mr *Zemanek* sees consensus as an operation in which "the majority has convinced the minority that the proposed text is necessary as well as the best to be obtained under prevailing circumstances" (Question 19). He differentiates between unanimity and consensus, and so do some other Confrères who emphasize the greater advantages of the former. Judge *Jessup* says: "It is doubtful that this procedure can usually attain the strength of a Resolution adopted by a registered unanimity". Judge *Mosler* observes: "If a resolution has been adopted unanimously and without abstentions this is very strong evidence that the resolution is supported by general opinion. Consent expressed by affirmative vote furnishes stronger evidence as consensus". Speaking of the role of unanimity in the recognition or formation of a customary rule Mr *Valticos* notes: "Le consensus serait aussi un élément positif en ce sens, bien que sans doute à un degré moindre".

The consensus procedure expresses a general agreement on the resolution[375]. The qualification "general" is essential. It indicates both the extent of the approval and the limits of the opposition to the specific parts of the resolution. The approval is general in the sense that it covers the fundamentals of the resolution and not necessarily any and every of its provisions. It is general also in the sense that only very few States (but not a great power) can exceptionally dissociate themselves from the resolution[376]. The opposition

[375] See the procedural rules on consensus of the World Population Conference, 1974 (E/5585, p. 57 and UN Juridical Yearbook, 1974, p. 163, n. 39) and the Third U.N. Conference of the Law of the Sea, rule 37 (A/CONF.62/30/Rev. 1 and UN Juridical Yearbook, 1974,, p. 164, n. 40).

[376] The essence of the G.A. consensus procedure is a support that is wider than "a quasi-consensus procedure" or "a modified form of consensus" whereby the Protocols to the 1949 Geneva Conventions were adopted, see J.A. Boyd (ed.), Contemporary Practice of the United States relating to International Law, AJIL, vol. 72, 1978, p. 375, at p. 390, quoting the report by G.H. Aldrich, Deputy Legal Adviser, U.S. Department of State.

cannot go so far as to destroy the generality of agreement. Mr *Bindschedler* points out that the value of consensus is none if the explanations given by States before or after the passing of the resolution contradict its contents. On the other hand, that value, as Mr *Seyersted* puts it, is "[g]reat if it reflects a real unanimity". In Mr *Ustor*'s opinion "[a] resolution adopted by consensus can be equated to a resolution voted unanimously provided such consensus covers genuine unanimity, i.e. if it is not destroyed by a series of oral reservations". Mr Suy also stresses the influence of declarations and reservations on the value of consensus. In the same line of thought Mr *Rosenne* thinks that "the answer depends on how real was the consensus, or how far was it a political gimmick to bring a useless political discussion to an end"; he "strongly" suspects that the latter "is very frequently the case".

If objections are fundamental, it is impossible to speak of any consensus in the material sense of approval and agreement[377], in spite of the recourse to the procedure itself. Mr *Virally* refers here to "equivocal consensus[378] and Judge *Schwebel* to "false consensus"[379]. An example is resolutions 3201 and 3202 (S-VI)[380]. It may be added that there exists a different, though related procedure which allows for more basic reservations and disagreements: it is adoption of a

[377] In their replies to Question 19 Messrs McDougal and McWhinney refer to consensus in the non-procedural sense. *Cf.* also the example cited by Mr Suy, *op. cit*, note 201, pp. 269-270.

[378] In connection with resolution 3201 (S-VI), *op. cit.*, PE note 97, pp. 62-63. J. Kaufmann, United Nations Decision Making, Alphen aan den Rijn and Rockville, Maryland 1980, p. 128, speaks of pseudo-consensus and adds the example of res. 33/109.

[379] *Op. cit.*, note 6, p. 308.

[380] See, in particular, the position of the United States, A/PV.2229, pp. 41-42, and the United Kingdom, A/PV.2231, p. 12. The U.S. delegation maintained that res. 3201 and 3202 (S-VI) had been adopted without vote, and not by consensus. The ground for this view was the serious objections to the resolutions. "Rather than consensus, there was acquiescence subject to reservations", E/SR.1921, p. 10 and the U.S. press release quoted by A. Cassese, Consensus and Some of Its Pitfalls, Rivista di Diritto Internazionale, vol. 58, 1975, p. 754, at p. 759, n. 13, who criticizes the formula of "acquiescence with reservations". Johnson, *op. cit.*, note 319, p. 221, concludes that these resolutions did not amount to consensus. Bedjaoui, *op. cit.*, note 67, pp. 174-175, writes of the contradiction between consensus and reservations. See also Flauss, *op. cit.*, note 125.

resolution without a vote. This method must be distinguished from the consensus procedure. The present Report is concerned with those instances only where the procedure applied reflects what Mr *Rosenne* called the real consensus. Our question is one of the usefulness of the procedure in the elaboration of law.

The answer seems to be that an agreement, though merely general, can constitute a stage in the elaboration of principles or more detailed rules[381]. Judge *Lachs* cites the successful resort to the procedure in the Committee on the Peaceful Uses of Outer Space, especially with regard to the drafting of resolution 1962 (XVIII)[382]. The same can be said of the Friendly Relations Committee; the text drawn up by it, i.e. resolution 2625 (XXV), as Sir Ian *Sinclair* puts it, records "some degree of general agreement on the content of the seven basic Charter principles"[383]. When the Assembly decides to repeat a rule that is already binding, consensus may prove useful because it permits one to avoid the difficulty of how to construe votes which would be cast against, or abstentions on, such a rule[384].

For all these reasons there is room for the view that in the process of elaboration of universally acceptable norms there are situations where consensus is a step forward and is to be preferred to a majority vote. That vote, it is true, could bring about the adoption of a better drafted and more precisely formulated resolution. But it would also mean that one has given up, at least for the time being, the chance for securing the support of all and for a further evolution in State attitudes[385]. Mr *Virally* has this to say on the potential of the consensus method:

> "en suivant cette procédure de consensus, les Etats s'engagent beaucoup plus qu'ils n'ont l'intention de le faire réel-

[381] Mr Suy is of the opinion that "only broad principles lend themselves to this adoption-procedure" (reply to Question 16).

[382] In particular in *op. cit*, PE note 95. Consensus method in this context is briefly described by C.Q. Christol, The Modern International Law of Outer Space, New York 1982, pp. 17-20.

[383] *Op. cit.*, PE note 124, p. 140.

[384] For if a rule is one of law States should have no other choice than to vote for it, *cf.* Thirlway, *op. cit.*, PE note 90, p. 67.

[385] *Cf.* Neuhold, *op. cit.*, note 294, pp. 32-33.

> lement, car il existe une sorte de mécanisme qui est déclenché et qui constitue un élément objectif rendant très difficile une marche arrière. L'on ne peut pas forcer les gouvernements à faire ce qu'ils ne veulent pas faire, mais l'on peut créer des situations politiques, face auxquelles les gouvernements ne peuvent pas réagir de façon absolument libre. L'adoption d'une résolution de ce genre, par consensus, est précisément un fait politique de cet ordre"[386].

In his observations on Questions 24 and 25 Mr *Zemanek* says that one "should work with consensus procedure" if "any lasting effect is to be achieved". "[T]he result is not always satisfactory" because usually the procedure functions "on the level of the lowest possible denominator". "Yet no other procedure, and in the least majority decisions, can under present circumstances lead to a generally acceptable result".

But doubts remain. Madame *Bastid* reminds us of the inherent vagueness of the consensus procedure, especially when the making of law is concerned:

> "L'accord sur une procédure qui affecte d'exprimer l'unanimité n'implique certainement pas l'effet d'un vote affirmatif d'une résolution, même sans force obligatoire et n'ayant que la portée politique d'une recommandation. Il pourrait être difficile dans un cas concret de déterminer les effets par rapport à un Etat donné d'un texte adopté dans ces conditions lorsqu'il contient l'énoncé d'une proposition qui se présente comme une règle de droit"[387].

[386] In: Les Résolutions, *op. cit.*, note 144, p. 21. L.B. Sohn thinks that "[d]ecisions arrived at by consensus have a stronger moral force, and their execution is thereby facilitated", but at the same time he warns against ambiguity and postponement of decisions resulting from "too slavish adherence to the principle of consensus", id., [Note] The United Nations, 28th Session. Introduction: United Nations Decision-Making: Confrontation or Consensus?, Harvard Int'l L.J., vol. 15, 1974, p. 438, at p. 445.

[387] S Bastid, Observations sur la pratique du consensus, in: Multitudo legum ius unum. Festschrift für Wilhelm Wengler zu seinem 65. Geburtstag, Berlin 1973, vol. 1, p. 11, at pp. 16-17.

The uncertainty of what exactly is achieved when consensus procedure has been applied finds expression in the comments by some Members of the Thirteenth Commission. Mr *Monaco* says that this procedure sometimes weakens the efficacy of the resolution. Mr *do Nascimento e Silva* warns that a resolution secured by consensus may be nothing more than "an empty victory". In Mr *Schachter*'s opinion the absence of voting makes the consensus procedure vague and calls for the clarification of the actual positions of States. The record may show that the procedure was a means of expressing less than full support for the resolution.

§ 27. *Reservations*

(1) *Meaning of the term.* When applied to the General Assembly resolutions the term "reservation" is used in a looser sense than the analogy of treaties, *mutatis mutandis*, would suggest. Hence the inverted commas one finds in the observations of some Confrères and also in Question 11. Official statements and legal writings corroborate this less strict meaning the word has in our context. Consequently, in the present paragraph the term covers any dissociation by a U.N. Member from a part or provision of the resolution which, as a whole, that Member approved by voting for it or in other confirmatory procedures, especially consensus.

First and foremost, the term signifies rejection of the provision. If there is a vote paragraph by paragraph, voting against a provision can have the effect of a reservation. The same is true of the declaration by a State that it would vote against the provision had there been a vote.

However, the term may mean something less than outright rejection. It can express a doubt or some misgivings regarding a particular part of the instrument. Judge *Jessup* notes that "[s]ome reservations are not rejections but qualifications or interpretations".

States do not invariably use the word "reservation". They also speak of their opposition or doubts. In each case one must go behind the words used to assess the extent of non-approval. In discussing the position of some U.N. Members on resolution 2145 (XXI) Judge *Gros* spoke of their "opposition, reservations or doubt"

and he also referred to "observations"[388]. Mr *Valticos'* reply to Question 11 succinctly distinguishes some shades of the meaning of the term. Mr *Virally* comes to the conclusion that certain explanations of the votes contain interpretations which approach those that can be formulated by way of reservations at the moment of the signature or ratification of a treaty[389].

(2) *Admissibility and relevance of reservations.* Judging by the constant[390] and unopposed practice in the General Assembly, there is no room for questioning the admissibility of reservations to resolutions, in whatever form and under whatever name. A reservation produces its effect the moment it has been made. There are no categories of reservations that, to be effective, would require an acceptance by other Members of the Organization. Nor does an objection to the reservation influence its effectiveness. The State which disapproves of the reservation may of course try to persuade the reserving State to change its attitude. For instance, the Lima Declaration of 1975 asked the developed countries to withdraw the reservations they had expressed on resolutions 2626 (XXV), 3201 and 3202 (S-VI)[391]. But such a demand does not modify the status of the reservation.

However, occasionally the matter has been viewed from a different angle, and reservations were said to be inapplicable or irrelevant. Thus in one of the Dissenting Opinions of Judge *Alvarez* we find the assertion that the G. A. declarations "by reason of their nature, are not susceptible to reservations"[392]. In the *Namibia* case, in one of his questions addressed to the representative of the Secretary-General, Judge *Gros* asked whether a State which made an express reservation to resolution 1514 (XV) cited as the basis (*fondement*) of resolution 2145 (XXI), and which renewed its reservation during the debate on the latter is bound by it despite this

[388] Dissenting Opinion, Namibia case, *op. cit.*, note 14, p. 334, para. 22.

[389] *Op. cit.*, PE note 39, p. 27, n. 24.

[390] This feature of the practice of making reservations to resolutions is emphasized by Judge Gros, *loc. cit.*, note 388.

[391] Declaration of the Second General Conference of the U.N. Industrial Development Organization, 26 March 1975, A/10112 and ID/CONF. 3/31.

[392] Dissenting Opinion, Reservations case, ICJ Reports 1951, p. 49, at. p. 52.

double reservation ("est lié malgré cette double réserve")[393]. The representative of the Secretary-General replied as follows:

> "The term 'reservation' has legal meaning when it relates to the acceptance by a party of new legal obligations, as in the case of a treaty. The form and contents of these reservations are carefully circumscribed. In the Secretary-General's submission, however, the term 'reservation' is not relevant to a resolution the effect of which was to establish a new factual and legal situation from which certain obligations flow automatically, as a matter both of law and logic"[394].

While the Court did not address itself to that point, Judge *Gros* recalled the constancy of the practice of reservations to resolutions and said that it is

> " necessitated through the need to provide States wishing to dissociate themselves from a course of action with a means of making their attitude manifest [...]. The consequences of the rejection of this practice and its effects would be to treat the political organs of the United Nations as organs of decision similar to those of a State or of a super-State, which, as the Court once declared in an oft-quoted phrase, is what the United Nations is not. For if a minority of States which are not in agreement with a proposed decision are to be bound, however they vote, and whatever their reservations may be, the General Assembly would be a federal parliament"[395].

Another possibility of dismissing the relevance of reservations is to look at the resolution as the act engaging the corporate personality of the Organization[396]. In § 25 (1) above the Rapporteur

[393] Pleadings, vol. 2, p. 28.

[394] *Ibid.*, p. 476, at p. 481, para. 21. Flauss, *op. cit.*, note 125, p. 29, is critical of this statement.

[395] Note 388. Johnson, *op. cit.*, note 319, pp. 217-218.

[396] This is the opinion of L. Gross, Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice, International Organization, vol. 17, 1963, p. 1, at p. 33. He refers to the "explanation of the vote".

has written of the two sides of each resolution, one representing the position of the U.N. Members, the other constituting the attitude of the Organization. As a corporate body the United Nations has no legislative powers in the field covered by the present Report (§ 1; Preliminary *Exposé*, § 2). For that reason the corporate decision cannot eliminate the impact of individual State positions.

Reservations become redundant if the resolution itself contains a clause which safeguards the individual attitudes. Such a clause is very rarely inserted. An example is resolution 3029 (XXVII) relating to the sea-bed and the ocean floor. In part B, paragraph 4, and part C, paragraph 3, the Assembly:

> "*Declares* that nothing in the present resolution or in the study shall prejudice the position of any State concerning limits, the nature of the regime and machinery or any other matter to be discussed at the forthcoming United Nations Conference on the Law of the Sea".

(3) *Effect of reservations*[397]. In reply to Question 11 Mr *Schachter* observes that reservations "serve the obvious purpose of recording a difference between the reserving state and the position expressed in the resolution". Mr *Valticos* points to the explicatory and elucidating aim of reservations. According to Judge *Jessup* one possible meaning of the reservation is that it "may enable the State whose delegate has voiced the reservation to take the position later that it considers the Resolution unacceptable".

Reservations correct the picture that emerges from voting figures. Judge *Koretsky* notes that

> "the estimates of the results of the voting on the basis of purely arithmetical counting without taking into consideration the real position of Member States, can hardly be regarded as right"

He further observes that

> "any kind of vote on the resolution (and especially ab-

[397] For a review of various opinions on the legal significance of reservations to G.A. resolutions, see Flauss, *op. cit.*, note 125, pp. 30-36.

> stention from voting) does not mean that *all* the paragraphs of the resolution were approved by all those who did not cast a dissenting vote. Such reservations are often made, even while voting 'for' a resolution"[398].

In other words, reservations limit the extent of approval and, therefore, weaken the resolution. This general effect is noted, in different words, by Mr *Bindschedler*, Judges *Jessup* and *Mosler*, Messrs *Seyersted*, *Suy* and *Ustor*. The well-known examples, among many others, are resolutions 2626 (XXV), 3201 and 3202 (S-VI) where the scope and nature of the reservations were such as to cast doubt on the general consensus behind, or approval of, these instruments. In the *Texaco* case the Tribunal referred to the statements made by 38 delegates on the adoption without a vote of resolution 3201 (S-VI) and noted the opposition of "the most important Western countries [...] to abandoning the compromise solution contained in Resolution 1803 (XVII)"[399].

More specific effects depend on the contents of the reservations. Judge *Jessup* and Mr *Schachter* say that various consequences are possible, and it may be assumed that other Confrères concur. Mr *Rosenne* finds a "generalized answer" to Question 11 impossible.

Messrs *McDougal*, *Schachter*, *Seyersted*, *Zemanek* and, implicitly, *Valticos* admit that reservations affect the *opinio juris* that might be inferred from the resolution. What is at stake here is the emerging *opinio juris*, *i.e.* the instrument aims at making new law. If, on the other hand, the resolution states the existing rules of law, no reservation, Mr *Suy* emphasizes, can modify them: "'Reservations' are not an institution applicable to customary law. They may, however, be a proof of *policy* positions aiming at modifying the law".

It is debatable whether any effect can be constructed on the analogy of treaty reservations. Mr *McWhinney* tells the Commission that "presumably" in our type of resolutions reservations to them "would have the same meaning and effect as reservations to a

[398] Dissenting Opinion, Expenses case, ICJ Reports 1962, p. 253, at pp. 271 and 279. Flauss, *op. cit.*, note 125, p. 36: " les Etats redoutent [...] que l'on prête à leur approbation d'une résolution une portée extensive".

[399] *Op. cit.*, note 9, p. 489, para. 85. *Cf.* Mr Dupuy's views on reservations in *op. cit.*, note 67, pp. 142 and 144.

treaty". Mr *Valticos* sees only a restricted similarity, while Mr *Monaco* rejects it. Mr *Schachter* remarks that reservations "should not be taken as an implicit acknowledgment that in their absence the reserving state would be obliged to comply with the resolution". *Quaere*, does Mr *McWhinney* start from a different premise?[400] A contrast between the two categories is also discernible in Mr *do Nascimento e Silva*'s comment that the effect of reservations to resolutions is none and that they "bear no weight".

Reservations to one resolution may have an influence on the fate of another, in particular on the procedure of its adoption. Mr *McWhinney* gives the following example[401]:

> "While, on the one hand, the Third World majority, annoyed with the United States and the Western European countries' express reservations to the 1974 Declaration and Programme of Action, were not disposed to compromise in regard to the December, 1974, Charter, the advanced industrial countries, seeing what they considered to be a Third World intransigence as to their reservations to the Programme of Action, decided to vote No or to abstain on the Charter vote".

(4) *Procedure*. The making of reservations to resolutions does not raise any particular procedural problems. The reserving State can formulate its position individually or as part of a common view

[400] Tomuschat, *op. cit.*, PE note 65, p. 483, thinks that reservations show that there is an uncertainty regarding the legal status of the resolution. He cites the example of res. 1904 (XVIII). Z. Haquani, Le droit au développement : fondement et sources, in : Colloque 1979, *op. cit.*, note 109, p. 22, at p. 35, maintains that they show that States do not regard resolutions as deprived "de toute portée contraignante". During the discussion on Haquani's and other papers M. Bettati denied that reservations threw any light on the legal character of resolutions: the making of reservations "signifie simplement que l'on n'est pas d'accord sur leur contenu politique ", *ibid.*, p. 132. See also Flauss, *op. cit.*, note 125, p. 18.

[401] *Op. cit.*, note 223, p. 135.

by a group of States[402]. The reservation can be communicated at any time of the debate, also after the resolution has been passed. There is equally an opportunity to present one's position when the Secretary-General transmits the resolution to individual Member States. There is no requirement of form. Usually reservations figure in the official records of the Organization[403].

§ 28. *Estoppel*

Does the attitude which a U.N. Member takes towards the adoption of a resolution create bars or preclusions that could be subsumed under the notion of estoppel?

In his Separate Opinion in the *Western Sahara* case Judge *Dillard* interpreted one of the Spanish arguments in the sense that it rested, *inter alia,* on the premise that "a kind of estoppel was operative against the claims" of Morocco and Mauritania by virtue of their approval of the G. A. resolutions relating to the process of decolonization[404].

Although the Questionnaire does not touch upon the matter, estoppel is mentioned in the observations of two Members of the Commission. In the reply to Question 6 Mr *do Nascimento e Silva* remarks that a statement in the resolution that it reflects customary law "can be considered as representing the opinion of the State that made it and the principle of estoppel may apply". Mr *Schachter* discusses the consequences of the principle of good faith and says that "the states which have voted for the resolution and its implicit (or explicit) premise should not under the principle of good faith be entitled to challenge the legality of action pursuant to the resolution. One may link this to estoppel [..]" (Question 20)[405].

[402] *E.g.*, The German Democratic Republic on res. 3281 (XXIX): "The socialist countries wished to make a number of reservations [...]", GAOR, 29th Sess., 2nd Cttee, 1649th Mtg, 6 December 1974, p. 443, para. 21. Flauss, *op. cit.*, note 125, p. 11, n. 24, cites the attitude of the EEC countries on resolutions relating to the new economic order.

[403] The procedure is discussed in some detail by Flauss, *op. cit.*, note 125, pp. 10-15.

[404] ICJ Reports 1975, p. 116, at. p. 122.

[405] See also Mr Schachter's view in *op. cit.*, note 195, p. 16. G. Schwarzenberger, A Manual of International Law, 4th ed., London and New York 1960,

Judge *Elias* is not far from espousing the view which regards estoppel as a source of obligation: "those states that vote for a particular resolution by the requisite majority are bound on the grounds of consent and of estoppel"[406]. The learned judge is not isolated in this opinion[407].

p. 200, argues that by voting for resolutions 95 (I) "the members of the United Nations have estopped themselves from denying that crimes against peace and humanity are based on rules of international customary law. It is even possible to include in this estoppel States which, subsequently, joined the United Nations or non-member States which [...] accepted the principles of the United Nations Charter by way of treaty commitment". On p. 177 he speaks of "the estoppel which has possibly been created" by that resolution. The formulation in his International Law as Applied by International Courts and Tribunals, vol. 2. London 1968, p. 48, is even more cautious. The author additionally invokes the good faith clause in Article 2, para. 2, of the U.N. Charter and observes that the resolution "can also be construed as an act of recognition of an otherwise not opposable situation". See also *id.*, Neo-Barbarism and International Law, Year Book of World Affairs, vol. 22, 1968, p. 191, at p. 196 and *id.*, Economic World Order? A Basic Problem of International Economic Law, Manchester 1970, pp. 40-41; at pp. 41-47 he analyses res. 1803 (XVII).

[406] T.O. Elias, Modern Sources of International Law, in: W. Friedmann, L. Henkin and O. Lissitzyn (eds), Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup, New York 1972, p. 34, at p. 51. G. Schwarzenberger, International Law, 3rd ed., London 1957, vol. 1, International Law as Applied by International Courts and Tribunals: I, pp. 51-52, refers to the dictum on res. 96 (I) in the Reservations case, ICJ Reports 1951, p. 23, and says that one of its interpretations could lead to an estoppel: as "this recommendation was unanimously adopted by the General Assembly, its contents may be considered to have become binding on all the members of the United Nations by way of estoppel". *Id.*, Neo-Barbarism etc., *op. cit.*, note 405, p. 196, mentions the principle of good faith.

[407] Cheng, *op. cit.*, PE note 31, p. 37, mentions "the principle of estoppel" among the foundations on which "the binding force of all rules of international law ultimately rests". D'Amato, *op. cit.*, note 60, p. 115, writes: "considerations of estoppel will operate to extend to abstaining states a rule contained in a declaration of consensus, as well as reinforcing the rule for the states that have actively participated in the expression of consensus". It may parenthetically be observed that to Judge Elias abstention has this effect by virtue of "acquiescence and tacit consent", *loc. cit.*, note 406. J. Abr. Frowein, in: Berichte, *op. cit.*, PE note 14, p. 210, sees the possibility of estoppel when States apply the resolution in their relations with the Organization. *Id.*, *op. cit.*, note 109, p. 155: "Über den bisher erörten Rahmen hinausgehend kann das Estoppel-Prinzip zu einer Bindung der Staaten an Resolutionen führen, denen sie zuge-

However, there are writers who do not commit themselves[408], while others deny the existence of estoppel in our context[409].

The Rapporteur shares the latter view. In a number of statements, whether official or doctrinal, estoppel does not mean a rule of evidence; it is a shorthand expression to indicate some limitations which result from the State's approval of the resolution. This Report has already shown that such limitations do exist, but there is no need or justification to base them on any estoppel. The Rapporteur agrees with the opinion that in international law estoppel is nothing more than a rule of evidence and not a rule creative of rights and duties, let alone legal norms. No estoppel is necessary to maintain (as the Rapporteur does) that there are different modalities whereby the Assembly resolutions contribute to the making of law.

On the other hand, in the area of evidence, one cannot deny that in connection with the voting record of a particular country an estoppel might arise in some future judicial or arbitral proceedings. But that is strictly a matter of such proceedings. The support given to the resolution could eventually constitute one element of a plea of estoppel invoked before a judicial or arbitral tribunal[410].

stimmt haben und auf deren Grundlage sie sich gegenüber der Organisation oder anderen Staaten gestellt haben". See also Higgins, *op. cit.*, note 41, p. 122; J.P. Müller, Vertrauensschutz im Völkerrecht, Köln - Berlin 1971, p. 252.

[408] Simma, *op. cit.*, PE note 29, p. 96 and *op. cit.*, note 71, pp. 56-57. Bruha, *op. cit.*, note 201, pp. 284-288 and 314-315. Flauss, *op. cit.*, note 125, p. 35.

[409] Tomuschat, *op. cit.*, PE note 65, p. 479; MacGibbon, *op. cit.*, note 278, p. 14. M. Mendelson, The Legal Character of General Assembly Resolutions: Some Considerations of Principle, in: K. Hossain (ed.), Legal Aspects of the New International Economic Order, London, New York 1980, p. 95, at pp. 96-97, expresses various doubts.

[410] Apart from writings cited in the Preliminary *Exposé* and the present Report many other publications had been consulted by the Rapporteur before he submitted the original version of the Provisional Report. In particular they included:

I. *Books and Hague Lectures. G. Arangio-Ruiz,* The United Nations Declarations on Friendly Relations and the System of the Sources of International Law, Alphen aan den Rijn 1979; *C.S. Bak,* An Evaluation of the 'Decisions' of the General Assembly of the United Nations as Contributory Factors to the Growth of International Law, New York 1967; *R. Bierzanek,* Zasady prawne

pokojowego współistnienia i ich kodyfikacja, Warszawa 1968; *H. Bokor-Szegö*, The Role of the United Nations in International Legislation, Budapest 1978; *B. Conforti*, Le rôle de l'accord dans le système des Nations Unies, RC vol. 142, 1974-II, p. 203; *H.H. Han*, International Legislation by the United Nations: Legal Provisions, Practice and Prospects, New York 1971; *A. Malintoppi*, Le raccomandazioni internazionali, Milano 1958; *M.G. Marcoff*, Sources du droit international de l'espace; RC, vol. 168, 1980-III, p. 9; *P. Radoynov*, Pravotvorcheskite funktsii na mezhdunarodnite organizatsii, Sofia 1975; *J. Stone*, Israel and Palestine: Assault on the Law of Nations, Baltimore and London 1981 (Chapter 2); *M.V. Yanovski*, Generalnaya Assambleya OON. Mezhdunarodnopravoviye voprosy, Kishinev 1971.

II. *Contributions to Journals and Collective Works.* L. Antonowicz, O pravovom kharaktere Deklaratsii OON otnositelno predostavleniya nezavisimosti kolonialnym stranam i narodam, Sovetskoe Gosudarstvo i Pravo, 1966, No. 4, p. 50; R.R. Baxter, International Law in 'Her Infinite Variety', ICLQ, vol. 29, 1980, p. 549; K. Becher, Die Charta der ökonomischen Rechte und Pflichten der Staaten und ihre Kritiker, Deutsche Aussenpolitik, vol. 21, 1976, No. 1, p. 66; R. Bierzanek, Metody rozwoju i formulowania prawa miedzynarodowego a ONZ, Panstwo i Prawo, vol. 3, 1948, No. 2, p. 6; H. Bokor-Szegö, The Contribution of International Organizations to the Formation of the Norms of International Law, in: Questions of International Law, 1970, p. 5; B. Bollecker-Stern, The Legal Character of Emerging Norms Relating to the New International Economic Order: Some Comments, in: Hossain (ed.), *op. cit.*, note 409, p. 68; M. Bothe, Legal and Non-Legal Norms - A Meaningful Distinction in International Relations? Netherlands YIL, vol. 11, 1980, p. 65; H.W. Briggs, The United Nations and International Legislation, AJIL, vol. 41, 1947, p. 433; C.N. Brower and J.B. Tepe, Jr., The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law?, International Lawyer, vol. 9, 1975, p. 295; M. Bulajic, Legal Aspects of a New International Economic Order, in: Hossain (ed.), *op. cit.*, note 409, p. 45; A.C. Castles, Legal Status of U.N. Resolutions, Adelaide Law Review, vol. 3, 1967, No. 1, p. 68; S.R. Chowdhury, Legal Status of the Charter of Economic Rights and Duties of States, in: Hossain, *op. cit.*, note 409, p. 79; G. Dahm, Die völkerrechtliche Verbindlichkeit von Empfehlungen internationaler Organisationen, Die öffentliche Verwaltung, vol. 12, 1959, p. 361; S. Engel, Procedures for the De Facto Revision of the Charter, ASIL Proceedings, 1965, p. 108; F. Ermacora, Das Problem der Rechtsetzung durch internationale Organisationen (insbesondere im Rahmen der UN), Berichte der Deutschen Gesellschat für Völkerrecht, 11. Tagung, 1969, Karlsruhe 1971, p. 51; G. Feuer, Réflexions sur la Charte des droits et devoirs économiques des Etats, RGDIP, vol. 79, 1975, p. 273; M. von Grüningen, Die Resolutionen der Generalversammlung der Vereinten Nationen und ihr Einfluss auf die Fortbildung des Völkerrechts, Festschrift für Rudolf Bindschedler, Bern 1980, p. 187; K. Heidenstecker, Zur Rechtsverbindlichkeit von Willensakten der Generalversammlung. Die Bestimmung des Rechtscharakters unter Verwendung von Artikel 38 des IGH-Statuts, Vereinte Nationen, 1979, p. 205; I. Herczeg, Problems of International Law in Formulating the Legal

Principles Governing Activities in Outer Space, in: Questions of International Law, 1964, p. 42; *id.*, Space Treaties and Law-Making Process in International Law; in: *ibid.*, 1970, p. 51; T. Ionasco, Le rôle des organisations internationales et, plus spécialement, de l'O.N.U., en ce qui concerne le développement du droit international, Revue roumaine des sciences sociales, vol. 9, 1965, p. 207; C.C. Joyner, U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation, California Western International Law Journal, vol. 3, 1981, p. 445; M. Lachs, The Threshold in Law-Making, in: Festschrift für Hermann Mosler, *op. cit.*, note 273, p. 493; R. Lagoni, Resolution, Erklärung, Beschluss, in: R. Wolfrum, N.J. Prill and J.A. Brückner (eds), Handbuch Vereinte Nationen, München 1977, p. 358; S.A. Malinin, O kriteriakh pravomernosti rezolutsii Generalnoy Assamblei OON, Pravovedenie, vol. 9, 1965, No. 2, p. 113; V.S. Mani, The 1970 Declaration on Friendly Relations: A Case Study in Law Creation by the UN General Assembly, International Studies, vol. 18, 1979, p. 287; K. Marek, Reflections on Contemporary Law-Making in International Law, in: International Relations in a Changing World, Genève, Leyden 1977, p. 367; J. Menkes, Prawny charakter rezolucji Zgromadzenia Ogólnego ONZ, Sprawy Miedzynarodowe, vol. 31, 1978, No. 9, p. 139; V. Pechota, Valne Shromázdeni OSN a projednáváni právnich zasad miroveho souziti, Casopis pro Mezinárodni Pravo, vol. 7, 1963, p. 97; D. Pindic, O pravnoj obaveznosti resolucija Generalna Skupstine UN, Mezdunarodni Problemi, vol. 10, 1958, No. 3; P. Radoynov, Pravnata sila na aktovete na Obstoto Sabranie na OON, Izvestija na Instituta za Pravi Nauki, vol. 14, 1964, No. 2; Rahmatullah Khan, The Legal Status of the Resolutions of the UN General Assembly, Indian Journal of International Law, vol. 19, 1979, p. 552; F. Roessler, Law, De Facto Agreements and Declarations of Principle in International Economic Relations, German YIL, vol. 21, 1978, p. 27; M. Sahovic, Codification of the Legal Principles of Co-existence and the Development of Contemporary International Law, in: *id.* (ed.), Principles of International Law concerning Friendly Relations and Co-operation, Belgrade and New York 1972, p. 9; O. Schachter, The Nature and Process of Legal Development in International Society, in: R. St. J. MacDonald and D.M. Johnston (eds), The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory, The Hague, Boston and Lancaster 1983, p. 745; L.B. Sohn, The Development of the Charter of the United Nations: The Present State, in: M. Bos (ed.), The Present State of International Law and Other Essays, Deventer 1973, p. 39; H. Steinberg, Bemühungen zur Kodifizierung und Weiterbildung des Völkerrechts im Rahmen der Organisation der Vereinten Nationen, ZaöRV, vol. 28, 1968, p. 617; E. Suy, 'A Peaceful Influence', Letter to The New York Times, 1 April 1977; A.J.P. Tammes, Soft Law, in: Essays on International and Comparative Law in Honour of Judge Erades, The Hague 1983; C. Tomuschat, Neuformulierung der Grundregeln des Völkerrechts durch die Vereinten Nationen: Bewegung, Stillstand oder Rückschritt? Zur Interventions-Deklaration von 1981 und zur Manila-Deklaration über Streitbeilegung, Europa-Archiv, vol. 38, 1983, p. 729; E. Ustor, The Progressive Development of International Law and the U.N. in: Questions of International Law, 1966; M. Virally, La valeur juridique des recommandations des organisations

VIII. *Conclusions*

§ 29. *How the Commission Should Proceed: Points Covered by Questions 21 and 22*

Question 21 implies the adoption of an Institute Resolution. The matter has been briefly discussed at one of the meetings the Commission held during the Dijon session in 1981, but we did not take any decision.

Most replies are either silent or noncommittal on the advisability of an Institute Resolution. Messrs *Bindschedler, Rosenne* and *Suy* adjourn their opinion. Messrs *Seyersted, Ustor* and *Virally* make some observations in connection with Question 21 without touching on the subject of the Resolution. There are Confrères who concentrated on the merits of the issue raised by this Question and their comments have already been reported in the introductory part of the present Report. Whether they favour the drafting of an Institute Resolution is not clear (cf. the replies of Judge *Jessup*, Mr *McDougal*, Judge *Mosler* and Mr *Valticos*).

So far, only two Members have opted for a Resolution: Messrs *do Nascimento e Silva* and *Zemanek*, the latter with some qualifications. Mr *McWhinney* does not "see any particular usefulness, at this stage, in our attempting to draft a detailed, expository Resolution containing a catalogue of prescriptions or recommendations as to future conduct by the U.N. General Assembly". Messrs *Monaco* and, implicitly, *Virally* emphasize the need of a study by the Commission, without specifying the form which our conclusions should take.

internationales, AFDI, vol. 2, 1956, p. 66; E. Wehser, Die Bindungswirkung der Empfehlungen der Vollversammlung der Vereinten Nationen, in: Thesaurus Acroasium of the Institute of Public International Law and International Relations of Thessaloniki, vol. 2: The Law of the United Nations (Session: September 1973), Thessaloniki 1976, p. 371; M.V. Yanovski, Sovetskaya nauka o yuridicheskoy sile rezolutsii Generalnoy Assambley OON, Sovetski Ezhegodnik Mezdhdunarodnogo Prava, 1964-1965, p. 111; *id.* Yuridicheskaya sila rezolutsii Generalnoy Assambley i Ustav OON, Sovetskoe Gosudarstvo i Pravo, 1965, No. 9.

Most of these writings were referred to in the footnotes of the original version of the Provisional Report. They fell victim to the abridgment of the text (see the explanation at the beginning of the present Report).

Question 22 develops Question 21 in accordance with the discussion in the Commission during the Athens session in 1979. The Commission is divided on whether the Institute should make any observations or suggestion regarding the contents, procedure and drafting of the General Assembly resolutions. Messrs *Rosenne, Seyersted* and *Ustor* give a positive answer, Mr *McDougal* rather inclines to it, and so does, it seems, Mr *Valticos*. On the other hand, Judge *Jessup* and Mr *do Nascimento e Silva* reply in the negative, and it may be assumed that Mr *Zemanek* shares this position. Mr *McWhinney* has doubts and Mr *Monaco* thinks the problem to be premature. Mr *Bindschedler* adjourns his opinion, while Judge *Mosler*, Messrs *Schachter, Suy* and *Virally* do not comment on this particular matter.

There was one possible direction of inquiry the Commission might choose, viz. that suggested by Madame *Bastid* during the discussion on Sir Gerald *Fitzmaurice*'s centenary report. Madame *Bastid* wondered whether the Institute should not undertake an examination of the resolutions that purport to establish new rules of law; such an examination could effectuate the task of a consortium of jurists envisaged by Sir Gerald *Fitzmaurice*[411]. While Mr *Bindschedler* postpones his reply and Messrs *do Nascimento e Silva, Schachter, Seyersted* and *Virally* abstain from expressing any opinion, other Members of the Commission are divided. Messrs *Rosenne, Ustor* and *Valticos* favour an inquiry along the lines indicated by Madame *Bastid*. Nor are Mr *McDougal*, Judge *Mosler* and Mr *Zemanek* against it; yet they express some doubts or make some qualifications. Thus Mr *McDougal* thinks that the Institute's

> "evaluation of a resolution might affect community expectations about authority and control. Modesty might, however, suggest that we not overestimate our potential importance in the making of international law under contemporary conditions".

To Judge *Mosler* the suggestion "is attractive but certainly not easily to be realized". And Mr *Zemanek* recommends that "the

[411] IDI, Livre du centenaire 1873-1973, pp. 384-385.

Institute should remain within the realm of realistic but scholarly theory". On the other hand, Judge *Jessup*, Messrs *McWhinney*, *Monaco* and *Suy*, though there are nuances in their comments, would not engage the Commission into that kind of study.

The view of Mr *Ustor* should separately be recorded because it amounts to a new proposol, albeit our learned Confrère supports the initiative of Madame *Bastid*. He asks whether it would "not be feasible to systematize and codify this vast material in one logical structure under the heading: 'The law of the General Assembly'". He adds that it could also "be done piecemeal beginning e.g. with 'The law of the General Assembly on the prohibition of the use of force'".

§ 30. *Summing up the Main Points*

The conclusions that are based on the replies by the Members of the Thirteenth Commission and on the two texts prepared by the Rapporteur (the Preliminary *Exposé* and the Provisional Report) are arranged in the following way:

I. Conclusions relevant to the elaboration of any category of normative resolutions.

II. Resolutions constituting evidence of law.

III. Resolutions contributing to the emergence of customary rules.

IV. Resolutions contributing to the emergence of general principles of law.

V. Resolutions and the elaboration of treaty rules.

VI. Resolutions and the enactment of law (rules other than the categories under III-V).

Subject to any revision by the Thirteenth Commission the conclusions could constitute the fabric of an Institute Resolution or they may retain their present form, i.e. constitute the final paragraph of the Commission's definitive text.

The conclusions cover what the Rapporteur thinks to be common ground among the Members of the Commission. The areas of disagreement have been indicated in the Report and are not again

signalled below. This accounts for some gaps by comparison with the treatment of the matter in the Commission's materials.

It is perhaps useful to recall that the conclusions concern resolutions of the U.N. General Assembly which lay down general and abstract rules of conduct (as defined in § 1 of the Preliminary *Exposé*), with the exception of the resolutions that enact the internal law of the Organization. The Commission concentrated on rules which are or could become part of general or universal international law. As in the *Exposé* and in the Report the word "rule" is used in the conclusions as a generic term, synonymous with "norm". "Principles" are one class of rules.

I. Conclusions relevant to the elaboration of any category of normative resolutions.

Legal policies

1. The resolutions reveal and express the contemporary tendencies of development of general or universal international law.

2. The resolutions lay down policies that determine the substance of law to be made. The resolutions can do it by formulating ready principles or even detailed rules, but they may confine themselves to expressing the main ideas and concepts of prospective law.

3. To find that a resolution or series of resolutions have played or do play the roles indicated in points 1 and 2 above, a certain time perspective and a constancy of purpose and position are necessary. Repetition or re-citation of resolutions are necessary in this context.

4. A resolution which lays down a rule that is contrary to international law should be understood as expressing a postulate. Such a resolution can lead to the loss by the respective provision or provisions of law of their general or universal nature and can constitute the beginning of a change in existing law.

Recommendations

5. The General Assembly of the United Nations has no competence to enact general international law by virtue of its resolutions. As acts of the Organization they are recommendations. This is no obstacle for States to declare, develop and make law by way of

resolutions. However, in contradistinction to decisions of a legislative nature, the method is one of negotiations conducted by States within the Organization and employing those of its procedures which are instrumental in laying down general and abstract rules of conduct.

6. Therefore one has to distinguish between the status of the corporate act of the Organization (which normally is a recommendation) and the status of the rule which is to be found in this act.

Consensus

7. An agreement expressed by consensus procedure, though merely general, can constitute a stage in the elaboration of new law.

Means for the determination of law

8. Resolutions can serve as a means for determining the existence of a rule or rules of law. This possibility does not exclude a greater role for the resolutions.

Basic drafting requirement

9. To avoid confusion the resolution has to use language that removes any uncertainty as to whether it is declarative of existing law or aims at making new law.

Legal rules

10. References to international law or to rights and/or duties under that law, or the inclusion of preserving clauses taking account of law, indicate that the resolution states rules of law.

11. The use of the word "shall" points to a statement of legal obligation.

Rules not yet legal

12. An express omission of an originally intended or suggested reference to international law, or the deletion of such a reference from the draft, creates a presumption against the resolution laying down rules of law.

13. The rules are not mandatory when the resolution employs the words "should", "recommendation" or "recommend"; describes the rule as a standard still to be achieved; calls upon States to

recognize the rule; commends the rule to States; or makes the observance of the rule dependent on the taking of voluntary measures.

14. Similar is the effect of a provision that law-declaring clauses of the resolution should be interpreted in the light or context of rules that are not yet law.

Declarations

15. A resolution called "declaration" is a suitable form for enunciating principles, whether of positive law or law to be made. In the practice of the Organization declarations do not always limit themselves to principles. They also contain detailed rules, while principles are equally to be found in resolutions which do not bear the name of declarations.

16. The legal status of declarations is not different from other normative resolutions. Yet this particular form can emphasize the importance and significance of the rules so enunciated.

Principles

17. Resolutions use the term "principle" in different meanings:

(a) a legal or nonlegal rule;

(b) a rule of higher or highest order, either legal or not;

(c) a rule that generates specific rules;

(d) an important rule in view of the objective of the resolution;

(e) a purpose or objective to be achieved, a postulate of legal or other policies, a guiding idea, in particular in revising old and introducing new law;

(f) directives of interpretation.

In some instances several of these meanings are combined. The use of the term in the sense indicated under (e) should be avoided.

18. Unless States decide otherwise, a principle of law stated in the resolution is directly enforceable in inter-State relations. Future elaboration of detailed rules is implicit in almost any statement or proclamation of principles, but that is not a bar to their producing regulatory effect and to their being implemented in practice.

Organ

19. In the practice of the General Assembly most resolutions are being prepared by organs in which States are represented, and not by bodies composed of independent experts. This gives States direct and continuous control over the drafting of the text. There is no compelling reason for suggesting a change of this practice, nor would such suggestion have any chance of being followed.

20. In the elaborating organ equitable geopolitical representation, presence of the main legal systems, and legal expertise should be assured. In the practice of the United Nations there is still ample room for improving the fulfilment of the latter criterion.

21. There should be a possibility for the Sixth Committee of the General Assembly to examine draft resolutions setting forth rules of positive or future law or standards of conduct relevant to the application or interpretation of law when these are being prepared by or under the supervision of other main committees of the Assembly.

Circulation

22. Circulation of the draft resolution for comments by Governments and non-governmental organizations or bodies is desirable. In particular, experienced bodies composed of expert jurists should have a chance of expressing their opinion.

23. The circulation eliminates haste and useless deadlines which are harmful to, or occasionally destructive of, any careful work on law-declaring or law-making resolutions.

All States as addressees

24. There is no impediment to addressing the resolution and its rules to all States, but the position of those which are not Members of the United Nations is not thereby prejudged.

Negotiation as method

25. In the making of resolutions which state general international law or contribute to its making the majority vote decision, normally applicable, has in fact to be supplemented or even replaced by a negotiated arrangement.

26. The General Assembly rules of procedure are sufficiently

elastic to permit an integration of a negotiating process into the U.N. parliamentary diplomacy and its workings.

27. So far one should consider as an open question any use, in the course of the negotiations on a normative resolution of (a) the UNCTAD model of conciliation, or (b) the application of a consultation procedure that was suggested by a U.N. Group of Experts for the making of resolutions on economic co-operation.

Repetition

28. Unopposed repetition or re-citation of a rule which has already been laid down in an earlier resolution, if it is not merely meant to give evidence of law, is proof of the existence of a standard of conduct that could become law or be relevant to the interpretation of law.

29. Such repetition can be a means of pressure on the opposing States to induce them to change their attitude. The voting record will show whether the pressure is effective and, consequently, the support for the repeated rule is increasing.

Unanimity

30. In assessing the value of unanimity it is necessary to take into account (a) the number and nature of abstentions and (b) those reservations which detract from the rules so approved.

State's vote for the resolution or other forms of approval

31. The State's approval of the resolution cannot be taken at its face value. In particular, the motives behind the approval must be explored to determine the existence of a law-stating or law-creating intention, in contradistinction to reasons of mere expediency or opportunism. The resolution's normative role can be assessed only if these elements are sorted out and established.

Majority

32. To be relevant majorities must be representative. A majority is representative when it displays no geopolitical gaps and includes the main legal systems.

Abstention

33. The resolution does not limit the freedom of the abstaining State.

34. If the scale of abstention is numerically large or qualitatively significant the law-stating or rule-making effect on the resolution is weakened or even eliminated.

Reservations

35. The resolution is susceptible to reservations. They are not subject to acceptance or objection on the part of any U.N. Member. Apart from resolutions stating existing law (points 55 and 56 below) the effect of reservations is to limit the extent of approval. Depending on its contents a reservation can mean less than rejection of the rule. It can be merely an expression of doubt.

36. A clause inserted in the resolution and safeguarding the individual positions of U.N. Members makes reservations redundant.

II. Resolutions constituting evidence of law.

Means for stating law

37. The General Assembly is an organ where politics of States are pursued, and its procedures serve that type of activity. Normally, therefore, the manner in which the Assembly functions does not allow for the proper assessment of the state of the law. Nonetheless inter-governmental negotiations, including consultations, can lead to the adoption of resolutions which constitute evidence of customary law or of its ingredients: custom-creating practice and/or the *opinio juris.*

38. To be declaratory of law the resolution must fulfil certain requirements. First of all, its object must be to state law, whether in an abstract way or by setting forth the grounds for a specific decision. Declaratory statements that serve another purpose are not evidence of law.

Whether recommendatory

39. A statement of law by the General Assembly is not recommendatory in nature. It is declaratory.

Subsidiary role

40. A resolution is a means whereby the law can be identified in a field where it seem uncertain or controversial whenever other instruments, in particular judicial decisions and treaties, have not fulfilled that role. A carefully prepared resolution permits the avoidance of many ambiguities which usually arise if the rule is to be stated on the basis of an analysis that concentrates exclusively on the practice of individual States.

Affirmation

41. In case the Assembly affirms rules applied in State practice or judicial decisions, such affirmation, if unanimous or nearly unanimous, becomes evidence of universal acceptance of the rules as law.

42. If the Assembly's affirmation concerns rules proclaimed as legal by a non-governmental organization, the resolution is a step towards their acceptance as law.

Reference to treaty

43. If the resolution carries a statement on the customary nature of a treaty provision, such a statement does not create any particular presumption in favour of the customary nature of the norm. The statement must be assessed in the same manner as any other resolution declaratory of law.

Evidence of practice

44. Approval of the resolution, whether by casting a favourable vote or by participating in the consensus, is not by itself conclusive of the fact that the State already participates in a practice that conforms to the resolution.

Repetition

45. Repetition or re-citation of the rule which is accompanied by contrary practice or which is made expressly in opposition to such practice constitutes no evidence of law. By exposing noncompliance, repetition increases doubts regarding the legal nature of the rule.

Subsequent consideration

46. Reservation of the subject for subsequent consideration deprives the statement of its evidentiary nature.

Compromise

47. Political compromise, and the application of the consensus procedure as its consequence, is not conducive to exact statements on elements of custom or customary law in general.

Rebuttable evidence

48. Evidence supplied by the resolution is rebuttable. In particular, contrary practice cancels the evidentiary effect of the resolution which states the existence of *opinio juris.*

49. The grounds which the resolution adduces to support its statement on the existence of a legal rule are not immune from verification.

50. Haste in drafting the text and lack of legal expertise in the drafting organ militate against the evidentiary value of the resolution.

Unanimity

51. Unanimity behind the resolution creates a presumption that the resolution contains an exact statement of law.

Consensus

52. Consensus creates weaker evidence than unanimity.

Majority

53. A majority vote of a law-declaring resolution produces its effects only for those voting in favour of the resolution. However, it cannot be excluded that a representative majority (point 32 above) will give the resolution a status similar to that adopted by unanimity (point 51 above).

Abstention

54. Abstention by a few States need not deprive a law-declaring resolution of its evidentiary effect *erga omnes* unless these States expressly negate the correctness of the statement of law.

Opposition and reservations

55. Opposition, in whatever form, to a rule of law stated in the resolution can constitute the beginning of a corresponding change

in positive law, but it does not free the opposing State from the bond of the rule. In this sense and to that extent reservations made to resolutions are inapplicable to statements on customary law therein contained.

56. Subject to point 55 above, by making a reservation on a statement of customary law the reserving State either rejects the exactness of the statement or signifies its policy position aiming at a future modification of the customary rule so stated.

General principles of law

57. Subject to points 37-56 above, *mutatis mutandis*, the resolutions can constitute evidence of general principles of law, especially in the field of human rights.

III. Resolutions contributing to the emergence of customary rules

Acceleration

58. Resolutions can accelerate the formation of custom.

Practice

59. Rules proclaimed in the resolutions can initiate, influence or determine State conduct and thereby generate State practice that constitutes an ingredient of new customary law.

60. Where practice is already in progress resolutions can contribute to its consolidation.

61. Resolutions themselves cannot be identified with State practice. They may and, in fact, do lead to it, but they themselves do not constitute practice.

Repetition

62. Repetition of the rule in another resolution or in a series of resolutions is something else than practice.

63. Repetition can be an indication that the process of generating custom-creating practice is developing.

64. If not followed by practice, repetition loses its significance in the law-creating process. It may then become proof of non-compliance and, therefore, absence of practice conforming to the resolution.

Opinio juris

65. Acceptance by States of the legal nature of a rule engendered in their practice and emerging from it can find expression in a resolution.

Opinio juris and unanimity

66. Unanimity behind the resolution creates an expectation that the practice of States will conform to the resolution and, consequently, new law will crystallize.

67. In situations where a rule of customary law is emerging from State practice or where there is still doubt whether a norm, though applied by an organ or by some States, is already one of law, a unanimous resolution consolidates a custom and removes the doubt which might there persist.

IV. Resolutions contributing to the emergence of general principles of law

68. Resolutions contribute to the emergence of general principles of law, especially in the field of human rights.

V. Resolutions and the elaboration of treaty rules

Incorporation of treaty rules into resolutions

69. The repetition in a resolution of a treaty rule does not change the rule's nature among the parties to the treaty. For non-parties it may facilitate their future adherence to the treaty, especially when the purpose of the treaty is to shape relationships and conduct inside the State.

First stage of treaty-making

70. A resolution can prepare and circumscribe negotiations on a multilateral treaty of general interest by indicating the matters to be dealt with in the treaty and by expressing the policies which the treaty should follow. The resolution can further include principles or other rules which should figure in the treaty.

71. A resolution referred to in point 70 above does not bind the hands of the negotiators of the treaty in the sense that the treaty becomes no more than a application or development of the resolution. But the resolution supplies the negotiators with guidelines which are likely to establish some common ground before negotiations begin and thus limit the freedom of negotiators.

Role of resolution
after conclusion of treaty

72. A unanimously or generally approved resolution which is preparatory in the foregoing sense (points 70-71 above) retains its autonomous effect when the drafting, conclusion or entry into force of the treaty is delayed, or when only a limited number of States became parties to it. In particular, the resolution can reinforce the more general relevance of the treaty in spite of the restricted number of ratifications or accessions.

73. The postulates of the resolution that were not taken over by the treaty, can become law either through custom or another treaty. There are, however, situations where a bar to such a development can arise.

Interpretation of treaties

74. A standard of conduct set forth in a resolution can be used in aid of treaty interpretation.

75. A unanimous resolution which interprets provision of the U.N. Charter constitutes an authoritative (authentic, binding) interpretation of the Charter if by their votes all the U.N. Members intended to, and did, accept it as such.

Resolution as treaty

76. A vote in favour of a resolution does not express the consent to be bound by the rules enunciated therein.

77. The presumption is against a resolution constituting a treaty.

78. States can conclude a treaty in the form of an Assembly resolution. The intention to do this must be unequivocal and mere use of terms that suggest a contractual engagement is not conclusive.

Incorporation of resolution into treaty

79. Incorporation of a resolution into treaty turns the rules of the former into treaty law for the parties.

80. Such incorporation is operated in one of the following ways: (a) a treaty clause makes the resolution part of the treaty, or (b) the treaty, without necessarily referring expressly to the resolution, repeats some or all of its material provisions.

VI. Resolutions and the enactment of law (rules other than the categories under III-V)

Acceptance

81. The resolution is made obligatory by unequivocal State acceptance.

82. Forms of acceptance other than those referred to in points 78 and 79 above do not necessarily change the rules of the resolution into treaty rules, though acceptance makes them binding.

83. An implicit acceptance is possible: the conduct of the State must leave no doubt whatsoever that it intends to be bound by the rules of the resolution.

84. Implementation of the resolution does not constitute conduct referred to in point 83 above.

85. Voting in favour of the resolution or another form of approval are not acceptance of the resolution as binding unless the Government declares that its vote or approval makes the resolution binding for it.

Means for deducing rules

86. Resolutions are a means for deducing rules from international law, for articulating such rules and for clarifying their content.

Subsequent affirmation

87. If a subsequent resolution affirms that a rule formulated in an earlier resolution has become binding, such affirmation constitutes an element of evidence which shows that the originally non-obligatory status of the rule has now changed. That evidence is not conclusive.

Modification of resolution

88. There is no obstacle to a change of the contents of a resolution by a subsequent one if the aim is to bring new rules into existence. One of the purposes of such a change can be the enlargement of the support behind the revised rules, in comparison with the original instrument.

Lawfulness of conduct prescribed

89. The presumption of lawfulness of the conduct prescribed by the resolution is rebuttable. However, States which voted for, or in any other way approved, the resolution are barred from challenging the lawfulness of the conduct conforming to it.

Majority

90. A majority vote for a resolution which proclaims a new rule of law has no effect for the opposing or abstaining States.

7th June 1983 (original version, not published).

17th October 1984 (abridged version).

Annex I

List of General Assembly resolutions cited in the Preliminary Exposé and/or *the Provisional Report*

22 (I)	Privileges and Immunities of the United Nations, 13 February 1946. A Resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, and Text of the Convention.
24 (I)	Transfer of certain functions, activities and assets of the League of Nations, 12 December 1946.
41 (I)	Principles governing the general regulation and reduction of armaments, 14 December 1946.
76 (I)	Privileges and immunities of the Staff of the Secretariat of the United Nations, 7 December 1946.
95 (I)	Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal, 11 December 1946.
96 (I)	The crime of genocide, 11 December 1946.
110 (II)	Measures to be taken against propaganda and the inciters of a new war, 3 November 1947.
160 (II)	Tax Equalization, 20 November 1947.
200 (III)	Technical assistance for economic development, 4 December 1948.
217 (III)	International Bill of Human Rights, 10 December 1948. A Universal Declaration of Human Rights.
239 (III)	Tax equalization - Staff Assessment Plan, 18 November 1948.
260 (III)	Prevention and punishment of the crime of genocide, 9 December 1948.
268 (III)	Study of methods for the promotion of international co-operation in the political field, 28 April 1949. A Restoration to the General Act of 26 September 1928 of its original efficacy.

272 (III) Observance in Bulgaria and Hungary of human rights and fundamental freedoms, 30 April 1949.

288 (IV) Threats to the political independence and territorial integrity of Greece, 18 November 1949.

289 (IV) Question of the disposal of the former Italian colonies, 21 November 1949.

290 (IV) Essentials of peace, 1 December 1949.

368 (IV) Invitations to be addressed to non-member States to become parties to the Convention on the Prevention and Punishment of the Crime of Genocide, 3 December 1949.

375 (IV) Draft Declaration on Rights and Duties of States, 6 December 1949.

378 (V) Duties of States in the event of the outbreak of hostilities, 17 November 1950.

381 (V) Condemnation of propaganda against peace, 17 November 1950.

387 (V) Libya: Report of the United Nations Commissioner in Libya; Reports of the administering Powers in Libya, 17 November 1950.

388 (V) Economic and financial provisions relating to Libya, 15 December 1950.

390 (V) Eritrea: Report of the United Nations Commission for Eritrea; Report of the Interim Committee of the General Assembly on the Report of the United Nations Commission for Eritrea, 2 December 1950.

392 (V) Procedure to be adopted to delimit the boundaries of the former Italian colonies in so far as they are not already fixed by international agreement, 15 December 1950.

505 (VI) Threats to the political independence and territorial integrity of China and to the peace of the Far East, resulting from Soviet violations of the Sino-Soviet Treaty of Friendship and Alliance of 14 August 1945 and from Soviet violations of the Charter of the United Nations, 1 February 1952.

530 (VI) Economic and financial provisions relating to Eritrea, 29 January 1952.

598 (VI) Reservations to multilateral conventions, 12 January 1952.

603 (VI) Designation of non-member States to which a certified copy of the Revised General Act for the Pacific Settlement of International Disputes shall be communicated by the Secretary-General for the purpose of accession to this Act, 1 February 1952.

630 (VII)	Convention on the International Right of Correction, 16 December 1952.
742 (VIII)	Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, 27 November 1953.
793 (VIII)	Invitation to non-member States to become Parties to the Convention on the Political Rights of Women, 23 October 1953.
794 (VIII)	Transfer to the United Nations of the functions exercised by the League of Nations under the Slavery Convention of 25 September 1926, 23 October 1953.
1148 (XII)	Regulation, limitation and balanced reduction of all armed forces and all armaments; conclusion of an international convention (treaty) on the reduction of armaments and the prohibition of atomic, hydrogen and other weapons of mass destruction, 14 November 1957.
1262 (XIII)	Question of arbitral procedure, 14 November 1958.
1378 (XIV)	General and complete disarmament, 20 November 1959.
1386 (XIV)	Declaration of the Rights of the Child, 20 November 1959.
1452 (XIV)	Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization, 7 December 1959.
1514 (XV)	Declaration on the granting of independence to colonial countries and peoples, 14 December 1960.
1652 (XVI)	Consideration of Africa as a denuclearized zone, 24 November 1961.
1653 (XVI)	Declaration on the prohibition of the use of nuclear and thermo-nuclear weapons, 24 November 1961.
1654 (XVI)	The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples, 27 November 1961.
1660 (XVI)	Question of disarmament, 28 November 1961.
1721 (XVI)	International co-operation in the peaceful uses of outer space, 20 December 1961.
1803 (XVII)	Permanent sovereignty over natural resources, 14 December 1962.
1815 (XVII)	Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, 18 December 1962.

1884 (XVIII) Question of general and complete disarmament, 17 October 1963.

1903 (XVIII) Participation in general multilateral treaties concluded under the auspices of the League of Nations, 18 November 1963.

1904 (XVIII) United Nations Declaration on the Elimination of all Forms of Racial Discrimination, 20 November 1963.

1962 (XVIII) Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 13 December 1963.

1966 (XVIII) Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, 16 December 1963.

1991 (XVIII) Question of equitable representation on the Security Council and the Economic and Social Council, 17 December 1963.

1995 (XIX) Establishment of the United Nations Conference on Trade and Development as an organ of the General Assembly, 30 December 1964.

2018 (XX) Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1 November 1965.

2037 (XX) Declaration on the Promotion among Youth of the Ideals of Peace, Mutual Respect and Understanding between Peoples, 7 December 1965.

2103 (XX) Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, 20 December 1965.

2106 (XX) International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965.

2131 (XX) Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965.

2145 (XXI) Question of South West Africa, 27 October 1966.

2158 (XXI) Permanent sovereignty over natural resources, 25 November 1966.

2160 (XXI) Strict observance of the prohibition of the threat or use of force in international relations, and of the right of peoples to self-determination, 30 November 1966.

2162 (XXI) Question of general and complete disarmament, 5 December 1966.

2181 (XXI) Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, 12 December 1966.

2200	(XXI)	International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966.
2202	(XXI)	The policies of apartheid of the Government of the Republic of South Africa, 16 December 1966.
2263	(XXII)	Declaration on the Elimination of Discrimination against Women, 7 November 1967.
2312	(XXII)	Declaration on Territorial Asylum, 14 December 1967.
2391	(XXIII)	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968.
2444	(XXIII)	Respect for human rights in armed conflicts, 19 December 1968.
2463	(XXIII)	Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations, 20 December 1968.
2465	(XXIII)	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 20 December 1968.
2467	(XXIII)	Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind, 21 December 1968.
2542	(XXIV)	Declaration on Social Progress and Development, 11 December 1969.
2548	(XXIV)	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 11 December 1969.
2551	(XXIV)	Forcible diversion of civil aircraft in flight, 12 December 1969.
2574	(XXIV)	Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean-floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind, 15 December 1969.
2603	(XXIV)	Question of chemical and bacteriological (biological) weapons, 16 December 1969.
2625	(XXV)	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970.
2626	(XXV)	International Development Strategy for the Second United Nations Development Decade, 24 October 1970.

2645 (XXV) Aerial hijacking or interference with civil air travel, 25 November 1970.

2674 (XXV) Respect for human rights in armed conflict, 9 December 1970.

2675 (XXV) Basic principles for the protection of civilian populations in armed conflicts, 9 December 1970.

2692 (XXV) Permanent sovereignty over natural resources of developing countries and expansion of domestic sources of accumulation for economic development, 11 December 1970.

2708 (XXV) Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 11 December 1969.

2749 (XXV) Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, 17 December 1970.

2784 (XXVI) Elimination of all forms of racial discrimination, 6 December 1971.

2832 (XXVI) Declaration of the Indian Ocean as a zone of peace, 16 December 1971.

2849 (XXVI) Development and environment, 20 December 1971.

2856 (XXVI) Declaration on the Rights of Mentally Retarded Persons, 20 December 1971.

2880 (XXVI) Implementation of the Declaration on the Strengthening of International Security, 21 December 1971.

2995 (XXVII) Co-operation between States in the field of the environment, 15 December 1972.

2996 (XXVII) International responsibility of States in regard to the environment, 15 December 1972.

3005 (XXVII) Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, 15 December 1972.

3029 (XXVII) Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea, 18 December 1972.

3034 (XXVII) Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some

people to sacrifice human lives, including their own, in an attempt to effect radical changes, 18 December 1972.

3057 (XXVIII) Decade for Action to Combat Racism and Racial Discrimination, 2 November 1973.

3068 (XXVIII) International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973.

3074 (XXVIII) Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 3 December 1973.

3103 (XXVIII) Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, 12 December 1973.

3129 (XXVIII) Co-operation in the field of the environment concerning natural resources shared by two or more States, 13 December 1973.

3171 (XXVIII) Permanent sovereignty over natural resources, 17 December 1973.

3175 (XXVIII) Permanent sovereignty over national resources in the occupied Arab territories, 17 December 1973.

3185 (XXVIII) Implementation of the Declaration on the Strengthening of International Security, 18 December 1973.

3201 (S-VI) Declaration on the Establishment of a New International Economic Order, 1 May 1974.

3202 (S-VI) Programme of Action on the Establishment of a New International Economic Order, 1 May 1974.

3232 (XXIX) Review of the role of the International Court of Justice, 22 November 1974.

3281 (XXIX) Charter of Economic Rights and Duties of States, 12 December 1974.

3292 (XXIX) Question of Spanish Sahara, 13 December 1974.

3314 (XXIX) Definition of aggression, 14 December 1974.

3362 (S-VII) Development and international co-operation, 16 September 1975.

3452 (XXX) Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 December 1975.

31/103 Drafting of an international convention against the taking of hostages, 15 December 1976.

33/109 Proposal for the establishment of a University for Peace, 18 December 1978.

35/7	Draft World Charter for Nature, 30 October 1980.
36/55	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 25 November 1981.
36/61	Draft Code of Medical Ethics, 25 November 1981.
36/103	Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 9 December 1981.
37/7	World Charter for Nature, 28 October 1982.
37/10	Manila Declaration on the Peaceful Settlement of International Disputes, 15 November 1982.
37/92	Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, 10 December 1982.

Annex II

Observations of the Members of the Thirteenth Commission on the Preliminary Exposé and the Questionnaire

1. Observations of Mr Rudolf L. Bindschedler

Berne, le 13 décembre 1979

Cher Confrère,

J'ai bien reçu votre Exposé préliminaire du 21 juillet 1979 ainsi que son complément du 12 novembre 1979. Je vous en remercie. C'est avec grand intérêt que j'ai pris connaissance de ces documents qui fournissent une excellente base aux travaux de notre Commission.

A votre questionnaire je réponds de la manière suivante :

1. Oui.

2. Oui, mais seulement comme moyen auxiliaire dans le sens de l'article 38 al. 1 d du Statut de la Cour internationale de Justice.

3. Les résolutions peuvent être considérées comme une preuve de la pratique des Etats ; elles donnent des indications sur leur comportement.

4. C'est possible pour certaines résolutions. L'effet de ces dernières dépend de leur qualité, de leur objectivité et de la majorité avec laquelle elles ont été adoptées ainsi que de la composition de cette dernière.

5. Non ; parce qu'elles ne constituent pas la pratique elle-même, ne pouvant servir que de preuve de cette pratique.

6. La résolution reste toujours non-obligatoire tandis que le traité lie les parties.

7. Non. La résolution est en général le résultat d'un compromis politique et, par conséquent, ambiguë et souvent mal rédigée ainsi que vous l'avez démontré dans l'Exposé.

8. Non, pour les mêmes raisons que j'ai indiquées dans ma réponse à la question 7. En outre, les résolutions ne sont pas obligatoires.

9. Une résolution ne peut, par essence, pas être la forme d'un accord entre les Etats. Mais ces derniers ont la possibilité de la rendre obligatoire et donc

de la transformer en règles de droit par un acte juridique spécial. Cet acte peut être soit une convention entre les Etats qui désirent rendre obligatoire le contenu de la résolution, soit une convention entre un ou plusieurs Etats avec l'Organisation des Nations Unies, soit encore un acte unilatéral d'un Etat indiquant clairement qu'il accepte le contenu de la résolution comme le liant. Nous avons alors à faire avec un acte composé : la résolution et l'acte spécial de l'Etat. Voir à ce sujet mon article dans " Berner Festgabe zum Schweizerischen Juristentag 1979, Rechtsakte der internationalen Organisationen ", p. 366-368, et mon cours à l'Académie de Droit international à La Haye, La Délimitation des Compétences des Nations Unies, Recueil 109 (I/1963), p. 349-356, 377.

10. L'utilité dépend de la qualité du contenu de la résolution. Cette dernière ne lie pas les négociateurs.

11. Ces " réserves " affaiblissent la portée de la résolution.

12. L'interprétation par une résolution n'a pas d'effet obligatoire ; elle reste une recommandation. Je pense que la Commission devra s'occuper le moment venu des résolutions interprétant la Charte.

13. C'est possible. Sont déterminantes la qualité de la résolution, la majorité avec laquelle elle a été adoptée et la composition de cette dernière.

14. Non, si la résolution ne dénature ou ne fausse pas les règles de droit.

15. S'il s'agit d'une règle destinée à devenir une règle de droit, la répétition peut constituer une preuve — entre autres — que la règle est devenue une norme du droit coutumier.

16. Cela dépend du cas concret.

17. Non. La " déclaration " peut avoir un contenu purement politique.

18. Etant donné que les règles formulées par l'Assemblée n'ont que le caractère d'une recommandation elles peuvent, en principe, être adressées à tous les Etats. Evidemment, il faut aussi tenir compte du contenu de la résolution. Les compétences de l'Assemblée générale sont définies uniquement par la Charte ; les Nations Unies ne sont pas identiques à la communauté internationale.

19. Oui. Mais la signification de la résolution ne dépend pas seulement de la majorité par laquelle elle a été adoptée mais également de la composition de cette dernière. La procédure du consensus n'a aucune valeur si les explications de vote avant ou après sont en contradiction avec la résolution, ce qui est souvent le cas.

20. Non. Les résolutions ne constituent pas une source de droit sauf dans les cas où elles sont obligatoires.

21. Je me réserve de répondre à cette question jusqu'à la fin de nos travaux.

22. Même réponse que pour la question 21.

23. Non. Il n'y a rien à ajouter à ce que vous avez dit dans l'Exposé.

24. Oui. Un des facteurs importants est la préparation par un organe non-politique et indépendant.

25. Certainement. La composition de l'organe joue un rôle, mais plus important est son caractère. Il est souhaitable que le projet du texte soit élaboré par une commission d'experts indépendants.

26. Il faut éviter trop de résolutions sur le même sujet. De telles répétitions diminuent la valeur de l'instrument.

27. En général, la conciliation est nuisible parce qu'elle favorise l'ambiguïté et l'imprécision du texte, ce dernier ayant alors pour seul effet de cacher les divergences.

28. La résolution reste une recommandation pour tous les Etats membres, pour ceux qui l'ont adoptée, ceux qui ont voté contre et ceux qui se sont abstenus. En ce qui concerne les deux dernières catégories l'effet découle de la procédure de la majorité qui règle l'adoption de la résolution.

29. .....

Veuillez croire, mon cher Confrère, à mes sentiments les meilleurs.

Rudolf L. Bindschedler

2. *Observations of Judge Philip C. Jessup*

August 16, 1979

1. My answer is in the affirmative.

2. You refer to art. 38 I (d) of the Statute of the Court. The drafting of that article is not satisfactory. The Court does not "apply" the teachings of publicists even in a subsidiary way. It may find that publicists have given expression to an existing rule of customary international law and the Court may base its decision on that rule. Whether or not it has done so is not known since the Court studiously avoids citing individual publicists by name. But as Hudson and Rosenne have noted, individual judges in separate or dissenting opinions have cited the writings of publicists as supporting the judge's conclusion or statement of the law as he finds it. In the course of the judicial deliberations, each judge prepares a written note. (Resolution Concerning the Internal Judicial Practice of the Court as adopted 12 April 1976, *I.C.J. Acts and Documents* No. 3 (1977) p. 155.) It is betraying no secret of the judicial conclave to note that each judge is apt to draft his note in such a way as to persuade his colleagues that he enunciates the applicable rules of international law and to that end he may cite in support any number of publicists and any amount of case law, whether from international or national tribunals. If he becomes a member of the drafting committee, he may join in deleting

specific references. The Court, *qua* Court, naturally hesitates to cite individuals or national courts lest it appear to have some bias or predilection. Hudson (*The Permanent Court of International Justice 1920-1942*, p. 614-615) cites certain special exceptions. As Rosenne points out, (*The Law and Practice of the International Court*, vol. II, p. 616) the pleadings of the parties naturally contain teaching of publicists and case law which supports the party's contentions. It must, of course, be understood that the judicial function differs from that of the advocate who starts from a predetermined position whereas the judge reaches his conclusion only after he has considered the law and the evidence. The pleadings may well invoke also Resolutions of the UN General Assembly and these also may be cited in the written notes of the judges. I believe that the Institut can be influential in suggesting what weight should be attributed to the General Assembly's Resolutions.

3. General Assembly Resolutions cannot be regarded as State practice, except perhaps in regard to the internal law of the United Nations which is an aspect you properly exclude from the present scope of your analysis. I hope it will eventually be treated since I attach importance to this interesting legal activity. (See my lectures on "Parliamentary Diplomacy", 89 *Recueil des Cours* (1956) p. 185.) The Resolutions can be regarded as "evidence of State practice " only in certain situations ; see below in answer to question 6.

4. Resolutions *can* influence (or initiate) State practice and it is clear that State practice can lead to the creation of custom. Whether any particular Resolution has this effect is a matter of historical analysis or observation.

5. Again, one can accept as an hypothesis that a Resolution may "accelerate the making of custom" in the sense that it stimulates States to act in a certain way. As to the question whether Resolutions can constitute the *opinio juris*, see my answer below to question 19.

6. Subject again to a consideration of question 19, if a sufficient number of States agree together to declare that they consider some statement to be declaratory of international law, this minimizes the problem of determining what is the consensus. I do not think it matters whether they voice that view in a Resolution, or in some preamble to a treaty which affirms that the following provisions are declaratory of existing international law. (Cf. the preamble to the Convention on the High Seas, 1958.) A difference is that if the statement is found in a treaty text as drafted, it does not have effect unless the treaty is adequately ratified; the mere fact that the delegates to the conference which drafts the treaty have full powers to sign is immaterial. On the other hand, the adoption (let us assume for the moment, the unanimous adoption) of such a declaratory Resolution by the General Assembly, has a special weight, given the nature of the General Assembly's procedures and this is true even though it is known that some delegates may act without instructions. However, if a certain number of States forthwith repudiate delegates' votes in favor of the Resolution, the Resolution loses its force in the sense here considered. You may consider further here the views of the International Law Commission as discussed by Rosenne (*op. cit.*, p. 615.)

7. I think one can not make a general statement that a Resolution is "a proper instrument for confirming or restating the law..." because of the fact that political rather than legal or juridical considerations usually determine the content of a Resolution. There may be exceptional cases in which the Resolution could be "a proper instrument."

8. This question can be linked with #7 and I would say a Resolution is not "suitable as a codification instrument" especially because there is the International Law Commission with its regular procedures, leading to international conferences and conventions.

9. Again, it is not possible to generalize but usually the answer would be in the negative for the reasons stated in answer to #7.

10. Resolutions may serve as a useful step in what is a general extra-organizational discussion or negotiation. However, such adoption would not bind the hands of treaty negotiators and in practice the Resolution may be useful only in regard to procedural matters such as the time and place of convening a conference *etc.*

11. It depends on the nature of the "reservation" and on the vote to which it is attached. It may limit acceptance of the principle while expressing a willingness to allow the Resolution to be adopted without affirmative opposition; such an aspect might accompany an abstention. It may enable the State whose delegate has voiced the reservation to take the position later that it considers the Resolution unacceptable. Some reservations are not rejections but qualifications or interpretations which may be relied upon subsequently not only by the State whose delegate voiced the reservation but by others who may assert that they concur even though they remained silent.

12. It may be difficult to distinguish this problem from that in #6. An interpretation of a legal rule is expressly or by implication a statement of a conclusion concerning the rule, whether it be a customary or a conventional rule. I think the Thirteenth Commission should deal with resolutions of this type as well as those which interpret the Charter.

13. They may have. It depends upon the text and the context.

14. This question assumes that all Resolutions have a "recommendatory nature," an assumption I would not immediately accept. Do you include those which are hortatory and those which are simply declarative, e.g. with regard to the status of a political entity?

15. It can be confirmatory and therefore strengthening just as is the case with state practice.

16. This is a matter which the Thirteenth Commission should not consider. It involves political questions of parliamentary tactics and it is not for the Institut to advise States how to act in the great variety of situations which involve many disparate factors.

17. The prime model is probably the Resolution unanimously adopted by the

General Assembly on December 13, 1946 affirming "the principles of international law recognized by the Charter of the Nürnberg Tribunal..."

18. I am not sure I understand what you mean by "obstacle." The question raises the problem of interpreting Article 2 paragraph 6 of the Charter. One notes that even this assertion of general authority is limited to what is "necessary for the maintenance of international peace and security." It is not appropriate here to discuss the extent to which the General Assembly as an organ of the United Nations is also "an organ of the international community." The "Organization" of the United Nations also equals the "organization" of the international community in a certain sense but the General Assembly without the Security Council has a limited authority.

19. Voting majorities are highly relevant. It is not only the actual numerical count but also the identity of the states constituting the majority. It is a frequent observation that a Resolution supported by all the permanent members of the Security Council has more weight than one adopted by only some of them. It is increasingly recognized that concurrence of the "Third World" is a central factor in determining the influence of a Resolution but it is equally true that the other States are not bound merely because the numerical majority passes a Resolution over their opposition. In terms of "the process of law-making", unanimity is of prime significance. The newer procedural device of consensus, on which there is a growing literature, may have varying influence depending upon the issue involved and indeed on the quality of the President of the General Assembly. It is doubtful that this procedure can usually attain the strength of a Resolution adopted by a registered unanimity.

20. I think the first part of this question has been answered in the replies to preceding questions. In my opinion, there is currently exaggerated assertion regarding the status of Resolutions as of themselves constituting new sources of law. The issue is raised by current discussions at the Law of the Sea Conference concerning Resolution D of 15 December 1969.

That Resolution

"*Declares* that, pending the establishment of the aforementioned international régime:

(a) States and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction;

(b) No claim to any part of that area or its resources shall be recognized."

This Resolution was adopted by 62 votes in favor, 28 against, 28 abstaining, and 8 absent. The votes in opposition included those of all the principal maritime States, of the United States, the United Kingdom, the USSR, France and Japan *inter alia*. It is impossible to claim that this Declaration in this Resolution has any binding legal force whatsoever. It is not a "new source of law."

21. The Institut should deal only with the legal effect of the Resolutions. This would include some explanation of the significance of the subject-matter, i.e. the contents, of the Resolution, and a conclusion regarding the importance of the vote. It should entirely refrain from suggesting, as in a procedural way, how the General Assembly should conduct its business.

Philip C. Jessup

[On April 15, 1980, Judge Jessup sent the following supplementary observations:]

I have little to suggest in regard to questions 22-29.

In reply to #22, I refer to my answer to #21.

In regard to #25 I might suggest that if a resolution is drafted and adopted by the Sixth Committee of the General Assembly, it might be more influential than if it were the product of a committee which lacked legal expertise.

As for #27, I suggest the analogy of the process in negotiating the convention on the Law of the Sea. If the promotion of agreement leads toward the acceptance of a text which commands general acceptance in terms of the legal character of the proposition, it is valuable. If it results in a compromise text which does not purport to be declaratory of international law, it may encourage later failure to ratify or failure to accept without reservation.

In reference to #28, I would refer to my answer to #20.

Philip C. Jessup

3. *Observations of Mr Myres S. McDougal*

January 7, 1980

Questionnaire

1. No. The concept of "obligation", as ordinarily used, is a mystical one. The relevant inquiry is an empirical one: What expectations are created in the general community about the course of future decision?

2. Resolutions are certainly bases of inference about the future course of decision.

Article 38 is simply incomplete in that it does not mention resolutions. No rational purpose could be served by giving resolutions the invidious label "subsidiary". In a particular context, resolutions may be the most important bases for inferring general community expectation.

3. It would be most artificial to subsume resolutions under any rubric of

"state practice" or evidence thereof. Resolutions are deliberate, direct communications of expectation by the assembled state officials and require no camouflage or window-dressing.

4. Resolutions may of course influence or not influence state practice. Whether state practice constitutes customary international law - i.e. creates the necessary expectations about policy, authority, and control - depends upon a number of variables. Whether resolutions create law may depend upon other variables, that is other features of the context of communication.

5. Resolutions may of course accelerate the making of customary law by shortening the time required for stabilizing and communicating community expectation. Resolutions are modalities for communicating the shared subjectivities commonly described as *opinio juris* and, hence, could not possibly be anything more than evidence of such subjectivities.

6. A recital in a resolution that it "reflects customary law" is an explicit statement of the necessary *opinio juris*. The comparability of such a recital with that contained in a treaty depends upon the number and characteristics of the parties subscribing to the different recitals and other variables in the context.

7. This depends upon how much support can be obtained for the resolution.

8. The form is certainly suitable. Whether resolutions are more easily obtained than other forms must again depend upon many variables.

9. The form offers no difficulty in communicating the terms of an agreement. When resolutions communicate the expectations required for customary international law, they may offer greater stability than agreements.

10. The reiteration of expectations may indicate increased clarity in communication and intensity in commitment. A resolution could hinder treaty negotiations only if it expressed customary law of *ius cogens* character.

11. The effect of "reservations" depends entirely upon the degree to which they affect the subjectivities commonly described as *opinio juris* and the policy content of such subjectivities.

12. Resolutions interpreting any legal rules, including those of the Charter, may, in appropriate contexts, create expectations about the future application of such rules.

Such resolutions would appear to be clearly within the scope of our Commission's concern.

13. Resolutions might have evidentiary value with regard to general principles of law if they make reference to uniformities in national authoritative decision.

14. There is some confusion in this question. Resolutions may have, under appropriate conditions, more than a recommendatory effect. The distinction between established rules and rules *de lege ferenda* may be mythical. The incorporation of rules into resolutions need not, depending upon the terms of the resolutions and other features of the context, weaken or change expectations about the future course of decision.

15. Repetition could, depending upon various features of the context, create the expectations required for a rule of law.

16. The use of resolutions should be guided by what appears to be wise and economical in any particular situation.

17. Type or appellation, if intent is otherwise made clear, would appear to be largely irrelevant.

18. The only relevance of the addressee is in terms of any difference created in community expectation about future decision. The broader the addressee, perhaps the easier to infer the necessary *opinio juris*. In any empirical sense, the General Assembly is clearly an organ of the international community.

19. The voting majorities, and even the composition of the majorities, is of course relevant to communicating expectations about authority and control. The creation of law requires the communication not only of a policy content, but also of expectations about authority and control. The more unanimous the voting, the more genuine the consensus in support, the more certain and stable the expectations about policy, authority, and control.

20. The law-making effect of resolutions derives from their effect upon expectation. Whether this effect is described in terms of sophisticated notions of "custom" or "agreement" or as something "new" would not appear to make much difference. The procedures for the clarification and communication of shared expectations are certainly of somewhat more recent origin than those we associate with custom and agreement. I am not sure what recent writings you refer to.

21. I would like to see your final *preliminary* draft and the suggestions of colleagues before trying to answer this. Our principal task, it would seem to me, is to try to clear up some of the current confusion about how international law is made. If we are capable of making recommendations for improving the procedures, so much the better.

22. I would shudder even at the thought of daring to differ with Mme Bastid. The Institut once played an important role in the making of international law, and its evaluation of a resolution might affect community expectations about authority and control. Modesty might, however, suggest that we not overestimate our potential importance in the making of international law under contemporary conditions.

If we can recommend improved procedures, we should by all means do so.

23. The terminology of resolutions is relevant only to their bearing upon *opinio juris*. Something depends upon the explicitness with which *opinio* is communicated, but it can be inferred from many different terminologies and features of the context.

24. The method of elaborating could affect the degree to which *opinio juris* is communicated. Particular procedures would require assessment in their larger contexts. I do not know enough about the range of procedures or the range of contexts to take the answer further.

25. The nature and composition of the drafting organ could of course affect the *opinio juris*. The drafting committee is the most important body at any conference.

26. Depends upon the combined communication coming out of the two resolutions, which could be affected by many variables.

27. So entirely dependent upon context that no general answer is possible.

28. This depends upon whether the resolution is more generally accepted as having communicated law. Unanimity has never been a requirement for the creation of the expectations that we call international law. The whole notion of customary international law developed because the modality of explicit agreement was too constraining.

29. The expectations described as international law are not created by isolated modalities or procedures but by a whole flow of communication, including practice, agreements, resolutions, etc. Some consideration might be given to the interrelations or reciprocal impact of all these different modes of communication.

Myres S. McDougal

4. Observations of Mr Edward W. McWhinney

Vancouver, October 15, 1979

My dear *confrère*,

Congratulations first of all, on a brilliant and courageous Report* that really breaks new ground. You will allow me, I know, in the full spirit of your Report, to offer some preliminary observations before responding to the detailed questions that you have set out. The Mandate of our Commission is couched in positivistic terms, responding to the essentially static conceptions of international law and international society that were the official starting point or *Grundnorm* for International Organisation in the immediate post-World War II era. But the post-World War II era is already over as the condition of Big-Power balance or equilibrium - Bipolarity - which was its main premise has already disappeared into history and given way to a condition of diffusion and dispersal of power, the emergence of new political and economic groupings, and the tendency to move from political-military to political-economic forces as the main solvent for international relations today. What our colleague, Dr. Castañeda, refers to as an "exaggerated juridical formalism", involving

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[* *I.e.*, Preliminary *Exposé*.]

closed categories of formal sources of international law and the notion that only that which can be subsumed under one or other of those *a priori* categories is deserving of the accolade of being called "law", is perhaps more appropriate to that more stable, or at least politically static, era of Big-Power dominance in international relations than to the new era of revolutionary transition that is now upon us when the emphasis must necessarily be upon a certain fluidity in the international law-making processes and upon a certain flexibility in the approach to definition of law itself. In a period of fundamental and rapid societal change, such as the present era in the World Community, attention must necessarily tend to shift from "law as command" or similar ultra-positivistic notions of law, to concentration upon what the parties themselves tend to treat as binding, or of normative significance in their mutual relations - to "Law-as-Fact", in contemporary "Legal Realist", behavioural science, terms. The attention given in recent years by certain judges of the World Court and other legal scholars to what, (to some jurists), are still *avant-garde* legal categories - the conception of the legally binding quality of unilateral declarations of State intention, for example, - are *indicia* of the new currents of thought in international legal science and of an impatience to break away from a conceived deadhand control of older, more restrictive conceptions of closed categories of formal sources of International Law. Some of these ideas are set out more fully in my recent monograph *The World Court and the contemporary international law-making process* (Sijthoff and Noordhoff, the Netherlands, 1979 especially at pp. 1-16). In the meantime, however, one might lodge a *caveat* as to the utility of relying too much - granted a certain *dédoublement fonctionnel* inherent in the fact that many of the professors and commentators concerned were acting, at the same time, as advisers to national foreign ministries - upon legal text-writings containing categorical propositions as to the legal status of U.N. General Assembly Resolutions, that were formulated in earlier time eras: either the short-lived, immediately post-War, period when the United Nations was still operating upon the original War-time premise of postulated Big Power cooperation in the post-War era, or then succeeding decade of Western political dominance of the General Assembly and thus of prevalence of Western legal ideas. The contemporary situation where the U.N. General Assembly has become, in effect, the principal forum for expression of "Third World" ideas and where it is, in voting terms, largely controlled by Third World coalitions, suggests the merits of caution in resting too strongly, today, upon more traditional or "classical" international law conception as to the proper *rôle* of the U.N. General Assembly and as to its law-making potential through its Resolutions.

My responses to your detailed questions follow, *seriatim:*

1. I do not think the distinction has any particular significance today beyond the extent to which individual State actors - presumably, now, a minority of States, and limited essentially to the Big Powers or to some older, predominantly Western States - might wish to treat it as relevant in assessing the extent of their own legal duties.

2. On all the empirical evidence today - World Court decisions, individual State practice and conduct, and the like - Resolutions are clearly means for the determination of rules of law; though, on the Law-as-Fact approach, the exact weight to be given to them will turn upon the concrete case of the particular Resolution or Resolutions concerned. Some Resolutions - those on decolonisation, sovereignty over natural resources, peaceful use of Outer Space - are clearly more important (normatively significant) than others and treated by States as such. I do not think the apologetic prefix "subsidiary", in Article 38(1)(d) of the I.C.J. Statute continues to have relevance today, except so far as it may happen, in individual cases, to reflect the qualitative differences existing in general State attitudes to different Resolutions.

3. Resolutions are certainly evidence of State practice, but in certain cases - for example, Resolution 1884 (XVIII), 17 October 1963 - and in so far as particular parties (in that case, the Soviet Union and the United States) choose to treat them as such, their significance may go beyond that and they may be treated as State practice in themselves.

4. Yes, particularly in the area of the so-called "new" International Law - decolonisation and national self-determination, sovereignty over natural resources, economic rights and duties of States and the new international economic order - Resolutions tend to have a certain prophetic quality and to help to influence or determine State conduct for the future. If not the International Law of today, recognized and accepted as such by all main legal systems, they may point the way to the International Law of tomorrow or the day after tomorrow, International Law on this view being not a static body of rules but a continuing, dialectical process of change and development in old rules and creation of new ones.

5. Yes.

6. I think that such a statement can only be meaningful when viewed in the context of particular cases and particular Resolutions. It is inherent in every Restatement of law that the seeds of change from the "old" to the "new" are there. On the other hand, a venture in total legal motivation under the guise of a Resolution that purportedly merely restates the pre-existing customary law, is hardly likely, in legal terms, to carry any more authority than the weight or persuasiveness of the substantive contents of the Resolution, such as they are.

7. It would seem better, in such cases, for the authors of the Resolution to apply civil courage and to drop the "restatement" fiction, in favour of acknowledging, frankly and openly, that they are in fact seeking to make new law.

8. As an abstract juridical question, why not? As a practical, instrumental question, since political considerations are more likely to operate in the choice of the delegates to a General Assembly codifying exercise than in the case of a technical, codifying conference, there is bound to be a certain turn-over in

the key personnel and thus a certain lack of continuity and effectiveness, militating against the success of the whole exercise.

9. As in the case of Resolution 1884 (XVIII) of 17 October 1963, already referred to, why not? It will depend, of course, upon the particular case. States have always exercised a certain flexibility as to their choices of the most appropriate arenas and instruments and procedures for dispute-settlement and international problem-solving, and this flexibility as to *method* of international law-making seems to be increasing and should surely be encouraged in the interest of a more representative and inclusive International Law.

10. I think the approach can be useful in particular cases, and I do not think it binds the hands in terms of any subsequent treaty negotiation.

11. Presumably, - and in so far as the Resolutions concerned have a normative legal significance in relation to those States - such "reservations" would have the same meaning and effect as reservations to a treaty.

12. That it can have a legal significance is clear, but the exact amount and weight cannot be decided in abstract but only in concrete cases. With Resolutions interpreting the Charter itself, since these necessarily fall within the "special competence" of the General Assembly, the weight of any such General Assembly interpretive Resolutions is presumably greatest. This latter subject is, I think, worth study in depth, by our Commission, on an empirical, case-by-case basis.

13. Yes.

14. In principle, no.

15. It may, in the concrete case, help an emerging new rule of international law to move from the stage of mere "law-in-the-making" to more general acceptance as positive law (*lex data*).

16. I see no reason for any such limitation in the abstract. In the concrete, it will no doubt turn on the nature of the particular problem adverted to in the Resolution.

17. I am not too sure that the nomenclature (*categories* of Resolutions) is too important in comparison to the substance (actual *contents* of the Resolutions).

18. I do not see why? Judge Lachs' dissenting opinion in *North Sea Continental Shelf* (I.C.J. Reports 1969, p. 3, at pp. 228-9), on the cognate issue as to treaties, may point the way in terms of international law doctrinal theory.

19. Yes. However, to insist upon unanimity seems artificial or precious in view of the sheer range and size of U.N. membership today. On the other hand, to make inter-bloc or inter-systemic consensus a prerequisite to the legal efficacy of Resolutions in politically controversial areas -, especially those concerning the so-called "new" international law -, would seem relevant. Soviet and Soviet bloc scientific legal literature has, in the past, focussed upon tri-bloc (Soviet, Western and Third World) inter-systemic consensus, in such cases. As

an example, on the law-as-Fact approach, both Soviet and American support would seem a pre-condition to any legally normative, binding quality to Resolutions, today, involving Big Power nuclear disarmament or Big Power co-operation in the peaceful use of Outer Space; and substantial Soviet bloc and Western support would also seem desirable or necessary to confer general normative legal quality upon Resolutions concerning the economic rights and duties of States or the new international economic order.

20. Yes. I myself would regard General Assembly Resolutions as a new source of law, in the special context and under the conditions set out in my general and specific comments, *supra*.

21. I think you should concentrate on a brief statement, - as the concluding chapter of the Commission's Report - on the points of agreement and disagreement, and so far as possible also, the nuances of the different intellectual positions, as revealed in the individual members of the Commission's responses to the Questionnaire. I think the Commission should content itself, thereafter, - and in the spirit of the Schachter Report to the Rome Reunion, - with a simple Resolution adopting, (or, failing that, simply "receiving") the Commission Report, which will then stand or fall, within the international scientific legal community, on its own intrinsic intellectual weight and persuasiveness, whatever that might be. I do not see any particular usefulness, at this stage, in our attempting to draft a detailed, expository Resolution containing a catalogue of prescriptions or recommendations as to future conduct by the U.N. General Assembly.

Sincerely yours.

Edward McWhinney

Complementary Observations of Mr Edward W. McWhinney

Vancouver, December 12, 1979

You will already have my detailed reply, under date October 15, 1979, to your *Preliminary Exposé* and also my responses to the 21 Questions which accompanied that *Exposé*. I have now received your letter of November 12, 1979 with the supplementary Questions 22-29, and my answers to these are now set out hereunder:

22. It may be questioned whether one can effectively prescribe or control the internal, constitutional procedures of parliamentary-style assemblies, once those assemblies have been established as on-going concerns, by elaborating, from outside those assemblies, abstract, *a priori* codes of rules. Parliamentary-style assemblies normally develop, in time, their own "conventional", customary law-based glosses on the internal rules of procedure with which they may have started out.

23. It is surely not the *terminology* of resolutions that is the key question, but their substantive content and, (on a Law-as-Fact approach), just how they are generally perceived and acted upon in the World Community at large. The literary quality and/or succinctness of the actual formulation of a resolution may, of course, be marginally relevant to any such general World perception.

24. No, except in so far as the *method* includes attention to such factors as political balance (Western, Soviet bloc, Third World) in the actual composition of drafting committees or in the elaboration of a drafting consensus on substantive issues.

25. Yes, bodies like the I.L.C., because of their inherently "technical" character, can normally be expected to command respect for their necessarily more technical drafts. In regard to other, presumably less technical or more frankly political organs, see the answer to question 24, *supra*.

26. On ordinary parliamentary rules, the later would override the earlier to the extent of any inconsistency; though purely national conflicts may be avoided or reduced by application of the ordinary rule of interpretation that conflict is not to be presumed except where there is express reference to or mention of the earlier resolution in the later one.

27. I cannot see its *legal* relevance; though in strictly *political* terms it may affect the quality and representativeness of the consensus accompanying the adoption of a particular resolution.

28. It will turn, in considerable measure, on the ultimate stature attained by the resolution, on a Law-as-Fact approach. In regard to certain resolutions that approach a *jus cogens* character in World Community terms - those concerning decolonisation, for example - a state may argue in vain that it is not legally bound by them, even though it may have voted against them or abstained from voting.

29. ...

5. *Observations de M. Riccardo Monaco*

Rome, le 16 juillet 1980

Mon cher Confrère,

Je vous prie de m'excuser de vous envoyer si tard mes observations relatives à votre questionnaire et à votre exposé préliminaire. Il faut tout d'abord que je vous félicite du travail que vous avez accompli avec tant de dévouement, de clarté et avec un excellent esprit de synthèse.

Je reprends vos questions dans leur ordre :

1. J'estime qu'il faut toujours maintenir la distinction entre les actes de caractère obligatoire et les actes non obligatoires : en effet, c'est un point de départ très utile pour notre étude.

2. Les résolutions de l'Assemblée générale sont des moyens utiles pour déterminer certaines règles de droit. En tout état de cause, il s'agit d'actes qui ont seulement un rôle subsidiaire au sens de l'art. 38, para 1 d) du Statut de la Cour Internationale de Justice.

3. Je ne crois pas que ces résolutions ont la même portée que la pratique des Etats : en effet, il s'agit de moyens de preuve d'une telle pratique. La raison en est que la pratique des Etats se fait dans le domaine international surtout à travers une série d'actes et de comportements qui assez souvent se passent sur le plan bilatéral ou multilatéral, ce qui est bien différent de l'action et des comportements qui se déroulent au sein d'une organisation internationale.

4. Les résolutions peuvent marquer le point de départ d'une pratique des Etats qui parfois conduit à la création d'une coutume.

5. La résolution peut, dans certaines circonstances, accélérer le processus de formation d'une coutume, mais en elle-même, elle ne concrétise pas l'*opinio juris* parce qu'elle se limite seulement à en apporter la preuve.

6. Lorsqu'on trouve dans une résolution l'affirmation que les règles qui y sont contenues reflètent le droit coutumier, tout cela n'a pas la même efficacité qu'une affirmation correspondante qu'on peut trouver dans un traité. En effet, le traité peut poser des règles *per relationem* à une coutume, alors qu'une résolution n'a pas la même efficacité.

7. Une résolution n'est pas à même de confirmer ou bien d'adapter la règle de droit dans un domaine dans lequel elle apparaît incertaine ou controversée. Pour faire cela, il est nécessaire d'avoir recours aux systèmes d'interprétation ou de vérification du droit qui sont normalement confiés par voie d'interprétation au juge international ou bien aux Etats eux-mêmes.

8. Les résolutions ne peuvent pas constituer un moyen apte à la codification de règles de droit international, d'autant plus que, dans le domaine des Nations Unies, il existe des procédures spéciales qui ont comme point de départ l'œuvre de la Commission du droit international.

9. Les accords entre Etats se font selon les règles codifiées par la Convention de Vienne de 1969, de sorte qu'il serait tout à fait prématuré de concevoir les résolutions comme une forme ultérieure d'accord entre Etats.

10. Il apparaît utile d'adopter dans une résolution, lorsque tout cela est possible, certains principes ou d'autres règles avant que le moment soit venu de les incorporer à un traité. Mais il est évident qu'une telle adoption n'est pas à même de lier les organes étatiques chargés de négocier le traité.

11. Les réserves faites par des Etats pendant la discussion ou au titre d'explication de vote des résolutions n'ont pas la même valeur que les réserves

faites par des Etats au traité, parce que la procédure de formation des résolutions diffère très sensiblement par rapport à celle des traités.

12. J'estime que notre Commission ne devrait pas s'occuper des résolutions qui visent à interpréter la Charte. Cela exclut donc que l'on doive se charger aussi des résolutions qui interprètent des règles juridiques autres que celles de la Charte.

13. En règle générale on peut attribuer aux résolutions une valeur probatoire à l'égard des principes généraux du droit.

14. A mon avis, il n'est pas opportun d'incorporer les règles juridiques dans les résolutions parce que, étant donné qu'elles possèdent déjà une valeur en tant que telles, le caractère de recommandation des résolutions leur enlèverait tout au moins une partie de leur force obligatoire. Evidemment, la conclusion peut être différente lorsqu'il s'agit d'englober dans des résolutions des normes *de lege ferenda.*

15. Lorsqu'on procède à la répétition ou à la re-citation d'une règle qui n'est pas encore juridique, tout cela n'ajoute rien à la règle qui ne peut pas acquérir par ce fait une valeur supérieure à celle qu'elle possède.

16. Il me semble que les résolutions devraient, en règle générale, se limiter à énoncer des principes parce que, étant donné aussi le caractère et les procédures de fonctionnement de l'Assemblée, il n'est pas opportun que celle-ci aborde aussi des règles de détail ou des règles ayant une portée spécifique.

17. Etant donné la variété des types de résolutions et les difficultés de leur classification, il est difficile d'indiquer un type de résolution particulièrement apte à énoncer des règles juridiques. Le cas des déclarations doit être considéré à part et non pas comme s'il s'agissait d'un acte particulièrement adapté à l'énonciation de règles juridiques.

18. La conception de l'Assemblée générale en tant qu'organe de la communauté internationale tout entière manque de rigueur juridique, de sorte qu'il faut considérer la valeur et la portée des résolutions comme se limitant à l'ordre juridique des Nations Unies.

19. Les résolutions sont adoptées aux majorités fixées par les règles de procédure de l'Assemblée, de sorte que lorsqu'il y a unanimité, cela a une importance seulement au plan des faits. En ce qui concerne la procédure du consensus, dans l'adoption de résolutions, tout cela se prête aux critiques bien connues qui ont été adressées à cette procédure qui, parfois, au lieu de renforcer, affaiblit l'efficacité des résolutions.

20. Si dans l'avenir, les procédures, les moyens et les systèmes d'adoption des résolutions au sein de l'Assemblée générale font de grands progrès, il est possible que les résolutions acquièrent la qualité d'une nouvelle source de droit. Toutefois, dans l'état actuel, on ne peut pas comparer les résolutions aux sources classiques des règles de droit international, c'est-à-dire la coutume et les traités. Tout cela amène à conclure que les résolutions n'ont pas, dans le processus

de création du droit, une influence comparable à celle qui appartient aux sources classiques.

21. J'estime qu'au stade actuel, l'Institut de Droit international devrait se borner à une étude approfondie de la matière. C'est pour cela que, pour le moment, il me semble prématuré qu'il puisse faire des suggestions à l'égard du contenu, de la procédure et de la rédaction des résolutions.

22. Pour les raisons qui précèdent, j'estime prématuré de faire des propositions concernant la procédure d'après laquelle l'Assemblée générale adopte les résolutions.

23. Non.

24 - 25 - 26. Le problème des procédures, bien que très important, lancerait l'Institut dans une voie très difficile étant donné surtout que la pratique de l'Assemblée nous montre que parfois il est presque impossible de changer les procédures même lorsque celles-ci apparaissent dépassées ou moins efficaces pour le but à atteindre.

27. Evidemment, lorsque c'est possible, le recours à des moyens de conciliation serait très utile pour faciliter les processus de rédaction du texte.

28. Il me semble que même un Etat membre qui a voté contre ou qui s'est abstenu à l'égard d'une résolution est quand même lié sur le plan juridique par la résolution adoptée par l'Assemblée.

29. Je laisse au rapporteur le soin d'indiquer à la Commission les autres questions éventuelles en matière d'élaboration des résolutions.

J'espère vivement que ces réponses vous seront utiles et je vous prie de croire, mon cher Confrère, en l'expression de mes sentiments les meilleurs.

Riccardo Monaco

6. Observations of Judge Hermann Mosler

Heidelberg, January 7, 1980

My dear Confrère and Friend,

1) Although it is true that resolutions of the General Assembly as such, i.e. as a formal means of exercising its powers, cannot create rights and obligations of the Member-States, their subject-matter may however be of binding character because of its conformity with a principle or rule of general international law. Furthermore, resolutions of the General Assembly may, even if not expressing or codifying principles or rules of a recognized source of international law and therefore not binding under the Charter, exercise an authority which cannot be ignored as not legally relevant. The degree of the authority of such

resolutions must be distinguished according to various factors, such as the intention of the General Assembly, their contents and the circumstances of their adoption. In order to be able to classify the provisions made in the resolutions from the aspect of their effect, the distinction between obligatory and non-obligatory provisions, the latter having a higher or lower degree of authority, is relevant.

2) The determination of rules of law by resolutions of the General Assembly has not the effect of constituting law but may codify existing rules and contribute to the development of new rules. Since codification implies, in practically all cases, progressive development, resolutions of this kind have a similar chance to be recognized as generally binding law as multilateral law-making treaties. As the procedural conditions of resolutions are less strict than those for the elaboration of multilateral conventions, the conclusion that a resolution is generally considered as binding law in the international community needs a more careful examination.

Resolutions which aim at determining developing rules of law can be referred to as persuasive authority. They are not a subsidiary means for the determination of rules of law in the sense of Article 38 para. 1 (d) of the I.C.J. Statute but they may be used as evidence for the conclusion that a customary rule or a general principle of law exists the development of which may have been promoted by that resolution.

3) If resolutions are carried out in practice they are to the same degree evidence of international law as State practice.

4) Affirmative answer.

5) Resolutions can accelerate the making of custom. They can constitute the *opinio juris* if the circumstances of their adoption show that general consensus exists not only with regard to the general principles therein but also with regard to the precise wording. Under similar conditions, resolutions may be considered as evidence of an already existing *opinio juris*.

6) A statement in a resolution that it reflects customary law is to a lesser degree conclusive than a similar statement in a multilateral law-making treaty (see *supra* No. 2).

7) Negative answer.

8) Multilateral conventions are preferable (although codification by resolutions is possible; see *supra* Nos. 1 and 2).

9) Resolutions are not a desirable form for agreements of States because the ambiguity of the term "resolution" creates difficulties for the interpretation of the text.

10) The Universal Declaration of Human Rights is an example for the usefulness of a resolution adopting principles of conduct prior to their incorporation into treaties. It is doubtful, however, whether this is the appropriate method which generally should be applied. I think that this two-stage procedure is useful if the subject is appropriate to be dealt with first in the form of a

more general outline of principles in a resolution and later, within the framework of these principles, in the precise terms of a treaty.

11) Reservations and explanations of votes diminish the authority of the resolution (see *supra* No. 1).

12) The significance of a resolution interpreting legal rules other than those of the UN Charter depends on their persuasive value (see *supra* No. 2). The Thirteenth Commission should include, in their study, resolutions interpreting the Charter.

13) See the answer to No. 2.

14) There is, in my view, no disadvantage in incorporating legal rules into a resolution.

15) See the answer to Nos. 1 and 2.

16) No general answer seems to me possible. The answer depends on the subject of each resolution.

17) "Declarations" seem to me a suitable method to enumerate fundamental principles and rules to be applied by all members of the international community. The styling of a resolution as "declaration" may be an appropriate means of making evident that the intention of the General Assembly was to state such principles and rules.

18) In view of the almost completely universal membership of the United Nations I see no obstacle to addressing "all States" instead of "all Members". Since the non-Member States had no opportunity of interfering in the debate preceding the resolution or to take part in the vote, the effect of the resolution with regard to outsiders rests solely on the persuasive power of its contents.

19) Voting majorities are relevant for the determination of the significance of a resolution in the process of law making. If a resolution has been adopted unanimously and without abstentions this is very strong evidence that the resolution is supported by general opinion. Consent expressed by affirmative vote furnishes stronger evidence as consensus. If a resolution, even if it is formulated in abstract terms, results in imposing stronger obligations on certain States or certain groups of States than on others the concurrence of the interested States with the majority is important (Cf., *mutatis mutandis*, North Sea Continental Shelf, judgment, I.C.J. Reports 1969; p. 43).

20) Resolutions of the General Assembly are, in my view, not an independent source of international law. Their relevance of stating and promoting international law has been evaluated *supra* (Nos. 1 and 2).

21) The Institute of International Law should make an attempt to classify the resolutions according to their contents, procedure and drafting, in relation to the effect which they are intended to have (stating the law, progressive development of the law, recommendations of conduct).

22) The suggestion made by Sir Gerald *Fitzmaurice* in the Livre du Centenaire (p. 272) as it has been supported by Mme. Bastid (l. c. 384-385) is attractive but

certainly not easily to be realized. The possibilities and consequences of constituting a committee elected by the Institute should be examined by the Thirteenth Commission.

23) Proposals for a more precise terminology of resolutions should be studied by our Commission. As regards the use of the terms "principles" and "rules" I made some suggestions in 140 R.d.C. (1974 IV), pp. 85-90. In order not to overload this letter I do not repeat them here.

24) The authority of resolutions in the process of law is in my view greater if that authority has been thorougly discussed by as many as feasible of the representatives of the States which are expected to comply with them. Not having personal experience of the procedural rules observed in the United Nations I am not able to make more detailed proposals.

25) The composition of the organ entrusted with the elaboration of a resolution is pertinent because the very first stages of the preparatory work can be decisive.

26) If the danger of the discrepancy between an old and a new resolution arises the latter should expressly clarify whether and to what extent it supersedes the former.

27) Conciliation may play a role in the attempt to formulate uncertain or disputed rules.

28) Voting against a resolution adopted according to the Charter by a sufficient majority may have different effects corresponding to the different types of resolutions. A negative vote of a member against a resolution which pretends to formulate existing international law means probably, subject to another possible interpretation of this vote under the actual circumstances, that the State concerned does not recognize the correctness of the statement. A negative vote against a resolution recommending the application of new principles or of precisely defined rules may mean that the State concerned does not intend to comply with the recommendations. Since no legal obligation is involved such a vote diminishes the non-legal authoritative effect of the resolution. The same is true, but to a lesser degree, with regard to abstention from voting. Of course, the number of negative votes and abstentions is important.

29) Additional questions should only be included in the work of the Commission if the need to deal with them should arise in the course of the work.

With kindest regards,

I remain

Yours sincerely

Hermann Mosler

7. *Observations of Mr Geraldo E. do Nascimento e Silva*

Bogota, August 25, 1979

My dear Friend and Colleague,

I have just received your excellent Preliminary *Exposé* on "Resolutions of the General Assembly of the United Nations". I only wish I had received it sooner since it would have been useful in the preparation of a Report I submitted to the Ibero-American Institute of International Law, in which I broached the subject.

Before answering the very complete questionnaire I wish to make some over-all observations. My answers will follow your guide-line, namely that the term resolution will refer exclusively to those of the G.A. of the United Nations; I shall also exclude those which refer to the internal law of organizations; unless otherwise stated my answers will be aimed at those resolutions in which there are doubts as to the legal nature of the rules invoked.

I hope that I understood the questions posed and apologize if such is not the case.

1. Yes, specially since there is an almost general consensus as to the non-obligatory nature of resolutions.

2. My answer is in the negative, but we must remember that the Statute of the I.C.J. is based on that of the P.C.I.J. when the use of resolutions by the League of Nations was unknown. However the rules to be found in resolutions can under certain conditions become rules of customary international law or represent general principles of international law.

3. The position taken by a State in the adoption of a resolution should be considered evidence of the practice of that particular State, even though that is not always the case in practice, *i.e.* a State that voted in favour of a resolution may not abide by the rules it contains. However it is difficult to accept the idea that every resolution should be considered as such since a State that advocated vigorously a given resolution may condemn with equal vigour another resolution which it cannot accept.

4. Resolutions can have a very important influence in the creation of custom, specially in those new fieds of international law, where previous to the resolution there was practically no regulation at all. Resolution 1962 (XVII) which you mention is a perfect example. The possibility of future reformulation of such rules must always remain open in these cases, since science and technology may make further leaps making those rules obsolete.

5. Resolutions can have an influence on custom but they dot not constitute the *opinio juris*, but only *may* be evidence thereof. At present no particular duration is required in the formation of custom, even though I don't accept the idea of *instant custom*.

6. Such a statement can be considered as representing the opinion of the State that made it and the principle of estoppel may apply.

7. Yes, subject to the limitations mentioned in answer 1, *i.e.* as long as it does correspond to international law.

8. Yes, as a preliminary stage. In the case of new situations it can be helpful in the charting of the future course of international law on the subject. We have already mentioned the resolution on outer space, and that on territorial asylum constitutes an important example.

9. No.

10. I feel that the answer must be in the negative. However it is to be presumed that a State in accepting certain rules in a resolution is not averse to its future incorporation in a treaty on the same subject-matter.

11. None. Even oral reservations or explanations of votes made in relation to treaties have a very small influence. The summary records may be used in the future interpretation of a treaty. If in the case of a treaty the influence is minimal it is easy to deduce that as far as resolutions are concerned such reservations bear no weight.

12. I feel that the Commission will be treading dangerous ground here. We must also remember that even though the Charter has not been amended (except in the case of the membership of certain organs) the intelligence of the Charter today has changed considerably since 1945.

13. Some articles of the Universal Declaration of Human Rights have been considered as such and the same can be said with regards some other resolutions such as that on territorial asylum. But such an interpretation does not apply to every resolution.

14. I see no disadvantage, even though doubts remain as to their obligatory nature.

15. In my opinion very little. The re-citation does not give added value. When the principle laid down in a resolution corresponds to the legal conscience or to political considerations there is no need to repeat it. The re-citation or repetition with a modified language occurs when the previous resolution or resolutions were not accepted in practice.

16. The General Assembly can proceed as it wishes. In certain cases the enunciation of more detailed regulations can have its advantages.

17. It would be desirable to limit the word "declaration" to the enunciation of legal rules, even though a declaration is in reality just another resolution.

18. No obstacle, even though non-members are free to take such a resolution into consideration or simply ignore it.

19. Irrelevant. The significance of voting majorities can depend on the interest of delegations during the discussions of the subject. Unanimity is often an empty victory, the same can occur in the case of consensus.

20. Resolutions can be considered as sources of law depending on the notion one has of source of law. *Latu sensu* resolutions can be considered as such.

21. I believe that a resolution of the Institut de Droit international would play an important role in the clarification of this problem. The IDI resolution should not enter into too many details, but limit itself to the proclamation of the principal legal consequences of UN resolutions. In this sense, it could point out that a resolution is non-obligatory and does not create international law; a resolution can have an important influence in the creation of custom specially in the new field of international law where no clear cut rules exist; with time rules laid down in a resolution, which at the moment of adoption were not part of international law, can under certain conditions become customary rules or spell out general principles of international law. The IDI resolution should avoid semantic entanglements. Even though the authors of UN resolutions demonstrate remarkable ingenuity in their drafting, words such as *affirms, confirms* or *reaffirms,* which obviously have distinct meanings, only mean *"recommend"* according to the UN Charter. The IDI should avoid making observations or suggestions regarding the contents, procedure and drafting of resolutions. Finally, we must realize that a IDI resolution, which would be welcomed by doctrine, might be subject to criticism by *onusiens,* more politically than legally minded, hostile to any measure that might minimize the importance of UN resolutions.

G.E. do Nascimento e Silva

Complementary Observations of Mr G.E. do Nascimento e Silva

Rio de Janeiro, December 26, 1979

My dear Friend and Colleague,

With reference to the additional questions of your letter of 12th November 1979 I would like to make the following observations.

22. The Commission could consider examining not only the relevant provisions of the Rules of Procedure of the General Assembly, but also the established practice of States in the General Assembly, United Nations Conferences, Councils and Committees. Consideration could be given in this respect to the role of regional groups in the process of elaboration of resolutions and to ways and means of streamlining this participation. The Commission should bear in mind that States are reluctant to confer mandatory character to resolutions.

23. The Commission could suggest certain degree of uniformity of language in order to avoid imprecisions and double-meanings, but should have no doubts as to the practicability of such an endeavour.

24. In principle when States decide to give a more solemn status to a resolution, proposing to call it a Declaration, Charter or otherwise, this decision exercises an influence in the drawing up of the resolution.

25. Yes.

26. The role of the former resolution should be to serve as a guidance for the latter to be drafted on the same subject. Practice shows that references to previous resolutions on the same theme are often and deliberately made at least in the introductory part.

27. No doubt that conciliation should always be one of the aims of a conference but practice shows that often such an effort may lead to an excess of conciliation or abuse of consensus. In the search for consensus conferences frequently put off a solution and the Conference on the Law of the Sea is a good example. The excessive preoccupation with consensus may result in a resolution devoid of substance.

28. Even those States that voted in favour are not bound - except morally - by a resolution; in the case of those States that voted against or abstained, the link is minimal.

29. I feel that the Commission should concentrate on some other problems not linked to that of resolutions. If the majority should vote in favour of a positive answer I would suggest the achieving of a genuine consensus *vis-à-vis* an ever increasing membership in international organizations of a universal character.

I remain,

Most sincerely

G.E. do Nascimento e Silva

8. Observations of Mr Shabtai Rosenne

October 30, 1979

My dear Friend and Colleague:

I very much regret that my duties kept me in New York and prevented me from attending the Meeting at Athens. I had particularly been looking forward to further discussions with you and with colleagues in the Thirteenth Commission, for I believe we are facing actually or potentially very serious problems.

I have pondered very deeply how to reply to your most stimulating preliminary exposé and your memorandum of 11 September. The temptation to engage in a doctrinal discussion with you is very great. But I wonder if it

would have any practical value? I have therefore decided to limit my contribution at this stage to my answers to your questionnaire, using the fewest possible number of words and leaving it to the reader to make his own deductions regarding their philosophical motivation (if any!).

1. The distinction is essential, if only because of the provision of article 18 of the Vienna Convention on the Law of Treaties with regard to the standing of a treaty between the date of the adoption of its text and its entry into force for a given State, I believe that treaty-drafting is a much more careful operation than resolution drafting.

2. It must not be overlooked that the wording of article 38 of the Statute of the Permanent Court of International Justice was itself a *solution transactionnelle* and I have little doubt that it has lost its original *raison d'être*, and was simply copied into the Statute of the International Court of Justice in 1945 through inertia. Surely, the "standing" of resolutions in the "thesaurus" (I have come to prefer that word to anything like "sources") of international law is not now open to question, in the sense that the practitioner and the teacher ignores them at his peril. On the other hand, States are not normally bound by them, unless the constituent instrument so provides. In this connection, the penultimate preambular paragraph of General Assembly resolution 3232 (XXIX) of 12 November 1974 is of relevance, although it has to be read in the light of the proceedings at the 1492nd meeting of the Sixth Committee on 5 November 1974, when that text was finally settled. Official Records of the General Assembly, twenty-ninth session, Sixth Committee, p. 166.

3. No. I am sure that many resolutions, especially on repetitive topics, are voted without any close consideration of their legal implications: indeed, I strongly suspect that in many cases delegations have fairly loose instructions of which the essential element is "not to rock the boat" and therefore, to vote as last year.

4. This is possible, but the focus must be on the practice of States, not on the resolution or on the voting, or its motivation.

5. First sentence - possibly. Second sentence: no to both parts.

6. This question is not sufficiently precise. For instance, is the statement made in the preamble, or in the dispositive? What is the exact wording you have in mind?

7. Could be *a* (not *the*) proper instrument for the purpose mentioned. Was not a great deal of the fundamental law of outer space first written in this way?

8. No reason to answer this question in the negative, but its excessive generality calls for caution.

9. This question is quite irrelevant. States are entitled to use any form for recording their agreements that they find politically acceptable.

10. A general answer is not possible as it will always depend on all the circumstances.

11. This question implicates the general art of interpretation: no generalized answer is therefore possible.

12. The answer to the first sentence is "none", unless consented to by all the parties to the treaty (if it is a case of treaty interpretation). To the second sentence - yes.

13. No.

14. No.

15. Diplomatic inertia only.

16. No general answer is possible.

17. No. The title given to a resolution is of no legal relevance.

18. First sentence - no. Second sentence - where is it stated that the General Assembly acts, or can act, as the "organ of the international community"?

19. First sentence - yes, not only numerical majorities, but also their political composition. Second sentence - yes. Third sentence - the answer depends on how real was the consensus, or how far was it a political gimmick to bring a useless political discussion to an end (as I strongly suspect is very frequently the case).

20. See answer to question 2.

21. First sentence - position reserved, but question may be premature. Second sentence - yes.

Hoping that these answers may be of some practical help to you, and wishing you, my dear friend and colleague, all success in your difficult task,

I remain,

Yours sincerely,

Shabtai Rosenne

Complementary Observations of Mr Shabtai Rosenne

December 12, 1979

Dear Friend and Colleague,

Many thanks for your letter of 17th November. I have since received the addendum from Mme Wehberg, and will continue to answer your questions in the same vein as before.

22. (1) Yes. (2) No. The General Assembly can take care of itself. I believe that it is aware of certain limitations under which it carries out its work, but all experience has shown that changes must come from within,

and cannot be imposed from outside. As an illustration of the evolution of techniques (without, at this stage, value judgment), compare the manner of production of the New York Convention of 1973 on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, with that of the Convention against the Taking of Hostages, to be adopted by the current session of the General Assembly before it ends next week. Having participated in both, and having some close knowledge of the political factors operating in each case, I am at a loss to suggest which technique was better in the given circumstances.

23. No. Terminology is frequently a highly delicate politico-diplomatic matter, today rendered more complicated by the multiplicity of language versions.

24. Yes, especially the initial research and determination of attainable objectives. Here, I think it is safe to say that the ILC, and probably also UNCITRAL, are the most thorough in their initial investigations, but on the whole their well tried methods have proved inadequate when there is pressure to finish a topic within a short time, or when interdisciplinary factors, or modern technology, are involved.

25. Doubtful. While "technically" the drafts produced by the ILC or UNCITRAL may well be the "best" (though I do not know by what scale of values that determination is to be made), this is not to exclude other techniques.

26. It is probably impossible to generalize, but I believe that in many instances the existence of a "precedent" facilitates the later diplomatic exercise. But this works in several ways.

27. It is essential. That is really how the ILC has come to work, and on the whole that is the way the Sixth Committee works, but technical words such as "conciliation" should be avoided. You really have here a special instance of normal diplomatic processes working, processes centered on the time-honored techniques of negotiation, but there is an enormous difference when the final product is legally not of a binding character, as, e.g. most resolutions of the General Assembly, and when it is or may be as, e.g. resolutions of the Security Council (that explains why so many of them are couched in language of recommendation rather than categoric decision).

28. (1) A negative vote implies total rejection of the resolution in question. (2) As for abstention, you know, the International Court has given in the *Namibia* Case (I.C.J. Reports, 1971, at p. 22) a technical explanation of the influence of abstention in the Security Council, and I believe that the underlying sentiment generally holds good *mutatis mutandis* in other international organs (subject to the terms of the constitution). But more serious than abstention, which really may mean that the State concerned wishes to leave all its options open and is indifferent to the passage of the resolution, especially if it is directly affected by the resolution, is the impact of "explanations of vote" or in instances of "consensus", oral reservations, on the record. I doubt if this is a matter for general regulation. As for the formal abstention of an interested State in a

case of a resolution requesting an advisory opinion in a matter of concern to that State, note the analysis and statement of the Court in *Western Sahara*, I.C.J. Reports, 1975, at p. 23. That passage notwithstanding, I have often asked myself if the Court would have handled the issues differently had the State concerned voted in the negative instead of abstaining.

29. I think it is too early to go into this. I have a feeling that you may find it very difficult to find a common thread through all the answers to your extremely searching questionnaire.

Accept, my dear friend and colleague, my warmest wishes for a Happy Christmas and a good New Year.

Yours sincerely,

Shabtai Rosenne

9. *Observations of Mr Oscar Schachter*

August 1980

1. The distinction between obligatory and non-obligatory acts is relevant in some respects to the Commission's study concerning the "elaboration of non-contractual instruments." In particular, the distinction is relevant to consideration of the ways in which the resolutions should manifest the intent of the assembly with respect to the legal effect of the resolution. It also has relevance to the procedure for consideration of proposed resolutions, the use of experts, the requirements for adoption, the significance of reservations and possibly other aspects of the process of elaboration and approval. It is therefore pertinent for the study to consider the conditions under which resolutions which are non-binding in principle may have obligatory effects. The study should not be limited, however, to an analysis of obligatory effects or to the distinction between binding and non-binding acts. It should consider the "elaboration" of resolutions that have no obligatory effect but which contribute in a material sense to the formation of law though they are *de lege ferenda*.

2. Resolutions may be means for the determination of rules of law, particularly insofar as they provide evidence of *opinio juris* and state practice. They then would be "subsidiary" in the sense of Article 38 para 1 (d).

3. Resolutions may constitute state practice in special circumstances, as for example when the General Assembly applies or interprets the Charter in respect to a matter that falls within the functions and competence of the General Assembly. An example is the determination by the General Assembly of non-self-governing territory for purposes of Article 73(e) of the Charter; another is its decision in respect to the termination of the mandate for South

West Africa. In contrast, Assembly resolutions which set forth rules or principles of customary international law would constitute evidence of state practice in cases where the resolution and the surrounding circumstances referred to past practice in general or particular instances. Such evidence would be subject to evaluation in the light of relevant factors.

4. Whether resolutions have in the past influenced state practice leading to the creation of custom is a historical question that requires consideration of the various factors affecting state practice in those cases. There is reason to believe that the resolutions on self-determination, racial discrimination, torture, and outer space have influenced state practice (e.g., national legislation and claims) leading to inferences of customary law.

5. One would reasonably expect that resolutions which reflect a general concordance of state positions would accelerate the development of customary law. When such resolutions affirm a legal principle or rule (e.g., the resolutions on the Crime of Genocide), they provide persuasive evidence of the *opinio juris* of the states. However, it does not seem appropriate to say that the resolutions "constitute the *opinio juris*".

6. A statement in a resolution that a proposition reflects (or is declaratory of) a pre-existing customary law norm should be regarded as evidence of a belief on the part of the states concerned that the statement is true. That belief may in itself be evidence of the truth of the statement. However, such evidence would only be presumptive. Whether the statement of law in the resolution is objectively true would depend on an evaluation of all the relevant evidence, including independent evidence as to the supposed pre-existing norm. In short, the resolution would be one element of evidence to be weighed with other relevant factors in determining the legal effect of the statement. A similar reference in a treaty would be subject to the same considerations and would have no greater evidentiary value as to customary law.

7. Is a resolution a proper instrument for confirming or restating the law where it seems uncertain or controversial? Two separate questions are raised by the term "proper": one of legality, the other of suitability. The question of legality arises because statements in resolutions that confirm or restate the law are not, in themselves, recommendatory. They are declaratory or determinative (constatations). The practice of the General Assembly shows that such statements of law are sometimes considered necessary to set forth the grounds for recommendations and therefore by implication come within the recommendatory function. A clear example is a resolution containing an interpretative statement as to the meaning of a Charter provision which had been controversial as applied to a particular situation (for example, the resolutions on apartheid). In other cases, notably the declarations of legal principles (e.g. resolution 2625) the resolution declares or confirms a principle of law with the manifest or implied intention of recommending its observance by member states. Such resolutions may consequently be considered as falling within the category of recommendations in the sense of Articles 10 and 13 of the Charter. It may

be contended that such statements of law are only permissible when they are *not* controversial. Otherwise, it can be argued, the Assembly is misusing its recommendatory power by making categorical judgments that are intended to be more than recommendatory. One answer to this contention is that such controversial statements of law can have no higher legal status than recommendations. A difficulty with this response is that such statements of law tend to be given evidentiary valuc and actually have greater legal effect than recommendations. While acknowledging that consequence, it is hard to deny that the Assembly must in some cases determine controversial legal issues in order to have a foundation for its permissible recommendations. Consequently I would not challenge the legal authority of the Assembly to decide such controversial issues. However, it should be understood that the conclusions of law are not ipso jure binding and that their evidentiary value may be rebutted.

A separate question concerns the suitability of resolutions as an instrument for confirming or restating law in controversial areas. The objections on grounds of suitability are familiar, to wit:

(1) determinations of law should not be made by political bodies

(2) the procedures of the Assembly do not as a rule allow for the proper assessment of the state of the law

(3) many governments in voting, or in refraining from objecting to, such resolutions do not mean to give the resolution legal effect; they consider it merely a recommendation and therefore do not take the determination of law seriously. (See Schwebel in 1979 Proc. Am. Soc. Int. Law 302).

These objections cannot be lightly dismissed. However, their force and relevance vary with particular cases and issues. There may be situations in which the procedures followed by the Assembly and the positions taken by governments would show that the legal issues were adequately examined and that the governments intended their votes to express support of the juridical correctness of the legal conclusion in the resolution. We should not assume a priori that these conditions are never met though they may be rare in the political atmosphere that prevails.

8. A resolution would not normally be a suitable instrument for codification for largely the same reasons as those suggested in the answer to question 7 in regard to restatements of confirmation of legal rules. Exceptional cases may, however, be envisaged in which codification of a particular area of law may be carried out by the International Law Commission (or another competent body of jurists) and embodied in a restatement rather than a convention. In that case, an Assembly resolution, while not the actual instrument of codification, would be useful to record the interest of member states in recognizing the codification as *lex lata* and in recommending its application by states.

9. Resolutions are not as a rule a desirable form for binding agreements among states. The reasons are obvious: the uncertainty as to intent and as to the authority of the representatives to bind the states. If states intend

that the substance of a resolution should have the force of a treaty, they can proceed to convert the principles of the resolution to a formal binding treaty, as they have done in several instances. On the other hand, one should not exclude the possibility of a resolution being employed to embody the agreement of states on principles or rules of conduct that would not have binding force by virtue of the resolution. Such resolutions would not constitute treaties within the meaning of the Vienna Convention of the Law of Treaties. They may, however, be desirable to reflect a concordance of state positions that would lead to a subsequent treaty, customary law or national implementation. The fact that such agreements embodied in resolutions are not binding would not preclude certain legal consequences for the states that have approved (see response to question 20 below). Consequently, the question whether resolutions are a desirable form for "agreement" requires further analysis in the light of the particular circumstances.

10. As indicated above, the adoption of principles or rules in a non-binding resolution may encourage or lead to the subsequent conclusion of a treaty. The resolution would in some cases prepare the way for treaty negotiations since it would serve to convey both a sense of the importance of the matters dealt with (as in the human rights field) and an expression of the policies for which general international support has been evidenced. Such resolutions are likely to reduce the area of negotiation for the subsequent treaty and to limit the freedom of the negotiating states. Although they would not be binding in a formal sense in practice they would impose substantial limits on the treaty negotiation.

11. Reservations to resolutions serve the obvious purpose of recording a difference between the reserving state and the position expressed in the resolution. They may be used to indicate why a statement of law is not regarded as well-founded and thereby to negate an inference of *opinio juris* on the part of the state concerned. Reservations are sometimes made ex abundanti cautela. They should not be taken as an implicit acknowledgment that in their absence the reserving state would be obliged to comply with the resolution.

12. As already indicated, the Assembly may find it necessary in exercising its recommendatory authority to interpret pertinent legal rules, whether or not they are in the Charter. Such interpretive statements are not ipso jure binding on states but if widely accepted they would carry weight. Resolutions interpreting Charter provisions such as res. 2625 should be included in the resolutions dealt with by the Commission.

13. Resolutions would have evidential value for general principles of law where the circumstances of their consideration by the Assembly (including studies of national law) provide a basis for inferring that the Assembly's decision rested on an adequate foundation.

14. As indicated earlier (see Question 7) legal rules may be justifiably incorporated into recommendatory resolutions because the rules are part of the premises for the recommendation. It is difficult to see how the inclusion

of legal rules can be prevented in these cases. Its "disadvantages" arise insofar as the Assembly's adoption of the rule has not been based on adequate consideration and to the extent that states adopting the resolution are under a misapprehension as to the declaratory effect of stating a rule in the resolution. Both of these difficulties may be met through appropriate changes in procedure.

15. Repetition or re-citation is but one element to be considered in determining the evidential value of resolutions in respect to *opinio juris* or, in some exceptional cases, to state practice. Repeated reference to a specific legal rule in successive resolutions tends to strengthen the conviction that the rule is expected to be complied with as a matter of law, but this conclusion must be assessed in the light of intent and relevant circumstances. In some cases, recitation may only evidence non-compliance or automatic (i.e. non-deliberate) reference.

16. While resolutions of a law-making character would normally enunciate principles, they might include detailed and specific rules when considered necessary.

17. Where a resolution is devoted entirely or mainly to enunciating legal rules of general importance, the appelation "declaration" is desirable. Where a resolution expresses a legal rule as part of the grounds for a recommendation, no special form seems necessary. It is desirable to make it clear whether the "rule" is meant to be a legal rule rather than a moral or political injunction.

18. There is no compelling reason why the Assembly's adoption or confirmation of rules should not be in a resolution addressed to all states.

19. "Voting majorities" are relevant for the determination of the significance of a resolution in the process of law-making. But it is necessary to consider not only the number of states but also their representative character, the extent of their interest and responsibility and any indications as to their expectations of compliance. Unanimity would be a highly significant factor but even unanimous resolutions must be assessed in the light of past and anticipated behaviour of the states concerned. A resolution, though unanimous, may be so contrary to actual practice and expectations of future compliance that it could not be regarded as persuasive evidence of a recognized legal obligation. Adoption by "consensus" (which avoids explicit voting) calls for an assessment of the actual positions of states and of their understanding of the meaning of their vote. In effect, the entire record - including the statements and practice of the states - should be examined to ascertain whether the "consensus" can be taken as approval or acceptance by all the states. Experience in the U.N. has shown that "consensus" may be a means for avoiding a vote when many states, or a significant group of states, hesitate to express full support for a resolution and have made reservations for the record.

20. A General Assembly resolution may have a law-making influence or effect irrespective of the operation of treaty or custom. One example, already mentioned above, is a resolution that expresses general principles of law in

the sense of Article 38 and, in the circumstances, constitutes persuasive evidence of the acceptance of such general principles. Several resolutions relating to human rights fall into this category.

A second example is related to the general principle of good faith as applied to declarations by states of their legal obligations. The International Court has referred to this principle in respect to unilateral declarations (*Nuclear Tests* cases, 1974). It seems equally applicable to collective declarations of legal rules embodied in resolutions. The clear and explicit acknowledgment by states of obligations binding on them or of legally permissible areas of activity should have no lesser effect in resolutions than in unilateral declarations. If that is so, the conclusion of the International Court in the *Nuclear Tests* cases may be applied to the resolutions, as follows: "Thus interested States may take cognizance of [such] declarations and place confidence in them, and are entitled to require that the obligations thus created be respected" (I.C.J. Reports 1974, 268, 473). It should be stressed that this conclusion depends on a determination that the states in question intend to be bound by the declaration.

A third example of legal effect also involves the principle of good faith. A resolution may be clearly intended as recommendatory for example, proposing standards for voluntary compliance. In adopting that resolution, a logically necessary assumption is that the states have the right under international law to take the proposed action. It would follow that the states which have voted for the resolution and its implicit (or explicit) premise should not under the principle of good faith be entitled to challenge the legality of action pursuant to the resolution. One may link this to estoppel by showing that the resolution is an inducement to states to adopt the recommended measures *and* concluding that reliance on that resolution by states taking such measures precludes the other assenting states from objecting to that action. This conclusion does *not* require the assumption that binding obligations have been created by the resolution; it holds even if the resolution is clearly intended to be a non-binding act. (This point involves questions under consideration by the 7th Commission).

It may be observed that the examples given above can be subsumed under the general proposition that resolutions may reflect the expectations of states concerning what is lawful and unlawful and therefore are one means of ascertaining such expectations. However, this general sociological proposition does not provide specific criteria for determining which resolutions carry such expectations and what precisely they are. Accordingly, it is still necessary to seek criteria in the formal "sources" of Article 38 or in the special (and limited) role of the accepted principle of good faith as indicated in the two examples above.

For this reason I would not conclude at this time that resolutions should be treated as a new source of law in the sense of Article 38. There is not sufficient international support for that position at the present time though such support may in the future take the form of a customary law development or a treaty recognizing the legal force of resolutions in some circumstances. In the present circumstances, we can recognize that resolutions are a "material source" of law contributing to the content of emerging customary law, as well

as to treaty law and general principles of law. Resolutions are also a means by which states may express an intent to be bound (with legal effect) as well as to adopt non-binding recommendations that evidence an understanding as to rights and duties of states which would preclude the assenting states from challenging the behaviour of other states confirming to that understanding. Although these two latter aspects do not fall clearly within custom or treaty, they can be based on good faith as a generally accepted principle of international law.

Oscar Schachter

10. Observations of Mr Finn Seyersted

Oslo, June 17, 1980

Replies to questionnaire on "Resolutions of the General Assembly of the United Nations".

1. Yes.

2. No. But they can set off customary law if uniformly applied. The source under Art. 38 is then the general practice. This is particularly true if the resolution deviates from pre-existing practice. An example of this is the resolution of the General Assembly on principles governing outer space, in as much as it provides that members of an intergovernmental organization launching space objects shall be jointly and severally liable together with the organization as such for any damage caused. This contradicts a general principle of international law to the effect that intergovernmental organizations are subjects of international law and are alone responsible for their acts. At least two conventions concluded after the resolution had maintained that principle. Thus the constitution of the Intersputnik (Space Organization between the Eastern European States) states expressly that the organization shall be liable for its acts within the limits of its means and that the members shall *not* be liable. This is a clear example of a resolution that does not create new law.

3. The latter.

4. Yes, often.

5. (a) They *can* accelerate.
   (b) They can constitute the *opinio juris* if they state or otherwise make it clear that they interpret existing law. Otherwise they are not even evidence of *opinio juris*.

6. (a) See 5 (a).
   (b) The purpose of a *resolution* is to attempt to set off customary law equally binding for all. The purpose of such a reference in a treaty

is to prevent non-contracting states from declaring themselves not bound by a rule of general international law by arguing that they have not ratified the treaty that confirms it. See for example the preamble of the convention on the high seas of 1958 - a convention which on practically all points merely confirms existing customary law - except that it overrules the controversial *Lotus* judgment of the International Court of Justice.

7. Yes, if agreement can be reached on a text. But it cannot alter a clear rule of international law - see the example cited under 2.

8. Yes - better than convention, because it has equal effect for all, in contradistinction to treaties, cf. 6 (b).

9. Yes - in organizations which by express provision or custom have adopted the principle that resolutions are binding.

10. That one does not yet know whether a treaty will be achieved and how many will ratify. Besides, it may influence the treaty-makers greatly although it does not bind them.

11. They detract from the legal and/or political effect of the resolution. In particular, they may demonstrate that there is no commonly accepted *opinio juris*.

12. (a) Answered above.
(b) Yes.

13. Not unless they say so and and are not contradicted by other sources.

14. No. But in *treaties* one should add expressly that they merely confirm existing rules in order to prevent non-contracting states from arguing that they are not bound by the rule.

16. The latter should be done whenever agreement can be reached.

17. This is partly a question of *name* and partly one of the *introductory text*. If it is a restatement of existing law, the latter is important, cf. above, and "Declaration" may also help.

18. (a) No.
(b) No.

19. (a) Yes.
(b) Yes.
(c) Great if it reflects a real unanimity - but small if it reflects a lightheartened consideration.

20. No - resolutions have no effect as sources of law unless they influence practice or restate existing law.

21. Yes - the same as for treaties.

24. They must be based upon studies of practice and not merely reflect a political compromise.

25. Yes.

28. The resolution has the same effect for all. Either it confirms existing law or it sets off customary law or its does neither. A negative vote will make the latter more likely.

Finn Seyersted

11. Observations of Mr Erik Suy

1. Generally speaking, I think that the distinction between "obligatory acts" and "non-obligatory acts" of the General Assembly is in itself a matter of considerable ambiguity, because the principle of the non-binding nature of G.A. resolutions is qualified by some exceptions. Several factors are involved. First, of course, the area or field within which the action is taken. The Charter provides in this respect certain guidance in Article 18 and also in other Articles such, for example, Articles 16, 17, 19, 22 and 109. Within a given particular area or field it is then necessary to distinguish the kind of action in question. Another important aspect to be taken into account is the addressee of the action concerned. It is obvious, for example, that regarding the Secretariat, General Assembly's recommendations, requests or invitations are "obligatory acts". Actually, most of the actions taken by the Assembly concerning the functioning of the Organization or its own functioning are in the nature of "obligatory acts" for the Organization or the Assembly as the case may be. In fact, the referred distinction between "obligatory acts" and "non-obligatory acts" has no meaning except in the context of relations between the Organization and other subjects of international law, particularly Member States or States in general and other intergovernmental organizations.

2. As to the question whether General Assembly resolutions are only "subsidiary" means in the sense of Article 38, para. 1 (d), of the ICJ Statute, my reply would be in the negative. For me, the role that these resolutions may play under Article 38 of the Statute of the ICJ cannot but be related to paragraph 1 (b). They may constitute an element of proof of an international custom, namely an element of evidence of a general practice accepted as law. See also reply to question 20.

3. Resolutions are not to be equated with State practice, but they can be guidelines for State practice. In other words, resolutions may contribute to the development of new State practice or may be an evidence of an existing State practice.

4. My reply to this question is definitely yes, but in certain cases only. Resolutions influence or initiate State practice particularly in areas not yet regulated by international law or regulated by that law only in a sparse manner or regulated by the law in a manner inconsistent with current needs. Declarations in certain fields such as the law of the sea, the law of outer space, the law of the environment are examples that may be mentioned in that respect.

5. Resolutions on legal questions can reflect o*pinio juris* and thus accelerate the making of customary rules.

6. In principle, there is no difference between such reference in a treaty or in a resolution. The text of a resolution as the text of a treaty is adopted by a given majority according to the rules of procedure of the organ or conference concerned. For the purpose of the weight to be given to the text concerned as evidence of customary law or State practice the approval or opposition to be taken into account is the one manifested at the moment of the adoption of the text. The question of ratification of treaties is another matter, which in my view is relevant only for the purpose of establishing whether a *conventional* relationship exists in the case between two or more given States. The example of the 1969 Vienna Convention on the Law of Treaties is very significant in that respect. Long before receiving the thirty-fifth instrument of ratification or accession nobody, including the International Court of Justice, doubted that the text of the Convention adopted by the Conference embodied and reflected rules of customary international law. I would add that the text of a treaty adopted in a specialized conference of plenipotentiaries duly accredited to that effect on the basis of a draft prepared by the ILC has a greater weight from the standpoint of evidence of customary law than the text of a resolution adopted in the general framework of a given session of the General Assembly. To entertain doubts in that respect is, in my opinion, contrary to the interest of the process of progressive development of international law and its codification undertaken under the auspices of the United Nations. I would add that the old-fashioned idea that declaratory statements of international law by the General Assembly were, generally speaking, a preferable means of codifying international law has not resisted the proof of the passing of time. There are two main reasons for that: (a) the codification of international law cannot be conceived in our times without its progressive development projection; (b) under contemporary conditions international law cannot fulfil its role by setting forth broad general principles only; it must be formulated in a more detailed and concrete manner in order to provide an answer to contemporary needs of inter-State relations.

7. There is nothing objectionable for a resolution to confirm or reiterate the law in a given field. It may be even useful as a written reminder of otherwise customary law. However, the query is formulated in a somewhat confusing way. If the law in the field concerned is uncertain or controversial, a resolution *confirming* or *restating* the law cannot mean anything else than a resolution confirming or restating the law *with its* uncertainties and controversies. Once more, we see here an example of playing games with words and concepts. As usual the matter turns around the meaning of the term "restatement of the law". Unless such a concept is used in a consistent manner, doctrine will continue to turn in circles. There is nothing wrong in defending a codification approach *pour ainsi dire* of a static nature. What, in my view, is less proper is to pretend that in international law a "restatement of the law" may modify, fill gaps or develop the existing law. A "restatement of the law"

by definition implies a restatement of the *existing* law, particularly if such a restatement is cast in a non-conventional instrument such as a resolution. A different matter would be, of course, the question of using resolutions as a means of *interpreting* existing law as the Friendly Relations Declaration did.

8. It should be noticed that article 23 of the Statute of the ILC is an article included in the section devoted to the "codification" of international law. It is a well known fact that for the drafters of the Statute "codification" and "progressive development" could proceed independently of each other, a belief superseded there since by the experience of the process itself and the position adopted by States vis-à-vis such a process.

The query raises also an underlying question of considerable importance which is frequently ignored or bypassed by doctrine. In international law, as in any legal system, legal rules to come into being *as such* must follow certain authoritative procedures prescribed or provided for by the legal system concerned. In international law such authoritative procedures are mainly two, the "conventional procedure" and the "customary law procedure". If a "codification instrument" is cast under the form of a G.A. resolution the rules embodied therein must receive their legal force, in order to be real binding legal rules, from a previous or subsequent conventional procedure or "customary law procedure", namely from an authoritative procedure *external* to the codification resolution instrument concerned.

The *travaux préparatoires* of the San Franscico Conference provide significant relevant information on the matter. At the 10th meeting, on 21 May 1945, Committee I 1/2 studied para. 6 of Section B of chapter V of the Dumbarton Oaks Plan and voted upon on the following question: "L'Assemblée devrait-elle avoir le pouvoir de promulguer des règles de droit international qui auraient un caractère obligatoire pour les Membres, après avoir été approuvées par le Conseil de Sécurité?" The reply of the Committee was negative (26 against 1 for). At the 12th meeting, on 24 May 1945, the same Committee voted upon another question implying a certain legislative power of the General Assembly, namely "Est-ce que l'Assemblée Générale devrait avoir les pouvoirs pour imposer des conventions lorsque, à son avis, ces conventions ne constituent que des corollaires des principes qu'elle a déjà reconnus comme obligatoires, ou lorsqu'elle estime que les obligations contenues dans les conventions doivent être nécessairement observées pour le maintien de la paix et de la sécurité internationales?". The Committee replied unanimously in the negative.

9. Resolutions are a desirable form for agreements of States but only *within the legal and organizational framework represented by the organization which adopts the resolution.* The procedure is unworkable at the general international law level.

10. Those resolutions constitute a framework for the negotiators: they are guidelines but they do not tie the hands of negotiators.

11. It is obvious that, depending upon the content of such reservations

or explanations of vote, the character of "rules" contained in the resolution may be weakened. However, if by its contents a resolution represents a restatement of *existing* rules of international law, "reservations" or "explanations of vote" cannot as such modify such rules. "Reservations" are not an institution applicable to customary law. They may, however, be a proof of policy positions aiming at modifying the law.

13. Much depends on the meaning attached to the expression "general principles of law". Nothing prevents States from formulating principles of law shared by all or most of their various municipal law systems in a resolution adopted by an international organ and, in such a case, the resolution would have in my view an "evidential value" of the principles concerned at the international level. It is, however, difficult to conceive that States would have recourse to resolutions for such a purpose. If, on the other hand, the expression "general principles of law" is intended to mean "general principles of international law" my answer should be definitely in the affirmative.

14. If the rules are *de lege lata* their incorporation in a resolution would not affect their validity. It is a reminder or a confirmation of existing rules.

15. Repetition and re-citation of such a rule would certainly contribute to speeding up the customary character of those rules. Such repetition is evidence of the *opinio iuris sive necessitatis* provided that there is no objection to such rule.

16. Practice shows that resolutions usually enunciate broad principles and that detailed obligations are then worked out in treaty-form (human rights, outer space, law of the sea). As there is a growing tendency to adopt resolutions by consensus, only broad principles lend themselves to this adoption-procedure. This is precisely one of the reasons why I consider that resolutions are not the most suitable kind of instrument, under contemporary conditions, for codifying and developing progressively international law.

17. "Declaration" is certainly a suitable title for the resolutions purporting to formulate legal rules or guiding principles. The use of this expression should indeed be restricted to that type of resolution.

18. I see no obstacle. My answer to the second query - which is formulated in terms of an exercise in political science rather than of a legal question - is negative.

19. See also under 6. The value of consensus will depend upon the declarations or "reservations" made on the occasion of the adoption of the resolution.

20. In 1974, the General Assembly adopted a resolution on the Review of the role of the International Court of Justice which contains the following preambular paragraph:

> "Recognizing that the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice".

There is a tendency to consider resolution as a formal source of law but only to the extent that they reflect a solid *opinio juris* which is confirmed by practice. But one has to be extremely cautious in this respect.

21. Not yet any comments.

22. I do not think it advisable for the Institut to undertake an analysis of various resolutions with a view to determine if and to what extent they purport to codify or develop legal rules.

23. No. The exploration suggested would have academic interest only.

24. There are various methods, and it would be difficult to state their influence on the law-making process. In my view the methods are a negligible factor. However, I consider that the method followed in the elaboration of a law-declaring or law-proposing resolution may increase, in certain instances, the evidential value to be attached to the resolution concerned from a legal standpoint. I have in mind, in particular, resolutions of a law-making content adopted or which could be adopted, following the ILC method, the UNCITRAL method, etc., namely of methods which involve the preparation of drafts on legal topics by organs established by the General Assembly for the purpose of codifying and developing progressively international law.

25. If we are dealing with the resolutions of the General Assembly this question seems superfluous. See my comments under question 24.

26. Depending upon the circumstances, a later resolution could indicate changes in perception and hence in the *opinio iuris*.

27. I fail to see the role of *conciliation* but would rather insist upon the importance of *consultations*. "Conciliation" plays no role here. The agreements reflected in the texts are the result of negotiations through consultations.

28. *Prima facie*, a Member State having voted against a resolution is not bound by it except if the resolution is in fact a decision. One will also have to explore the effect of a resolution the various paragraphs of which have been the object of a vote. An analysis of the explanations of vote will be necessary. Even for Member States having voted in favour of the resolution concerned it is questionable whether such a positive vote *by itself* binds legally Member States regarding the contents of the resolution, because a vote, positive or otherwise, does not modify the legal régime of a resolution whose contents are mere recommendations. General Assembly resolutions addressed to Member States are not in principle legally binding by themselves (subject of course to exceptions, see comments under question 1). In my opinion, Member States remain in principle free, independently of the way their votes were cast, to draw the legal consequences of their vote as well as of the recommendation contained in the General Assembly resolution concerned. In order for the contents of a General Assembly resolution to become legally binding for Member States it necessitates a special act of acceptance of the recommendations contained in the resolution performed individually by Member States. Such an act may, of course, take place before or after the adoption of the resolution

in question. It is necessary to point out that even after having voted against a resolution a Member State may, however, endorse it subsequently by an individual special act (for example, by a statement). As from that moment, that State would also be bound by the resolution. As to the meaning of the abstention, my views are that abstaining States are States which reserve their position vis-à-vis the resolution concerned. The Rules of Procedure of the General Assembly consider abstaining States as Members which were *not* present and voting.

29. The meaning of consensus should certainly be discussed.

Erik Suy

12. Observations of Mr Endre Ustor

Budapest, 4 February 1980

Dear Friend and Confrère,

I have read with great interest your excellent Preliminary *Exposé* and I congratulate you on the admirable way in which you treated the subject.

The following are my replies to your Questionnaire:

1. You answered this question yourself in the *exposé* by stating: "resolutions which are of interest to the present *exposé* belong to the category of recommendations." (page 35). I agree.

2. Resolutions *are* means for the determination of the rules of (customary) international law, or at least for the determination of the *opinio juris atque necessitatis*. Although the G.A. is not a judicial body and it does not consist of the most highly qualified publicists, it virtually represents the community of States. Hence its resolutions do have in my view at least the same - if not higher - evidential value than the subsidiary means mentioned in article 38 subparagraph 1 d of the ICJ Statute. All this applies, however, only to resolutions adopted unanimously or practically unanimously. In judging the legal value of a G.A. resolution further caution is recommended by Sir Gerald *Fitzmaurice* who states that "...there is ... inevitably a tendency for Assembly resolutions to be adopted in a highly emotional context, and accordingly to reflect political, economic or social aspirations rather than any responsible assessment of the relevant legal issues and considerations." (Livre du Centenaire, page 271). There is more than a grain of truth in this remark.

3. I find difficulty in equating a resolution *per se* to practice. It is rather evidence of o*pinio juris* (*communis* - in case of unanimity). A resolution of the type mentioned in question no. 6 can be regarded as evidence of State practice.

4. They may do so.

5. a) Yes, b) see 3 above.

6. Such statement in a resolution is a strong presumption concerning the acceptance of the rule in question by the States voting in the affirmative. If such statement is included in a treaty the presumption turns into firm law between the parties.

7-9. The desirable and proper form for the agreements of States is still the treaty. This applies to codification also. When treaty-making is not feasible a resolution would also do as second best.

10. A resolution of this kind may act as a stimulus to move States in a certain direction in developing law i.e. in concluding treaties. Principles adopted in such a resolution constitute a strong moral pressure in the course of subsequent treaty negotiations.

11. They diminish the force of the "moral obligation" originating from the resolution.

12. It is an evidence in respect of the meaning of the legal rule in question. b) No.

13. They have.

14. If the resolution clearly expresses that it upholds a rule of *lex lata* this probably does not weaken the force of that rule, it may even strengthen it.

15. It probably increases the rule's chances of becoming law, but depending on the text and the circumstances the reverse may also happen: repetition can increase the doubts surrounding the rule's binding force.

16. I would not venture to limit the freedom of States to draft resolutions in the way they like.

17. I accept that resolutions enunciating legal rules should normally be called declarations.

18. a) No. b) No.

19. a) Yes. b) See above under 2. A resolution adopted by consensus can be equated to a resolution voted unanimously provided such consensus covers genuine unanimity i.e. if it is not destroyed by a series of oral reservations.

20. The law-making influence or effect of G.A. resolutions is not independent of custom. Resolutions are not a new source of law.

21. The first question is for you to answer in the first instance on the basis of the replies received. The second question indicates that you have already certain ideas concerning possible answers to the first. In respect of these you query whether it would not be considered presumptuous if the Institut gave advice to the G.A. I don't think so. A resolution of the Institut could possibly underline the importance of the law-making or law-enunciating resolutions of the G.A. and make suggestions concerning the method of their drafting. (See below my answer to question no. 24).

22. I support the initiative of Madame Bastid and would add the following:

In view of the long list of the law-making resolutions of the G.A. would it not be feasible to systematize and codify this vast material in one logical structure under the heading: "The law of the General Assembly"? Or if this seemed to be a too presumptuous undertaking could this not be done piecemeal beginning e.g. with "The law of the G.A. on the prohibition of the use of force" or with any other comprehensive topic?

I do believe that there would be room for improvement of the "Methods and Procedures of the G.A. for dealing with Legal and Drafting Questions" annexed to the Rules of the Procedure of the G.A. under G.A. resolution 684/VII.

23. Not necessarily.

24. Law-making deserves and needs special care, i.e. expert advice, circumspection, patience, time. These must be assured by the relevant procedure.

25. The organ in question must be of a representative character, *i.e.* its composition must be placed on the widest possible geographical basis.

26. The principle *lex posterior derogat priori* will obviously play a role in the drafting of the second resolution.

27. The ultimate value of conciliation depends on its success. But even if success can not be predicted, the resort to conciliation has its merits, it keeps open the door to agreement and is therefore - whenever feasible - recommended.

28. A recalcitrant Member State's negative vote or abstention does not absolve it from its obligations under a rule of law binding on it on the basis of customary or treaty law.

29. I have no other proposals to make.

With warmest personal regards.

Yours sincerely.

Endre Ustor

13. Observations of Mr Nicolas Valticos

Genève, le 14 décembre 1979

I. — *Commentaire général*

Avant de répondre individuellement aux diverses questions posées, j'aurais à faire un commentaire plus général. Il faudrait, me semble-t-il, partir des idées suivantes : d'une part, que les résolutions, en tant que telles, n'ont pas de valeur obligatoire et, d'autre part, qu'elles constituent un cadre formel dont le contenu peut varier sensiblement d'une résolution à l'autre (voir par

exemple dans Rousseau, *Droit international public*, tome I, Paris, 1970, p. 434, le rappel des distinctions, faites par Basdevant dans son *Dictionnaire de la terminologie du droit international*, entre les différents types de recommandations). De même, c'est parfois à l'intérieur d'une même résolution qu'on relève des différences d'une disposition à l'autre. Le classement des résolutions et leurs effets juridiques dépendent donc du contenu matériel des textes considérés, ainsi que des conditions d'élaboration et d'adoption de ces textes.

Le questionnaire paraît viser essentiellement les résolutions à propos desquelles peut se poser la question de savoir si on doit les considérer comme des sources directes ou indirectes de droit international. Dans la mesure où il en est ainsi, les questions relatives à cet aspect du problème ne couvrent naturellement pas les résolutions intérieures à l'Organisation — de caractère généralement administratif ou quasi législatif — ou les résolutions concernant le maintien de la paix et de la sécurité, qui ont trait à des situations de fait particulières et bien déterminées et n'entendent pas poser des règles juridiques générales. Dans ces conditions, les questions qui suivront valent surtout pour les résolutions qui peuvent constituer la reconnaissance de l'existence d'un principe général de droit — les résolutions " déclaratives " étudiées par Castañeda — ou, éventuellement, devenir une étape vers l'établissement d'une pratique et la formation d'une règle coutumière. A un stade ultérieur des travaux de la Commission, il serait sans doute utile de distinguer nettement entre, d'une part, les problèmes qui pourraient être communs à toutes les résolutions (mode d'élaboration, classification) et, d'autre part, ceux qui concernent plus spécialement certains types de résolutions comme celui de savoir si elles peuvent constituer des sources de droit international.

Par ailleurs, dans le classement et l'analyse des résolutions, il convient de ne pas attacher une importance excessive aux termes utilisés dans ces textes. Dans ce cas plus que dans d'autres, l'exégèse risquerait d'induire en erreur car il faut garder à l'esprit les conditions de leur élaboration, le caractère parfois défectueux de leur formulation, les motivations variées qui étaient à leur origine, la nature quelquefois composite de leur contenu — qui comporte des risques de confusion et d'amalgame —, enfin le fait que, quelle que soit la portée des termes utilisés, les résolutions ne peuvent être autre chose et plus que ce qu'elles sont.

II. — *Réponses aux questions*

1. Certainement. Il est vrai que, dans ce domaine où, comme on l'a souvent remarqué, les notions sont souvent floues — et les frontières de l'obligatoire et du non-obligatoire parfois indécises — et où les résolutions pourraient être une étape dans la formation des règles juridiques, les catégories ne peuvent pas toujours être tranchées, ni les distinctions nettes. Néanmoins la distinction proposée serait justifiée et même nécessaire.

2. Les résolutions ne sont pas un moyen approprié pour établir des règles juridiques. Leur adoption n'offre pas les garanties d'un traité. Le rejet, à San

Francisco, de la proposition des Philippines est un élément décisif à ce sujet. On ne peut même pas, à mon sens, les ranger parmi les sources subsidiaires.

3. Une réponse générale ne me paraît pas pouvoir être donnée à cette question. Cela dépendra des termes et des conditions d'élaboration et d'adoption de la résolution considérée.

4. Cela pourrait être le cas.

5. Les résolutions pourraient accélérer la formation de la coutume dans certaines conditions (contenu et termes de la résolution, conditions de son adoption, majorité obtenue). A cet égard, elles pourraient témoigner de l'existence d'une *opinio juris*, si la majorité est assez large.

6. Compte tenu des conditions d'adoption de la résolution (notamment de la majorité obtenue), il me semble difficile de contester qu'une résolution indiquant qu'elle reflète la coutume ne soit pas un élément important dans la reconnaissance de l'existence d'une telle coutume. Une résolution adoptée par 150 Etats sur ce point serait d'une plus grande portée qu'une indication dans un traité bilatéral. Par contre, un traité diplomatique multilatéral aurait un bien plus grand poids.

7. Ce n'est pas l'instrument approprié. Cependant, dans certaines conditions (par exemple si la résolution a été préparée par un organe juridique comme la Commission du droit international et si elle obtient une majorité significative), elle pourrait être un moyen ou du moins une étape utile.

8. Non ; un traité serait naturellement préférable. Voir cependant aussi la réponse à la question 7.

9. Non. Là encore un traité serait naturellement préférable puisqu'une résolution n'a pas de caractère obligatoire. Elle pourrait néanmoins s'y substituer, temporairement parfois, en cas de difficulté d'aboutir à un accord formel, mais alors elle n'aurait naturellement pas le même poids juridique.

10. Cela peut constituer un ballon d'essai, une première approximation, un pis-aller (voir réponse à la question 9), parfois une manœuvre. Une résolution, texte en principe non obligatoire, ne devrait pas lier juridiquement les mains des négociateurs d'un traité. Elle pourrait néanmoins les influencer — ou limiter leur champ d'action — politiquement ou moralement, si les négociateurs ont, peu auparavant, voté en faveur de la résolution.

11. *Mutatis mutandis*, la portée et les effets des réserves sont analogues à ceux des réserves relatives à un traité. Mais avec une différence essentielle tenant au fait que les résolutions n'ont pas le caractère obligatoire des traités : les réserves à leur sujet doivent donc simplement viser à expliquer la position d'un Etat par rapport à l'ensemble ou à certaines dispositions du texte, les raisons pour lesquelles cet Etat n'entend pas leur donner effet ou encore le sens qu'il entend leur attribuer. Certes les Etats ne sont pas juridiquement tenus de donner effet aux résolutions, mais ils peuvent estimer qu'elles entraînent une obligation morale ou qu'elles constituent une pression politique et souhaiter donc expliquer leur position (par exemple s'ils considèrent qu'il n'existe pas

de règle coutumière en la matière ou qu'il s'agit de dispositions *de lege ferenda* auxquelles ils ont des objections).

12. De toute manière, les résolutions ne paraissent pas être un moyen d'interprétation approprié, à moins qu'il ne s'agisse d'interpréter une précédente résolution.

13. Elles pourraient avoir une telle valeur, mais celle-ci ne serait pas absolue.

14. Les résolutions pourraient rappeler l'existence de règles juridiques existantes.

15. Cela pourrait signifier le désir d'accélérer la formation d'une règle coutumière (à moins que cela ne relève simplement de la méthode dite Coué).

16. La résolution est un cadre somme toute commode et des questions très diverses peuvent être traitées dans ce cadre. De préférence, une résolution devrait effectivement énoncer des principes, mais il pourrait être parfois utile d'y insérer aussi des dispositions précises, s'agissant des modalités possibles de mise en œuvre d'un principe.

17. La résolution étant un cadre et visant à exprimer l'opinion de l'Assemblée générale sur des questions et dans des conditions très diverses, il ne paraît guère possible ni même désirable d'en déterminer un type idéal. Quant aux " déclarations ", elles sont simplement le type le plus solennel des résolutions et leur valeur morale ou politique, mais non juridique, peut être plus grande ou peut être voulue telle.

18. La réponse à la première question est " non " pour trois raisons : l'ONU comprend la très grande majorité des pays du monde ; les résolutions qu'elle adopte n'ont pas de caractère obligatoire ; une résolution relative par exemple à l'état du droit international et des principes généraux du droit a par définition une vocation universelle et un caractère objectif. La réponse est négative aussi pour la seconde question, car le raisonnement qui précède ne vaut que pour le cas spécial des résolutions.

19. Les majorités auxquelles les résolutions sont votées ont nécessairement (voir plus haut réponses aux questions 6 et 7) une signification particulière quand il s'agit de savoir si une résolution reflète l'existence d'une coutume ou constitue une étape pour sa formation. L'unanimité ou la quasi-unanimité montrerait qu'il n'existe pas d'objection à la reconnaissance ou à la formation d'une règle coutumière. Le consensus serait aussi un élément positif en ce sens, bien que sans doute à un degré moindre.

20. La réponse est négative sur les deux points.

21. Je réserve ma réponse définitive à ce stade initial, mais l'Institut devrait viser en principe à mieux préciser la notion et les effets des résolutions, à en esquisser les principaux types, et à permettre de mieux discerner le rôle des résolutions à l'avenir, notamment les cas où elles constituent un instrument utile et les cas où ce genre d'instrument serait à éviter, éventuellement les procédures et conditions d'adoption souhaitables, etc.

22. Je serais essentiellement en faveur des vues de Mme Bastid.

23. L'utilité d'une telle opération serait douteuse, pour les raisons données dans la dernière partie de mon commentaire général ci-dessus.

24. Oui, la participation d'un organe de juristes représentatif, comme la Commission du droit international, donne plus de poids à la signification juridique d'une résolution.

25. Oui (voir réponse ci-dessus, sous 24).

26. Il convient de distinguer entre l'aspect formel et la substance d'une résolution. Pour ce qui est du premier, une résolution ne constitue pas chose jugée mais chose décidée. L'acte contraire serait donc théoriquement concevable et il devrait être possible à une résolution d'en modifier une précédente. En effet, les résolutions ne sauraient être plus immuables que ne le sont, par exemple, les lois. Cependant, pour ce qui est de la substance, du contenu d'une résolution, la situation est plus complexe. Dans le cas d'une résolution supposée reconnaître l'existence d'une coutume, on voit mal comment une coutume différente pourrait être reconnue peu après. Un argument analogue pourrait être formulé pour ce qui est des résolutions susceptibles de contribuer à la formation de règles coutumières. Dans de tels cas, il conviendrait d'apprécier le temps écoulé et les changements éventuels des conceptions et des circonstances.

27. Dans le cas de résolutions visant à reconnaître ou confirmer l'existence d'une coutume, la conciliation à proprement parler ne devrait pas avoir un grand rôle à jouer. En effet, la conciliation a pour principal domaine les conflits d'intérêt (sous réserve d'un rôle particulier qui lui est reconnu en matière de contestations relatives à l'application de certains textes adoptés par des institutions spécialisées comme l'OIT et l'UNESCO). La conciliation n'est pas conçue comme une procédure appropriée lorsqu'il s'agit de dire l'état du droit. Si cependant, par conciliation on entend simplement des possibilités accrues de négociation, de telles mesures pourraient naturellement être utiles. La conciliation même serait davantage à sa place dans le cas de résolutions visant à dicter des règles de conduite aux Etats ou à certains Etats, notamment dans des domaines de politique générale, de sauvegarde de la paix, etc. Elle aurait ses limites (nécessité de bonne foi de toutes les parties, urgence des situations, etc.), mais mériterait d'être tentée.

28. Une résolution de l'Assemblée générale devrait avoir la même valeur juridique pour tous les Etats Membres, quel qu'ait été le vote de ceux-ci. Politiquement ou moralement, il pourrait en être autrement.

29. Pas de commentaire à ce stade.

Nicolas Valticos

14. Observations of Mr Michel Virally

La Nartelle, le 6 août 1980

Mon cher Confrère et Ami,

Toute une série de circonstances ne m'ont pas permis de reprendre, avec l'attention qu'il mérite, votre rapport révisé pour la Treizième commission, avant ces tout derniers jours. Je vous prie de m'en excuser. Mes observations risquent, de ce fait, de vous parvenir beaucoup trop tard pour vous être utiles. Si c'est le cas, veuillez tout simplement les ignorer.

J'ai relu votre rapport avec beaucoup de plaisir et d'intérêt et je tiens à vous féliciter à nouveau de la vigueur et du sérieux de vos analyses qui, sur un certain nombre de points, aboutissent à une salutaire remise en ordre de questions parfois traitées dans la doctrine avec un peu de légèreté.

Sur la plupart des conclusions auxquelles vous aboutissez, je peux vous marquer mon accord, même si, parfois, je me sépare de vous par certaines nuances qui ne méritent pas d'être évoquées ici.

Il y a seulement deux points, sur la partie ancienne de votre exposé, où je hasarderai une remarque, peut-être déjà faite dans une correspondance antérieure.

Page 36, vous exprimez l'opinion qu'une règle coutumière ne pourrait pas conférer un pouvoir législatif à l'Assemblée générale. Je suis bien d'accord avec vous pour penser qu'une telle règle coutumière ne s'est pas formée jusqu'à présent et n'est pas même en voie de formation. Je ne vois pas, en revanche, pourquoi une telle règle ne pourrait pas se former si un consensus apparaissait sur ce sujet et donnait naissance à une pratique suffisamment constante et générale. C'est très improbable dans l'état actuel des relations internationales, mais si une telle coutume se formait néanmoins, au nom de quoi pourrait-on lui refuser toute validité ? Aucun traité, même la Charte, ne peut, me semble-t-il, même en prévoyant une procédure formelle de révision, empêcher le fonctionnement du processus coutumier, qui est lié au jeu de facteurs socio-historiques.

Page 44, vous exprimez l'idée que, de façon générale, le vocabulaire utilisé dans les résolutions est sans effet sur la valeur juridique de ces dernières. Je suis tenté de vous suivre, mais avec des nuances, ou des réserves, assez importantes. Vous indiquez vous-même, pages 44-45, que l'usage des mots " recommande " ou " recommandation " n'est pas dépourvu de signification et qu'on peut en tirer certaines conclusions (quant à l'absence de force juridique de la résolution qui les emploie).

En réalité, le vocabulaire utilisé donne toujours des indications, qui peuvent être importantes, sur la volonté, ou l'intention, des auteurs du texte. Cela est vrai des termes "recommande ", ou " recommandation ", avec des conséquences négatives. Peut-on affirmer, *a priori*, que les termes " s'engagent ", ou " engagement ", ou " sont convenus ", ou " acceptent ", etc. ne nous donnent aucune indication utilisable sur cette même volonté ou intention ?

Bien entendu, cela ne clôt pas l'analyse. Il restera toujours à se demander quelle portée juridique peut avoir la volonté, ou l'intention, ainsi exprimée dans un instrument, la résolution, dont la nature juridique est difficile à définir avec précision (et qui peut recouvrir, vous l'indiquez fort bien un peu plus loin, des réalités juridiques fort différentes, exigeant un inventaire détaillé de ses diverses dispositions). Le point de départ qu'on trouve dans le vocabulaire ne me paraît pas négligeable pour autant.

J'en viens maintenant à la partie nouvelle de votre rapport révisé, c'est-à-dire aux pages 72 à 80.

Nous avons déjà eu l'occasion de discuter de ces questions à Athènes, mais je ne suis pas sûr de m'être très bien exprimé à ce sujet.

Un des points qui me paraissent les plus intéressants dans le thème dont a été chargée la Treizième commission est celui des rapports entre la volonté des auteurs d'une résolution et les effets juridiques éventuels de cette dernière.

La phrase que je viens d'écrire contient une équivoque. " L'auteur " d'une résolution est, bien évidemment, l'organe international (en l'occurrence, dans la ligne de votre rapport, l'Assemblée générale) qui l'adopte, en se conformant à un certain nombre de règles de procédure pré-établies.

Ceci n'est vrai, toutefois, que si on se place à un point de vue purement formel. La réalité politique est très différente. La plupart des résolutions (sinon toutes) sont le résultat d'un processus de négociation qui, le plus souvent, s'est déroulé en marge de la procédure formelle, et qui a conduit à la réalisation d'un accord, d'abord (parfois) entre les Etats qui " patronnent " le projet de résolution, puis entre ceux qui le votent ou acceptent qu'il soit considéré comme adopté par la procédure du consensus.

Quelle est la nature juridique de cet accord, sur quoi porte-t-il exactement, comporte-t-il, de la part de ceux qui s'y sont ralliés, des engagements, ces engagements peuvent-ils les lier juridiquement, en quoi et de quelle façon les lient-ils, les représentants qui ont participé aux négociations et à la procédure d'adoption avaient-ils le pouvoir d'engager leur Etat ? Voilà toute une série de questions, auxquelles on pourrait ajouter d'autres encore, dans le même esprit, et qui me paraissent du plus haut intérêt. Toutes se rapportent à l'élaboration des résolutions des organisations internationales.

Les réponses qui peuvent y être données ne modifient probablement pas les conclusions auxquelles on est parvenu par d'autres voies quant à la valeur juridique des résolutions en tant qu'instruments juridiques *formels*. Elles pourraient ouvrir de nouvelles perspectives sur la signification juridique des différentes dispositions *contenues* dans ces résolutions, et rapportées à la volonté, ou l'intention, des auteurs des résolutions.

J'emploie ici le pluriel, parce que, si on se place dans cette optique, c'est-à-dire si on s'intéresse au contenu des résolutions (résultat d'un accord négocié) et non plus seulement à leur forme, les véritables auteurs sont ceux qui ont conclu l'accord ou s'y sont ralliés.

Si on aborde l'analyse des résolutions de l'Assemblée générale sous cet angle, la question importante n'est plus celle de la procédure formelle, mais

bien celle du processus de décision (decision-making process), qui comme je l'ai souligné déjà, se déroule le plus souvent en marge de la procédure.

Il s'agit, évidemment, d'une recherche difficile à effectuer *in concreto*, puisque les principales étapes d'une négociation ne font généralement pas l'objet de comptes rendus et se déroulent au cours de rencontres officieuses et non publiques. Le processus de décision est donc, habituellement, très difficile à reconstituer par qui n'y a pas participé personnellement. En revanche, une réflexion théorique sur ces problèmes devrait permettre de les éclairer et de mieux utiliser les divers indices observables dans chaque cas concret en vue de faire apparaître la véritable volonté, ou intention, des auteurs (dans le sens défini plus haut) et de dégager les conclusions qui s'imposent sur le plan du droit.

C'est avec ces considérations présentes à l'esprit que je réponds aux questions nouvelles de votre questionnaire.

22. Pour les raisons déjà indiquées, je ne pense pas que l'examen de la procédure puisse apporter beaucoup de lumière, si on s'en tient aux seules règles formelles qui prétendent la réglementer. Je ne pense pas non plus que le processus de décision puisse être amélioré de façon substantielle par une révision des règles formelles de procédure.

23. Oui, en vue d'explorer ce que cette terminologie peut révéler sur les intentions réelles des rédacteurs du texte des résolutions.

24. Oui, je le crois, mais à condition de prendre en considération le véritable processus de décision (et, notamment, de négociation) beaucoup plus que les règles de procédure.

25. Oui, sans aucun doute, pour les deux parties de cette question.

26. C'est là une question très complexe, à laquelle il faudrait consacrer une analyse très fouillée. La situation est très différente suivant qu'il y a eu ou non un changement de majorité entre la première et la seconde résolution. Elle est très différente également si la première résolution était maximaliste (ce qui, dans certains cas, a eu pour conséquence qu'elle a été adoptée par une majorité réduite) et si ses " auteurs " (dans le sens défini plus haut) ont cherché à la maintenir et à la réitérer pour faire pression sur la minorité opposée, ou s'ils ont voulu, au contraire, élargir la majorité qui l'approuve (en cherchant de nouveaux points d'accord). Différente encore si les résolutions successivement adoptées sur le même sujet peuvent être considérées comme une série d'étapes dans le cadre d'une négociation en progression.

27. A peu près nulle, comme l'a bien montré l'exemple de la CNUCED. L'expérience montre que la négociation ne se développe à l'aise que dans des cadres officieux et en marge de toutes les règles qui tentent de la contraindre ou de l'organiser suivant un modèle pré-établi.

28. D'un point de vue juridique, cette résolution est évidemment dépourvue d'effet (s'il s'agit bien d'une résolution du type courant). C'est précisément cette absence d'effet qui fait préférer, dans beaucoup de cas, la négociation à

la simple délibération conclue par un vote enregistrant les résultats numériques (et parfois individualisés) des acceptations, des refus et des abstentions.

29. Les questions relatives au processus de décision, telles que j'ai essayé de les décrire plus haut.

En vous souhaitant un bon été, je vous prie de croire, mon cher Confrère et Ami, à l'assurance de mes sentiments très cordiaux.

Michel Virally

15. Observations of Mr Karl Zemanek

1. As a working hypothesis, yes. But the working hypothesis should be constantly checked during the study and, if necessary, revised in the light of the latter's results.

2. to 5. Resolutions have different functions and there are, thus, different types of resolutions although they all bear the same name. Only some of them have a function in the norm-creating or norm-forming process. For our purpose it suffices to single out two types:

(a) The function of the first type is to create and/or build up legal consciousness in a certain matter (*i.e.* what in customary law would be called the subjective element, in the form of *opinio necessitatis* which has not yet hardened into *opinio iuris*) or to modify one already existing. It thereby stimulates a sort of learning process in states which may, eventually, lead to corresponding custom or to the adoption of a multilateral convention. Taken as separate instances, however, these resolutions are neither state practice nor its evidence: they are simply tools to form a uniform *opinio iuris sive necessitatis* and are thus elements of a norm-forming process.

(b) A second type of resolution, in most cases called " declaration ", establishes the existence of a certain *opinio iuris* and is thus *prima facie* evidence of it. It may, however, be disproved by other evidence, for instance subsequently different but unchallenged practice of states.

6. Such a statement is evidence in the aforementioned sense and subject to disproval. A similar reference in the operative part of a treaty would bind states parties to it.

7-8. The question has been discussed at some length during the early stages of the codification of the law of treaties. For the reasons given under 6 they do not seem particularly well suited.

9. They have sometimes been used for recording "gentlemen's agreements" made in the General Assembly, for instance on the distribution of seats among

regional groups in the Security Council, etc. But here we have yet another type of resolution, concerning organizational matters ("internal law" in the *Exposé*), which differs in function and character from those hitherto discussed.

For general purposes resolutions would not appear as a desirable form of recording agreements of states and that for the reasons given above.

10. See answer to 2.-3.-4.-5. If we deal with a resolution of type (a), its purpose was to bring about consciousness that states' activity in the matter should of necessity follow its lines. A resolution of type (b) goes one step further and establishes the existence of such consciousness. But even this type of resolution would only evidence an *opinio iuris* at a given moment and would not legally bind treaty negotiators at another since *opinio iuris* may change.

From a practical point of view, however, "declarations" are usually the result of protracted negotiations among the interested parties in the General Assembly which gives at least some of these interested parties a strong vested interest not to deviate from the once achieved result. This is particularly so when treaty negotiations are conducted in the same body and only a short while after the "declaration" has been adopted.

11. In the sense explained under 2.-3.-4.-5. "reservations" to resolutions are intended to put dissent on record in order to prevent the emerging *opinio iuris* from including and thus binding the state in question.

12. Since the Charter does not empower any of its organs to interpret authoritatively (in the normal, not in the McDougalian sense) either the Charter or any other legal rules, resolutions attempting such interpretations have no different effect than others. As to the second question, I think that the Thirteenth Commission should study the subject.

13. Yes. See part (b) of answer to 2.-3.-4.-5.

14. No. See answers to 6.-7.-8.-9.

15. See part (a) of answer to 2.-3.-4.-5.

16. That depends on the function of the resolution. For the types of resolutions discussed here, specific regulations seem superfluous or even harmful since legal consciousness does only exist or can only be built up on a very general level. Once the understanding is firm enough, its elaboration by treaty or custom should not present too great a difficulty.

17. Yes to the second question.

18. Since a resolution is only evidence of an *opinio iuris* which exists among the members of the United Nations, its being addressed to "all States" does not change its nature. However, such address may create a global consensus through acquiescence by the non-members (they are, anyhow, rather few nowadays).

19. Yes. If adopted by a majority, resolutions of the types mentioned in the answer to 2.-3.-4.-5. evidence only the *opinio iuris sive necessitatis* of that majority. "Consensus" on the other hand implies that, although there is no

unanimity, the majority has convinced the minority that the proposed text is necessary as well as the best to be obtained under prevailing circumstances. The minority would therefore appear to share the general legal consciousness without being necessarily committed to its implementation through custom or treaty.

20. The answer depends on the type of resolution. Resolutions on organizational matters are binding on other organs of the UN and on member states and may, therefore, be considered as a specific source of law, although others might consider them as secondary treaty law (since they derive their validity from the Charter).

As to the second question, the opinions mentioned therein do not reflect reality.

21. After having attended 16 sessions of the General Assembly, I rather doubt that outside advice has any impact on it. It would, therefore, seem advisable that the resolution of the Institut should remain within the realm of realistic but scholarly theory.

22. I am afraid that my answer is the same as to 21.

23. It might be useful to study the different functions of resolutions referred to in answer to 2-3-4-5, and to isolate more precisely those types which have functions in the law-forming process from other types, *e.g.* resolutions exhorting member states to implement Charter obligations or resolutions on organizational matters.

24-25. As far as resolutions mentioned in the answer to 2-3-4-5 are concerned, the procedure for their elaboration is of paramount importance. It would lead too far to describe here all relevant factors in detail. I shall limit myself to enumerating the most significant ones:

(a) Since an organ with a numerous membership, as the General Assembly, is ill-equipped to prepare a meaningful draft out of numerous and often conflicting proposals, the task of preparing a text is normally entrusted to a committee with limited membership. For the purposes discussed here, it is preferable that the committee be composed of representatives of States rather than of independent experts. The success of a committee of this type depends largely on the careful selection of its membership, which should include all interests existing in the matter. States which represent these interests should moreover be willing and capable to convince other states with the same interest but not represented on the committee that the finally emerging solution was the best that could be achieved under present circumstances and safeguards the interests in question adequately.

(b) If any lasting effect is to be achieved, the committee should work with consensus procedure. It is true that since representatives of states defend primarily the interests of their countries, they tend to reach compromise mostly on the level of the lowest common denominator.

Thus the result is not always satisfactory. Yet no other procedure, and in the least majority decisions, can under present circumstances lead to a generally acceptable result.

26. See part (a) of answer to 2-3-4-5. Sometimes, however, the texts of successive resolutions on the same subject vary because of quite unrelated world events or changes in government or policy of some member states, which induce states to change their previous positions. That may necessitate a weakening or strengthening of the language of a particular resolution in order to make it acceptable. But, in general, resolutions on the same subject tend to become stronger in language over the years.

If, however, there is concordance or, as one may also put it: repetition of stereotype formulas, this is rarely the result of legal considerations but rather of *inertia* or laziness since it is easier to copy an existing text than to draft a new one and also easier to get agreement on it.

27. None. Moves and devices to bring about agreement are an integral part of the negotiating process.

28. See answer to 19.

29. See answer to 23.

Karl Zemanek

The elaboration of general multilateral conventions and of non-contractual instruments having a normative function or objective

L'élaboration des grandes conventions multilatérales et des instruments non conventionnels à fonction ou à vocation normative

(Thirteenth Commission)[1]

Resolutions of the General Assembly of the United Nations

Definitive Report and Draft Resolution

Krzysztof Skubiszewski

I. *Introduction*

The Rapporteur is grateful to all the Confrères who gave him valuable guidance during the two Commission meetings held in Cambridge in 1983. He expresses his best thanks to those Confrères who commented in writing on the Provisional Report. The observations of the Members of the Commission made the preparation of the present Report possible.

§ 1. *Scope of the Definitive Report*

The Definitive Report limits itself to setting down the conclusions

[1] The Commission is composed of Messrs Lauterpacht and Skubiszewski, Rapporteurs; Abi-Saab, Bindschedler, Blix, Bowett, Jessup, McDougal, McWhinney, Monaco, Mosler, do Nascimento e Silva, Rosenne, Rousseau, Schachter, Seyersted, Suy, Torres Bernárdez, Ustor, Virally, Yankov and Zemanek, Members.

The abbreviations PE and PR denote respectively the Preliminary Exposé and the Provisional Report.

to be drawn from the study undertaken by the Commission. In so far as it seemed advisable, they are accompanied by some explanations. The present conclusions are briefer than those submitted in § 30 of the Provisional Report. Nonetheless they cover the two aspects of our topic, i.e. procedures and techniques of elaboration *and* the legal consequences of the resolution.

Mr *Rosenne* doubts whether this broad scope is correct. He points out that, in some analogy to the treaty, we could focus our attention on the General Assembly resolution as an instrument and abstain from inquiring into that instrument's possible consequences in the realm of law. To some extent Mr *Torres Bernárdez* shares this position though he does not go so far as to exclude entirely the study of the nature of rules proclaimed by the Assembly. Yet he is in favour of separating the two facets and postponing the investigation of the status of these rules (comment on PR § 30, points 5 and 6).

The problem of separation is simple and should not lead to any difference of opinion. The Provisional Report has already distinguished between the substance of the resolution and the procedure of its elaboration. However, their divorce cannot be absolute, for in our subject the various techniques and modalities influence the resolution's role on the plane of the sources of law. Hence the analogy to treaties is only partially valid. To look on the treaty exclusively as an instrument, without entering into the issue of its being an agreement productive of rights, duties or legal rules, does not leave many ends loose. In spite of some doctrinal controversies we know very well what the treaty is. On the other hand, the level of certainty, or rather uncertainty, regarding the consequences of the G.A. resolutions is entirely different. If we restricted ourselves to the study of the instrument alone, we would not make much progress. The role of resolutions of international organizations in stating, proposing and even making law is far from settled and it varies from case to case. That role may depend, sometimes to a high degree, on a particular procedural device. The mandate of the Commission points to an analysis of instruments, including procedures that bring them into existence. But we undertake this analysis in order to see whether the instrument under consideration has a function in the process of law elaboration - and what this function is. Moreover, the Rapporteur is not quite sure that the suggestion that we pro-

ceed along the lines of the Vienna Convention on the Law of Treaties would result in totally freeing the Commission from the study of the effects of G.A. resolutions.

However, there is some change of emphasis. While the conclusions of the Provisional Report were norm-oriented, in the present text more importance is assigned to the instrument. Mr *Bowett* suggested that the conclusions on voting be grouped together, and so did Mr *Ustor* with regard to repetition of resolutions. The Rapporteur has extended this approach to the entire elaboration process: each procedural problem is now being treated as a whole and not parcelled out among the various categories of norms.

The conclusions now presented are more compact and less detailed than those which have been set forth in the Provisional Report (§ 30). While Mr *McWhinney* seems to be inclined to leave the conclusions of that Report as they are, the majority of the Commission during the discussion in Cambridge have generally expressed their preference for a briefer formulation. This position is strongly supported by Mr *do Nascimento e Silva* in his written observations. Mr *Zemanek* favours a redrafting of some conclusions and the introduction of more coherence between the broad and affirmative language they occasionally use and the qualifications to be found in others. This inevitably leads to more concise formulations. Messrs *Monaco, Torres Bernárdez* and *Ustor* have commented on PR § 30 in detail, and Messrs *Bowett, McDougal* and *do Nascimento e Silva* have also dealt with some specific points. All these comments and observations have influenced the new shape of the conclusions: several statements that figure in PR § 30 have been eliminated, while others have been revised. As a result, the present conclusions are more practice-oriented and less doctrinal. Thus, to some extent, they meet the demand put forward by Mr *Rosenne.*

§ 2. *How to Terminate the Commission's Work on General Assembly Resolutions*

In their replies to the Questionnaire most Commission Members were either silent or non-committal on the advisability of a Resolution to be adopted by the Institute on our present subject (PR § 29). In Cambridge several Confrères were doubtful about such a Resolution, and this attitude prevails in the written observations.

The Commission, Mr *Bowett* notes, has embarked upon some of the controversial areas of international law. We should not assume that "the work of the Commission in such areas will be appropriate for the traditional resolution, overwhelmingly supported". Consequently, our Confrère prefers "to see the Commission produce a set of rules, or propositions, with commentaries attached to each rule". Mr *McDougal* thinks that "it might be a mistake to press toward a summary resolution by the Institute as a whole". The "best course for the Commission now might be simply to submit" a revised Report "to the Institute for its receipt and publication". Mr *McWhinney* observes that "the Resolution approach" is not "particularly helpful or productive in areas of International Law that are clearly in flux and where, evidently, doctrinal - legal positions often tend, more than elsewhere, to reflect particularistic national interests or political - ideological positions". One might fear that "a Resolution project would reduce to a lowest-common-denomination statement and fetter further legal development in this area". Our Confrère, therefore, suggests that the Institute content itself with a simple Resolution "'receiving' (not, in terms, adopting) the Report". And he emphasizes the importance of the publication of the Provisional Report. Mr *Rosenne* has "serious doubts whether [the Provisional Report] could possibly serve as a basis for a formal pronouncement by the Institute". These doubts "derive precisely from the fact that it deals with difficult and highly controversial questions of legal philosophy and is not practice-oriented". Mr *Torres Bernárdez* thinks an Institute Resolution to be premature at the present stage. Finally, Mr *Zemanek* writes that it appears "difficult to draft a Resolution which would command general support in the Institute. It seems thus preferable to maintain the conclusions as such in the final paragraph of the Commission's definitive text".

While Messrs *Monaco* and *Ustor* do not express an opinion, Mr *do Nascimento e Silva* does not reject the idea of an Institute Resolution. But he is quite clear in his view that, for various reasons, the conclusions "should be more concise" and "avoid entering into controversial details".

The Rapporteur thinks that the Thirteenth Commission should make an attempt to arrive at a common position. What he means is the conclusions alone, not the comments attached to them. The

brevity of the latter is, no doubt, unsatisfactory, but the Rapporteur had to keep the size of the Commission's materials within certain limits. The comments, including their gaps and ambiguities, remain the exclusive responsibility of the Rapporteur.

The conclusions now presented in Section II below take full account of the observations of those Members of the Commission who so helpfully commented on the Provisional Report and particularly on its § 30. (In the case of the Members who preferred to remain silent the Rapporteur is comforted by the adage *qui tacet consentire videtur*.) The Rapporteur hopes that the conclusions of the Definitive Report constitute the position of the Commission as a whole or at least of its preponderant majority. This does not mean that the conclusions would not be open to amendments when the Commission meets on the eve of the Institute's Session. In any case, our subject is ripe to be placed on the agenda of the Session. A Draft Resolution is submitted in Section III below.

II. *Conclusions*

§. 3. *Resolutions to Which the Conclusions Apply*

The conclusions of this Report concern exclusively those resolutions of the U.N. General Assembly which lay down general and abstract rules of conduct for States. Let us repeat that a rule is general when both its addressees and the circumstances in which they must behave as required, are defined in a generic, and not individualized, way. On the other hand, the rule is abstract when it deals with a conduct that can or does recur and not with one that is unrepeatable. Accordingly, the conclusions below concentrate on G.A. resolutions which enunciate rules that relate to an unlimited number of situations envisaged in the rule and apply to any U.N. Member or State which happens to find itself within the ambit of the rule; these rules do not designate any specific addressee or addressees. Consequently, the reference in the conclusions[2] to "resolution" or "resolutions" does not cover any and every category of resolution adopted by the General Assembly, but only one class

[2] And, earlier, also in the Preliminary *Exposé* and the Provisional Report.

selected for our study. The selection was dictated by the mandate of the Commission.

Resolutions that contain general and abstract rules of conduct in the foregoing sense can be called normative. This designation does not mean that the rules (including principles) which they proclaim constitute law. General Assembly resolutions often lay down rules which have not yet acquired, or will never acquire, legal force. Normativity is a notion that is broader than that of legal (binding) force. For not every norm which is relevant in international relations is a legal one. The concept of normative resolutions of the General Assembly comprises not only acts which state the law, but also acts which formulate a standard of conduct, in particular one that aspires to the status of law without having, at the moment, attained it.

These clarifications show that the Rapporteur's understanding of the normative is different (broader) than that of Mr *Weil* who seems to identify the non-normative with the non-legal and the normative with the legal[3]. As with our Confrère the Rapporteur is against the introduction of "relative normativity" into international *law*, but he thinks that the notion of normativity cannot be identified with law alone: we also have moral, ethical, religious or purely political norms. Mr *Virally*'s Preliminary Exposé and Reports presented at the Cambridge Session give ample proof of the significance of such norms in inter-State relations and of the possibility of some of them being transformed, one day, into law[4].

§ 4. *The Constitutional Position*

Conclusion 1

Absence of law-making competence

The Charter of the United Nations does not confer on the General Assembly the power to enact international law.

[3] PR note 33, pp. 415-417.

[4] Annuaire IDI, vol. 60, 1983, Part II, pp. 166 ff. Feuer, *op. cit.*, PR note 410, section II, p. 276, distinguishes normativity from binding force with regard to UNCTAD which is "un organisme à vocation normative, encore que sans pouvoirs de décision".

Comment: The Charter does not vest the Assembly with the power to enact law (PE § 2, PR § 1). The power of an international organ to make law for States cannot be implied: it must result from their unequivocal authorization[5]. As yet no such authorization has been bestowed upon the General Assembly. The question whether the Assembly could acquire it in a way other than a Charter amendment remains academic.

Mr *McDougal* suggests that in speaking of the absence of the provision conferring legislative competence, the adjective "formal" should be added (comment on PR § 30, point 5). Indeed, there is no "formal" competence in the sense that no empowering provision is to be found in the constitutional instrument. But the law of the United Nations, like any other law, consists also of rules that are inferred from the provisions which figure in the relevant source. The process of inference is not formalized, yet rules which result from it become part of the legal system, though they are not "formal" in the sense that they have been expressly formulated in the instrument under consideration. The Rapporteur agrees with the idea behind Mr *Mc Dougal's* suggestion. Nonetheless he prefers not to use the term "formal" in the context of the present conclusions: the term has various meanings in the theory and methodology of law.

Conclusion 2

Recommendations

The General Assembly has the power to make recommendations encouraging the progressive development of international law and its codification.

Comment: Article 13, paragraph 1 (a), of the Charter constitutes the basis for the adoption of these recommendations, but some of them can also be fitted into Articles 10, 11, or 14. The exercise of

[5] The power to enact the internal law of the organization (PE § 1) can be implied, but that law is not primarily concerned with the conduct of States *inter se;* it regulates the internal life of the organization. The implied powers of legislation in the European Communities would be more relevant; however, their existence is questioned by some commentators. Even if these two instances can be regarded as true exceptions to the rule stated, they do not detract from it in any significant way.

this power has in practice led to the adoption of a large number of resolutions which lay down general and abstract rules of conduct (§ 2) for the U.N. Members or even for all States. They correspond to the first category mentioned by Mr *Bowett* (point 2 of his reply). His remaining two categories concern specific situations and/or States, but they assume the existence of a general and abstract rule of conduct (PE § 1).

As corporate acts of the Organization, the resolutions to which the present conclusions refer are recommendations. Mr *Rosenne* stresses the link between the constitutional provisions of the Organization, in particular its powers and competences, and the force of the resolution. This link has not been passed over in silence in the materials of the Commission (PE §§ 1 and 2; PR § 1). Yet any competence of the Organization, no matter how weak or narrow, is neither academic nor deprived of effect. Some consequences always follow from the exercise of a competence, including one of making recommendations. (Cf. Judge Sir Hersch *Lauterpacht*).

Another point one should bear in mind is that though the recommendatory nature of the resolution normally extends to the rule to be found therein, such extension is not automatic: the rule can be of a different, i.e. non-recommendatory, nature. In other words, the status of the rule need not to be identical with the status of the resolution itself (PE § 5 (2)). The powers of the Assembly under the above-mentioned provisions are broad enough to include the adoption of resolutions that are declaratory of existing law. In that case the rule is one of law not because it has been incorporated in an Assembly instrument, but owing to its being already part of law. On the other hand, if the rule that figures in the resolution is nothing more than that resolution's invention, it is non-obligatory because it results from a recommendatory act.

However, between the poles of stating the existing law (which the Assembly is empowered to do) and making new law (which lies beyond the Assembly's competence) there is a range of other functions relating to the elaboration of rules, and the G.A. resolutions can serve these various functions.

There is no denying that the notions of obligation and binding force have been brought to the foreground at the outset of the Commission's analysis. This approach has met with some doubts. "There

is a lot of mysticism in the words 'binding force'" Mr *McDougal* notes. It should perhaps be added that in the Commission's texts the dichotomy of the obligatory and the non-obligatory relates solely to the plane of law and is maintained in order to clarify our starting point (PE § 3; PR §§ 1 and 20 (1)).

The Preliminary *Exposé* (§ 3) has quoted Sir Gerald *Fitzmaurice* to the effect that resolutions were often adopted "precisely because they were not binding in law". However, several resolutions were voted without a clear and uniform understanding of their nature. States may and in fact sometimes do differ in their opinions on the legal status of the same resolution. If a group of States wants other nations to follow a resolution, the group usually attaches more legal weight to it than in the case of another resolution, though an objective analysis shows that the two instruments have the same legal status. Furthermore, we know of resolutions which in spite of their general language are meant for some States only.

Many Assembly resolutions contain purely political commitments. But this does not deprive them of a role in the elaboration of legal rules. In other words, a recommendation can have an authority that is pertinent to the making of law. Our issue is a complex one and there is no simple answer to our query: one resolution can have a status that is different from that of another in spite of the fact that they all emanate from the same body.

Conclusion 3

There is no impediment to addressing the resolution and its rules to all States, but the position of those which are not Members of the United Nations is not thereby prejudged[6].

§ 5. *Normative Resolutions*

Conclusion 4

Resolutions containing general and abstract rules of conduct

The power referred to in Conclusion 2 includes, amongst other acts, the adoption of resolutions of the following types:

[6] For comment, see PR § 23 (1).

(a) resolutions explicitly laying down general and abstract rules of conduct for States;

(b) resolutions dealing with specific situations but assuming, expressly or impliedly, a general and abstract rule of conduct for States;

(c) resolutions addressed to specific States, but assuming that the rule of conduct required of the State specifically named would be required of all States in a similar situation.

Comment: The notion of general and abstract rule and the notion of normative resolution have been explained in § 2 above. The term "rule" is here used in its general sense and denotes any category of norm, including principles.

It may be debatable whether a particular G.A. resolution already fulfils a normative function or would rather fall under the more nebulous rubric of normative calling ("vocation normative").

The Preliminary *Exposé* and the Provisional Report have concentrated on category (a). Mr Bowett refers to "resolutions purporting to formulate general rules of conduct binding on all States". Category (a) above is broader, for it also comprises resolutions reciting rules *de lege ferenda*.

Categories (b) and (c) have not been absent from the Commission's considerations. In particular, the Preliminary *Exposé* (§ 2) mentions the resolutions in which the Assembly assumes the existence of a principle or rule when it condemns certain acts or calls upon States to follow a line of conduct, e.g. resolutions 2551 (XXIV) or 2645 (XXV). In (b) and (c) the present Conclusion takes over the formulation by Mr *Bowett*.

Conclusion 5

Law-declaring and law-generating resolutions

Resolutions referred to in Conclusions 2 and 4 either state the law or contribute to its generation.

The law-declaring or law-stating class comprises the following categories:

(a) resolutions which are a means for the determination of international law;

(b) resolutions constituting evidence of international custom or of one of its component elements;

(c) resolutions constituting evidence of general principles of law.

Half way between this and the law-generating class are resolutions setting forth standards of conduct relevant to the application or interpretation of law.

The law-generating or law-shaping class comprises the following categories:

(d) resolutions which help to bring about the birth of international custom or of one of its component elements;

(e) resolutions contributing to the emergence of general principles of law;

(f) resolutions delimiting the material scope of negotiations on a multilateral treaty of general interest; in particular, resolutions setting forth rules to be included in a future treaty;

(g) resolutions laying down policies that determine the substance of future law, whether customary or treaty.

Comment: The foregoing categories have been distinguished on the basis of the practice of the General Assembly. States rarely questioned the constitutional admissibility of resolutions whose provisions would fit one or more of these categories. The heart of the matter is the will of States to use the G.A. resolution for one of these purposes.

The actual role of resolutions in the elaboration of law varies, and there is no simple definition of their status. There is not one type of normative resolution but several types.

Also, provisions of one resolution can and often do have a different legal status. The opening paragraph of Mr *Valticos'* reply to the Questionnaire and the observations of Mr *Rosenne* attached to the present Report are among the comments which draw our attention to this fact.

Conclusion 6

Relevant factors

The following factors help to identify a normative resolution in the sense of Conclusions 4 and 5:

(a) respect for a minimum of procedural standards and requirements;

(b) the language of the resolution;

(c) method of adopting the resolution;

(d) implementation of the resolution.

Comment: The normative purpose, function and contents of a resolution in the sense of Conclusions 4 and 5 depend on the intention of states. This intention manifests itself in the course of the elaboration of the resolution.

The first indication that there is room for the preparation and adoption of a normative resolution is the state of the law and the attitude which at least some U.N. Members take. They consider that it is desirable to clarify existing law, or to initiate its reform, or to lay down rules in a new field. They then choose the G.A. resolution as an instrumentality of their action.

Mere intention, even if easily identifiable, does not suffice to turn a resolution into a normative one. What is necessary is the existence of various factors which show that the intention prevailed and States decided to bestow upon the resolution a normative function. The Provisional Report has referred to different enumerations of these factors (§ 5 (4) where the *Texaco* case was quoted; § 5 (5), § 10 (4); and introduction to Section VII). Mr *Rosenne* touches upon the issue in his observations on that Report.

§ 6. *Procedural Standards and Requirements*

Conclusion 7

Negotiation as method

The making of resolutions that either state existing law or contribute to the emergence of new law should be based on a negotiated arrangement. The rules of procedure of the General Assembly are sufficiently elastic to permit the integration of the negotiating process into the U.N. parliamentary diplomacy and its workings.

Comment: The Charter procedure for the adoption of resolutions is majority voting. However, in trying to produce normative texts,

whether *de lege lata* or *de lege ferenda*, little if anything can be attained by a majority decision imposed on a reluctant minority. Hence the techniques of negotiation must be applied to achieve a real result on the plane of law elaboration. Principles and more detailed rules incorporated into the the G.A. resolutions should result from careful and patient consultations; otherwise only a result on paper will be obtained. The United Nations procedures give ample opportunity to various types of negotiations: official and unofficial, open and secret.

The consensus procedure (Conclusion 19), in spite of all its shortcomings, reflects a negotiated and agreed outcome and, therefore, can constitute a stage in the elaboration of new law. It is true that a more restricted group of U.N. Members which commands a majority, will normally produce a text that is better than an instrument resulting from a compromise. However, the support of all is probably to be preferred, even if it is limited to general agreement and does not eliminate the opposition to some specific provisions. Of course, one has to inquire whether the method of consensus has indeed been applied. For there were instances where in spite of the external manifestations of consensus the actual operation simply concealed a total lack of fundamental agreement.

On the other hand, adoption of a resolution without a vote, which does not equal approval by consensus, makes the identification of the normative intention more difficult, if possible at all.

The U.N.C.T.A.D. conciliation procedure and the proposals on negotiating groups to seek agreement before a vote in matters of international economic co-operation have been noted in PR § 25 (5).

Conclusion 8

Intergovernmental organ

Owing to the preparation of resolutions by organs in which States are represented, Governments have direct and continuous control over the drafting of the text. This facilitates the determination of the normative intention.

Comment: The Provisional Report has occasionally stressed the value of bodies composed of experts independent of Governments (e.g., § 24). In a subsidiary capacity they can be helpful in drawing

up the text, but the task cannot be entrusted exclusively to them. The making of law-declaring or law-shaping resolutions requires constant participation by Governments. Besides, there is no antinomy between legal expertise and Government representation. The Sixth Committee is an organ which combines the two. Hence it seems desirable to create a possibility for the Sixth Committee to examine draft resolutions setting forth rules of positive or future law or standards of conduct relevant to the application or interpretation of law when these are being prepared by or under the supervision of other main committees of the General Assembly.

Conclusion 9

Composition of the organ

If the elaborating organ is not composed of all the U.N. Members, equitable geopolitical representation, presence of the main legal systems, and legal expertise are factors which favour the working out of universally acceptable principles and rules.

Conclusion 10

Circulation of drafts

Circulation of the draft resolution for comments is desirable.

Comment: Circulation should primarily take place among the U.N. Members, but drafts containing principles and rules of general interest could equally be submitted to non-Members or other international organizations. In specific cases the Sixth Committee or another elaborating organ could also consider the possibility of seeking advice of experienced non-official bodies composed of jurists[7].

Circulation permits the accumulation of comments between sessions, which in turn creates a more solid base for subsequent work on the resolution. Another advantage is that it gives Governments more time to consider the text and eliminates haste which is usually harmful to arriving at a correct statement of law or a mature proposal on new law.

[7] *Cf.* the observations of Mr Torres Bernárdez on PR § 30, point 22.

§ 7. *The Language of the Resolutions*

Conclusion 11

Importance of terminology

The language used by the resolutions helps to determine their normative purport. In particular, references to international law or equivalent phrases permit the inference that the resolution states the law. Express omission of such formulations or the use of clearly non-mandatory terms creates a contrary presumption.

Comment: The inconclusiveness of the language of a number of resolutions is well known (PE § 4 and PR § 22 (1)). This unsatisfactory state of things does not deprive the semantic aspect of its genuine importance. Language and drafting belong to the core of the elaboration process, and they count among the decisive factors defining the function and role of any resolution. Mr *Rosenne* reminds us here of the dictum in the *Namibia* case[8].

Inquiring into the language of the resolutions need not amount to a tendency to align resolution-drafting with treaty-drafting. Mr *Rosenne* warns against such alignment. On the other hand, some standards of good drafting are universally relevant, whatever the nature of the instrument. The present Conclusion may be said to be rather elementary (cf. Mr *Ustor*'s remark on PR § 30, points 10-14). Yet it seems to constitute a useful reminder in view of the fact that the drafting of some normative resolutions leaves room for criticism.

Thus references to international law or to rights and/or duties under that law would *prima facie* indicate that the resolution states the principles or rules of that law. The same can be said of the inclusion of a preserving clause which takes account of law. The English word "shall" and its equivalents in other languages usually must be understood as denoting an obligation, and there is room for inquiring whether it is legal (PE § 8 (4)). However, the use of these and similar expressions is not free from scrutiny. For the resolution as an act of the Organization is a recommendation and

[8] ICJ Reports 1971, p. 53, para. 114. This dictum concerns resolutions of the Security Council but it may also apply to the G.A. resolutions.

normally its provisions would partake in the nature of the instrument, though - as already explained in the comment to Conclusion 2 - this is not always the case. In resolution 37/7 the often repeated "shall" has a recommendatory meaning.

The word "should" places the conduct of States on the plane of wishes or recommendations. However, there were instances where the term "should" introduced norms which at least some States regarded as part of law, e.g. resolution 1962 (XVIII)[9]. Other examples of non-mandatory language or clauses, including the word "recommendation" and its derivatives[10], were given in PE § 5 (1) and PR §§ 22 (1) and 30, points 12-14.

When a mention of international law was originally proposed or suggested and later intentionally deleted from the draft, such a modification shows that the norm stated is not one of positive law (PR § 5 (5)). A recommendation that States uphold a principle implies that the principle is not legal. But when it is, the verb "recommend" should be avoided[11].

Conclusion 12

Principles

Resolutions use the term "principle" in different meanings. Principles are to be found in resolutions bearing various names, including declarations.

Comment: The absence of a uniform meaning or of a simple duality - legal and non-legal principles - makes it imperative to determine the specific meaning of the term in each particular instance. While some refer to principles that are part of law, the General Assembly also employed the word in the sense of directives of interpretation, and not unfrequently the term denoted norms *de lege ferenda*. In still other resolutions the word is used to emphasize the importance of the standard. Finally, there are instances of

[9] *Cf.* the use of "shall" and "should" in res. 37/92, especially in paragraph 8. See Mr Rosenne's remarks at the end of his observations on the Provisional Report.

[10] Sloan, *op. cit.*, PE note 6, pp. 23-24, gives examples where the term is not used in a non-obligatory sense.

[11] See res. 637 (VII), paragraph 1.

much looser senses: a principle means a purpose or objective to be achieved, a legal or other policy, a guiding idea, in particular one which aims at the revision of old law and the enactment of new law. Examples of this variety were given in PE §§ 6 and 7 and in PR § 22 (2).

Conclusion 13

Declarations

The legal status of declarations is not different from other resolutions. Yet this particular form can emphasize the importance and significance of the norms so enunciated. Declarations are suitable for laying down new principles the purpose of which is to influence the progressive development of international law.

Comment: In his observations on PR § 30, point 16, Mr *Monaco* distinguishes between this type of declaration and "normal resolutions", i.e. those "ayant un objet bien défini et énonçant des règles spécifiques". Mr *Ustor* draws the attention of the Commission to the proliferation of such names as proclamation, code, charter or even world charter. Some call these names solemn, others regard them as highflown or even misleading. Declarations have been discussed in PE § 10 and PR § 22 (3.)

§ 8. *Adoption of Resolutions*

The adoption of a General Assembly resolution has two sides. First, it is the making of the act of the Organization: the resolution is attributed to the United Nations and not to the voting or consenting States taken individually or collectively. If we limited our inquiry to the resolution considered solely as the U.N. act, there would be no need to go into the various modalities of the decision-making process. The matter is governed by Article 18 of the Charter and our task would boil down to the interpretation of this provision. But there is also, as explained in PR § 25 (1), the other side of every normative resolution. By participating in its adoption the Member State takes a position which usually permits the identification of that State's attitude on the normative issue at hand. Here the questions of unanimity, substantial majority, and abstention are highly relevant, while they are non-existent in the framework of Article 18 and its

present application[12]. This second aspect of the problem is important in spite of the fact that States are usually aware of the basic limitation inherent in the rule-making by the Assembly: they know that they are voting for, or consenting to, a mere recommendation. In other words, it can be assumed that States know on what level they commit themselves.

Before specific conclusions falling under the head of § 8 are set forth below, it is convenient to deal with the problem of repetition or re-citation of resolutions.

The various facets of repetition of resolutions have been discussed in §§ 4 (5), 5 (8) and 10 (3) of the Provisional Report. Mr *McDougal* thinks that "[t]he impact of repetition in crystallizing expectations may be understated" in PR § 10 (3). Repetition of resolutions has also evoked comments by Messrs *do Nascimento e Silva, Rosenne, Torres Bernárdez* and *Ustor*. The Rapporteur has reconsidered the matter and has decided not to suggest any definite conclusions on the repetition of resolutions, though several such conclusions figure in the Provisional Report (§ 30, points 3, 28, 29, 45, 62-64 and 87).

There is no hard and fast rule on the significance of repetition or re-citation of a rule in another resolution or series of resolutions. Reiteration of resolutions can reveal and express different things.

If the repeated rule is not opposed by States, repetition can be said to be redundant, whether the purpose of the resolution is to state existing law, suggest the adoption of new law, or propose a novel interpretation of law. In the practice of the United Nations unopposed repetition of the resolutions or their provisions usually results from political motives which have little or no bearing on the elaboration of the norm and its legal status. But in some situations involving the *lex ferenda*, absence of opposition may be said to show that the rule enjoys approval and could eventually become law.

If, on the other hand, the repeated rule meets with opposition, repetition exposes the rejection of, or at least the doubts regarding, the rule. The whole matter then remains in a state of flux and,

[12] In particular, the two-thirds majority under paragraph 2 of that Article need not be, and actually often does not constitute, a substantial and representative majority.

consequently, little can be said, for the time being, of the status of the repeated rule. Nonetheless a persistent majority can use the method of repetition as a means of pressure on the opposing States to induce them to change their attitude. The voting record will show whether the pressure is effective in increasing the support for the repeated rule. However, if opposition continues in existence and is accompanied by actual noncompliance with the rule, the significance of repetition for the purpose of stating or shaping law will be doubtful.

In any case, repeated resolutions cannot be identified with State practice.

Conclusion 14

Unanimity

In assessing the value of unanimity it is necessary to take into account the abstentions and those reservations which detract from the rules so approved.

Conclusion 15

Unanimous statement of existing law

Unanimity behind a law-declaring resolution creates a rebuttable presumption that the resolution contains an exact statement of law.

Conclusion 16

Unanimity and the shaping of new law

Unanimity behind the resolution creates an expectation that the practice of States will conform to the resolution and, consequently, new law will crystallize.

In situations where a rule of customary law is emerging from State practice or where there is still doubt whether a norm, though already applied by an organ or by some States, is one of law, a unanimous resolution can consolidate a custom and remove the doubt which might there persist.

Joint comment on Conclusions 14-16: Unanimity must be real and not apparent. Hence the reference, in Conclusion 14, to abstentions and reservations. They can easily weaken or destroy the formal

unanimity. In case of statements on existing custom the resolution must fulfil the requirements enumerated in Conclusion 23 below.

Unanimity does not change the resolution's recommendatory nature nor does it lead *per se* to any legally binding effect. Yet it points to universal backing of the rule or standard enunciated in the resolution.

Unanimity has been explored in PR §§ 5 (4), 8-10 and 25 (2).

Conclusion 17

Majority

To be relevant to the elaboration of normative resolutions, majorities must be representative. A majority is representative when it displays no geopolitical gaps and includes the main legal systems.

Comment: In their observations on PR § 30, points 53 and 90, Messrs *Monaco* and *Torres Bernárdez* discuss the majority vote. The latter does not accept the foregoing definition of representative majority. Mr. *McDougal* was critical of PR § 30, point 90, which has now been deleted.

Constitutionally, the majority vote is governed by Article 18 of the Charter which gives no special standing to resolutions that have to be adopted by a two-thirds majority. But to assess the normative role of the instrument, one must inquire into the composition of the majority. Only then it will be possible to see whether the resolution commands general support (cf. PR § 25 (33)).

Conclusion 18

Negative vote and abstention

If the scale of negative votes is numerically large or qualitatively significant the law-stating or rule-making effect of the resolution is weakened or eliminated. Abstention exercises a comparable influence.

Comment: In the case of normative resolutions a negative vote or abstention can have similar or even identical effects in spite of the inherent difference between the two. The problem has been discussed at some length in PR 25 (4).

Conclusion 19

Consensus

A resolution adopted by the consensus procedure, though expressing an agreement that is merely general, can constitute a stage in the elaboration of new law.

Comment: The consensus procedure consists in the absence of voting linked to the absence of opposition to the adoption of the resolution. The absence of opposition means that there is general agreement on the content of the resolution, but no more than that (cf. PR § 17). Objections which do not concern the fundamentals of the resolution are admissible. Yet even an agreement that is merely general can constitute a stage in the elaboration of new law (PR § 26). On the other hand, the situation is more complex with regard to resolutions which state existing law. For the generality of agreement, which is the essence of consensus, may easily make them meaningless. One must very carefully inquire into the circumstances of the adoption of such resolutions before they can be invoked as evidence of law. There is political compromise behind any consensus and that compromise is not normally conducive to exact statements of law.

However, no hard and fast rule can be formulated here, and each resolution should be assessed on its own merits. Occasionally, consensus may prove a useful procedure for stating the law. This procedure admits of no abstentions and negative votes, whereas their presence at the voting of a law-declaring resolution necessarily raises the issue of their admissibility and effect.

Conclusion 20

Reservations

The resolution is susceptible to reservations. They are not subject to acceptance or objection on the part of any U.N. Member. Apart from resolutions stating existing law the effect of reservations is to limit the extent of approval. Depending on its contents a reservation can mean less than rejection of the rule. It can be merely an expression of doubt.

Reservations attached to law-declaring resolutions do not affect the binding force of the law so stated for the reserving country.

Comment: In the context of General Assembly resolutions the term "reservation" means any dissociation by a U.N. Member from a part or provision of the resolution. That Member approves the resolution as a whole and in all its other parts or provisions. A reservation can be expressed by using other descriptions, such as opposition, doubt, observations, or explanation of the vote. The admissibility of reservations to resolutions is corroborated by constant practice. Reservations serve the purpose of recording a difference between the view of the reserving State and the position expressed in the resolution. They may also have an explicatory or elucidating aim. If the resolution states customary international law or general principles of law, reservations have no effect on the application of these norms. In particular, the reserving State cannot thereby free itself from the bond of custom. In such a case the reservation reveals a policy attitude, e.g. dissatisfaction with existing law, a wish for its revision, etc. (PR § 27).

§ 9. *Implementation of Resolutions*

Conclusion 21

Implementing procedures

Supervision of the compliance with a normative resolution, and especially the setting up of an organ that examines the attitude of States and their practice towards the resolution, can be a factor contributing to the emergence of new law.

Comment: Various writers have emphasized the significance of the implementing machinery in the process of law-making through non-binding resolutions. Experience within the United Nations corroborates the role of implementation in this respect. However, the present Conclusion should not move beyond the general statement of a possibility. The matter has been briefly touched upon in PR §§ 8 (1) and 20 (3). Implementation of recommendations remains voluntary and does not turn the resolution into a binding act. In particular, implementation of the resolution does not constitute conduct whereby it can be implied that the implementing State intends to be bound by the rules of the resolution as a matter of law. But implementation can contribute to the growth of a practice which may prove law-creating.

§ 10. *Law-Declaring Resolutions*

Conclusion 22

Means for the determination of law

Resolutions can serve as subsidiary means for the determination of rules of law.

Comment: Up till now the International Court of Justice has not expressly subsumed any resolution under Article 38, paragraph 1 (d), of its Statute. But the language it used in the *Namibia* and *Western Sahara* cases[13] is sufficiently general to admit of such a possibility. The *Texaco* case is also relevant here[14].

Numerous references by States to G.A. resolutions in the context of international law, unclear as they often are, could be understood as accepting this function for some resolutions.

The formula used in the eighth preambular paragraph of resolution 3232 (XXIX), quoted in PR § 5 (1), is broad enough to cover the resolutions' role as a means of law determination. This passage, however, met with doubts or opposition on the part of several States.

Conclusion 23

Evidence of international custom

The resolution constitutes evidence of customary law or of one of its ingredients (custom-creating practice, *opinio juris*) when

(a) such has been the intention of States in adopting the resolution,

(b) there is agreement of States behind the resolution,

(c) the procedures applied have lead to the elaboration of an exact statement of law, and

(d) the terms of the resolution give expression to such a statement and contain nothing that weakens or contradicts it.

Comment: Resolutions as evidence of custom have been discussed

[13] ICJ Reports 1971, p. 16, at p. 31, paras. 52 and 53; 1975, p. 12, at pp. 31-33, paras. 54-59, and p. 34, para. 60.

[14] ILR, vol. 53, p. 422, at p. 484, para. 80.

in PR §§ 3-5. It is true that in most cases the General Assembly determines the law of the Charter and not general international law. Yet the Charter contains a number of principles and rules of that law. The dicta in the *Namibia, Western Sahara* and *Texaco* cases support the evidentiary value of some resolutions (PR §5 (1)). Though several States expressed doubts on the eighth preambular paragraph of resolution 3232 (XXIX), quoted in PR § 5 (1), they usually do not deny that a resolution can constitute evidence of law.

However, resolutions are not conclusive evidence. Hence it does not suffice to invoke the resolution: the law-applying organ is free to inquire into its contents and into what it actually says.

The analysis of U.N. records shows that it is not easy to establish the intention of Governments to state the law. But the task is not impossible. Mr *Rosenne* thinks that "[a]s often as not a vote is an indication of a political desideratum and not a statement of belief that the law actually requires such a vote or contains any element of *opinio juris sive necessitatis* [...] or that the resolution is a statement of law".

While not yet evidence of an established custom or its component elements, some resolutions can confirm the existence of a stage in their formation. We may here recall the dictum in the LIAMCO case[15].

Conclusion 24

Subsidiary role of resolutions as evidence of international custom

A resolution is apt to fulfil the evidentiary function where other instruments, such as multilateral treaties or judicial decisions, do not supply the necessary evidence.

Comment: In the absence of other evidences a carefully drafted and generally supported resolution will usually yield a better result than an analysis which concentrates on the practice of individual States. The analysis of that practice normally leaves some ambiguities unresolved.

[15] ILM, vol. 20, 1981, p. 1, at. p. 53.

The evidentiary function of the resolution is subsidiary. This does not mean that there are evidences which are principal and others which are not. The resolution has a role to play when there are gaps in the existing materials of international law. Otherwise the resolution becomes repetitive or even useless (cf. resolution 37/10).

In exceptional situations a resolution can pass upon the evidentiary value of a treaty provision or judicial decision, e.g. resolution 95 (I).

Conclusion 25

Rebuttable evidence
of international custom

Evidence supplied by the resolution is rebuttable.

Comment: Resolutions do not constitute conclusive evidence of customary law or of its component elements. In particular, the grounds which the resolution adduces to support its statement on law are not immune from verification. The present Conclusion also applies to repeated resolutions (§ 8 above) and to resolutions which say that a treaty provision or judicial decision reflects a general custom.

If a subsequent resolution affirms that a rule formulated in an earlier resolution has become binding, such affirmation constitutes an element of evidence which shows that the originally non-obligatory status of the rule has now changed. That evidence is also rebuttable.

Conclusion 26

Evidence of general
principles of law

Conclusions 23-25 apply, *mutatis mutandis,* to general principles of law.

Comment: A resolution can constitute evidence of general principles of law, but this role is more potential than real. With the exception of human rights and fundamental freedoms, U.N. Members usually do not state general principles of law in G.A. resolutions (cf. PR § 14).

§ 11. *Law-Generating Resolutions*

Conclusion 27

Custom

Rules proclaimed in the resolution can initiate, influence or determine State conduct and thereby generate State practice that constitutes an ingredient of new customary law.

Where practice is already in progress resolutions can contribute to its consolidation.

Acceptance by States of the legal nature of a rule engendered in their practice and emerging from it can find expression in a resolution.

Comment: Resolutions themselves, whether repeated or not, cannot be identified with State practice. They may and, in fact, do lead to it, but they themselves do not constitute practice.

Resolutions can accelerate the formation of custom. This does not mean that any instant customary law could be created by a resolution or series of resolutions, though Mr *McDougal* thinks that "[i]n some contexts a good case might be made for 'instant custom'".

The growth of customary law as a result of resolutions is discussed in Section III of the Provisional Report.

Conclusion 28

First stage of treaty-making

A resolution can prepare and circumscribe negotiations on a multilateral treaty of general interest by indicating the matters to be dealt with in the treaty and by expressing the policies which the treaty should follow. The resolution can further include principles or other rules which should figure in the treaty.

A resolution referred to in the preceding paragraph does not bind the hands of the negotiators of the treaty in the sense that the treaty becomes no more than an application or development of the resolution. But the resolution supplies the negotiators with guidelines which are likely to establish some common ground before negotiations begin.

Comment: A resolution which is preparatory to the treaty in the foregoing sense retains its autonomous effect when the drafting, conclusion or entry into force of the treaty is delayed, or when

only a limited number of States become parties to it. Also, as Mr *Monaco* has pointed out, such a resolution can emphasize the importance of the treaty when it has finally been concluded and can exercise an influence in favour of its ratification.

Conclusion 29

Incorporation
of resolution into treaty

Incorporation of the contents of a resolution into treaty turns the rules of the former into treaty law for the parties.

Comment: Such incorporation is operated in one of the following ways: a treaty clause makes the resolution part of the treaty or the treaty, without necessarily referring expressly to the resolution, repeats some or all of its material provisions. Examples were given in PR § 12 (4).

Conclusion 30

Treaty obligation
to abide by a resolution

The parties to a treaty may agree in it to accept a resolution or resolutions as binding.

Comment: This type of engagement may cover an existing or a future resolution or both. Examples were given in PR § 13 (1).

Conclusion 31

Incorporation of treaty rules
into resolution

The repetition in a resolution of a treaty rule does not change the rule's nature among the parties to the treaty. For non-parties it may facilitate their future adherence to the treaty.

Comment: Such incorporation occurs very rarely. An example is resolution 2018 (XX). This category of resolution can prove helpful when the purpose of the treaty is to shape relationships in the internal sphere of the State.

Joint comment on Conclusions 28-31: The Commission's *Exposé* and Reports on the G.A. resolutions do not deal with the negotiations

on, and the adoption of, the text of a treaty within the General Assembly. Nor do they discuss the procedural problems connected with the initiation by the Assembly of conferences whose task is to draft and adopt treaty texts. Finally, the Commission is not here concerned with the Assembly's own treaty practice. For all these subjects do not belong to that sector of the Thirteenth Commission for which the present Rapporteur is responsible. On the other hand, matters now covered by Conclusions 28-31 had to be taken up because they show some possibilities inherent in the rule-making by the General Assembly. The Reports of the Commission clearly distinguish between the adoption of the text of a treaty by the General Assembly and the conclusion of a treaty in the form of an Assembly resolution (PR § 13 (2) and (3)). In the latter case, very rare as it is, States decide to incur contractual international engagements which they lay down in a G.A. resolution. States are free to bind themselves in any form whatsoever; therefore, the form of a U.N. resolution, unusual as it seems for the purpoe, cannot be excluded. Nonetheless the Rapporteur has decided not to repeat here the rather obvious conclusions that figure in PR § 30, points 77 and 78. Cf. the comment thereon by Mr *Torres Bernárdez*.

Conclusion 32

General principles of law

Resolutions can contribute to the emergence of general principles of law.

Comment: Most of these principles have been and are being formed in the domestic legal systems. However, the acceptance of certain common values on the international plane can lead to their articulation in international instruments, including the G.A. resolutions. A case in point is that of certain human rights and fundamental freedoms proclaimed by the General Assembly, in particular the impact of the Universal Declaration of Human Rights (PR § 15).

Conclusion 33

Legal policies

Some resolutions may reveal and express contemporary tendencies in the development of general international law. Some resolutions

may lay down policies that determine the substance of law to be made. The resolutions can do it by formulating principles or even detailed rules, but they may confine themselves to expressing the main ideas and concepts of prospective law.

Comment: Certain normative resolutions do not say what international law is or should be, how a treaty is to be understood or what provisions should figure in a future treaty. Instead they expound and support doctrines and concepts which are meant to promote the development of law in a particular direction. They then leave the task to the operation of existing sources.

A resolution cannot change law, detract from its binding force or modify the scope of its application. If it contains statements that are contrary to existing law, they must be regarded as no more than manifestations of certain attitudes or proposals for the future.

Various contemporary tendencies of legal development have been articulated by the G.A. resolutions. Suffice it to recall human rights, self-determination, the liquidation of colonialism, disarmament and related problems, nuclear weapon tests, economic relations and the needs of the Third World, outer space, or sea-bed and ocean floor. (cf. PR § 16).

III. *Draft Resolution of the Institute*

The Rapporteur presents two versions of the operative part of the Draft Resolution of the Institute. In both versions the Institute limits itself to taking note of the Conclusions as those of the Commission and not as those of the Institute[16]. That is the essential point, and the two versions are identical in this respect. The difference between them is of a drafting nature. The Rapporteur prefers the first version.

[16] There is, of course, no obstacle to the voting of a broader formula if the Institute so decides. Thus the Institute could take note of the Conclusions without indicating that they are those of the Commission alone, or the Institute could adopt the Conclusions.

The proposal is couched in the following terms:

Resolutions of the General Assembly of the United Nations

The Institute of International Law,

Considering that the mandate of the Thirteenth Commission comprises, amongst other things, an inquiry into the elaboration of non-contractual instruments which have a normative calling,

Considering that some resolutions of the General Assembly of the United Nations have such a calling,

Having examined the Reports of the Thirteenth Commission on the Resolutions of the General Assembly of the United Nations, in particular the Conclusions of the Commission,

[1st version]

Takes note of the following Conclusions arrived at by the Commission:

[Here follow the Conclusions which figure in Section II above, without comments.]

[2nd version]

Takes note of the Conclusions which have been arrived at by the Commission and are set forth in the annex to this Resolution.

Annex

Conclusions of the Thirteenth Commission on the Resolutions of the General Assembly of the United Nations

[Here follow the Conclusions which figure in Section II above, without comments.]

14th November 1984.

Annex

Observations of the Members of the Thirteenth Commission on the Provisional Report.

1. Observations of Mr Derek W. Bowett

Cambridge, October 13, 1983.

1. In general I find this an extremely thorough and interesting draft. I do not share the view expressed by some colleagues that its scope is too wide. It seems to me essential to cover this topic as a whole (which is, in any event, only part of the larger mandate of the Commission).

2. The notion of a "normative" resolution may require further clarification. I was impressed by Professor Zemanek's question as to whether resolutions on Antarctica were "normative". There are perhaps three distinct categories:

a) resolutions purporting to formulate general rules of conduct binding on all States
b) resolutions dealing with specific situations but assuming, expressly or impliedly, a general rule of conduct
c) resolutions addressed to specific States, but assuming that the rule of conduct required of the State specifically named would be required of all States in a similar situation.

3. As regards the draft of conclusions I believe that this will benefit from careful drafting scrutiny. The language is in parts not very precise.

I would prefer to see the conclusions on voting - conclusions 31, 44, 51, 52, 53, 54, 75, 76 and 90 grouped together, simply because one wants to see a coherent treatment of the question of the significance of votes cast, for or against a resolution, or abstentions from voting.

4. The notion of exploring the "motives" behind a State's approval of a resolution is a difficult one (Rule 31). Apart from a State's explanation of vote, how is this to be done?

5. I doubt that we can maintain Rule 50. To say that the value of a resolution is lessened by "haste in drafting the text or lack of legal expertise" is perhaps acceptable to the Institute, but it will be taken as an affront by the U.N.

6. My own preference would be to see the Commission produce a set of rules, or propositions, with commentaries attached to each rule, rather in the way

the I.L.C. operates. In that form, it will be much easier for readers to follow, and more likely that busy diplomats at the U.N. will try to digest it. And I am doubtful about the virtue of trying to embody the results of our work in formal resolutions, to be adopted by the Institute as a whole. The topic is clearly a highly controversial one - as discussions in the Commission have already shown - and it is unlikely that any draft resolution will carry the kind of general support which the Institute would normally wish to see behind its formal resolutions. It has been the express intention of the Institute to embark upon some of the more "marginal" and, therefore, controversial areas of international law. I have no quarrel with the decision. But, correspondingly, the Institute should not assume that the work of Commissions in such areas will be appropriate for the traditional resolution, overwhelmingly supported. Precisely because the topics are controversial it is mistaken to expect overwhelming support, and another format is desirable. This is why I suggest a set of "Rules" and Commentary.

D.W. Bowett

2. *Observations of Mr Myres S. McDougal*

New Haven, Connecticut 06520
October 24, 1983

Dear Krzysztof:

Though I attended the meetings of the Thirteenth Commission in Cambridge and have carefully read your Provisional Report, I am not quite sure what you wish in written form from us now.

It seems to me, as I indicated in Cambridge, that you have done a magnificent Provisional Report. It is both comprehensive and precise in its delineation of the problems, in its coverage of the different features in the context that may affect the law-making impact of a resolution, and in its outlines of opinion and practice. You have my hearty congratulations on a superb piece of scholarship.

I should think, however, that it might be a mistake to press toward a summary resolution by the Institute as a whole. We saw in Cambridge, and have seen before, how tenaciously and extensively, and how inconclusively, the members of the Institute will raise and debate what are inherently metaphysical questions and our problem could be construed to raise a host of such questions.

It seems to me that the best course for the Commission now might be simply to submit your Preliminary Report, as you may revise it after hearing from all the members of the Commission, to the Institute for its receipt and publication.

May I further suggest that, if you do intend to revise the Provisional Report, you make a somewhat different, and more extensive, statement, either

at the beginning of the Report or at the top of page 228 before the summing up, of the larger problem confronting the Commission in its inquiry about the law-making role of resolutions.

The broad outlines of such a statement, as I suggested in an earlier letter, would run somewhat as follows. Law-making in any community, by whatever modality, is a process of communication by which certain expectations are created in the community members. For effective law-making, these expectations must include at least a triple reference: to policy content (the projected shaping and sharing of community values); authority (the appropriateness of the decision-making process); and control (the probabilities that the projected policies will be put into actual operation). In the global arena, communications about these three different components of law are made through many different procedures and modalities, ranging through a broad continuum, from the most deliberate and formal (international agreements) to the least deliberate and formal (inferences from habitual behaviour and relatively uniform decision). In any particular case in any particular context, all procedures and modalities, from the most deliberate to the least deliberate, must be reviewed for a realistic determination of whether law has, or has not, been created.

What this broad statement means with respect to any particular "resolution" is that the law-making impact of that resolution is a function of two different factual contexts. The first, and smaller, context is that of the resolution itself: precisely who was communicating, what policy, to whom, in what setting, by what modalities, with what outcomes in expectations about policy, authority, and control. This is the context so brilliantly described by you in your Report. The second, and larger, context is that of the most comprehensive global process of law-making. The outcomes of the particular "resolution" context may be affected by the outcomes of the other communications by which the expectations we call law are created. The result is that the relevance of every feature of the "resolution" context, which you so carefully recount, is affected not only by every other feature of that context but also by every feature of the more comprehensive global process of communication about law. That is why, since you leave your summary points largely unqualified, you received so many nit-picking comments from members of the Commission in Cambridge and why even I will have to nit-pick you on many points if you do not introduce the general contextual qualification.

Even now I should like to add a few nit-picks:

p. 229 Paragraph 5. Put the word "formal" before competence.

p. 230 Paragraph 9. Very dubious.

p. 241 Paragraph 90. Even more dubious.

As I read your Provisional Report I noted a number of reservations here and there. A copy of these, for whatever value they may have in revision, are attached on a separate sheet.

In closing may I say, again, how much I have enjoyed your Report and thank you for a tremendous contribution to scholarship.

Cordially,

Myres S. McDougal

Comments upon Provisional Report

3. In the light of history, it defies reason to suggest that constitutions, including the U.N. Charter, cannot be revised by custom and broad interpretation.

The *Reparations* case is an example of revision by broad interpretation.

The very problem with which we deal is an example of revision of a constitution by custom (see § 11 (3)).

§ 10 (2). In some contexts a good case might be made for "instant custom". All that is required for "law" is clarity about general community expectation.

§ 10 (3). The impact of repetition in crystallizing expectations may be understated here.

§ 11 (3). It is not "acceptance" but "expectation" that is necessary to law. Of course, many features of the context, other than the resolution, may affect expectation. There would be very little customary law if unanimous acceptance were required. The function of "custom" is to offer an escape from the necessity of agreement.

§ 11 (3) (4). There is a lot of mysticism in the words "binding force".

§ 17 (2) (3). The important question about consensus is the degree to which unanimity is required. If unanimity is required, a veto over policy, tantamount to the making of policy, is given to a minority.

§ 18. It is not quite realistic to write as if resolutions, customs, and treaties are separate sources of law. They are all part of a more comprehensive, continuing process of communication by which the expectations we call law are created.

§ 18. The views expressed here that resolutions have no role in the more comprehensive process of communication seem highly inaccurate and anachronistic.

By presenting a number of allegedly different modalities in Article 38 for making law and asking the role of resolutions with respect to each we tremendously undercut the contemporary importance of resolutions in making international law.

3. *Observations of Mr Edward McWhinney*

Vancouver, July 4, 1984

My dear confrère:

I have received your letter of 9 June 1983, and the accompanying Report of the 13th Commission of the *Institut* on Resolutions of the U.N. General Assembly.

First of all let me congratulate you on this enormously comprehensive and thoroughly documented study. It is, of course, not merely an excellent synthesis of the opinions of our Commission, but, in its identification of the nuances of individual positions and the attempt to show interrelations, it will undoubtedly itself serve to establish trends and conditions in contemporary International Law, from the older, classical law to the new. The most encouraging aspect of your Report, in this regard, in my view, is the evidence of the trend, among so many of our *confrères*, away from legal positivism and *a priori* theories of sources, on the more empirical, fact-oriented approaches to the international law-making process.

You raise the basic question as to the next step for the Commission, and pose the possibility of an *Institut* Resolution. While some *Institut* members clearly like the Resolution approach, and also handle the fine drafting involved very well, I am not sure that it is particularly helpful or productive in areas of International Law that are clearly in flux and where, evidently, doctrinal-legal positions often tend, more than elsewhere, to reflect particularistic national interests or political-ideological positions. I fear a Resolution project would reduce to a lowest-common-denomination statement and fetter further legal development in this area. Would it not be better, therefore, to proceed in the spirit of the Schachter Report of a decade ago and content oneself with a simple Resolution "receiving" (not, in terms, adopting) the Report, and leaving it to members, in further written comments to you or else in debate, to add any further nuances - whether qualifications or extensions? Publication of the Report is itself a positive contribution to the dialectical process of international law-making today. The selected list of U.N. General Assembly Resolutions that you attach to your Report as Annex I is evidence of this process. Many of the individual Resolutions contained in the list clearly were not yet law at the time of their adoption, but have attained a sufficiency of general acceptance, by now, to qualify as such today; and some few, indeed, would even appear to rank, by now, as *Jus Cogens*.

With again my congratulations on a superb piece of work,

With very best wishes,

Sincerely yours,

Edward McWhinney

4. Observations de M. Riccardo Monaco

Rome, 28 mars 1984

Mon cher Confrère,

Tout d'abord je vous demande de bien vouloir m'excuser du grand retard avec lequel je vous envoie mes observations.

Votre excellent rapport provisoire était depuis longtemps à la connaissance des membres de la Commission. Mais pendant la session de Cambridge le manque de temps nous a imposé de nous borner à une discussion tout à fait préliminaire.

Nous avions à notre disposition un texte qui m'a beaucoup impressionné par l'ampleur et la profondeur de vos recherches. Elles ont abouti à une étude très complète et qui en plus a été conduite avec une rigueur systématique vraiment admirable. Cela va bien sûr faciliter la tâche des membres de la Commission.

La méthode que vous avez suivie vous a amené à rédiger à la fin de votre rapport toute une série de conclusions, de sorte que les grands développements de votre texte sont maintenant résumés dans des formules précises.

Les quatre-vingt-dix points qui constituent vos conclusions rencontrent en grande partie mon accord : c'est pour cela que je me bornerai à faire seulement des brefs commentaires à l'égard de certains problèmes qui, à mon avis, demandent une réflexion ultérieure, ou bien un examen plus approfondi.

n. 15. *Déclarations*

Ce point commence avec une constatation qui est fondée sur la pratique, c'est-à-dire qu'une résolution dénommée déclaration est un moyen destiné à énoncer des principes. Cela dit, l'on souligne que le contenu de la déclaration peut porter sur la *lex lata* ou bien sur la *lex ferenda*.

Il faudrait marquer ultérieurement que la valeur des déclarations de principe réside essentiellement dans le fait qu'elles énoncent des principes nouveaux. Bien que ces derniers ne donnent pas naissance à des règles déjà reconnues, ils ont toutefois une très grande importance du point de vue de la *lex ferenda*.

S'il s'agit au contraire de principes qui sont déduits ou qui se rattachent à la *lex lata*, dans ce cas l'influence des déclarations est mineure, parce qu'alors ces actes peuvent plus facilement être compris parmi les directives qui favorisent la codification du droit existant.

Il est difficile à ce propos d'établir si et dans quelle mesure la *lex ferenda*, au cas où elle serait formulée dans un texte de caractère exceptionnel, comme, par exemple, une déclaration, pourrait avoir une influence décisive sur la *lex lata*. L'exemple récent qu'on cite est celui du texte de négociation composite officieux, qui est devenu le projet de convention sur le droit de la mer à la Troisième Conférence des Nations Unies sur ce sujet. A cet égard on affirme en doctrine que l'influence de la *lex ferenda* sur la *lex lata* est totalement indépendante de la forme et de la valeur juridique des instruments utilisés pour formuler le droit souhaitable. Il me semble qu'il serait hasardeux d'aller jusque-là : en tout état de cause le point 15 dont il s'agit est axé sur l'hypothèse que la déclaration serait adoptée par une résolution et, par conséquent, par un acte dont on connaît la portée et l'efficacité.

n. 16

J'approuve en substance les affirmations qui résultent de ce point. Seulement, à mon avis, il serait opportun de souligner davantage l'influence qu'une

déclaration de principe peut avoir sur le développement progressif du droit international. En d'autres termes, certaines déclarations ont marqué une étape dans le chemin qui peut conduire à admettre sur la communauté internationale des sources atypiques. A cet égard il faut toutefois faire preuve de toute la prudence nécessaire. Par exemple l'importance de la Charte des droits et devoirs économiques des Etats adoptée par la résolution 3281 du 14 décembre 1974 est indéniable. Mais il faut reconnaître que ce texte, étant donné qu'il porte sur une quantité de sujets de nature différente et qu'il énonce des principes qui sont tout simplement de caractère politique, est loin d'avoir, dans son ensemble, la même efficacité juridique qu'une résolution ayant un objet bien défini et énonçant des règles spécifiques. Cela m'amène à dire qu'une telle déclaration ne coïncide avec une résolution au sens propre du mot que d'un point de vue formel, alors qu'elle possède des caractères substantiels très différents de ceux des résolutions normales.

n. 18.

Il y a sur ce point deux affirmations qui donnent beaucoup à réfléchir : j'estime donc qu'il faut les examiner l'une après l'autre.

Le premier problème qui se pose est celui de l'efficacité d'un principe de droit à partir du moment où il est établi par une résolution : l'on affirme que le principe, en tant que tel, serait directement applicable sur le plan international.

Cette affirmation demande, bien sûr, des explications ultérieures. Nous savons qu'un principe, étant donné sa nature, pose une règle qui est générale et abstraite : il en découle qu'il est difficile de pouvoir envisager son application directe dans l'ordre juridique international.

Il suffit de se référer à certains exemples : le principe de l'égalité des Etats, celui de leur indépendance, ou bien encore celui de la bonne foi se bornent à donner aux Etats des directives dont doit s'inspirer leur comportement. Mais précisément à cause du fait qu'il s'agit de simples lignes de conduite, qui n'aboutissent pas à des prescriptions positives, de tels principes ne sont pas comparables à des règles concrètes. D'où la conséquence qu'ils ne possèdent pas encore une valeur normative. Voilà la raison pour laquelle le même point pose un deuxième problème qui est étroitement lié au premier, et qui comporte la conclusion suivante : si en réalité l'élaboration de règles détaillées, destinées à rendre possible la réalisation du principe, est implicite dans presque tous les textes qui proclament des principes, cela signifie que le principe, en tant que tel, ne possède pas l'efficacité nécessaire pour son application directe.

En d'autres termes si dans la plupart des cas le principe demande à être complété, en vue de son application, par un certain nombre de règles de détail, cela prouve le contraire, c'est-à-dire que le principe n'est presque jamais directement applicable. Et alors la première règle devient une simple hypothèse, dépourvue de valeur réelle.

Le dernier développement du point 18 d'après lequel le manque de règles détaillées ne serait pas un obstacle ni à l'application *pratique* du principe, ni a son effet normatif, semble contredire l'affirmation précédente.

De toutes façons, il paraît plus prudent de ne pas évoquer l'application pratique d'un principe. En outre il faudrait, à mon avis, indiquer des distinctions entre les différentes catégories de résolutions, d'autant plus qu'il est difficile de rencontrer des résolutions énonçant des principes " auto-exécutoires".

Il faut encore remarquer que, si un principe déterminé, nonobstant l'absence de règles d'application, trouve quand même dans la pratique une réalisation plus ou moins étendue, cela se fait normalement non à travers l'adoption de règles détaillées d'exécution, mais en vertu de l'œuvre de la jurisprudence.

n. 31.

En principe je suis d'accord avec l'idée qu'il faut, dans la mesure où cela se révèle possible, rechercher les motifs qui ont amené les Etats a approuver une résolution : cela peut prouver leur intention de constater le droit existant, ou bien de donner vie à des règles nouvelles.

Toutefois cela ressemble beaucoup à la recherche de la cause de la loi en droit interne : assez souvent cette cause n'est pas saisissable, parce que le motif qui est à la base de la volonté du législateur est de nature politique et non pas de caractère juridique.

En effet, même si les Etats, en adoptant une résolution, sont amenés à le faire pour des raisons qui ne touchent pas à la politique législative en tant que telle, il en résulte toutefois également une conclusion qui a une valeur normative. C'est pour cela que je suis assez hésitant quant à l'opportunité de poser la condition qui figure à la dernière phrase de ce point.

n. 38

Il s'agit d'un point délicat. Le but poursuivi est celui de faire une distinction entre les résolutions qui sont déclaratoires du droit existant et celles qui ne le sont pas. A cette fin l'on affirme que de telles résolutions doivent être destinées à constater le droit, de façon abstraite ou bien en ayant en vue des décisions spécifiques ultérieures.

Je suis d'accord sur le fond de ce point : mais je voudrais suggérer que, à partir du moment où l'on fait référence à un certain nombre de conditions, l'on ajoute à l'élément déjà cité, les autres éléments auxquels la résolution, pour atteindre le but de déclarer le droit, doit se conformer.

n. 51, 52, 53

Ces trois points peuvent être examinés ensemble, parce qu'il existe entre eux un lien très étroit.

En ce qui concerne l'*unanimité* il faut tout d'abord tenir compte du point n. 30, qui déclare que la valeur de l'unanimité se mesure aussi en vérifiant le nombre des abstentions ainsi que les réserves qui diminuent l'efficacité des règles adoptées à l'unanimité.

Cela n'enlève pas quand même à l'unanimité sa portée qui est en tout cas décisive quant à la preuve des règles ainsi approuvées. Mais il faudrait de toute façon mettre au clair que la présomption dont il s'agit n'est pas une présomption *juris et de jure*, mais une présomption simple, qui, en tant que telle, admet

la preuve du contraire. Pour ce qui est du *consensus* je suis d'accord avec la formule adoptée ; toutefois il faudrait évaluer ce point en tenant compte du n. 7, où le *consensus* a un autre caractère, dans le sens qu'il se réfère à la procédure à travers laquelle sont élaborées des résolutions normatives, et non pas à la preuve de l'existence d'une règle de droit. En ce qui concerne la *majorité*, j'approuve la première phrase. Mais à l'égard de la deuxième il devrait ressortir clairement des mots employés que seulement dans des circonstances exceptionnelles une majorité représentative pourrait donner à une résolution une efficacité semblable à celle d'une résolution adoptée à l'unanimité.

n. 57 et 68

J'approuve ces deux points ; seulement la référence aux droits de l'homme ne me semble pas nécessaire. En d'autres termes, pourquoi, en matière de preuve ou de création de principes généraux de droit, faudrait-il spécialement faire mention des droits de l'homme pour marquer l'existence d'un domaine particulier dans lequel, par préférence à d'autres domaines, l'on verrait surgir de nombreux principes généraux? A mon avis, il faudrait se borner à citer les droits de l'homme comme exemple.

n. 72

Je tiens à souligner l'importance de la deuxième partie de ce point. En effet il arrive assez souvent que l'entrée en vigueur d'un traité soit retardée par la lenteur avec laquelle les Etats ratifient le traité ou y adhèrent : cela souvent à cause de la complexité de la procédure de ratification ou d'adhésion. Une résolution de telle sorte qui intervient après la conclusion ou la ratification d'un traité peut vraiment signaler l'importance du traité et avoir une influence considérable dans le sens de renforcer l'idée qu'il est utile d'y devenir partie.

n. 87

Je trouve un peu faible la formulation de ce point. A mon avis, il serait opportun de la renforcer. En outre pourquoi la preuve ainsi apportée ne serait-elle pas décisive ?

Je vous prie de croire, mon cher Confrère, à l'assurance de mes sentiments très cordiaux.

Riccardo Monaco

5. *Observations of Mr G.E. do Nascimento e Silva*

Vienna, April 9, 1984

My dear Friend and Confrère,

You must forgive me for not having answered sooner, but to be quite frank, after going over your Provisional Report on "Resolutions of the General Assembly of the United Nations" I really did not know how to formulate my observations on it.

Initially, I must congratulate you on the thorough and scholarly manner in which you prepared the Provisional Report. The wealth of information and the bibliography make it a work of lasting interest.

However, I feel that the conclusions do not correspond to our Institute's practice. In the Exposé (§ 29), you point out that "only two members opted for a Resolution: Messrs. do Nascimento e Silva and Zemanek, the latter with some qualifications". I would like to point out that I also considered that a Resolution of the IDI would play an important role in the clarification of this problem, but insisted that it "should not go into too many details, but limit itself to the proclamation of the principal legal consequences of U.N. Resolutions" (p. 273).

The conclusion - 90 in number - on the contrary are not based on this philosophy; quite to the contrary. I fear that the Institut would not be in a position to go over them all in one session, since quite a few are controversial. I myself would hesitate to endorse some of them, even knowing that from a theoretical point of view many are quite attractive and others, with the passing of time, may end up by constituting an undeniable fact.

The summing up of the main points, albeit very ingenious, is equally controversial: the classification of the various types of resolutions, although attractive from a theoretical standpoint, is open to discussion.

At this stage, I must also join those who had difficulty in accepting Madame Bastid's suggestion that the Institut should undertake an examination of the Resolutions that purport to establish new rules of law (§ 29). If the Institut should embark on such a task, the same doubts we have regarding the legal value of resolutions would still remain, and we would be open to the criticism mentioned by Mr. McDougal. It would also be a very heavy task. The existing practice is satisfactory: text writers have analysed the resolutions and the Declaration on Human Rights is an excellent example of the influence of doctrine in this field.

In spite of the arguments presented, I still have misgivings about the value of repetition of resolution, consensus and unanimity.

No repetitions were necessary in the case of those resolutions which take into account entirely new situations created either by the impact of science and technology or by a change in mentality regarding a given problem, as in the case of human rights. In none of the resolutions formulating legal guidelines, which were accepted almost immediately by the international community, was the need of repetition ever raised.

The repetition process occurs with regard to political issues in which, often, the rules that a voting majority tried to impose do not have a sufficiently acceptable legal background. In other instances, such as in the case of the resolutions on apartheid, racial discrimination and other similar ones, the repetitions result from ill-advised political motivations: unnecessary repetition, from a purely legal point of view, can be considered as detrimental to the principle postulated. The same applies to resolutions adopted by consensus or unanimously.

Consensus formulas are quite often devoid of significance and the text accepted is such that it can, with a certain degree of ingenuity, fit into the instructions of most of the delegations.

My remarks may be construed as contrary to the conclusions and I wish to stress my acceptance of many of them; but, repeating my initial remark, I would like to insist that a Resolution along the lines of past IDI practice should be more concise and, in this case, avoid entering into controversial details.

Most sincerely,

G.E. do Nascimento e Silva

6. Observations of Mr Shabtai Rosenne

New York, 7 October 1983

My dear Friend and Colleague,

I have studied with great admiration your magnificent Provisional Report on *Resolutions of the General Assembly of the United Nations* which you have prepared for the Thirteenth Commission of the Institute of International Law. This is truly a remarkable document on which I congratulate you most sincerely. I hope it will very soon be published in our transactions.

I have also given a great deal of thought to what transpired at the meeting of the Thirteenth Commission in Cambridge and, from an intellectual point of view, I have to couple that discussion of ours with the discussion of the report of our colleague Michel Virally in the meetings of the Institute itself.

In my letter of 30 October 1979, I resisted the temptation to engage in a doctrinal discussion with you, and in your letter to me of 17 November 1979 you asked me to reconsider that, but, as explained at the time, pressures of work prevented me from doing more than answering your questions, which I did in my letters of 30 October and 12 December 1979, both of which are annexed to your Provisional Report. It is now clear to me that those replies of mine were far too short and misleading, and for that I take full responsibility.

Since then, I have completed a monograph entitled *Practice and Methods of International Law* which should be published here by the end of this year or early in 1984. I will do my best to send you a copy when it comes out. In the meantime, I want to give you two extracts from it which supply, so to speak, the philosophical motivation for the matters discussed in this letter. You will appreciate that they are the fruit of long study and experience of the United Nations.

The first quotation is the following. It comes in the section dealing with Article 38, paragraph 1, of the Statute of the International Court and reads as follows:

> Nevertheless, that catalog of elements is incomplete, certainly for practical purposes. For instance, while most resolutions of most inter-

national organizations are not 'binding' under the terms of the constituent instrument of the organization in question and an international organization has no legislative function, an observation which applies to all organs of the United Nations save certain decisions of the Security Council coming within the scope of Article 25 of the Charter and worded in an obligatory and not merely recommendatory or exhortatory form, they cannot today be ignored entirely. He would be a rash international lawyer who took shelter behind the formal position as a ground for ignoring resolutions of major international organizations operating in a field of concern to him at a given moment. There is no practical need - provided the necessary reservations are kept in mind and expressed where necessary - to become involved in the controversy of the precise legal status of resolutions and declarations, however named, of the General Assembly. It is safer to recognize that many of them are to be brought within the general thesaurus of international law as indicators of a possible direction for the desired evolution of the law. This is the concept which found cautious expression in General Assembly resolution 3232 (XXIX), 12 November 1974, on the review of the role of the International Court of Justice. In the penultimate paragraph of the preamble the General Assembly recognized that 'the development of international law *may* [italics supplied] be reflected, *inter alia*, by declarations and resolutions of the General Assembly which *may* [italics supplied] to that extent be taken into consideraton by the International Court of Justice.'

The second, which appears in Chapter V, entitled *Resolutions of International Organizations*, is as follows:

The Place of Resolutions in the Thesaurus of International Law. Resolutions adopted by organs of intergovernmental organizations are today to be included in the general storehouse of international materials for which the international lawyer must have regard. Their precise status in the hierarchy of instruments, however, in the sense of the extent to which they might impose legal obligations upon States or upon entities, depends both upon the terms of the constituent instrument of the organization within which that organ operates and upon the terms of the resolution themselves. The general reservation, applicable to both conventional and customary law, that a State cannot be legally obliged by an instrument or rule to which it has not given its consent, is equally applicable in the case of resolutions. The principal legal question that arises is whether membership in that organization is sufficient in itself to attract to a member State which has voted against the resolution, or even abstained or not participated in the vote, the obligation in principle to conduct itself in accordance with the terms of a resolution of a qualified organ of that organization, even though it has not given its consent, by a

favorable vote or otherwise, to the terms of that resolution, in whole or in part.

After that question of principle has been answered, attention must be turned to the terms of the resolution, to see whether they are couched in language to impose a legal obligation of compliance with them. The guiding rule was expressed pithily by the International Court of Justice in the following sentence: 'The language of a resolution... should be carefully analysed before a conclusion can be made as to its binding effect.' Namibia case, ICJ Reports 1971, 16, para. 114; 49 ILR, p. 43.

It is being argued with increasing frequency that repetition of resolutions on a given topic is itself evidence of the emergence of a rule of customary international law on that topic. This is sometimes called the spontaneous production of a rule of customary law through repeated resolutions of a major international organ. This view has been advanced even in separate opinions in the International Court and it can be found in the records of organs such as the International Law Commission and of non-governmental organizations such as the Institute of International Law or the International Law Association, and even in 'studies' submitted in the name of the Secretary-General. But such a view attributes too much weight to States' action in voting the way they do. As often as not a vote is an indication of a political desideratum and not a statement of belief that the law actually requires such a vote or contains any element of *opinio juris sive necessitatis* or that the resolution is a statement of law. There is a tendency today for the agendas of international organs to be excessively repetitious, and the repeated voting is frequently an inert reflex from a policy decision when the issue was first brought up for discussion. An experienced observer of the work of international organizations ought to be able to predict with a high degree of accuracy the voting on any issue, even in the early stages of a debate.

I think that the foregoing quotations are sufficient to explain why I have great difficulties in accepting your suggestion that the conclusions of your Provisional Report "cover what the Rapporteur thinks to be common ground among the Members of the Commissions" and why those conclusions "could constitute the fabric of an Institute resolution."

Quite frankly, while I find your Provisional Report a superb piece of doctrinal analysis, my serious doubts whether it could possibly serve as a basis for a formal pronouncement by the Institute derive precisely from the fact that it deals with difficult and highly controversial questions of legal philosophy and is not practice-oriented. In my conception, the Institute shares with bodies like the International Law Commission the obligation to produce practice-oriented texts. Of course every Rapporteur has his own philosophical approach which finds expression in his reports, but the final pronouncement, to my way of thinking, should free itself from any individual's philosophical contentions

and concentrate on producing statements of law which can command general assent and be put into practice by States. The function of the free and spontaneous debates to which we are accustomed is precisely to reach a consensus out of the babel of views, often strongly held, to overcome the adage *quot homines tot sententiae*. The Institute has shown remarkable success in doing this in the past, and I assume the Thirteenth Commission will be able to continue that tradition.

I do not fully understand what is meant by an expression which is gaining currency and of which I find traces in your Provisional Report, namely "soft law". Either a rule of law exists or it does not, and I cannot find any justification for taking a rule or principle which is in process of gestation and regard it as having already acquired the status of a rule of law. I think this is well brought out by the long series of cases and arbitrations on various aspects of the law of the sea since 1951, and the difficulties which international courts and tribunals have experienced, and States also, for that matter, in knowing how to deal with the evolving Law of the Sea.

In light of the foregoing, I have considerable difficulty in answering the 90 questions, or propositions, which you included in Section 30 of your Provisional Report. Indeed, I think it follows from the two quotations that I have given above that if I had to give formal answers to those 90 points, most of them would be negative.

In our meeting in Cambridge, our colleague Santiago Torres-Bernárdez recalled that the situation in which the Thirteenth Commission now finds itself is reminiscent of that which the International Law Commission faced in 1950 at the beginning of its work on the Law of Treaties. Let me quote one sentence from paragraph 161 of the Commission's report of 1950 (A/1316):

> A majority of the Commission favoured the explanation of the term 'treaty' as a 'formal instrument' rather than as an 'agreement recorded in writing'.

A close look at the Vienna Convention on the Law of Treaties, I think, will show that on the whole it deals with the instrument and not with the obligations deriving from the instrument, and it seems to me that this should be the correct orientation for the future work of the Thirteenth Commission. A start was made in that direction by the Commission's decision at Cambridge. which I hope the Institute will endorse, that our colleague Eric Suy and myself should undertake work on highly concrete and practical subjects. I personally would hope to have my paper ready in good time for our 1985 meeting.

My concrete suggestion is that you seek to guide the Commission into general practical lines concentrating on the instrument as an object on which the law might have something to say or might not - in this case resolutions of the General Assembly of the United Nations - rather than on legal consequences which might or might not (and this is where the high level of legal and political controversy exists) flow from those instruments. In that connection, it does seem to me that the Vienna Convention itself of 1969,

perhaps together with the draft articles on the law of treaties of 1982, and other aspects which could cross your mind, could supply a catalogue of topics - I would not put it higher than that - on which a practice-oriented discussion such as I am conceiving could be based.

I want to take this opportunity to deal with point 11 of your conclusions. I am afraid that while as a matter of legal theory and of good English legislative draftsmanship you may be right, the postulate itself and the way you have expressed it could be misleading and diplomatically awkward. The United Nations now works in six languages, and each language has its own method of dealing with this particular problem. Resolutions are drafted in many different ways but, in my experience, not with that great care which is normally characteristic of treaty-drafting. If English treaty-drafting prefers the simple future tense with the word "shall" to indicate obligation (although this is not invariable), French usually prefers the simple present tense. The legal difficulties arise when we run into the English subjunctive or optative and the use of ambiguous auxiliary verbs like "would" or "should", which are virtually untranslatable. I have seen international plenipotentiary conferences nearly break down over the inability to translate a delicate compromise using these kinds of words into other languages. The Drafting Committee of the Third United Nations Conference on the Law of the Sea and, more particularly, the Language Groups spent much time on this problem and it was accepted that complete conformity could not be attained in the six authentic texts of the Convention. I do not think that it is really desirable or necessary to attempt to align resolution-drafting too closely on treaty-drafting. The nature of the functions being performed is entirely different.

I must apologize for the length of this letter and for what I suspect is for you its generally negative tenor. In my belief, the issue is one of major importance, both on its own merits and for the Institute as a whole. I therefore believe that the frankness with which I have allowed myself to express my thoughts here will be accepted in the spirit in which it is intended and that, notwithstanding any disappointment it might cause to you, will be regarded as a positive contribution to the major topic entrusted to the Thirteenth Commission and to your capable hands as our Rapporteur.

With warm personal regards.

Yours sincerely,

Shabtai Rosenne

7. *Observations de M. Santiago Torres Bernárdez*

Le 29 mai 1984

Cher Confrère,

Permettez-moi de vous adresser, encore une fois, mes plus vives félicitations pour votre très intéressant rapport provisoire sur les résolutions de l'Assemblée

générale des Nations Unies. Ledit rapport est à la fois remarquablement complet et synthétique.

Il appelle toutefois de ma part un certain nombre d'observations que, pour des raisons de commodité, je limiterai aux conclusions:

Points 1 et 2: Tout au début de ces deux points, il conviendrait d'insérer le mot "may" après les mots "The resolutions". Il faudrait en outre supprimer le mot "ready" dans la deuxième phrase du point 2.

Point 3: Il conviendrait de supprimer les mots "and a constancy of purpose and position" et de rédiger la deuxième phrase de la façon suivante: "The repetition or re-citation of a resolution by another resolution or resolutions could serve as evidence of the intention to attribute to its contents a normative role at the general international law level".

Point 4: Une résolution contraire à une règle de droit international bien établie ne doit pas se voir, *a priori*, attribuer en droit un sens particulier; elle pourrait certes refléter un certain changement de l'*opinio juris*, mais tout dépendrait à cet égard du type de résolution en question, de la matière couverte, des caractéristiques des votes émis, des réserves éventuelles, du caractère éventuellement répétitif de la résolution concernée, des sujets obligés par la règle de droit, etc.; quand bien même un certain glissement de l'*opinio juris* serait indiscutable, cela ne pourrait suffire, comme tel, à mettre en cause la portée, sur le plan du droit international général, de la règle ainsi contestée.

Points 5 et 6: Je soutiens sans réserve la distinction faite entre, d'une part, le statut de l'acte de l'organisation et, d'autre part, le statut de la règle qu'il contient, même si, parfois, ladite distinction peut donner lieu à des expressions quelque peu paradoxales sur le plan terminologique, telles que, par exemple, celle de " recommandation " déclaratoire de droit coutumier. D'autre part, cette même distinction m'amène à poser une autre question, de méthode celle-ci, que j'ai déjà eu l'occasion de mentionner brièvement à Cambridge, à savoir celle de la définition de la tâche que la 13e Commission s'est vue confier par l'Institut. A mon avis, de la réponse qui sera donnée à cette question de méthode dépend largement la possibilité de faire des progrès dans l'étude du sujet. De tels progrès pourraient se voir compromis si les aspects relatifs au statut de l'acte de l'organisation devaient se confondre avec ceux qui concernent le statut de la règle qu'il contient: cela serait susceptible de se produire au cas où l'examen des uns et des autres se ferait conjointement sans que ne fussent effectuées les distinctions qui s'imposent. Si les deux séries d'aspects auxquels je viens de me référer entrent dans le cadre de l'étude des " résolutions de l'Assemblée générale de l'Organisation des Nations Unies " dont il est ici question, il conviendrait de les examiner et de les approfondir séparément l'une après l'autre. Dans cette perspective, l'on pourrait commencer par une analyse de tout ce qui concerne la " résolution de l'Assemblée générale " en tant qu'acte de l'Organisation, c'est-à-dire par ce que l'on pourrait appeler, en s'inspirant du " droit des traités ", le " droit des résolutions de l'Assemblée générale ". En d'autres termes, il s'agirait d'abord d'identifier et d'énoncer tous les éléments pertinents concernant la réso-

lution en tant qu'" instrument " (élaboration, adoption du texte, réserves, force obligatoire, interprétation, application, validité, etc.), comme l'a fait la Commission du droit international lors de la codification du droit des traités. C'est seulement au cours d'une étape postérieure que l'on aborderait les aspects relatifs au statut des règles que contiennent les résolutions aux fins d'énoncer tous les éléments qui pourraient se révéler nécessaires pour établir dans quelles conditions il est permis d'attribuer aux dites règles une valeur normative ainsi que de déterminer la portée d'une telle conclusion pour le droit international général et son développement progressif. Il me semble que le titre général du sujet (" L'élaboration des grandes conventions multilatérales et des instruments non conventionnels à fonction ou à vocation normative ") ne fait pas obstacle, bien au contraire, à l'adoption de la méthode suggérée.

Points 8, 9, 10 et 11 : Ces points gagneraient, à mon sens, à être précisés et développés aux fins d'éviter de possibles malentendus.

Points 11, 13 et 15 : La relation entre l'utilisation, dans les résolutions, de certains mots ou termes et les conclusions générales énoncées sous ces points me semble trop tranchée.

Point 17 : L'acception du terme " principe " figurant *sub* e) ne devrait pas être *a priori* bannie : un " principe " ne doit pas, en soi, correspondre à une règle, qu'elle soit de nature juridique ou de toute autre nature.

Point 18 : Ceci implique bien sûr qu'il s'agisse effectivement d'un principe de droit dont la nature *de lege lata* soit vérifiée.

Points 19, 20 et 21 : Je suis en général d'accord avec leur contenu.

Point 22 : L'intervention, à ce stade, de sociétés savantes impliquerait un changement de " stratégie " en matière d'élaboration des résolutions de l'Assemblée générale ; à côté d'avantages certains, elle pourrait présenter des inconvénients majeurs : retards apportés à l'adoption de résolutions à caractère urgent, difficultés de praticabilité et, éventuellement, inopportunité. Je suis partisan de maintenir, sur le plan des méthodes et des procédures, une distinction très nette entre la codification et le développement progressif du droit international dits " diplomatiques " ou " inter-étatiques " et ceux appelés " scientifiques " ou " savants ".

Point 23 : Le recours à l'expression " *law-making* resolutions " ne préjuge-t-il pas de la réponse à donner à une question particulièrement controversée ? D'ailleurs, peut-on ignorer que l'expression " *law-making* treaties " fait elle-même l'objet d'importantes controverses et hésitations ?

Points 25 et 26 : Le libellé de ces points contribue à mettre en lumière les difficultés qui se posent du fait que la méthode suggérée ci-dessus dans mon commentaire relatif au point 6 n'a pas été entièrement suivie. " Making " et " negotiating " une résolution ne sont certainement pas des opérations identiques, ni sur le plan du droit interne de l'organisation, ni sur celui de la qualification ou des effets du contenu d'une résolution quelconque par rapport au droit international général.

Point 28 : Faute de plus amples précisions, j'émets des réserves quant au recours à l'expression " standard of conduct ".

Point 29 : Le contenu de ce point me semble devoir offrir un plus grand intérêt au regard d'une étude de science politique que de droit international.

Point 30 : Il serait utile de préciser le sens et la portée des mots " number and nature " dans ce contexte.

Point 31 : Je réserve entièrement ma position sur le libellé de ce point. Du point de vue du droit international, il n'est pas sans intérêt de distinguer, d'une part, l'acte d'un Etat et ses effets juridiques et, d'autre part, les motivations psychologiques ou autres qui ont amené cet Etat, ou ceux de ses organes en ayant la capacité, à agir. A mon sens, l'" intention " étatique qui, dans certaines circonstances, doit être légitimement prise en considération pour définir le sens et la portée d'un acte d'un Etat, ne doit en rien être confondue avec les " motifs ", par ailleurs fort divers, qui peuvent être à l'origine d'une telle intention. S'il est vrai que l'on ne peut considérer qu'un acte tel qu'un vote engage l'Etat au-delà de la portée attribuée à un tel vote dans le cadre d'une organisation déterminée, il est également vrai que les effets de ce vote, quel qu'il soit, ne peuvent se situer en-deçà de ladite portée.

Points 32 à 40 : Je réserve ma position sur l'énoncé de tous ces points.

Point 41 : Le mot " evidence " devrait être précédé du mot " additional ". Le contexte dans lequel s'inscrivent la pratique et les décisions judiciaires mentionnées, ainsi que leur portée respective, ne sont pas non plus dépourvus d'intérêt. D'autre part, je demeure perplexe quant à l'insertion des mots "if unanimous or nearly unanimous ". L'unanimité ou la quasi-unanimité a certainement une importance au niveau du droit international général dans la mesure où les règles en question sont des règles " *de lege ferenda* ". Mais, dans le présent contexte, les règles que la résolution affirme seraient plutôt des règles " *de lege lata* ", sans quoi il serait difficile de comprendre la référence faite à des règles " applied in State practice or judicial decisions ".

Point 42 : Je ne suis pas favorable au contenu de ce point.

Point 43 : Le rapport entre la règle coutumière et la règle conventionnelle pose des problèmes particulièrement complexes. Insérer une troisième composante dans une telle relation, à savoir la résolution, ne peut que contribuer à renforcer encore la complexité de ces problèmes. D'autre part, je ne vois guère la nécessité du libellé en question, *inter alia*, parce que la généralité d'une norme de droit international se définit de moins en moins par rapport à la distinction entre droit coutumier et droit conventionnel. Aujourd'hui, l'on peut trouver des règles " générales " et des règles " particulières " dans le droit coutumier aussi bien que dans le droit conventionnel. Je serais donc favorable à la suppression de ce point.

Point 44 : Ladite approbation, *a fortiori* si elle découle d'un consensus qui pour certains participants peut ne correspondre en rien à un vote positif, n'implique pas non plus que s'instaure de la sorte un début de pratique de l'Etat en question.

Point 45 : Le libellé de ce point appelle, *inter alia*, la nécessité de prendre en considération d'une façon beaucoup plus concrète le sujet de droit international dont il s'agit. Par exemple, la " pratique contraire " d'un Etat ne constitue pas en elle-même, peu s'en faut, une preuve de ce que la règle énoncée dans la résolution ne serait pas une règle de droit international dans les relations entre des Etats dont la pratique serait conforme à la règle en question. L' " unanimité " des pratiques n'est par ailleurs pas une condition nécessaire pour qu'une règle de droit international soit considérée comme " générale ".

Point 46 : Voir le commentaire consacré au point 45.

Point 47 : Je ne vois que très difficilement l'utilité de ce point au regard d'une formulation à caractère juridique.

Point 48 : J'accepte volontiers l'idée générale que véhicule ce point.

Points 49 et 50 : Ces points pourraient, à mon sens, être supprimés.

Point 51 : Peut-être le terme " présomption " est-il ici trop fort ; le mot " probabilité " ne conviendrait-il pas mieux ? D'autre part, il va sans dire qu'une telle " probabilité " n'a de sens que lorsque, compte tenu de toutes les circonstances et de tous les éléments qui entrent en ligne de compte, le contenu de la résolution se présente *prima facie* comme un " statement of law ".

Point 52 : Je réserve ma position sur ce point.

Point 53 : Je suis tout à fait opposé à l'affirmation contenue dans la deuxième phrase de ce point. D'ailleurs, en ce qui concerne le sens et la portée de l'expression "representative majority", je ne peux accepter la définition donnée au point 32.

Points 53 et 54 : Le vote négatif ou l'abstention " réprobatrice " d'un Etat ne peuvent par eux-mêmes porter atteinte au caractère obligatoire, à son égard, de la règle coutumière déjà établie que la résolution en question ne ferait que proclamer ; c'est ce qui d'ailleurs ressort du libellé général des points 55 et 56.

Points 57 et 68 : J'avoue ne pas voir le critère juridique qui permettrait de se référer à un domaine du droit plutôt qu'à un autre.

Points 58 à 66 : J'accepte volontiers les principes qui sont énoncés dans tous ces points.

Point 67 : La signification d'un vote unanime n'est guère toujours aussi certaine ; un vote positif peut émaner d'un Etat n'ayant point la conscience de se lier de la sorte ou n'ayant pas la volonté d'attribuer à la résolution en cause de tels effets. C'est pourquoi la formulation suivante semblerait plus adéquate : " a unanimous resolution *could* consolidate a custom and remove the doubt which there might persist". La pratique dont il est question devrait en outre, dans un cas comme dans l'autre, être certaine.

Point 69 : Je suis d'accord avec le principe qu'énonce la première phrase. Quant à la seconde phrase, je suggérerais d'en supprimer la fin à partir du mot "especially".

Points 70 et 71 : Je suis en général d'accord avec le libellé de ces points sauf en ce qui concerne les mots "and thus limit the freedom of negotiators" qui devraient, selon moi, être supprimés (point 71).

Points 72 et 73 : La deuxième phrase du point 72 nécessiterait d'être clarifiée.

Point 74 : Quel est le sens à attribuer à l'expression "standard of conduct" dans le présent contexte ? Si le sens d'une telle expression devait aller au-delà du contenu des articles 31 et 32 de la Convention de Vienne sur le droit des traités, le point en question ne me paraîtrait que difficilement acceptable.

Point 75 : Il ne ressort pas suffisamment clairement du texte si l'expression " authoritative interpretation " est utilisée dans le sens généralement attribué à cette expression en droit international ou si elle se réfère à l'interprétation qu'un " organe " principal de l'Organisation peut donner d'une disposition déterminée de la Charte. En tout état de cause, il me semble nécessaire que la présente formule soit mise en corrélation avec ce qui a été dit dans la déclaration adoptée à la Conférence de San Francisco concernant l'interprétation des dispositions de la Charte par les organes de l'Organisation. Il ne faut pas oublier non plus que dans la pratique des Nations Unies, la Cour internationale de Justice a été appelée à se prononcer dans des cas bien connus sur l'interprétation à donner à certaines dispositions de la Charte.

Points 76 à 78 : Une résolution de l'Assemblée générale des Nations Unies n'est pas *ex definitione* un traité. Cela n'empêche pas, et la pratique à cet égard est bien connue, que l'Assemblée générale puisse se substituer à la " conférence internationale " comme forum pour la négociation et *l'adoption du texte d'un traité.* En pareilles circonstances, l'acte d'adoption du texte du traité trouve sa substance dans un vote à l'Assemblée et adopte bel et bien la forme d'une résolution de l'Assemblée générale. Un tel vote et une telle résolution remplacent, *mutatis mutandis,* le vote par une conférence et l'acte final adopté par ladite conférence. Cette forme d'adoption du texte d'un traité mise à part, les traités élaborés au sein de l'Assemblée générale ne se distinguent guère du point de vue de la forme de ceux adoptés au sein d'une conférence d'Etats. Il ne me paraît par exact de dire que " States can conclude a treaty in the form of an Assembly resolution ". La forme que revêt un traité conclu au sein de l'Assemblée est purement et simplement celle d'un traité, comme dans le cas de traités élaborés au sein d'une conférence. Ce qui est adopté sous la forme d'une résolution est l'acte d'adoption du texte du traité, et non le traité lui-même.

Points 79 et 80: Les principes qu'énoncent ces points sont acceptables mais lesdits points devraient être révisés sur le plan de la forme. Il serait par exemple plus approprié, au point 79, de parler d' "Incorporation of *the contents* of a resolution into a treaty".

Points 81 à 88 : Il conviendrait de rédiger ces points avec davantage de précision — on se réfère surtout aux points 85, 87 et 88 — aux fins d'éviter des confusions non souhaitées.

Point 90 : Quels seraient les effets d'une telle résolution à l'égard des Etats en ayant appuyé l'adoption, si l'on excepte ceux auxquels se réfère le point 89 ?

En ce qui concerne la forme à donner aux conclusions ci-dessus commentées, je serais enclin à penser qu'une résolution de l'Institut pourrait, à ce stade, s'avérer prématurée. Enfin, pour ce qui est de la proposition faite par Madame Bastid, je partage volontiers l'opinion de nos confrères MM. McDougal, Mosler et Zemanek.

Veuillez croire, cher Confrère, à l'assurance de ma considération très distinguée.

Santiago Torres Bernárdez

8. Observations of Mr Endre Ustor

26 March 1984

My dear Confrère,

Referring to your note of 9 June 1983 and to the short discussion among some members of the Thirteenth commission held at Cambridge I submit herewith - together with any apologies for the delay - some observations on your provisional report on "Resolutions of the General Assembly of the United Nations".

I concentrate my remarks on Chapter VIII of the report entitled "Conclusions".

In paragraph 29 of that chapter you summarize the answers received to questions 21 and 22 of your Questionnaire. Your summary seems to indicate that the members of the commission are not too enthusiastic about the rather ambitious undertakings suggested by these questions and you yourself do not wish to press the point. While I understand and do not oppose this position at this juncture, I believe that the idea of Madame Bastid namely "...entreprendre... l'examen des résolutions [de l'Assemblée générale] qui prétendent établir de nouvelles règles de droit..." is worthwhile to be kept in mind for some future time. Judge Jessup also said in the course of the same discussion "...Parmi ces résolutions [de l'Assemblée générale des Nations Unies] il faut opérer un tri et dégager de la masse les résolutions déclaratives de droit" (Livre du Centenaire, p. 368).

The Institut which - unlike its members - has infinite time, may wish to revert to the idea in one of the years to come.

Coming now to paragraph 30 and the 90 points included I have the following observations to offer:

It may be important that the title of the definitive text (whether embodied in a resolution or not) express with great clarity what you repeatedly stressed in your report, namely that the conclusions concern only those resolutions of the General Assembly which lay down general and abstract rules of conduct.

Your points are arranged into six categories. While this creates certain repetitions I do not object to this arrangement; I cannot suggest any better.

Points 1 and 2 are seemingly subject to point 3. Is the word "necessary" in the last line of point 3 not too strong? And shouldn't the predicates in points 1 and 2 be softened to " may reveal and express" and " may lay down " ? Is the second sentence of point 2 not going into too minute details?

In my understanding the noun "postulate" used in point 4 has a specific meaning which does not fit in here (the same does not apply always to the verb). "Desideratum" or "demand" could be used instead.

I wonder whether the idea behind points 5 and 6 would not be made clearer by deleting the last sentence of point 5 and contracting the remainder of 5 with point 6.

Shouldn't the first words of point 7 be replaced by the words "A resolution adopted by... " ? But even with that change does point 7 reveal anything on the nature of the consensus procedure? Can a resolution adopted by whatever voting procedure not "constitute a stage in the elaboration of new law"?

In point 9 you change the tenor of the text from mere statements (*constatations*) to a hortatory sentence. Does the Institut wish to exhort the General Assembly?

Points 10 to 14 are rules of interpretation, some of them elementary which may not be needed to be pointed out. (Rule 12 suggests that in some instances a study of the *travaux préparatoires* may be necessary).

In the process of the inflation in titles the Assembly calls some of its resolutions Charter, World Charter, Proclamation, Code. These could also be mentioned in points 15 and 16 in line with Declarations.

In point 17 the last sentence, being hortatory, could be avoided. As to the noun "postulate" in par. (e) see my comment on point 4 above.

Point 18 goes in my view too far. Is this statement not subject to point 3?

The discreet disapproval of a seemingly unchangeable practice as contained in point 19 does perhaps not seem to be absolutely necessary.

I would soften somewhat points 20 and 21 by stating that "it seems desirable" instead of "should".

There is a delicate clash between points 21 and 22. If the draft resolution is examined by the Sixth Committee is there still need of a further examination by "experienced bodies composed of expert jurists"?

Point 23 is an implicitly disparaging remark. I would rather delete it.

In point 25 I would suggest to substitute "can in fact be supplemented" for "has in fact to be supplemented".

Points 26 and 27 do in my view not add too much to point 25.

Some link should be created between points 28 and 29 on the one hand and point 3 on the other.

In connection with point 31 I feel that the presumption goes the other way round.

Is the idea of point 39 not clearer expressed by points 5 and 6?

I would avoid the criticism of the General Assembly implicit in the expression "carefully prepared" in point 40.

It would be useful if some link could be established between point 45 and points 2, 28 and 29.

With point 47 I respectfully disagree. The statement, kept in general language, goes well beyond the limits of our topic and ignores the outstanding importance of compromise in all walks of life - law-making not excluded.

Point 50 may state the truth, still my advice would go against the inclusion of this point into our text.

I fear that there is too much repetition in points 62-64. See points 3, 28, 29 and 45.

Point 73: "postulates" the same remark as to point 4 above.

Points 79 and 80 belong - I submit - to the law of treaties and not to the law of GA resolutions.

All these observations, my dear Confrère, relate to minor matters and do not detract from my general approval of and admiration for the magisterial work you have done.

With best regards, I remain.

Yours sincerely,

Endre Ustor

9. *Observations of Mr Karl Zemanek*

Vienna, 2 April 1984

Let me, first of all, congratulate you most sincerely on the enormous work which you have put into writing this Report. It is not only impressive because of the mountains of literature which you have analyzed and presented in this lucid systematic form but also because you were able to elucidate some sort of consensus from our replies.

Stimulated by § 29 and the opening sentences of § 30, I offer you a few general remarks which I hopefully shall be able to supplement in the near future with remarks concerning some particular points.

After having studied your conclusions, I have again considered the way in which the Commission should proceed in the future. It seems to me that a double strategy would probably be best:

1. Given the vastness of the material and the firm differences of view on the subject, it does indeed appear difficult to draft a Resolution which could command general support in the Institute.

It seems thus preferable to maintain the conclusions as such in the final paragraph of the Commission's definitive text.

If this view were followed, a redrafting of some of the conclusions may become necessary because their present language is too broad and affirmative; it is true that this language is then often qualified in later conclusions but when reading the former one is not aware that such qualifications will appear.

2. I am, on the other hand, greatly attracted to the idea of Mme Bastid which was shared, although with a slightly different accent, by Mr Ustor. It should, indeed, be highly interesting to analyse the normative value of specific resolutions purporting to evidence or establish rules of international law by using the conclusions in your Report as criteria for the process of evaluation. The substance could then, in accordance with the findings of that analysis, be described systematically in a sort of codification as the "law of the General Assembly", as Mr Ustor suggests. Although I share Prof. McDougal's opinion on the relative importance of our influence, the study would nevertheless serve a useful purpose, be it simply that nobody else is undertaking it systematically. It might be a perfect "niche" for the Institute.

Care should, however, be taken in choosing the subject for the first of such studies. It may be preferable to choose a subject which has been dealt with in one or in only a few resolutions and is thus easier to tackle. With the experience gained in this pilot study one could then take on more complex subjects, like the one mentioned by Mr Ustor.

Karl Zemanek

La loi applicable aux effets du mariage après sa dissolution

(Seizième Commission) *

Rapport provisoire

François Rigaux

Introduction

1. La détermination de la loi applicable aux effets d'un mariage dissous est un sujet dont la matière peut paraître banale. Il recèle toutefois une grande richesse si on veut l'utiliser comme point de départ d'une réflexion sur la méthode du droit international privé. La 16e Commission a tenu deux réunions, l'une à Dijon l'autre à Cambridge. Les discussions ont révélé la difficulté de proposer à l'Institut des résolutions simples, aptes à épuiser le sujet et à procurer des solutions acceptées par tous. C'est pourquoi le rapport qui vous est soumis est divisé en quatre parties.

2. Comme il n'a pas paru très aisé de délimiter avec précision le domaine assigné aux travaux de la 16e Commission, il a paru nécessaire de consacrer toute la première partie à cette question. Des concepts essentiels comme ceux de « dissolution » du mariage ou d'effets d'un mariage dissous nécessitent une élaboration approfondie. En outre, l'intitulé du thème assigné à la 16e Commission paraît réduire celui-ci aux seules questions de conflit de lois : ne faut-il pas y faire une place aux conflits de juridictions ? Enfin, votre rapporteur a jugé utile de montrer les ramifications du thème à travers plusieurs branches du droit international privé, la protection des mineurs,

* La Seizième Commission est ainsi composée : M. François Rigaux, *rapporteur ;* MM. Evrigenis, Graveson, Jayme, P. Lalive, Loussouarn, von Mehren, Philip, Reese, Schwind, Scerni, Ziccardi, membres.

les successions, les régimes matrimoniaux, les délits et les quasi-délits.

3. La deuxième partie contient l'exposé de quelques solutions empruntées au droit positif de différents pays, sans qu'il soit permis de déduire de cette comparaison une suffisante convergence des règles de conflit sur la loi applicable aux effets d'un mariage dissous. En outre, votre rapporteur est conscient des lacunes de son information qui ne couvre qu'une poignée de systèmes de droit international privé appartenant à l'hémisphère nord.

4. La troisième partie du présent rapport a pour objet la présentation de quelques questions de nature méthodologique qui débordent largement le thème assigné à la 16e Commission. Le lien que votre rapporteur s'est efforcé de maintenir entre ce thème et les questions de méthode n'est pas artificiel. D'une part, il est sans doute plus commode de discuter de questions générales à propos d'un sujet particulier, de telle sorte que la réflexion théorique s'enrichisse de difficultés pratiques. D'autre part, étant au carrefour de plusieurs règles de conflit respectivement applicables à la validité du mariage, au divorce, à l'attribution de l'autorité parentale, aux obligations alimentaires, aux régimes matrimoniaux, aux successions, et entretenant des liens étroits avec la matière des conflits d'autorités et de juridictions, le thème de la loi applicable aux effets du mariage dissous est particulièrement adéquat pour une discussion plus fondamentale sur la méthode du droit international privé.

5. La quatrième partie commente l'avant-projet de résolutions annexé au présent rapport: conformément aux développements de la troisième partie, les résolutions en projet s'efforcent de tenir compte, d'une part, des solutions partielles relatives au thème de la 16e Commission déjà mises en œuvre dans plusieurs conventions de La Haye et, d'autre part, de la nécessité de proposer des règles aptes à s'insérer dans des systèmes nationaux de droit international privé qui, sur les nombreuses questions connexes au problème particulier des effets du mariage dissous, ne sont pas harmonisés. Cela explique aussi que certaines dispositions de l'avant-projet de résolutions risquent, à première vue, de paraître tautologiques, la préoccupation du rapporteur ayant été de réserver la solution des questions de droit international privé qui auraient très largement excédé la mission de la 16e Commission.

Première Partie

Délimitation du domaine des investigations

§ 1er. — *La notion d'effets du mariage dissous.*

6. Le sens premier des mots paraît clair : un mariage a été conclu et, dans la plupart des cas, un homme et une femme ont mené une vie conjugale commune. Le mariage est ensuite dissous et, hormis l'effet principal de l'acte de dissolution qui, en principe, restitue à chacun des ex-époux la liberté de conclure de secondes noces, quelques effets juridiques survivent à cet acte, effets qu'il est plus adéquat de rattacher au mariage dissous qu'à la dissolution elle-même.

7. En se bornant à une première énumération, qui n'entend pas être exhaustive, il est possible de désigner les principaux de ces effets, tels : la survivance éventuelle de certains effets personnels du mariage, qui concernent principalement la conservation du nom acquis par l'effet du mariage ; la survivance d'effets patrimoniaux qui incluent notamment : la liquidation du régime matrimonial, le maintien éventuel d'un droit de succession et d'autres droits de survie prenant effet après le décès survenu postérieurement à la dissolution du mariage, la persistance d'une obligation alimentaire, soit entre le moment de la dissolution et le jour du décès d'un des partenaires de l'union dissoute, soit, après ce décès, à charge de la succession ; le partage de l'attribution et de l'exercice de l'autorité parentale sur les enfants mineurs issus de l'union dissoute ; le maintien d'empêchements, définitifs ou temporaires, au remariage de l'un ou l'autre des partenaires, quand ces empêchements trouvent leur source dans l'union dissoute.

8. Une des difficultés du thème a pour objet la définition du concept de dissolution.

Le décès doit être écarté, qu'il soit ou non une cause de « dissolution » au sens propre du terme. Les problèmes significatifs ont une origine différente, la plus notable et la seule qui ait fait l'unanimité des membres de la 16e Commission étant le divorce. En revanche, il n'est pas certain ni que les différentes nullités ni que l'inexistence soient, au sens propre du terme, des cas de dissolution du mariage.

Réserve faite de l'extension éventuelle de ce concept aux hypothèses de nullité et d'inexistence, la dissolution du mariage est généralement prononcée par une autorité, judiciaire dans la plupart des cas, plus rarement administrative. Ainsi, pour que se produisent les effets d'un mariage dissous, il faut reconnaître la décision ou l'acte de dissolution. Si pareille décision a été prononcée dans un Etat autre que l'Etat où est réclamé un effet particulier du mariage dissous, les modalités propres à cet effet sont subordonnées à la reconnaissance de la décision étrangère, sans se confondre avec pareille reconnaissance. Il arrive toutefois que la décision ayant prononcé la dissolution du mariage inclut dans un dispositif complémentaire le règlement d'effets particuliers du mariage dissous, tel le jugement de divorce allouant une pension alimentaire ou statuant sur la garde des enfants mineurs. D'une manière comme de l'autre, les problèmes suscités par la reconnaissance des actes et des jugements étrangers doivent demeurer en dehors du domaine couvert par les travaux de la 16e commission. Il faut supposer que le mariage a été dissous en vertu d'une décision reconnue dans l'Etat où sont réclamés des effets juridiques se rattachant à l'union dissoute. La seule question pertinente pour les travaux de la 16e Commission tend à déterminer le régime applicable aux effets ci-dessus qualifiés d'« accessoires » et qui se rattachent plutôt au précédent mariage qu'à l'acte par lequel l'union a été dissoute.

§ 2. *L'assimilation établie entre le divorce et d'autres hypothèses de dissolution du mariage.*

9. Plusieurs législateurs ont, de manière explicite, élaboré un concept générique de « dissolution du mariage » couvrant des hypothèses distinctes de celle du divorce.

L'un des exemples les plus significatifs apparaît dans la section 6 d'une loi israélienne de 1969 :

> «Section 6.
> In this Law
> «dissolution of marriage» includes divorce, annulment of marriage and a declaration that a marriage is void ab initio; ...»
> (Jurisdiction for Dissolution of Marriages (Special Cases) Law, 1969, Israel Statute Book, 27-7-1969, *Les législations de droit international privé*, p. 252).

10. Selon une méthode différente mais qui atteint le même résultat, l'article 10 de la Convention scandinave du 6 février 1931, contenant certaines dispositions de droit international privé sur le mariage, l'adoption et la tutelle déclare applicable « par analogie » (*mutatis mutandis*) aux questions relatives à « l'annulation du mariage » (selon la traduction anglaise : « the invalidity or annulment of a marriage ») les dispositions des articles 7 à 9 qui visent la séparation et le divorce.

Comp. le texte anglais dans : *Les législations de droit international privé*, p. 177 et les textes français et allemand dans : Makarov, t. II, pp. 555-556.

11. De même, l'article 8, alinéa 2, de la Convention de La Haye du 2 octobre 1973 sur la loi applicable aux obligations alimentaires étend « aux cas de séparation de corps, de nullité ou d'annulation du mariage » (« in the case of a legal separation and in the case of a marriage which has been declared void or annuled »), la solution portée par l'alinéa 1er du même article en ce qui concerne « les obligations alimentaires entre époux divorcés ». Une formule identique apparaît dans l'article 8 de la Convention de La Haye du 2 octobre 1973 concernant la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires (« si ces aliments sont dus en raison d'un divorce, d'une séparation de corps, d'une annulation ou d'une nullité de mariage »).

Voy. encore l'article 22, (3), de la loi tchécoslovaque du 4 décembre 1965 :

« (3) Les dispositions (relatives au divorce) seront également appliquées à l'annulation du mariage et à la constatation de l'existence ou de l'inexistence du mariage. »

L'assimilation est encore plus radicale dans l'article 38, (1), de la loi yougoslave du 15 juillet 1982 :

« Si le mariage est nul ou dissous, les rapports personnels et patrimoniaux des époux sont régis par le droit indiqué à l'article 36 de la présente loi » (ce dernier article désigne la loi applicable à ces rapports durant le mariage).

12. En écartant l'hypothèse de la séparation de corps, qui est totalement étrangère à la mission de la 16e Commission, on fera observer que les dispositions conventionnelles étendant les règles

applicables au divorce à d'autres cas de « dissolution » (seule la loi israélienne emploie ce dernier mot) s'efforcent de rencontrer les diverses catégories de « nullité », celles-ci n'ayant pas des effets identiques selon toutes les législations.

Dans les pays de common law, il existe une distinction traditionnelle entre un *void marriage* et un *voidable marriage*.

Pour le Royaume-Uni, voy. notamment le *Matrimonial Causes Acts*, 1973 et, sur cette question : North-Cheshire, pp. 389-390, et pp. 411-412, en ce qui concerne la difficulté de qualifier certaines décisions néo-zélandaises pour l'application du *Recognition of Divorces and Legal Separations Act*, 1971. Sur la même distinction en droit australien, voy. Sykes-Pryles, p. 264 et Sykes, pp. 129-145.

Le concept d'« Aufhebung » que connaissent les droits d'inspiration allemande suscite aussi certaines difficultés, bien que la doctrine allemande de droit international privé rattache cette forme de dissolution du mariage à la nullité plutôt qu'au divorce.

Voy. notamment : Kegel, pp. 328-329, qui rattache la question à l'article 13 EG (validité du mariage) et non à l'article 17 EG (divorce). Comp. le rapport Verwilghen, n° 152, qui inclut l'*Aufhebung* parmi les cas d'application de l'article 8, alinéa 2, de la Convention précitée du 2 octobre 1973 et le rapport Bellet-Goldman, n° 16, qui exclut explicitement l'*Aufhebung* du domaine matériel de la Convention de La Haye du 1er juin 1970 sur la reconnaissance des divorces et des séparations de corps.

13. Les auteurs qui, pour les besoins propres du droit international privé, distinguent le divorce de la nullité, caractérisent le premier par la circonstance que les faits qui y donnent naissance sont postérieurs à la célébration du mariage ou que, à tout le moins, ces faits se sont prolongés durant le mariage, tandis que la nullité ne saurait se fonder sur des faits autres que ceux qui existent au moment de la célébration.

Voy. Rabel, t. Ier, p. 576. Comp. l'impossibilité, constatée dans le rapport Bellet-Goldman (n° 6), de définir le divorce pour l'application de la Convention précitée du 1er juin 1970. La définition que contient le même passage du rapport (« la dissolution du vivant des époux d'un mariage valable ») ne saurait satisfaire, puisqu'elle se réfère au concept, lui-même non défini, de « mariage valable ».

14. L'une des raisons qui justifie un traitement analogique des effets du divorce et des effets d'autres cas de « dissolution » du

mariage est que le mariage nul ou annulé ne perd pas tous ses effets. Qu'il cesse de produire des effets pour l'avenir offre une ressemblance supplémentaire avec le divorce. En outre, si grave que soit le vice qui invalide le mariage, dès qu'un homme et une femme ont vécu ensemble comme époux, ont peut-être engendré des enfants, ont eu un patrimoine commun, le dénouement de leurs relations entraîne des mesures appropriées.

Il en résulte aussi que le droit interne modalise ce qu'aurait de trop abrupt une nullité radicale. Empruntée au droit canonique, l'institution du mariage putatif est un moyen de corriger la notion en principe déclarative d'une nullité.

Sur le pouvoir des juridictions américaines de tempérer certains effets de la nullité, voy. Rabel, t. I^er^, p. 588.

§ 3. *L'identification d'effets du divorce autres que la dissolution du lien conjugal.*

15. Ainsi qu'il a déjà été dit (n° 6), l'effet principal du divorce est de mettre fin pour l'avenir à la relation conjugale et, du moins en principe, de restituer à l'un et à l'autre époux l'aptitude au mariage. Le libellé du mandat confié à la 16^e^ commission exclut que celle-ci se préoccupe de cet effet principal du divorce. L'expression « effets du mariage après sa dissolution » désigne en termes clairs et, à tout prendre, adéquats, des effets qui se rattachent plutôt à l'union dissoute qu'à l'acte même de dissolution. Il s'agit d'effets qui se produisent à la fois en dépit et en vertu du divorce.

En dépit du divorce, puisque certains droits et obligations sont maintenus entre les ex-époux, soit de manière temporaire pour la liquidation du passé, soit même de manière permanente, alors que la logique impitoyable du divorce aurait plutôt dû conduire à une rupture totale pour l'avenir. Mais aussi *en vertu du divorce*, puisqu'il a été mis fin aux droits et obligations respectifs des époux et que les rapports juridiques qui survivent à l'acte de dissolution subissent, du fait de celui-ci, une forme de novation et sont, le plus souvent, substantiellement différents de ceux qui régissaient jusque-là les époux.

Il n'est pas indifférent de poser aussi lucidement que possible la problématique de ces effets du mariage dissous, parce que l'orien-

tation des solutions de conflit de lois y est étroitement liée. C'est pourquoi avant de faire l'inventaire des principaux effets analysés par la doctrine du droit international privé (*infra*, § 4), il convient de tracer le cadre conceptuel dans lequel ces effets sont présentés.

16. Plusieurs codifications ou projets de codification récents traitent conjointement dans la même règle de conflit de lois des conditions ou des causes du divorce et de ses effets.

> Voy. notamment le paragraphe 20, (1), de la loi autrichienne (« Les conditions et les effets du divorce... »), l'article 13, alinéa 1er, de la loi turque (« Les causes et les effets du divorce... »), l'article 843, alinéa 4, du Code de la famille du Sénégal et l'article 709 du Code de la famille du Togo.
>
> L'application combinée des articles 54 à 56 du Code Bustamante soumet à la *lex fori* tant la détermination des causes du divorce (mais non l'admissibilité, voy. l'article 52) que les « effets civils » du divorce.
>
> Comp. l'article 17, (3), du projet du Max-Planck-Institut qui soumet les conséquences du divorce (" Die Scheidungsfolgen ") à la loi applicable aux « effets généraux du mariage » (*Allgemeine Ehewirkungen:* Art. 14) distingués du régime patrimonial (*Güterstand:* Art. 15), loi qui ne coïncide pas nécessairement avec la loi applicable au divorce, déterminée conformément à l'article 17, (1), du même projet. Voy. dans le même sens l'article 38 (1), de la loi yougoslave (*supra*, n° 11).

17. D'autres codifications ou projets de codification règlent de manière spécifique les « effets accessoires » du divorce ou certains de ces effets. L'exemple le plus significatif est la première phrase de l'article 61, 2, du projet suisse:

> « Le droit applicable au divorce ou à la séparation de corps régit les effets accessoires du divorce et de la séparation de corps ». Sont réservées les questions relatives au nom et au régime matrimonial (deuxième phrase) ainsi qu'aux obligations alimentaires (renvoi à la Convention de La Haye du 2 octobre 1973 en vertu de l'article 47 du même projet).

Quelques instruments règlent expressément certains effets particuliers du divorce.

> Voy. par exemple: Convention scandinave du 6 février 1931, art. 3 et 7 à 10.
>
> L'article 17, (3), du projet du Gouvernement allemand règle de manière explicite la loi applicable à un seul effet accessoire du divorce, la compensation des droits de pension (*Versorgungsausgleich*).

18. Alors que les dispositions réglant dans leur généralité « les effets » du divorce (*supra*, n° 16) ne distinguent pas de manière spécifique l'effet essentiel (la dissolution du lien conjugal) des effets « accessoires », et que les dispositions ne réglant que ces derniers effets considèrent implicitement que l'effet essentiel découle de plein droit de la décision de divorce rendue ou reconnue dans l'Etat du for, l'autonomie des « condamnations accessoires » est le mieux soulignée dans les instruments excluant de leur domaine matériel cette catégorie d'effets. Tel est par exemple le cas pour la Convention de La Haye du 1er juin 1970 sur la reconnaissance des divorces et des séparations de corps.

> Article 1er, alinéa 2 : « La Convention ne vise pas les dispositions relatives aux torts, ni les mesures ou condamnations accessoires prononcées par la décision de divorce ou de séparation de corps, notamment des condamnations d'ordre pécuniaire ou les dispositions relatives à la garde des enfants ».
>
> Voy. en outre le rapport Bellet-Goldman, n° 53.

19. Le concept d'« effet accessoire » du divorce est d'origine doctrinale. Il apparaît déjà chez Bartin qui, selon la perspective, propre à son pays et à son temps, du divorce-sanction, parle de « condamnations accessoires », visant par là la pension alimentaire et les dommages-intérêts alloués à l'époux au profit duquel le divorce a été prononcé (t. II, § 318, p. 327).

> Voy. aussi : Georges Holleaux, qui dans *Le droit international privé de la famille en France et en Allemagne* (Paris-Tübingen, 1954), p. 167, oppose les « effets secondaires » du divorce à l'effet essentiel que constitue la dissolution du mariage.

Dans la doctrine allemande on rencontre des notions équivalentes, celles de : *Nebenfolgen der Scheidung* (*Gamillscheg*, Art. 17 EG, n° 534-615 ; Kegel, p. 340) ou de *Nachwirkungen* ou *Nebenwirkungen* (Wengler, § 24, pp. 637-638).

Quant à la doctrine de langue anglaise, dont la problématique est centrée sur le conflit de juridictions plutôt que sur le conflit de lois, elle appelle « *ancillary relief* » des mesures particulières prononcées par le juge saisi de l'action en divorce en ce qui concerne notamment les obligations alimentaires, la garde des enfants, le *dower* de l'ex-épouse.

20. Dès le début du XIX^e siècle, Neumeyer a considéré que les effets du divorce qualifiés d'accessoires étaient plutôt la continuation de certains effets du mariage après sa dissolution.

> Voy. Karl Neumeyer, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Barlolus* (München, Sellier, t. I^er, 1901), p. 21, cité par Rabel, t. I^er, p. 561.

Beaucoup plus récemment le professeur Pierre Mayer distingue, parmi les prétendus effets « accessoires », les effets et les suites du divorce. Les premiers aménagent « le passage de l'état de mariage à celui de non-mariage », et cet auteur y range l'obligation alimentaire entre les ex-époux, la condamnation à des dommages-intérêts et le droit éventuel à la conservation du nom acquis par l'effet du mariage (n° 584). Quant aux suites du divorce, elles concernent le « fonctionnement d'institutions soumises à une loi propre que le divorce a seulement pour effet de perturber ». Pareilles « suites » ont pour objet le régime matrimonial et la vocation successorale. La distinction est significative pour le choix de la solution de conflit de lois, les effets du divorce dépendant de la loi qui en détermine les causes, tandis qu'aux suites est applicable la loi propre de l'institution dont elles relèvent.

§ 4. *Inventaire des principaux effets du mariage subsistant après qu'il a été dissous.*

21. Sans préjuger les solutions de conflit de lois respectivement applicables à chaque catégorie d'effets du mariage dissous, et en s'abstenant de tout classement systématique, il est possible de dresser l'inventaire des effets du mariage dissous.

Pareils effets concernent respectivement :

a) les relations entre les ex-époux et leurs enfants mineurs (*infra*, n° 22).

b) l'aptitude au remariage de chacun des ex-époux (*infra*, n° 23) ;

c) les rapports personnels et patrimoniaux des ex-époux (*infra*, n° 24).

22. Rappelons d'abord pour mémoire le statut de légitimité des enfants issus du mariage. Le divorce est certes inopérant à cet égard mais non certaines formes de nullité ou d'inexistence.

Pour ce qui concerne les relations entre les ex-époux et leurs descendants, le divorce n'aurait pas d'effet perturbateur si l'attribution et l'exercice des droits de garde et de visite ou d'hébergement n'étaient pas, trop souvent, un enjeu du litige conjugal et, surtout, si certaines dispositions de droit interne ne liaient pas l'attribution de la garde aux positions respectives des époux au terme de l'action en divorce.

23. Après la dissolution du mariage par le divorce, il peut subsister des obstacles s'opposant à la célébration d'une nouvelle union, soit avec le même partenaire, soit avec un autre conjoint ; il arrive aussi qu'un remariage soit soumis à un délai d'attente. Sous cette rubrique, il n'y a pas lieu de considérer les empêchements de mariage dépendant de l'effet « essentiel » du divorce, soit parce que la décision ayant dissous le précédent mariage ne satisfait pas aux conditions mises à sa reconnaissance dans un autre Etat soit même parce que l'indissolubilité du mariage y est un principe rigoureux interdisant que pareil effet soit reconnu à un divorce étranger. Les empêchements ou les délais de remariage envisagés ici ont un objet restreint et une nature particulière : ils sont limités dans le temps ou ne visent qu'un partenaire déterminé.

Outre la prohibition parfois faite aux époux divorcés de se remarier entre eux, on peut mentionner les obstacles opposés au remariage de l'époux condamné pour adultère avec son complice, les délais d'attente prévus par la loi ou déterminés par le tribunal lors de l'admission du divorce, le délai de viduité, la production d'un certificat de liquidation des biens... A cela s'ajoute le délai durant lequel un recours est ouvert contre la décision de divorce, bien que cet empêchement de remariage soit d'une nature très différente des précédents puisqu'il concerne l'effet propre du divorce sans être lié comme tel à l'union dissoute. Certains des empêchements énumérés visent à réprimer la faute commise par l'époux condamné au divorce, ou à imposer un délai d'attente aux deux époux.

Sur ces empêchements en droit comparé, voy. notamment: Gamillscheg, Art. 13, nos 364-368, 387, 393, 405 ; Morris, p. 107 ; Travers, *La Convention de La Haye relative au mariage*, t. Ier, nos 207, 240-245, 425-443, cette dernière référence n'ayant plus qu'un intérêt historique.

24. Quant aux rapports entre les ex-époux, hormis l'incidence de la dissolution du mariage sur le nom des ex-conjoints, et l'allocation de dommages-intérêts à l'époux ayant obtenu le divorce ou victime de l'adultère ou de sévices de son conjoint, qui a une nature mixte, ils ont essentiellement un caractère patrimonial.

Parmi les effets patrimoniaux, trois aspects peuvent être distingués : la survivance d'une obligation alimentaire, la liquidation du régime matrimonial, en ce inclus la déchéance, par l'effet du divorce, de donations ou d'avantages contractuels, le maintien d'un droit sur la succession de l'ex-conjoint au jour de son décès ou d'un droit à une pension de survie. Telle qu'elle est aujourd'hui réglée par de nombreux droits internes, la persistance de relations d'ordre patrimonial entre les ex-conjoints déjoue les distinctions trop schématiques qui viennent d'être faites.

Il faut d'abord récuser tout rattachement systématique de l'obligation alimentaire au concept de « responsabilité personnelle du conjoint condamné » (Benjamin, p. 129), et parce que le divorce est, de moins en moins, la sanction d'une faute, et parce que les règles de droit matériel interne sur les aliments après divorce ne restreignent plus l'attribution de ce droit au seul conjoint « innocent ». En outre, il arrive que le droit interne accorde à l'ex-conjoint divorcé le droit à une pension alimentaire à charge de la succession, tandis que, du vivant des ex-époux, le versement d'un capital peut prendre la place d'aliments périodiques. On ne saurait non plus omettre l'incidence, trop souvent négligée des civilistes, des droits de survie que l'un des époux — selon la conception traditionnelle, l'épouse — peut faire valoir contre un Etat ou une institution internationale, ou à l'égard de caisses de pensions publiques ou semi-publiques. Dans le même ordre d'idées, le droit matériel allemand s'est efforcé de compenser, lors du prononcé du divorce, les droits de pension respectifs de l'un et de l'autre époux.

Sur les problèmes suscités par le *Versorgungsausgleich* en droit international privé, voy. notamment: E. Jayme, « Versorgungsausgleich in Auslandsfällen ", *N.J.W.*, 1978, 2417 ; *Le divorce en droit international privé* (Ann. de la Faculté de droit de Strasbourg, L.G.D.J., Paris, 1980), pp. 67-69, 79-82. On a vu ci-dessus (n° 17) que ce problème est le seul effet du divorce expressément réglé par le projet de loi de droit international privé du Gouvernement allemand.

Dernière observation : les rapports patrimoniaux entre les ex-époux ont pu faire l'objet d'un règlement contractuel, dont la validité et les effets sont différemment appréciés par les divers ordres juridiques, règlement qui s'inscrit parfois dans une procédure de divorce par consentement mutuel.

§ 5. *Conflits de lois et conflits de juridictions.*

25. Le mandat conféré à la 16e Commission paraît, selon son libellé, limité à la seule détermination de la loi applicable aux effets du mariage dissous. Il faut, à cet égard, constater une double lacune. D'une part, la nature même du problème ainsi posé, qui, au moins en cas de divorce, est « la suite d'une procédure judiciaire ou autre » (Convention de La Haye du 1er juin 1970, art. 1er, al. 1er) est inextricablement lié à la reconnaissance de la décision judiciaire ou administrative, notamment quand le juge ou l'autorité ayant admis le divorce s'est lui-même prononcé sur certains effets « accessoires de la dissolution du lien conjugal. D'autre part, les travaux de la 16e Commission ont d'entrée de jeu fait apparaître que pour une part appréciable des membres de l'Institut — et notamment ceux qui appartiennent à des pays de common law — les problèmes traités par cette commission suscitent au premier chef des questions de juridiction.

26. En s'efforçant de déterminer « la loi applicable » aux effets d'un mariage dissous, l'Institut ne saurait faire abstraction du droit interne de nombreux Etats pour lesquels, posée en ces termes, la question est à peu près privée de sens. Trois questions essentielles pour le thème assigné à la 16e Commission sont, dans les pays de common law, réglées selon la méthode des conflits de juridictions à l'exclusion de la méthode des conflits de lois. Ces questions concernent respectivement l'admissibilité et la détermination des causes du divorce, les obligations alimentaires et l'exercice de l'autorité parentale.

Ainsi, le concept de « loi appliquée au divorce » (Convention du 2 octobre 1973 sur la loi applicable aux obligations alimentaires, art. 8, al. 1er) s'identifie dans les pays de common law avec la *lex fori*.

> La règle en vertu de laquelle dans les pays de common law le tribunal saisi d'une action en divorce se borne à vérifier sa compétence juridictionnelle (jurisdiction *in* rem) pour ensuite appliquer son

propre droit matériel est trop connue pour qu'il soit besoin d'insister. Voy. notamment la Rule 42 de Dicey (Dicey-Morris, p. 312) et la règle similaire appliquée en Australie (Sykes, p. 205).

Il en est de même en matière alimentaire (*maintenance order*), que les aliments soient réclamés durant le mariage ou après sa dissolution.

Pour le Royaume-Uni, voy. notamment : *Matrimonial Proceedings and Property* Act 1970 ; *Matrimonial Proceedings* (*Magistrate's Courts*) Act 1960 ; Morris, pp. 172-174 ; North-Cheshire, p. 388, p. 429-433, p. 435.

L'application de la *lex fori* est aussi la règle en ce qui concerne les décisions relatives à la garde des enfants après divorce.

Voy. notamment, pour le droit américain, Leflar, § 245, p. 585, l'élément essentiel pris en considération par le juge américain étant, au surplus, " *the child's welfare* ".

27. Une complication supplémentaire, que révèle la méthode des conflits de juridictions dans les pays de common law, provient de ce que la détermination de certains effets du mariage dissous (ou effets « accessoires » du divorce), en ce qui concerne par exemple la liquidation du régime matrimonial, le droit à des aliments, la garde des enfants, n'obéit pas aux mêmes règles de compétence juridictionnelle que l'action en divorce elle-même. Il peut en résulter une scission entre la reconnaissance due à l'effet essentiel d'un divorce étranger (la dissolution du lien conjugal) et le maintien d'une obligation alimentaire ou la reconnaissance d'autres droits patrimoniaux (*dower* par exemple) dans l'ordre juridique de l'Etat requis. La doctrine américaine parle à ce sujet de « divisible divorce », expression désignant, d'une manière qui n'est sans doute pas tout à fait adéquate, une séparation entre la dissolution du lien conjugal et le régime des effets du mariage dissous (voy. *infra*, n° 50).

28. Les explications qui précèdent font apparaître la difficulté de donner une portée universelle à un concept très familier aux juristes du continent européen, celui de « statut du divorce ». L'idée sous-jacente à la plupart des solutions doctrinales élaborées sur le continent européen depuis le début du XX^e^ siècle est qu'il existe une loi applicable au divorce, laquelle en déterminerait, sans limitation dans le temps, les effets, en ce inclus ceux qui sont qualifiés d'acces-

soires et doivent plutôt être analysés comme des effets du mariage dissous.

Voy. *supra*, n° 16, les exemples empruntés à des codifications ou projets de codification récents.

L'article 61, 2 du projet suisse (supra, n° 17) soumet, sous les réserves qu'il formule, les « effets accessoires du divorce » à « la loi applicable au divorce ». L'article 13, alinéa 3, de la loi turque complète d'une règle particulière les dispositions générales inscrites sous les alinéas précédents : « Les demandes de pensions alimentaires relatives au divorce et à la séparation de corps et ne relevant pas de mesures provisoires, sont soumises à la loi régissant le divorce et la séparation de corps ».

29. Quelques auteurs relèvent à juste titre la discordance qui peut exister entre la loi selon laquelle le divorce a été effectivement prononcé et la loi qui aurait dû y être appliquée.

Voy. notamment: *Gamillscheg*, Art. 17, n° 540, selon lequel les effets du divorce relèvent de la loi qui y était applicable même si elle n'a pas été appliquée.

Il existe sur ce point une différence significative entre la formule de l'article 61, alinéa 2, du projet suisse (« le droit applicable au divorce ») et celle de l'article 8, alinéa 1er, de la Convention du 2 octobre 1973 sur la loi applicable aux obligations alimentaires (« la loi appliquée au divorce »), bien que l'exposé des motifs contenu dans le Message du Conseil fédéral (n° 235.5, p. 96) ne paraisse pas apercevoir cette différence.

Selon le même projet, les deux solutions coexisteraient en droit international privé suisse, ayant l'une et l'autre des domaines matériels distincts.

Une question différente consiste à savoir si « la loi applicable au divorce » doit, pour la détermination ultérieure de certains effets du divorce, être désignée en fonction de la localisation des facteurs de rattachement au moment où le divorce a été prononcé ou au moment auquel le juge se prononce sur les effets de ce divorce.

L'interprétation de l'article 61, alinéa 1er, du projet suisse, telle qu'elle se dégage du Message du Conseil fédéral, paraît impliquer que la loi applicable au divorce est définitivement cristallisée après le prononcé du divorce. Comp. P. Mayer, n° 584, qui estime que la formule de la Convention de La Haye doit être préférée pour ce seul motif, ce qui ne paraît pas conforme à l'interprétation de l'exposé des motifs du projet suisse.

30. Les deux principales solutions rattachant les effets du mariage dissous au statut du divorce suscitent l'une et l'autre des problèmes spécifiques.

Le concept de « loi applicable » se distingue très radicalement de la notion de « loi appliquée ». Le premier implique un jugement porté dans l'Etat (Y) où un effet particulier est réclamé, conformément aux règles de conflit de lois de cet Etat. Si le divorce a été prononcé dans un autre Etat (X), il n'est pas certain ni que le droit applicable selon la règle de conflit de l'Etat Y ait été appliqué dans l'Etat X ni, sans doute, qu'il y soit applicable en vertu des règles de conflit du même Etat. L'harmonie entre une variété particulière de divorce et les effets propres que ce divorce imprime aux rapports ultérieurs entre les ex-époux est dès lors loin d'être atteinte. Pareille discordance se vérifie avec la plus grande force si le divorce a été prononcé dans un Etat dont les tribunaux déterminent les causes du divorce selon la *lex fori*.

La notion de « loi appliquée au divorce » n'est guère plus satisfaisante. Si elle a pour effet de désigner indirectement la loi du tribunal ayant prononcé le divorce, elle incorpore dans l'apparence d'une règle de conflit de lois un pur constat de fait, déterminé par le lieu dans lequel l'action en divorce a été introduite. Si, au contraire, le tribunal saisi du divorce est soumis à un système élaboré de conflit de lois, il n'est pas toujours aisé de repérer la loi effectivement appliquée, alors surtout que la détermination des causes de divorce est soumise à l'application cumulative de plusieurs lois ou que le tribunal a été saisi de deux actions réciproques ayant chacune un régime propre.

On trouve encore un tel exemple de cumul limitatif dans l'article 35, 2, de la loi yougoslave.

En Allemagne, l'application de l'article 17 EG peut conduire à ce que les actions réciproques en divorce soient réglées par deux lois différentes. Dans ce cas, selon la doctrine, les effets du divorce sont rattachés à la loi allemande. Voy. Gamillscheg, Art. 17, n° 537 ; Kegel, p. 340.

L'application aux causes du divorce de la loi de l'époux demandeur (voy. notamment le paragraphe 20, (2), de la loi autrichienne) conduit au dualisme du statut du divorce en cas de demandes réciproques.

§ 6. *Statut du divorce et autres institutions auxquelles se rattachent certains effets particuliers du mariage dissous.*

31. Le rattachement des « effets accessoires » du divorce au « droit applicable au divorce » (projet suisse, art. 61, 2) est, en réalité une forme de « rattachement accessoire », consistant à emboîter la solution dans une autre règle de conflit, celle que désigne l'institution dans laquelle les effets considérés trouvent leur source.

> Sur la notion de rattachement accessoire, voy. notamment : R. Vander Elst, *Conflits de lois*, (t. I[er] de R. Vander Elst et M. Weser, *Droit international privé belge*, Bruylant, Bruxelles, 1983), n° 19, p. 104.

Il existe d'autres rattachements accessoires que celui qui est opéré au statut du divorce. Ainsi, l'article 38 de la loi yougoslave soumet les effets personnels et patrimoniaux d'un mariage « nul ou dissous » à la loi qui régit ces rapports durant le mariage.

32. Il faut toutefois s'interroger sur la consistance d'un prétendu statut du divorce, qui gouvernerait les effets ultérieurs du mariage dissous. On peut reprendre ici l'observation faite par le professeur Vitta (t. II, p. 263) à propos du mariage putatif, à savoir qu'il n'existe pas, en droit international privé, d'institution unitaire du mariage putatif mais que les effets d'un tel mariage qui subsistent après sa dissolution sont réglés par chacune des lois compétentes, désignées selon la nature propre à chacun de ces effets.

En prononçant la dissolution du mariage, le divorce a porté à l'institution qui structurait les rapports entre époux une atteinte si profonde que le mariage dissous s'est évanoui comme entité juridiquement reconnaissable. Faut-il, soit, comme le fait la loi yougoslave à l'instar de la règle qui maintient en vie une société dissoute pour les besoins de sa liquidation, rattacher à la loi du mariage les effets de l'union dissoute, soit ériger en statut permanent un acte essentiellement fugace, le divorce ? Ne convient-il pas plutôt de répartir les principaux effets du mariage dissous entre les institutions porteuses d'avenir qui conservent une vie propre au-delà de l'acte de dissolution ? Telle est la question qui devra être tranchée par la 16[e] commission, même si la réponse doit conduire à l'éclatement des solutions, sinon du thème, soumises à ses délibérations.

33. Sans anticiper sur un examen plus approfondi des indications que procurent le droit positif en vigueur et l'enseignement de la doctrine (*infra*, deuxième partie), on se bornera à indiquer ici quelques points de rassemblement au milieu d'un ensemble disparate.

Les principales institutions auxquelles il peut être envisagé de rattacher les effets d'un mariage dissous sont :

a) en ce qui concerne l'autorité parentale, le régime propre à celle-ci ;

b) à l'égard des empêchements au remariage, temporaires ou limités, les règles gouvernant l'aptitude matrimoniale de chacun des futurs époux ;

c) quant aux effets du divorce sur le nom, le statut personnel de chacun des ex-époux ;

d) pour les droits de succession et les autres droits de survie (notamment le droit à une pension) le statut successoral et le droit applicable au droit de survie considéré.

L'incidence du divorce (ou de l'annulation du mariage) sur le régime matrimonial dépendrait de la loi applicable ou des lois applicables à celui-ci. La question des obligations alimentaires, qui est sans doute la plus délicate de toutes, doit être réservée.

Deuxième Partie

Aperçu de quelques solutions de droit positif

§ 1.er. — *La méthode des conflits de lois*

A. — *Les solutions globales.*

34. Parmi les récentes codifications européennes, quelques-unes contiennent une règle de conflit de lois rattachant le divorce et ses effets à la loi régissant les effets personnels du mariage. L'exemple le plus significatif est le paragraphe 20 de la loi autrichienne.

> § 20. — Divorce.
>
> (1) Les conditions et les effets du divorce sont régis par le droit qui, au moment du divorce, est applicable aux effets personnels du mariage.

(2) Si, d'après ce droit, le divorce ne peut être prononcé, ou si n'existe aucun des points de rattachement prévus au paragraphe 18, le divorce est régi par le statut personnel de l'époux demandeur au moment du divorce.

Ainsi le statut du divorce (qui inclut la totalité de ses effets) n'est pas dissocié de l'institution matrimoniale, sauf dans le cas particulier prévu par le chiffre 2 du paragraphe 20.

La loi turque est, sur le même point, assez proche de la loi autrichienne. Bien que « les causes et les effets » du divorce y fassent l'objet d'une règle de conflit propre (art. 13), les solutions qui y sont contenues sont identiques à celle de l'article 12, alinéa 3, relatif aux « effets généraux du mariage ». La différence la plus notable avec la loi autrichienne consiste à prévoir l'application subsidiaire de la loi turque si aucune des lois désignées par la règle de conflit principale « ne peut être déterminée » (art. 12, al. 3, et art. 13, al. 2).

35. Dans certaines codifications qui soumettent le divorce à des solutions de conflit de lois propres, différentes de celles qui régissent les effets du mariage, les effets du divorce sont dissociés de la loi déterminant les causes du divorce, pour être rattachés à la loi applicable aux effets personnels du mariage.

Voy. par exemple l'article 38 de la loi yougoslave qui se réfère à l'article 36, dans lequel « les rapports personnels et patrimoniaux des époux » font l'objet d'un rattachement global.

L'article 17, (3) des propositions du Max-Planck Institut rattache les effets du divorce « au droit qui, au moment de la dissolution du mariage régissait les effets généraux de celui-ci », ce qui renvoie implicitement à l'article 14 du même projet (*Allgemeine Ehewirkungen*), tandis que les effets patrimoniaux (*Güterstand*) font l'objet d'un rattachement distinct (art. 15).

36. Les solutions qu'on peut qualifier de globales trouvent leur origine dans une doctrine ancienne qui proposait l'application au divorce et à ses effets de la loi personnelle des époux, à une époque où ceux-ci partageaient habituellement la même nationalité.

Voy. par exemple, Arminjon, t. III, n° 41 ; Despagnet et de Boeck, n° 264 ; Laurent, t. V, n° 138-141 ; Travers, *La Convention de La Haye relative au divorce et à la séparation de corps*, n° 229. Comp. Fiore, t. II, n° 695, proposant l'application de la loi déterminant les causes du divorce.

Il faut toutefois noter que la Convention de La Haye du 12 juin 1902 pour régler les conflits de lois et de juridictions en matière

de divorce et de séparation de corps ne contenait aucune règle relative aux effets du divorce, la disposition en projet relative à cette question n'ayant pas été adoptée par les délégués.

Voy. : Travers, *op. cit.*, n° 226, et la jurisprudence suisse citée par Kosters et Bellemans, pp. 661 et s., notamment Trib. féd., 13 juin 1912 et 28 mai 1914, ayant appliqué la *lex fori* à la garde des enfants, à la suite d'un divorce prononcé par le tribunal d'un autre Etat dans lequel la Convention était en vigueur.

La résolution votée par l'Institut à la session de Lausanne (5 septembre 1888) et portant « règlement international des conflits de lois en matière de mariage et de divorce » ne contient pas davantage de disposition relative aux effets du divorce.

Voy. le texte de cette résolution dans l'Annuaire (éd. nouvelle abrégée, 1928, pp. 801-805).

B. — *Les solutions particulières*

1° *Eclatement du statut du divorce*

37. Même quand la doctrine contemporaine paraît demeurer fidèle à un rattachement de principe des effets du divorce soit à la loi personnelle des époux (Loussouarn et Bourel, n° 334), soit à la loi selon laquelle ont été déterminées les causes du divorce (Batiffol et Lagarde, t. II, n° 453 ; Gamillscheg, Art. 17, n° 534 ; Graulich, n° 95 ; Kegel, p. 340 ; voy. déjà, Niboyet, t. V, n° 1516), cette solution est accompagnée de dérogations et d'exceptions si considérables qu'il faut conclure à l'éclatement du statut du divorce. Pareil éclatement est entériné par le professeur Wengler (§ 24, pp. 637-638), qui distrait les effets du divorce d'un tel statut pour les soumettre respectivement à la loi régissant chacune des institutions ayant, selon la formule du professeur Mayer (n° 585) subi l'effet perturbateur du divorce. Loin d'être un effet accessoire du divorce, ces diverses catégories d'« effets » relèvent de l'institution dont elles dépendent.

La liste de ces institutions n'est pas trop difficile à établir, les auteurs cités dans les numéros suivants incluant des références jurisprudentielles à l'appui des solutions souvent convergentes qu'ils proposent.

2° *L'autorité parentale*

38. L'exercice de l'autorité parentale après le divorce est généralement rattaché au statut personnel de l'enfant mineur soumis à cette autorité.

Voy. notamment : Batiffol et Lagarde, n° 453 et les réf. de jurisprudence à la note 2 *bis* ; Fadlallah, n° 361-362 ; Niboyet, t. V, n° 1517, p. 54. *Contra*, Benjamin, pp. 125-126, J. Foyer et J. Foyer, n° 175-177, Graulich, n° 95, note 1, qui préfèrent l'application du statut du divorce.

En droit international privé allemand, la question paraît unanimement rattachée à l'article 19EG (*Kindschaftsrecht*) et non à l'article 17 (*Scheidung*).

Voy. notamment, Gamillscheg, Art. 17, n° 596 et s. ; Kegel, p. 341 ; Wengler, § 24, pp. 637-638.

Plusieurs auteurs soulignent toutefois que l'ordre public du tribunal saisi pourrait faire obstacle à l'application d'une loi étrangère qui ne prendrait pas en compte l'intérêt de l'enfant.

Voy. notamment, Gamillscheg, Art. 17, n° 595, n° 603 ; Loussouarn et Bourel, n° 334.

En plusieurs pays dans lesquels est en vigueur la Convention de La Haye du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs, les dispositions de cette convention ont été appliquées aux mesures de protection prises à l'occasion d'une action en divorce ou après le prononcé du divorce.

Voy. notamment, BGH, 20 décembre 1972, Fam RZ, 1973, 138 ; Bay OLG, 25 août 1972, Fam RZ, 1972, 582 et d'autres décisions citées dans Sumanpouw, t. I^er^, pp. 256 et s., t. II, pp. 101 et s.

Pareille solution résulte indubitablement de la faculté de réserve inscrite dans l'article 25 de la Convention.

Sur l'origine et la portée de cette réserve, voy. le rapport explicatif de M. W. de Steiger, *Actes et Documents de la 9e session de la Conférence de La Haye de droit international privé*, t. IV, pp. 239-241.

3° *Le nom de chacun des ex-conjoints*

39. L'effet du divorce sur le nom de la femme divorcée est généralement rattaché au statut personnel de la femme, compétent pour la détermination du nom de celle-ci.

Voy. notamment : Batiffol et Lagarde, t. II, n° 453, et réf. note 2 ; Gamillscheg, Art. 17, n° 587 ; Graulich, n° 89, n° 95, note 2.

Il semble toutefois que la question soit controversée en droit international privé allemand (voy. Gamillscheg, Art. 17, n° 577-586) et quelques auteurs demeurent fidèles à la loi du divorce.

Voy. : Benjamin, pp. 124-125 ; J. Foyer et J. Foyer, n° 174 ; Massfelder, dans : *Le droit international privé de la famille en France et en Allemagne*, p. 183.

4° *Les restrictions au remariage après divorce*

40. Les restrictions auxquelles est parfois soumise l'aptitude à se remarier après le divorce sont généralement rattachées à la loi gouvernant les conditions d'acquisition du nouveau statut d'époux plutôt qu'à la loi en vertu de laquelle le précédent mariage a été dissous. Il n'est sans doute pas essentiel pour les travaux de la 16e commission de préciser si cette loi est la loi nationale ou la loi du domicile du conjoint divorcé qui désire se remarier, voire même la loi du pays où la seconde union est célébrée.

Les interprètes de la Convention de La Haye du 12 juin 1902 pour régler les conflits de lois en matière de mariage ont toujours considéré que les empêchements particuliers dérivant d'un précédent mariage du futur époux relevaient de la loi nationale, compétente, selon l'article 1er de la convention, pour régler le « droit de contracter mariage ». Cette solution est d'autant plus significative que, ainsi qu'on l'a vu, la Convention de La Haye du même jour sur le divorce s'était abstenue de régler explicitement les effets du divorce (voy. *supra*, n° 36).

Voy. Travers, *La Convention de La Haye relative au mariage*, t. Ier, nos 206, 207, 245, 444-447, 522. La compétence partielle reconnue à la loi du lieu de la célébration par l'article 2 en ce qui concerne notamment « la prohibition absolue de se marier, édictée contre les coupables de l'adultère à raison duquel le mariage de l'un d'eux a été dissous », confirmerait, s'il était nécessaire, que cette question était en principe réglée par l'article 1er.

41. La doctrine continentale plus récente paraît favorable à l'application de la loi nationale de chaque futur époux à la détermination des empêchements particuliers au remariage trouvant leur source dans une précédente union.

Voy. notamment : Batiffol et Lagarde, t. II, n° 453 ; Benjamin, pp. 126-128 ; J. Foyer et J. Foyer, n° 173 ; Gamillscheg, Art. 13, n° 369 et s. ; Niboyet, t. V, n° 1517, pp. 447-448.

Il reste toutefois controversé si un tel empêchement est « bilatéral » (*doppelseitig*), c'est-à-dire s'il suffit qu'une des deux lois nationales le prévoie : par exemple, si la loi nationale du futur époux subordonne à l'expiration d'un délai de viduité le remariage d'une femme veuve ou divorcée, l'empêchement doit être emprunté à la loi nationale du futur mari même si la loi nationale de la future épouse ignore un tel empêchement.

En faveur de ce caractère bilatéral, voy, notamment : Gamillscheg, Art. 13, n° 388 ; Rabel, t. I^er^, pp. 292-3, en ce qui concerne les empêchements déduits d'une condamnation pour adultère. *Contra :* Rolin, t. II, n° 607.

Il faut encore noter que les délais d'attente ont le plus souvent un caractère prohibitif. Quant aux empêchements définitifs et dirimants, il devraient être écartés en vertu de l'exception d'ordre public.

Voy. notamment : Benjamin, pp. 126-128 ; Gamillscheg, Art. 13, n° 380, n° 402 ; Kegel, p. 341.

5° *Liquidation du régime matrimonial et droits de succession*

42. La liquidation du régime matrimonial et le maintien d'un droit de succession entre époux divorcés sont rattachés, respectivement, à la loi du régime et aux successions.

Pour la première solution, voy. : Benjamin, pp. 132-133 ; Gamillscheg, Art. 17, n° 613 ; Graulich, n° 95 ; Mayer, n° 585 ; Rolin, t. II, n° 609. En ce qui concerne la seconde solution, voy. : Benjamin, p. 134, p. 220 ; Gamillscheg, Art. 17, n° 615 ; Mayer, n° 585 ; Wengler, § 24, pp. 637-638.

6° *L'allocation de dommages-intérêts à l'époux innocent*

43. Les dommages-intérêts éventuellement dus par l'époux condamné au divorce sont généralement rattachés à la loi du lieu du divorce, au titre de loi du lieu du délit.

Voy. Batiffol et Lagarde, t. II, n° 454 et la note 1 ; Benjamin, pp. 131-132 ; Loussouarn et Bourel, n° 335 ; Niboyet, t. V, n° 1429, pp. 254-255.

7° *Les obligations alimentaires*

44. Le problème le plus délicat a pour objet le maintien d'une obligation alimentaire après le divorce. Dans les diverses doctrines nationales, la solution de conflit de lois paraît en liaison directe avec le contenu des règles de droit matériel interne. Ainsi, à l'époque où, en droit interne français, l'obligation alimentaire ne survivait qu'au profit de l'époux « innocent », le rattachement à la loi du lieu du divorce, perçue comme *lex loci delicti*, paraissait prédominant.

Voy. notamment : Batiffol et Lagarde, t. II, n° 454 ; Benjamin, p. 129 ; Loussouarn et Bourel, n° 335 (plutôt la *lex fori* en qualité de loi de police) ; Niboyet, t. V, n° 1429, pp. 153-154, n° 1517, pp. 453-454.

Toutefois, après avoir indiqué cette solution, Batiffol et Lagarde poursuivent dans les termes suivants :

« Mais la loi des effets du divorce a prévalu ultérieurement, mettant en relief l'aspect alimentaire de la pension et ménageant l'homogénéité de l'ensemble. Cette dernière solution s'accorde mieux que la précédente avec la nouvelle législation française qui diversifie les conséquences pécuniaires du divorce en fonction des causes de celui-ci et, dans les hypothèses les plus fréquentes, détache la pension, rebaptisée « prestation compensatoire », de l'attribution des droits dans le divorce » (t. II, n° 454).

Ainsi, « la loi des effets du divorce » — sous réserve de l'ambiguïté de cette expression — paraît prévaloir aujourd'hui.

Voy. notamment : Gamillscheg, Art. 17, n° 549, avec de nombreuses références de jurisprudence allemande. Selon cet auteur, le *Scheidungsstatut* est *unwandelbar*, le choix de la loi du divorce étant définitivement cristallisé au moment du prononcé (*ibid.*, n° 565 ; sur cette question, voir *supra*, n° 29), tandis qu'un changement du contenu de cette loi doit être pris en considération dans le respect des règles de droit transitoire de la même loi (*ibid.*, n° 567). C'est aussi à cette loi qu'il appartient de déterminer la validité d'une renonciation à la pension et des contrats qui y sont relatifs (*ibid.*, n° 570-571). Comp. Wengler, § 24, pp. 637-638, qui rattache les obligations alimentaires après divorce à la loi régissant les effets personnels du mariage.

Sur la notion de « loi des effets du divorce » les ouvrages les plus récents se réfèrent à l'article 8 de la Convention de La Haye du 2 octobre 1973 sur la loi applicable aux obligations alimentaires.

Voy. notamment : Batiffol et Lagarde, t. II, n° 454, Mayer ; n° 584.

8° *Le partage des droits à la pension et les pensions de survie*

45. La détermination de la loi applicable au maintien au profit d'un conjoint divorcé d'une pension de survie échéant au décès de l'autre ex-conjoint est d'autant plus délicate qu'elle touche à la fois au statut du divorce, aux obligations alimentaires, aux régimes matrimoniaux et à la dévolution successorale.

Sans doute la solution dépend-elle au premier chef du régime — qui appartient souvent au droit public — des pensions de survie. Par exemple, le statut des fonctionnaires détermine à quelles conditions le conjoint divorcé survivant à l'agent décédé a droit à une pension. Si, toutefois, un tel statut subordonne le droit à la pension aux causes pour lesquelles le divorce a été admis, il y a lieu d'introduire sous la qualification pertinente du régime de pension le divorce prononcé dans un autre ordre juridique.

> Pour un cas dans lequel le régime de pension était celui d'une organisation internationale (en l'occurrence la C.E.E.), voy.: Cour de just. des Communautés européennes, 5 février 1981, aff. 40/79, *Recueil* 1981, 361, *IPRax*, 1983, 289 note F. Rigaux, 1983, 276.

L'article 17, (3), du projet de loi de la République fédérale d'Allemagne rattache en principe au statut du divorce le *Versorgungsausgleich* du droit interne allemand, en complétant la règle de conflit bilatérale visant une institution spécifique de la *lex fori*, d'une règle d'application immédiate soumettant à la loi allemande le droit à la compensation des droits de pension de toute personne divorcée dont l'ex-conjoint peut faire valoir un droit à la pension en Allemagne.

9° *Les solutions particulières du projet suisse*

46. Parmi les instruments législatifs récents, le projet suisse est le seul qui ait explicitement adopté la répartition des effets du divorce entre diverses institutions. Sans doute, comme il a déjà été indiqué, l'article 61, 2, de ce projet soumet en principe « les effets accessoires du divorce » au « droit applicable au divorce » (voy. *supra*, n° 28). Quatre exceptions sont expressément visées : les dispositions de la même loi sur le nom et sur le régime matrimonial (art. 61, 2, 2e phrase), les obligations alimentaires (référence à la Convention du 2 octobre 1973 sur la loi applicable aux obligations alimentaires contenue dans l'article 47) et la protection des mineurs

(référence à la Convention de La Haye du 5 octobre 1961 contenue dans l'article 83 du projet). De l'absence de réserve explicite on ne saurait toutefois déduire que les droits d'un époux divorcé sur la succession de son ex-conjoint seraient réglés conformément à l'article 61, 2, plutôt que selon les règles applicables au droit successoral (art. 84 à 94).

§ 2. — *La méthode des conflits de juridictions*

A. — *Les empêchements de mariage trouvant leur source dans un précédent mariage dissous.*

47. La doctrine des pays de common law discute de manière approfondie les effets extraterritoriaux des empêchements de remariage fondés sur une loi étrangère. Comme les cas de jurisprudence sont relatifs à des divorces obtenus à l'étranger, c'est sur le terrain de l'efficacité des décisions étrangères que la question est étudiée en doctrine.

> Voy. notamment : North-Cheshire p. 346, analysant le *Recognition of Divorces and Legal Separations Act* 1971. Le divorce étranger reconnu en Angleterre entraîne l'aptitude au remariage dans ce pays.

Deux décisions anglaises prononcées à quelques années d'intervalle sont respectivement relatives à chacune des deux hypothèses les plus notables.

Dans la première le remariage en Angleterre d'une femme domiciliée dans ce pays au moment de la seconde union a été tenu pour valable bien que le divorce eût été obtenu dans la colonie du Cap et que l'intéressée se fût remariée avec le complice de l'adultère, alors que le droit applicable au divorce prohibait un tel mariage. La deuxième décision a annulé le mariage célébré en Angleterre par un homme domicilié dans ce pays mais résidant en Inde, un mois avant l'expiration du délai de six mois durant lequel une voie de recours est ouverte contre la décision de divorce rendue en Inde.

> Voy: : *Scott v. Att. Gen.* (1886) 11 P.D. 128 ; *Warter v. Warter* (1890) 15 P.D. 152. Dans la seconde décision Sir James Hannen P., qui avait également rendu la décision précédente, a précisé la portée de celle-ci en observant que le caractère pénal de l'empêchement déduit de l'adultère interdisait de le prendre en considération.

La doctrine contemporaine maintient la distinction entre un empêchement ayant un caractère répressif, auquel il n'est pas reconnu d'effet en Angleterre, et l'empêchement qui s'incorpore à la décision dont les pleins effets sont retardés jusqu'à ce qu'elle soit devenue définitive.

Voy. notamment : Dicey-Morris, rule 45, p. 334 ; Graveson, p. 288 ; Morris, p. 108 ; North-Cheshire, pp. 347-348. La même solution vaut en Australie : *Miller v. Teale* (1954) 92 C.L.R. 406 (High Court of Australia), au Canada : *Hellens v. Densemore* (1957) 10 D.L.R. (2d) 561 (Supreme Court of Canada) ainsi qu'en Nouvelle-Zélande. Voy. : Castel, p. 367 ; Nygh, p. 443 ; Sykes, pp. 256-257 ; Webb, p. 294.

En revanche, c'est à tort que Morris (p. 108) critique *Lundgren v. O'Brien* (1921) V.L.R. 361, décision australienne ayant refusé d'annuler le mariage conclu en Australie, avant l'expiration du délai de viduité prévu par la loi belge, par une femme divorcée et domiciliée en Belgique, pareil empêchement étant prohibitif selon le droit belge.

48. La question se pose sensiblement dans les mêmes termes aux Etats-Unis, bien que la jurisprudence paraisse plus divisée sur l'équilibre à maintenir entre le respect de la restriction au droit de se remarier prévue par la loi du domicile au moment de la célébration du mariage et la faveur du mariage contracté selon la loi du lieu de célébration.

Voy. notamment Ehrenzweig, § 79, p. 265 ; Goodrich, pp. 233-235 ; Leflar, § 222, pp. 449-450 ; Scoles-Hay, § 13.9, p. 429 ; Stumberg, pp. 285-286 Voy. aussi les décisions reproduites dans : von Mehren and Trautman, pp. 222 et s.

La règle souple inscrite dans la section 283 du *Restatement 2d* («the most significant relationship to the spouses») exprime l'incertitude de la jurisprudence antérieure. Sur la question particulière des empêchements de remariage après un divorce, voy. le commentaire du rapporteur, t. II, pp. 241-242.

B. — *Les aliments après divorce*

49. L'obligation alimentaire entre époux divorcés est, selon le droit anglais, essentiellement réglée sur le terrain des conflits de juridictions (voy. *supra*, n° 26). Après qu'un tribunal anglais a condamné une personne mariée à subvenir aux besoins de son conjoint, la dissolution du mariage par le divorce n'éteint pas de plein droit l'obligation alimentaire, le juge ayant un pouvoir discrétionnaire

pour maintenir celle-ci. Comme le constate le professeur Morris (p. 174), si un jugement de divorce anglais n'a pas pour effet d'éteindre le droit aux aliments, pareille conséquence doit à plus forte raison être refusée à une décision étrangère.

Dans l'exercice de son pouvoir discrétionnaire, le juge anglais prend en considération les circonstances dans lesquelles le divorce a été prononcé à l'étranger. Que le créancier d'aliments n'ait pu se défendre contre l'action en divorce (« ex parte divorce », voy. Graveson, p. 289) est une raison pertinente pour la décision à rendre sur les aliments.

> Le Professeur Graveson parle à ce sujet de « functional » *recognition* du divorce étranger (p. 306), notion assez proche du « divisible divorce » américain. Voy. aussi : Dicey-Morris, rule 53, p. 387 ; Morris, p. 174 ; North-Cheshire, pp. 388, 429-433, 435, et, dans la jurisprudence, *Wood v. Wood*, [1957], P. 254.

La même solution est enseignée en Australie et en Nouvelle-Zélande.

> Voy. notamment : Syker, p. 285 ; Webb, pp. 291-295, ces auteurs s'interrogeant sur l'application de la doctrine de l'*estoppel* pour le cas où le conjoint réclamant des aliments a participé à la procédure au divorce ou s'est lui-même prévalu de la dissolution du mariage. Voy. aussi la section 74 du *Restatement 2d.*

50. Les auteurs américains parlent de « divisible divorce » pour désigner la règle selon laquelle la reconnaissance dans un Etat du divorce prononcé dans un autre Etat n'étend pas nécessairement ses effets aux droits patrimoniaux (ce qui inclut le droit aux aliments) localisés dans le premier Etat).

Plusieurs arrêts de la Cour suprême des Etats-Unis ont admis une telle dissociation. Elle implique que le principe et l'étendue des droits patrimoniaux litigieux soient déterminés abstraction faite du « statut du divorce ».

> Voy. notamment : *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279, 63 S.Ct 1118 (1945) ; *Estin v. Estin* 334 U.S. 541, 68 S. Ct 1213 (1948) ; *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360 (1967). Les extraits les plus significatifs de *Estin* et *Vanderbilt* sont reproduits dans : von Mehren and Trautman, pp. 1545 et s. Sur l'influence — jugée douteuse — d'un arrêt plus récent, *Shaffer v. Heitner*, 433

U.S. 186, 97 S. Ct 2569 (1977), voy. notamment Scoles-Hay, § 15.28, note 7, p. 508.

Dans la doctrine, voy.: Ehrenzweig, § 80, p. 165; Goodrich, sect. 139; Leflar, § 227 Scoles-Hay, § 15.28; Stumberg, pp. 327-329. Une doctrine analogue a été appliquée au maintien du *dower* après le divorce. Voy. notamment: Leflar, § 237, p. 480; Stumberg, pp. 318-319.

La règle est insérée dans la section 77 du *Restatement 2d.* C'est par considération pour les solutions de common law qu'à la demande des délégations américaine et irlandaise il a été introduit une faculté de réserve sous l'article 14 de la Convention de La Haye du 2 octobre 1973 sur la loi applicable aux obligations alimentaires.

Tout Etat pourra, conformément à l'article 24, se réserver de ne pas appliquer la Convention aux obligations alimentaires:

.....

3. Entre époux divorcés, séparés de corps, ou dont le mariage a été déclaré nul ou annulé, lorsque la décision de divorce, de séparation, de nullité ou d'annulation du mariage a été rendue par défaut dans un Etat où la partie défendante n'avait pas sa résidence habituelle ». Voy. rapport Verwilghen, nos 164-165. Selon l'interprétation du rapporteur, la réserve ne devrait pas avoir pour effet de soustraire les aliments après divorce au domaine matériel de la convention mais d'y rendre applicable le droit commun des obligations alimentaires (art. 4 à 6).

Troisième Partie

Réflexions sur la méthodologie du droit international privé

§ 1er. *Observations préliminaires sur la double relation à l'espace et au temps*

51. La doctrine du droit international privé est assez naturellement encline à privilégier l'espace, domaine, par excellence, des conflits de lois. N'est-ce pas la division géographique des territoires étatiques qui structure ces conflits en attribuant à l'action des normes respectivement posées par les différents législateurs des domaines spatiaux propres ?

La territorialité ne saurait être entendue d'une manière purement physique, comme si l'Etat gouvernait effectivement toutes les personnes se trouvant sur son territoire et maîtrisait utilement tous

les biens qui y sont localisés et comme si les commandements de l'Etat étaient privés de toute force à l'égard des personnes résidant et des biens situés hors du territoire étatique. Le concept d'espace n'en demeure pas moins le signe le plus apparent de l'autorité régulièrement exercée, et appuyée, le cas échéant, de la coercition physique, tandis que la division stable des espaces territoriaux a créé les conditions nécessaires à l'édification de systèmes de droit international privé.

52. Le pluriel rend compte de la réduplication du conflit de lois. La divergence des règles nationales de droit matériel interne se double de la diversité des systèmes étatiques de droit international privé. Si fulgurante que nous apparaisse cette vérité en 1984, il n'est pas sûr qu'elle a suffisamment inspiré les méthodes de travail de l'Institut. Nos pères fondateurs, et parmi eux Asser ou Mancini ainsi qu'Albéric Rolin, croyaient en l'avenir d'un système universel de droit international privé, qui se construirait, *pari passu*, c'est-à-dire sur le même plan méthodologique que le droit international public. C'est fidèle à cette croyance que l'Institut a durant un siècle produit un nombre appréciable de résolutions sur les questions les plus diverses du droit international privé. Résolutions qui, à défaut de se rattacher à aucun système institutionnel, se présentaient comme l'épure d'un ordre juridique irréel.

53. Le temps est, non moins que l'espace, un concept fondamental du droit international privé. Sans doute faudrait-il d'abord mesurer la place du temps dans l'objet de la science juridique en général. De même que toute action humaine se localise sur un ou plusieurs points de l'espace, elle porte nécessairement une date. De plus, et ceci est une observation sur laquelle il faudra revenir plus longuement, il y a deux manières, pour un juriste, de concevoir le double paramètre espace-temps. Soit qu'il appréhende une situation individuelle, à dater et à localiser, soit qu'il considère la norme applicable, laquelle, aussi mais d'une autre manière, se laisse réduire à l'espace et au temps. La norme a une aire d'application ou, si elle appartient à un droit religieux, elle définit par un procédé d'affiliation la catégorie de ses sujets, et elle appartient à l'histoire par la date (plus ou moins précise, selon la nature des sources) à laquelle elle est apparue et par le moment auquel elle a été abrogée, s'est éteinte ou est tombée en désuétude.

54. Le droit international privé aide le juriste à prendre conscience de la diversité et, partant, de la relativité des solutions juridiques ainsi que de la précarité des droits subjectifs dont la règle investit ses destinataires. La fonction qu'y remplissent l'espace et le temps est aussi plus accusée que dans les autres branches du droit. C'est assez évident pour l'espace, qui n'occupe qu'un second rôle dans les ordres juridiques internes. Mais a-t-on assez aperçu que la formation des situations typiques du droit international privé, ces situations qui se rattachent à plus d'un Etat, n'a pas moins besoin de temps que d'espace ? Les mouvements à la faveur desquels les personnes se déplacent et les biens sont transportés d'un lieu à un autre, la plupart des procédés qui permettent aux agents juridiques de communiquer entre eux, occupent une portion mesurable de la durée. Plus qu'aucune autre branche du droit, le droit international privé est la mémoire circonstanciée d'événements passés dont ceux qui pratiquent cette discipline recueillent la survivance parmi nous.

55. La relation à l'espace et au temps offre encore une particularité commune à ces deux catégories. Qu'il s'agisse de la norme ou d'une situation individuelle, la référence est mesurable, l'espace et la durée étant découpés selon une échelle de grandeurs qui permet d'y désigner tantôt un point tantôt une plage. La mise en œuvre du droit est très directement liée à la mensuration du sol et à la computation. La loi se distingue de la coutume par la précision chiffrée avec laquelle la première détermine son aire et fixe son entrée en vigueur ainsi que sa propre abrogation.

§ 2. *Conflits de lois et conflits de juridictions ou règles et institutions*

A. — *L'impossibilité d'isoler la règle de conflit de lois*

56. Une première question de méthode sur laquelle les membres de la 16e commission se sont divisés a pour objet l'incidence du conflit de juridictions sur la solution applicable à une situation matérielle déterminée : par exemple, subsiste-t-il, après la dissolution du mariage, une obligation alimentaire entre les ex-époux ? La question peut être posée dans les termes où l'Institut l'a lui-même libellée pour la soumettre à vos délibérations : quelle est

la loi applicable à l'obligation alimentaire qui subsiste entre d'anciens époux après la dissolution de leur mariage ?

Ainsi posée en termes de règlement du conflit de lois, la question pourrait être jugée trop abstraite : on paraît croire qu'il est procédé à un tel règlement hors de l'espace et du temps ou, ce qui revient au même, en dehors de tout espace étatique et au regard de l'éternité — *sub specie æternitatis* — condition désincarnée que certains pourraient croire le propre de la science. Il faut plutôt se demander si la question ainsi formulée comporte une réponse, du type : les effets du mariage après sa dissolution sont régis par la loi de la nationalité (ou de la dernière nationalité) commune aux ex-époux ou par la loi de leur dernier domicile commun. Sans doute pourrait-on essayer de concrétiser une question jugée trop générale en cherchant les solutions les plus adéquates pour chaque catégorie d'effets : l'obligation alimentaire, le partage de l'autorité parentale, la survivance de certains droits successoraux, les obstacles, définitifs ou temporaires, au remariage de chacun des ex-époux soit entre eux soit avec un(e) autre partenaire, etc. Mais on ne ferait rien d'autre que reculer une barrière sans se donner les moyens de la franchir.

Les liens entre le conflit de lois et le conflit de juridictions se laissent découper sur trois plans. Une première méthode de solution, qui pour être partielle, n'est pas négligeable, consiste à faire prévaloir le second sur le premier : la règle de droit international privé désigne le juge compétent pour une catégorie de situations auxquelles est appliqué le droit matériel interne de la *lex fori*. Mais il existe un lien plus structurel — on peut même dire nécessaire — entre le conflit de lois et le conflit de juridictions : les limites dans lesquelles s'exerce la compétence institutionnelle d'un ordre juridique déterminé définissent aussi le domaine spatial des règles de conflit de lois qui y sont contenues. La troisième réflexion réintroduit la catégorie du temps : si l'on distingue l'opération de la loi sur une situation juridique en devenir de l'application autoritaire à laquelle procède le juge, c'est un laps de temps qui les sépare l'une de l'autre. L'application judiciaire du droit a nécessairement un caractère rétrospectif et cela n'est pas sans incidence sur le règlement du conflit de lois. Telles sont les trois questions à approfondir : la réduction de certains conflits de lois à un conflit de juridictions (B), la relation entre les règles et les institutions (C) et le caractère rétrospectif de l'application judiciaire de la règle de droit (D).

B. — *La réduction de certains conflits de lois à un conflit de juridictions*

58. Si l'on assigne pour objectif au droit international privé la répartition des compétences entre les ordres juridiques étatiques, on peut concevoir à cette fin deux techniques différentes. L'une consiste à rechercher un critère adéquat pour la délimitation de la compétence internationale des autorités et des juridictions des différents Etats en laissant à celles-ci le soin d'appliquer leurs propres règles de droit matériel interne. Selon l'autre méthode, on s'efforce d'identifier un critère adéquat de rattachement de chaque situation typique, pareille règle de conflit de lois étant offerte à tous ceux qui accepteront de la mettre en œuvre, juges, autorités publiques, mais aussi arbitres ou même simples particuliers désireux de régler leur conduite conformément au droit. Posée en ces termes, la différence entre les deux méthodes risque de paraître artificielle, bien qu'elle trouve un appui dans la tradition de l'Institut qui a adopté des résolutions ayant pour contenu les unes des règles de conflit de juridictions, les autres, et plus souvent, des règles de conflit de lois.

59. La première méthode, celle qui tend à réduire le conflit de lois à un conflit de juridictions ne saurait être généralisée. Elle n'est certes pas adéquate pour les situations que les parties peuvent régler entre elles sans aucune intervention des autorités ou des juridictions étatiques. Par exemple, la loi applicable à un contrat ne saurait dépendre du juge saisi d'un éventuel litige. Un état permanent et en principe indélébile, telle la filiation, ne devrait pas non plus dépendre du choix du tribunal auquel seraient soumises les questions relatives à la détermination de cet état.

En revanche, certaines questions se prêtent davantage à l'absorption du conflit de lois par le conflit de juridictions. Tel est notamment le cas si la matière donne nécessairement lieu à une intervention judiciaire ou administrative (par exemple, la dissolution du mariage par le divorce) ou si la loi confère au juge un pouvoir d'appréciation étendu. Il en est ainsi, par exemple, de l'homologation d'une adoption ou de l'attribution du droit de garde sur un mineur selon le critère de l'intérêt de l'enfant.

60. Pour ce qui concerne l'adoption, il y a deux raisons de subor-

donner le conflit de lois au conflit de juridictions, comme l'a fait la Convention de La Haye du 15 novembre 1965 concernant la compétence des autorités, la loi applicable et la reconnaissance des décisions en matière d'adoption. D'une part, l'établissement d'un rapport de filiation entre l'adoptant ou les adoptants et l'adopté requiert nécessairement un contrôle judiciaire ou administratif ; d'autre part, l'obligation, d'ailleurs portée par l'article 6, alinéa 1er, de la Convention de La Haye précitée, de ne prononcer l'adoption que si celle-ci « est conforme à l'intérêt de l'enfant », substitue à la technique du conflit de lois une appréciation discrétionnaire indissociable de la *lex fori*.

61. Quant aux conflits relatifs à la garde d'un enfant mineur, ils sont aussi, au moins dans les ordres juridiques sécularisés, soustraits à toute solution posée à l'avance dans une norme positive. Car ou bien les auteurs de l'enfant (notamment après la dissolution de leur mariage) partagent à l'amiable l'exercice des attributs de l'autorité parentale, sans que soit mise en œuvre aucune disposition normative susceptible d'être désignée par une règle de conflit de lois, ou bien l'un d'eux s'adresse au juge qui prononcera selon le critère de l'intérêt de l'enfant tel que cet intérêt peut être perçu dans la société à laquelle le juge appartient, c'est-à-dire conformément à la *lex fori*.

62. C'est encore de la même manière que sont administrées les mesures de protection de la jeunesse. Aux raisons très pertinentes pour lesquelles la Cour internationale de Justice a refusé de décider qu'un Etat lié par la Convention de La Haye du 12 juin 1902 pour régler les conflits de lois et de juridictions relativement à la tutelle des mineurs était tenu d'appliquer les règles de conflit de lois de cette convention à des mesures de protection de la jeunesse, s'ajoute l'incompatibilité entre de telles mesures et la méthode des conflits de lois. La seule question pertinente, notamment du point de vue du droit international, est de savoir si les autorités d'un Etat sont compétentes pour prendre à l'égard de mineurs n'ayant pas la nationalité de cet Etat des mesures de protection dont le contenu et l'étendue ne paraissent guère dissociables de la *lex fori*.

C. — *Règles et institutions*

63. En réservant la méthode de travail qui serait la plus adéquate

pour l'Institut, il faut distinguer deux catégories d'institutions à l'intérieur desquelles le droit international privé se construit.

Dans l'ordre interne de chaque Etat, les règles de conflit posées par le législateur et, à plus forte raison, celles qui se laissent dégager de la jurisprudence sont inséparables des bornes assignées à la compétence internationale des juridictions du même Etat. Il n'est pas nécessaire qu'un tel lien soit explicite pour que l'on guérisse le délire positiviste d'un Kahn ou d'un Bartin qui ont prétendu restituer à chaque système étatique de conflit de lois la valeur universelle qu'ils avaient déniée à la méthode instituée par Savigny, Mancini ou von Bar. A la dénégation péremptoire de Kahn — « il n'y a pas de droit international privé du droit international privé » — il faut répondre que le domaine spatial de chaque système national de conflit de lois est nécessairement circonscrit par les limites dans lesquelles le même Etat parvient à rendre effectives les décisions de ses juges et les actes de ses autorités.

64. Quant à la codification internationale des règles de conflit de lois, du type de celle que pratique la Conférence de La Haye de droit international privé, elle suppose que chaque Etat contractant s'engage à faire appliquer la convention par les organes dont il est internationalement responsable. Dans les Etats où elles sont en vigueur les dispositions d'une convention sur la loi applicable ont pour domaine spatial d'application toutes les situations « relevant de (la) juridiction » de ces Etats (au sens selon lequel ces mots apparaissent dans l'article 1er de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales). Quand une convention sur la loi applicable restreint son propre domaine spatial aux situations qui se rattachent, selon le critère d'applicabilité qui y est énoncé, à l'un des Etats contractants, pour cette catégorie de situations il s'agit encore de celles qui relèvent de la juridiction de l'un ou de l'autre Etat contractant.

65. Bref, toute règle de conflit de lois s'insère nécessairement dans un ordre juridique positif, le plus souvent le droit d'un Etat, parfois aussi l'ordre juridique international particulier que plusieurs Etats instituent par la conclusion d'un traité international. Détachée d'un tel ordre juridique, la prétendue règle de conflit de lois est privée de tout caractère normatif, elle est un assemblage de mots,

sans force et sans destinataires, une proposition doctrinale dont pourront, s'ils le veulent bien, s'emparer ceux qui font le droit positif. Telle est, il faut s'y résigner, l'exacte nature d'une résolution de l'Institut.

La confiance avec laquelle l'Institut attend qu'un législateur national ou une institution interétatique de codification s'inspire de ses résolutions en matière de droit international privé comporte une double explication. Outre la conviction de l'unité universelle du droit international privé, qui était dominante à l'époque où l'Institut est né il y a quelque cent douze ans, il faut aussi mettre en relief l'influence exercée sur la pensée juridique occidentale par le normativisme.

66. S'il est vrai que l'ordre juridique n'est qu'un ensemble de règles agencées les unes aux autres selon le modèle dont Kelsen a génialement construit la mécanique, il est permis à la science du droit d'écrire, hors de tout ordre juridique réel, des propositions normatives, pour les mettre à la disposition de n'importe quel législateur. Si, au contraire, l'ordre juridique est un combiné de règles et d'institutions, le *corpus* normatif étant un géant immobile tant qu'un réseau d'autorités et de juridictions n'a pas réussi à l'animer, une proposition normative détachée de tout ordre juridique réel est, à la limite, insignifiante. N'est-ce pas ce réseau institutionnel qui fait vivre l'ensemble normatif, qui distingue un système de droit positif d'un pur agencement de propositions normatives ?

67. Le choix d'une théorie institutionnelle du droit est d'autant plus pertinent en droit international privé que la compétence normative de chaque Etat a pour nécessaires limites l'aptitude de l'appareil étatique à administrer les situations particulières, à soumettre à l'évaluation de ses organes judiciaires les cas litigieux et à faire prévaloir dans les faits la volonté de l'auteur de la norme grâce à l'effectivité des agents d'exécution étatiques.

Sans doute rien n'empêche-t-il l'Etat ayant cinq millions d'habitants de croire que la règle de droit matériel interne fixant l'âge de la majorité à vingt et un ans et, même, que la règle de conflit rattachant la capacité à la loi nationale, valent pour quatre milliards d'êtres humains. Toutefois, au-delà des limites dans lesquelles le fonctionnement des institutions étatiques assure la mise en œuvre de

chacune de ces deux règles, celles-ci perdent toute signification normative, et il ne paraît guère raisonnable d'affirmer que l'Etat accepte gracieusement de restreindre par la règle de conflit de lois la portée normative illimitée de sa règle de droit matériel interne et, moins encore, de soutenir que la règle de conflit de lois nationale a une valeur absolue.

Aucune loi de la sémantique ne fait obstacle à ce que la règle déterminant l'âge de la majorité civile ait pour destinataire (ou pour sujet) tout être humain, mais au-delà des limites naturellement fixées par l'appareil institutionnel de l'Etat qui a posé une telle règle, celle-ci n'est plus qu'une proposition du langage commun, dont il est facile de saisir le sens mais qui est dépouillée de tout caractère normatif.

68. Il faut revenir à présent à la conviction exprimée par les fondateurs de l'Institut, et qui est celle de l'unité et de l'universalité de l'ordre juridique international. Selon cette conception les règles de droit international privé auraient le même statut scientifique que les normes gouvernant les relations interétatiques. L'unité œcuménique inclurait ainsi une unité méthodologique. Sur ce point encore c'est le concept d'institution qui permet de tracer une séparation méthodologique rigoureuse entre les deux subdivisions du droit international, ce qu'on appelle souvent le droit international public et le droit international privé.

Alors que le droit international privé est dénué d'institutions propres, celles-ci étant empruntées presque toujours aux ordres juridiques étatiques — d'où la vérité de l'affirmation selon laquelle le droit international privé est une branche du droit interne — plus rarement à un système interétatique, les relations internationales se sont édifiées sur un réseau institutionnel spécifique. Il existe un ordre juridique international, il n'y a pas d'ordre juridique international privé.

L'évolution du droit depuis un siècle a accentué le clivage méthodologique entre les deux matières et, si l'on ose résumer cette évolution d'une manière succincte et simplifiée, on peut opposer à la prescience des fondateurs de l'Institut en ce qui concerne le droit international (public) leurs illusions quant au statut du droit international privé.

69. Les institutions internationales se sont, au cours du dernier siècle, considérablement développées, raffermies, renforcées. Quand l'Institut élabore une résolution dans le domaine propre du droit international, il remplit une double fonction : tantôt il se borne à mettre en forme ou à codifier une pratique généralement observée par les organes de la société internationale, tantôt il s'efforce avec prudence de combler les lacunes du droit positif, mais, pour novatrices qu'elles soient, les propositions ainsi avancées s'intègrent à un corps normatif animé par des institutions vivantes. De telles propositions sont douées d'une normativité pour le moins virtuelle et elles sont conçues en fonction d'organes réels auxquels il est possible de les adapter. Rien de pareil, faut-il le dire, en droit international privé. Les tentatives les plus prestigieuses imaginées par la science juridique allemande, qu'il s'agisse du code de Frankenstein ou du traité d'Ernst Rabel, expriment davantage les choix doctrinaux de l'auteur qu'une déduction serrée opérée sur la comparaison des systèmes étatiques. Outre que l'effort comparatif n'a jamais dépassé le cercle restreint des systèmes de droit international privé d'origine européenne (ce qui inclut parfois les deux Amériques), la tentative de comparer des règles de conflit de lois détachées de toute institution étatique précise est, pour les raisons déjà exposées, nécessairement vouée à l'échec.

Ne réussissant pas à être la codification d'une pratique universelle dont la réalité n'a jamais été démontrée, la formulation de règles de conflit de lois en dehors de tout ordre juridique étatique ne paraît pas de nature à faire progresser la science du droit international privé.

D. — *Le caractère rétrospectif de l'application judiciaire du droit.*

70. Quelle que soit la nature d'une décision judiciaire — déclarative, dispositive ou constitutive — les faits soumis au juge appartiennent nécessairement au passé. Même s'il lui est demandé de prévenir un dommage ou de décerner une injonction ayant la nature d'une prohibition, le juge ne saurait motiver sa décision sans s'appuyer sur des événements déjà vérifiés. L'observation est banale, mais elle reçoit une coloration particulière en droit international privé. Deux motifs y concourent : d'une part, la scission entre les critères de compétence juridictionnelle et les critères de compétence législative et, de l'autre, la manière dont se conjuguent en droit international privé les sé-

quences de fait qui sont soit antérieures soit postérieures à la date du procès.

71. C'est une combinaison d'espace et de temps qui caractérise le mieux la distance qui risque de s'introduire entre les faits respectivement pertinents pour la solution du conflit de lois et pour la détermination de la compétence juridictionnelle. En ce qui concerne par exemple les effets d'un mariage dissous, tout serait relativement simple si les ex-époux conservaient l'un et l'autre la nationalité et le domicile qui étaient les leurs au moment du divorce. Les difficultés s'accumulent dès qu'un tel changement s'est produit, et les raisons d'appliquer aux effets du mariage dissous la loi personnelle des époux au moment du divorce, ou la loi selon laquelle le divorce a été admis paraissent moins pertinentes dès que ces époux ou l'un d'eux ont changé de domicile ou même de nationalité.

Sous réserve des observations complémentaires qui seront faites dans le numéro suivant, alors que la compétence juridictionnelle dépendra du critère adéquat (par exemple du lieu du domicile) déterminé au moment du procès, certains avantages de la stabilité du facteur de rattachement en matière de conflit de lois conduiraient le juge du pays où le défendeur a transféré son domicile après l'admission du divorce, à appliquer aux effets actuels et futurs du mariage dissous la loi d'un pays avec lequel les ex-époux n'ont plus aucun lien. On verra dans le paragraphe suivant l'incidence de ce changement sur le choix de la solution de conflit de lois. Il suffit pour l'instant d'indiquer que le litige éventuel aura généralement pour juge un tribunal du pays à l'égard duquel il existe un rattachement actuel, et que cette circonstance ne laisse pas d'influencer le choix de la solution de conflit de lois.

72. L'affirmation selon laquelle l'activité du juge a un caractère rétrospectif n'est que partiellement exacte. Même si la décision sollicitée est de nature déclarative — le juge est invité à déduire de la loi les droits et obligations respectifs des parties — le demandeur ne manque pas, quand il a le choix entre les tribunaux de plusieurs pays, de préférer celui de ces pays dont il attend la décision la plus favorable, soit en raison du contenu du droit dont il peut raisonnablement prévoir l'application, soit parce que c'est en ce pays que son statut personnel doit être reconnu ou que se localisent les biens

sur lesquels l'exécution forcée sera la mieux assurée. Ainsi, des considérations de nature prospective, liées notamment à l'efficacité de la décision à intervenir, vont guider les choix de nature procédurale.

§ 3. *L'insertion des situations juridiques dans une durée discontinue.*

73. L'expression abstraite « effets du mariage après sa dissolution » désigne une série complexe d'événements diversement qualifiés (voy. sur ce point le paragraphe 4) et dont les composantes peuvent être référées à des moments successifs. Pareil rapport au temps nécessite quelque éclaircissement.

Le concept même d'« effets » désigne inévitablement les termes successifs d'une chaîne causale, à l'origine desquels on trouve trois événements notables, à savoir la célébration puis la dissolution du mariage, suivies, le cas échéant, du décès d'un des ex-époux. Parmi les effets à considérer il en est qui ont un caractère permanent ou continu, tels l'obligation alimentaire ou le partage des attributs de l'autorité parentale, il y en a d'autres qui sont eux-mêmes ponctuels, par exemple l'obstacle que le mariage dissous peut opposer à la conclusion d'une deuxième union ou le maintien de droits contre la succession d'un des ex-époux ou du droit à une pension de survie à faire valoir au moment du décès.

La nature continue ou ponctuelle du droit dépend, le cas échéant, du contenu du droit matériel applicable : il en est ainsi, par exemple, si, au moment de la dissolution du mariage, la loi compétente offre à l'un des époux divorcés le choix entre une pension alimentaire et le paiement d'un capital. De manière plus complexe encore, le principe et l'étendue du droit à des prestations successives peuvent être soit subordonnés aux causes de la dissolution du mariage (par exemple, en raison de l'exclusion de tout droit à des aliments au profit de l'époux condamné au divorce) soit liés à la date à laquelle la dissolution a été prononcée (par exemple, par la garantie donnée à l'époux innocent ou présumé tel de conserver, par le paiement d'une pension alimentaire, le niveau de vie qui était le sien à la veille de la dissolution du mariage).

74. Les événements significatifs — célébration du mariage, admission du divorce, décès d'un des conjoints divorcés — brisent la

continuité de la durée. Si ces événements appartiennent à la définition du critère de rattachement, il en résulte normalement que la concrétisation de ce critère s'opère une fois pour toutes au moment pertinent : la loi applicable est fixée selon la nationalité, le domicile ou la résidence possédé par la personne intéressée au moment où s'est produit l'événement significatif. Il n'en va pas de même pour les effets continus, étalés dans la durée : la loi applicable à de tels effets (par exemple à l'obligation alimentaire) est susceptible de se modifier en cas de déplacement du facteur de rattachement significatif. On aperçoit la difficulté qui en résulte si le principe ou l'étendue de l'effet particulier dépend d'un événement antérieur contemporain d'une localisation différente du facteur de rattachement. A cet égard, la détermination de la loi applicable à la pension alimentaire après divorce est sans doute l'une des plus malaisées à soumettre à une règle de conflit de lois valable pour tous les cas.

75. La durée couverte par la détermination des effets du mariage occupe une fraction appréciable de la vie humaine, sans qu'on puisse négliger la catégorie de ces effets qui concerne les attributs de l'autorité parentale. A cette longueur du temps s'ajoute l'hétérogénéité des phénomènes à considérer.

La notion de dissolution du mariage, d'abord, est singulièrement équivoque. Faut-il, à côté du divorce, y inclure la répudiation ? La constatation de la nullité d'un mariage, l'inexistence d'un mariage (*Nicht-Ehe*) sont-ils, à proprement parler, des cas de « dissolution » ? Sans doute pourrait-on envisager de restreindre au seul cas du divorce la règle de conflit de lois à rédiger, ou élaborer des règles particulières pour les cas de répudiation, de nullité et d'inexistence.

76. Une difficulté plus ardue provient de ce que la matière des effets du mariage touche à plusieurs concepts-clés du droit international privé. L'expression désigne un conglomérat de problèmes qui trouvent leur unité dans l'histoire du couple ayant cessé d'être uni, mais la plupart de ces problèmes risquent d'être revendiqués par d'autres règles de conflit au nom d'une cohérence non moins contraignante. Pareil risque se vérifie à propos de chacune des grandes catégories d'effets à considérer.

Le principal effet du divorce — plutôt que du mariage dissous — est l'aptitude au remariage. Toutefois, celle-ci n'est pas toujours

immédiate ni inconditionnelle et il faut tenir certains obstacles au remariage pour un effet du mariage dissous plutôt que pour un effet du divorce. Si un époux divorcé a conclu de secondes noces en transgression d'une disposition de la loi régissant les effets du mariage dissous, l'applicabilité de cette loi peut être abordée selon deux perspectives très différentes : soit à l'occasion de la réclamation d'un effet se rattachant au premier mariage, soit parce que la validité du second est attaquée (ou qu'un effet de ce mariage est contesté). Si un telle action est portée devant une juridiction du pays où les secondes noces ont été célébrées, le juge sera sans doute plus enclin à préserver la validité de l'union actuelle qu'à faire une application rigoureuse de la loi régissant les effets du premier mariage dissous, et cela d'autant plus que la légitimité des enfants issus de la deuxième union en dépendrait. Même dans un Etat tiers, face au premier mariage qui est de toute manière irrémédiablement dissous, les secondes noces bénéficient du prestige de l'actualité.

77. Les trois principaux effets du mariage dissous ont des traits particuliers qui les rattachent respectivement à trois catégories traditionnelles du droit international privé : les obligations alimentaires, les successions et les régimes matrimoniaux, l'autorité parentale. C'est au point de se demander s'il y a place pour une catégorie de rattachement supplémentaire — les effets du mariage dissous — ou pour une simple modalité des trois premières catégories. Le caractère spécifique des problèmes suscités par un mariage dissous n'est cependant pas douteux.

En ce qui concerne d'abord les obligations alimentaires, on pourrait être tenté de négliger le caractère propre d'une telle obligation lorsqu'elle survit à la dissolution du mariage, et de la soumettre à une règle de conflit couvrant l'entièreté du domaine considéré, par exemple à la loi de la résidence habituelle du créancier d'aliment. Pareille créance alimentaire n'est cependant pas aisément détachable du statut du divorce, notamment quand le principe ou l'étendue de l'obligation sont subordonnés au type de divorce ou à la position respective des parties durant la procédure. Pareille hypothèse illustre bien une difficulté propre au droit international privé et qui résulte d'un mélange trop riche de variations spatio-temporelles : si le divorce a été prononcé selon la loi X et que l'un des ex-époux ait sa résidence

habituelle dans l'Etat Y, conserve-t-il dans cet Etat les droits alimentaires déterminés selon la loi X, l'obligation est-elle intégralement régie par la loi Y, ce qui implique néanmoins la recherche d'une équivalence entre les effets alimentaires du mariage dissous dans l'un et l'autre droit, ou bien faut-il scinder les problèmes en rattachant le principe du droit aux aliments à la loi X et ses modalités à la loi Y.

Même difficulté pour ce qui concerne d'une part la liquidation du régime matrimonial et, de l'autre, les droits qu'un époux divorcé peut faire valoir contre la succession de son ex-partenaire décédé après le divorce. Il suffit de supposer dans le premier cas que le régime matrimonial est rattaché à la loi X et le divorce à la loi Y. A laquelle des deux lois appartient-il de procurer les modalités selon lesquelles il est procédé à la liquidation du régime matrimonial entre époux divorcés ? Dans le second cas, si la loi du divorce est la loi X et que la succession soit soumise aux lois Y et Z (ce qui est possible au cas où les immeubles laissés par le *de cujus* sont situés en plusieurs pays), il se pose une question analogue à celle qui a été soulevée à propos des obligations alimentaires : le conjoint divorcé peut-il faire valoir contre la succession les droits qu'il puise dans le statut du divorce (par exemple le droit à une créance d'aliments sur les biens de la succession) ou ces droits sont-ils déterminés selon la loi (ou selon chaque loi) successorale, avec la nécessité d'adapter les unes aux autres les institutions respectives du statut du divorce et de la loi successorale ?

Même problème enfin, en ce qui concerne le partage des attributs ou de l'exercice de l'autorité parentale. Comment combiner entre elles les prescriptions du droit applicable (ou des droits successivement applicables, au gré d'un changement de nationalité, de domicile ou de résidence du mineur) à l'autorité parentale, et les dispositions du statut du divorce qui modalisent pareil exercice en raison de la cause pour laquelle le mariage a été dissous ?

78. Le caractère insurmontable des difficultés qui viennent d'être signalées ne démontre pas seulement l'impossibilité de couler dans une résolution de l'institut les règles de conflit de lois applicables aux divers effets du mariage dissous, selon une formulation qui serait utilisable dans n'importe quel ordre juridique étatique. Il y a aussi un enseignement à tirer pour des efforts de codification plus limités,

tels qu'ils sont poursuivis par exemple à la Conférence de La Haye de droit international privé. Efforts plus limités puisque la Conférence réunit un nombre déterminé d'Etats dont les représentants qualifiés peuvent mesurer l'incidence des règles en projet sur l'application des normes et le fonctionnement des institutions de chacun de ces Etats. Il est dès lors possible de dessiner avec précision le domaine sur lequel la codification en projet va se substituer aux règles de conflit nationales et la manière dont les normes communes vont s'insérer dans chaque ordre juridique étatique.

Toutefois, la matière assignée à la 16e Commission de l'Institut met bien en relief les limites d'une codification partielle. Pour désigner de manière harmonieuse la loi applicable aux effets d'un mariage dissous, il faudrait une codification couvrant simultanément tous les domaines matériels énumérés dans les numéros précédents : validité du mariage, obligations alimentaires, régimes matrimoniaux, successions, causes du divorce, autorité parentale, de manière à ne laisser aucune variable hors du champ de la codification.

79. Une dernière série d'observations concerne l'ambiguïté d'un concept cependant essentiel pour notre propos : il s'agit du « statut du divorce » ou de la « loi en vertu de laquelle le divorce a été prononcé ».

La première observation a pour objet la circonstance que le divorce est un acte juridictionnel, plus rarement un acte administratif, qui suscite au premier chef un problème de reconnaissance internationale des actes et des jugements. Si la décision judiciaire s'est elle-même prononcée sur l'un ou l'autre des effets du mariage dissous (par exemple, en attribuant la garde des enfants à l'un des époux ou en lui allouant une pension alimentaire), le problème concerne plutôt la matière de la reconnaissance des jugements étrangers que celle des conflits de lois. Il reste sans doute que, dans les deux exemples qui viennent d'en être donnés, l'autorité de la chose jugée est limitée dans le temps, les décisions relatives à la garde d'enfants ou à des aliments pouvant être revues en cas de changement des circonstances. Sur le second point toutefois, il est possible que la loi applicable au divorce ait restreint la faculté de faire modifier le montant de la pension, eu égard à la nature spécifique des obligations alimentaires après divorce.

Pour le surplus, le concept de « statut du divorce » ou de « loi en vertu de laquelle le divorce a été prononcé » est moins significatif qu'il n'a pu l'être dans le passé. L'admissibilité et la détermination des causes du divorce sont progressivement sorties de la référence au statut personnel qui prévalait encore au début du XX^e siècle. Selon des procédés divers, qu'il est inutile d'indiquer ici, la pression de la demande a élargi la compétence de la *lex fori*, les juges n'ayant pu résister à accorder le divorce selon les critères qui leur sont les plus familiers. En outre, la multiplication des causes indéterminées, qui confèrent au juge un pouvoir quasi discrétionnaire, a elle aussi contribué à l'effacement progressif d'un statut du divorce distinct de la loi du tribunal qui l'a prononcé. Telle est du moins l'évolution la plus significative dans la plupart des pays sécularisés, la permanence du statut personnel ayant au contraire regagné du terrain dans les Etats ayant une population islamique.

§ 4. *L'incertitude des qualifications.*

80. Est-il présomptueux d'aborder — d'effleurer — à l'occasion d'un thème particulier des conflits de lois le redoutable problème des qualifications ? Sans doute, mais on n'échappe guère à la nécessité d'en dire quelques mots. Ceux-ci visent seulement à renforcer les observations faites sous le paragraphe précédent. Le concept-clé pour les travaux de la 16^e Commission est celui de « dissolution du mariage ». Or, comme il a déjà été dit, non seulement il existe des causes diverses de dissolution, mais il n'y avait pas, à l'intérieur même de la 16^e Commission, accord unanime sur le sens du mot « dissolution ». Pour certains, le décès n'est pas à compter parmi les causes de dissolution du mariage, difficulté qui n'est pas insurmontable, puisqu'il suffit, par une disposition expresse, d'inclure dans la résolution à rédiger ou d'en exclure l'hypothèse du décès.

Plus difficile apparaît l'hypothèse de la nullité, avec la gradation que connaissent certains droits, de l'annulation à l'inexistence, avec la distinction entre le « void marriage » et le « voidable marriage », ou la distinction entre « Nichtigkeit » et « Aufhebung » ou « Anfechtbarkeit ». Seul le concept de « dissolution » aurait permis de couvrir toutes ces hypothèses dans leur diversité, mais il était précisément jugé, par certains et pour de bonnes raisons, inadéquat. Il est vrai, dans la rigueur des termes, que déclarer la nullité ou cons-

tater l'inexistence d'un mariage, ce n'est pas le dissoudre. En revanche, l'extension à certaines causes de nullité des effets du divorce et la fonction de substitut du divorce que remplit la nullité dans les ordres juridiques formellement fidèles à l'indissolubilité du mariage (que l'on pense par exemple à l'élargissement des causes de nullité en droit canonique contemporain) interdisent d'exclure d'une résolution relative aux effets de la dissolution du mariage l'immense variété des cas de nullité.

81. Sans même qu'on ose évoquer les droits confessionnels de l'Inde ou des pays islamiques, le droit des relations familiales résiste aux efforts d'unification. L'unification du droit privé matériel est hors d'atteinte parce que les institutions familiales plongent leurs racines dans le passé collectif de chaque peuple (vérité moins assurée aujourd'hui pour ce qui concerne les pays industrialisés et sécularisés). Quant à l'unification des règles de conflit de lois, elle se heurte surtout à des obstacles de nature technique ou conceptuelle. L'affirmation faite par Burckhardt il y a quelque soixante ans n'a pas été démentie par les progrès du droit comparé : différant dans toutes leurs parties, les lois civiles de deux pays ne sauraient se voir assigner des limites communes puisque celles-ci doivent être tracées entre les conceptualisations respectives de l'un et l'autre système. Une codification totale et circonstanciée de règles de conflit communes à plusieurs Etats est hors d'atteinte, une codification partielle est nécessairement bancale.

§ 5. *La conceptualisation des situations de fait.*

82. Le mandat confié à la 16e Commission est manifestement inspiré par la méthode classique de Savigny. Pour déterminer la loi applicable aux effets du mariage après sa dissolution il faut localiser chacun des effets et en déduire la loi qui y est applicable. Le concept de rapport de droit (*Rechtsverhältnis*) ou rapport juridique a besoin d'être précisé. Quelle est la consistance d'un tel rapport en dehors de l'ordre juridique auquel il appartient ? Or, la tâche du droit international privé est précisément de désigner cet ordre juridique. La tentative de Rabel, reprise par notre confrère Ago, qui ont soumis à l'appréhension de la règle de conflit de lois un pur rapport de vie (*Lebensverhältnis, fatti di vita umana*) est une excellente manière

de poser la question, mais on peut douter qu'elle y apporte une réponse décisive.

83. Les notions de « rapport de vie » ou de « situation de vie » reposent sur une distinction radicale entre le fait et le droit. Elles impliquent que le juriste s'empare de faits bruts, qu'il verse dans un moule juridique duquel les faits sortent transfigurés par le droit ou, plus simplement, en ayant reçu leur figure juridique. La difficulté est que les faits bruts n'existent pas ou, ce qui revient au même, qu'ils sont comme tels inconnaissables. Le droit est un langage, et le praticien n'appréhende aucun fait qui n'ait déjà été manié par le droit, qui n'ait été exprimé à l'aide de concepts juridiques ou de notions de la vie courante en liaison avec le droit. Pareille difficulté a clairement été mise en lumière dans les pages qui précèdent : comment parler de la situation d'une femme qui, après son divorce, s'efforce d'obtenir des aliments de son ex-mari sans utiliser un vocabulaire juridique ?

84. Pareil vocabulaire, à quel ordre juridique est-il emprunté ? On connaît la réponse positiviste à cette question. Pour Kahn comme pour Bartin, tout praticien raisonne nécessairement dans l'ordre juridique d'un Etat déterminé, et c'est pourquoi l'opération que le second appelle « qualification » consiste à appréhender toute situation particulière à l'aide des concepts du droit matériel interne de la *lex fori*. S'ils ont raison, il est impossible d'élaborer, comme l'Institut n'a cessé de le faire, des résolutions qui désignent les hypothèses des règles de conflit de lois à l'aide de concepts de droit privé qui ne se rattachent à aucun ordre juridique étatique particulier. Bien plus, même les concepts juridiques utilisés dans les règles de conflit des conventions internationales ne sauraient être rattachés à cet ordre juridique imaginaire qui se laisserait dégager de la comparaison des systèmes de droit civil interne des Etats ayant conclu une telle convention.

85. Au demeurant, le problème est plus vaste et il concerne aussi des traités internationaux qui ne concernent qu'indirectement le droit international privé. De nombreuses dispositions de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et du Pacte international relatif aux droits

civils et politiques contiennent des concepts de droit privé, tels que « mariage », « vie privée et familiale », « filiation », « nom », dont il faut bien supposer qu'ils ont une signification commune aux ordres juridiques respectifs des Etats contractants. Dans le premier cas, il appartient sans doute à la Cour européenne des droits de l'homme de dégager le noyau de signification commune à des concepts que le traité lui-même n'aurait pas pu définir, mais il y a matière à une ample réflexion sur la nature des concepts de droit privé remplissant ainsi une fonction auxiliaire dans un instrument de droit international public.

Les juridictions internationales doivent satisfaire à une tâche analogue quand les situations constitutives d'une obligation internationale sont décrites à l'aide de concepts du droit privé pour lesquels il n'existe pas — et ne saurait pas exister — une définition autonome appartenant comme telle à l'ordre juridique international.

86. A la question posée en ces termes il n'y a aucune réponse satisfaisante. La plus adéquate paraît être la suivante. De même qu'aucun ordre juridique interne n'a réussi à construire un lexique rigoureux analogue à celui que peut procurer le langage mathématique, les définitions juridiques étant nécessairement réductibles aux concepts du langage usuel, c'est sans doute par l'intermédiaire de ce vocabulaire usuel que les ordres juridiques communiquent entre eux. Si humiliant que cela puisse paraître pour la science du droit, les termes de droit privé utilisés dans les conventions internationales n'atteignent pas à la précision — au demeurant relative — des concepts de droit privé interne avec lesquels ils paraissent s'identifier. Autrement dit, c'est grâce à la médiation du sens usuel de concepts tels que « mariage », « divorce » ou « filiation » qu'il est possible à plusieurs Etats de conclure un traité dans lequel ces mots sont utilisés, ou qu'il est permis à l'Institut de les insérer dans une de ses résolutions. Pareil langage est totalement privé de rigueur, ce qui condamne, par conséquent, aux interprétations divergentes très bien perçues par Kahn et par Bartin, et plus ample est la volonté d'unification plus floue la signification des concepts mis en œuvre.

87. Si l'on refuse toute scission rigoureuse entre le fait et le droit, si une situation de vie ne reçoit sa consistance juridique que d'un système déterminé de droit positif, il faut mettre en doute l'identité

de faits de vie respectivement appréhendés par deux règles de droit et notamment par des règles appartenant l'une et l'autre à des ordres juridiques différents. Quand un Français épouse une Marocaine devant l'officier de l'état civil de Bordeaux, l'union est valable selon le droit international privé français et elle est privée de toute valeur au regard du droit international privé marocain, la Mudawwana prohibant l'union d'une femme musulmane avec un homme qui n'appartient pas à l'Islam (Code du statut personnel marocain, art. 29, 4°). La séquence des faits doit, dans son historicité, être appréhendée suivant le principe d'identité. Pour le psychologue ou le sociologue, pour l'historien des faits sociaux, pareille séquence est unique et irréversible. Il n'en va pas de même pour le juriste. Saisissant ces faits par la double médiation de sa règle de conflit de lois et de la disposition de droit matériel interne qui y est déclarée applicable, chacun des deux ordres juridiques construit sur les mêmes faits deux situations juridiques rigoureusement incompatibles, auxquelles le principe d'identité ne saurait s'appliquer. Dans l'ordre juridique français l'échange des consentements procure tous les effets d'un mariage valable. Selon l'ordre juridique marocain, outre le discrédit religieux qui s'attache à la musulmane infidèle, cette femme encourt les peines qui frappent la fornication. Le concept de « mariage » ne saurait d'aucune manière qualifier une telle situation selon le droit marocain.

Pareil exemple illustre la précarité des droits subjectifs acquis selon l'ordre juridique d'un Etat déterminé et la nécessité de conquérir la reconnaissance de droits similaires mais non identiques dans les autres ordres juridiques, notre confrère Wengler ayant démontré de manière très convaincante ce qu'on pourrait appeler le nominalisme du droit international privé.

Quatrième Partie

Objet d'une résolution de l'Institut sur les effets du mariage dissous en droit international privé

§ 1er. *Objectifs proposés à l'Institut.*

88. Sur le thème assigné à la 16e Commission, l'état de la question, tel du moins qu'il se dégage de la deuxième partie de ce rapport,

ne permet pas de conclure à l'existence d'une solution de conflit de lois applicable à l'ensemble des effets du mariage dissous. Parmi les codifications et projets de codification récents, seul le projet suisse a dépassé l'affirmation d'un rattachement global — qui doit être jugé chimérique — de la totalité des effets du mariage dissous à une loi unique, qui, dans l'hypothèse la plus fréquente, celle du divorce, serait « le statut du divorce ».

La plupart des effets du mariage dissous (ou « effets accessoires » du divorce ») se rattachent assez naturellement à l'institution dont chacun de ces effets relève de par sa nature, l'acte de dissolution du mariage se bornant à affecter d'une modalité propre le déroulement de ces effets. La principale difficulté, commune aux diverses catégories d'effets, consiste à harmoniser avec le statut propre à chacune de celles-ci, les données spécifiques de la loi selon laquelle le mariage a été dissous. Pareille difficulté est, faut-il le dire, liée à la dispersion des éléments géographiques du rattachement : l'institution dont dépend l'effet litigieux est soumise à la loi d'un Etat autre que l'Etat dont la loi a été appliquée à la dissolution du mariage.

89. Comme l'Institut l'a rappelé dans le préambule de la résolution adoptée à Rome le 14 septembre 1973 sur « les effets de l'adoption en droit international privé », il importe de tenir compte des travaux de la Conférence de La Haye de droit international privé, trois conventions élaborées par celle-ci ayant réglé deux des principaux problèmes suscités par les effets du mariage dissous, tandis qu'une quatrième convention est relative à la reconnaisance des divorces.

D'une part, l'interprétation donnée à la Convention du 5 octobre 1961 concernant la compétence des autorités et la loi applicable en matière de protection des mineurs (voy. *supra*, n° 38) inclut dans le domaine matériel de cette convention les mesures prises ou à prendre pour la protection de mineurs dont les auteurs sont divorcés ou dont le mariage a été annulé.

D'autre part, les deux Conventions du 2 octobre 1973, l'une concernant la reconnaissance et l'exécution des décisions alimentaires, l'autre sur la loi applicable aux obligations alimentaires, incluent en principe dans leur objet matériel les aliments réclamés après la dissolution du mariage, chacun des deux instruments contenant une disposition particulière à cet effet.

90. La manière la plus efficace de « tenir compte » des travaux de la Conférence de La Haye consiste, comme l'a déjà fait l'Institut, notamment dans sa résolution précitée sur les effets de l'adoption, à s'efforcer de combler les lacunes laissées par les conventions déjà élaborées, voire de réparer les incohérences nées du règlement de situations connexes dans des instruments séparés. Il convient aussi de s'écarter le moins possible du domaine déjà couvert par les Conventions de La Haye. C'est pourquoi, en dépit des réticences exprimées par certains membres de la 16e Commission, votre rapporteur suggère de soumettre au même régime que le divorce les hypothèses « de nullité ou d'annulation du mariage ». Pareille terminologie doit recevoir le sens qui y a été donné à la Conférence de La Haye.

91. L'apport d'une résolution de l'Institut devrait dès lors consister à :

1° affirmer le lien qui unit les effets du mariage dissous à l'institution à laquelle se rattache chaque catégorie d'effets.

Pareille méthode doit être jugée adéquate en ce qui concerne les restrictions apportées au remariage de chacun des ex-époux, les relations entre les père et mère dont l'union a été dissoute et leurs enfants, le droit au nom, la liquidation du régime matrimonial et le droit de succession, l'allocation de dommages-intérêts à l'époux ayant obtenu le divorce aux torts de l'autre ;

2° rappeler, moyennant des retouches et des compléments, la solution des deux Conventions de La Haye du 2 octobre 1973 en ce qui concerne les obligations alimentaires, cette matière paraissant la seule qui se rattache indubitablement au statut du divorce ;

3° indiquer le lien à établir entre l'obligation de reconnaître le divorce, telle qu'elle découle de la Convention de La Haye du 1er juin 1970, et celle de donner exécution aux condamnations accessoires portées par l'acte de dissolution du mariage ou à la suite de cet acte ;

4° formuler des propositions relatives au régime des pensions de survie et des droits de compensation de pension en cas de dissolution du mariage.

§ 2. *Les solutions de droit positif qui se laissent dégager des quatre Conventions.*

A. — *Les obligations alimentaires entre les ex-époux.*

1° *La reconnaissance des décisions prononcées dans un autre Etat contractant.*

92. Outre les autres conditions, usuelles dans les instruments internationaux relatifs à la reconnaissance et à l'exécution de décisions judiciaires, la Convention du 2 octobre 1973 concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires, subordonne la reconnaissance ou l'exécution à l'application alternative de deux séries de règles de compétence indirecte, inscrites respectivement dans l'article 7 et dans l'article 8. C'est évidemment l'article 8 qui intéresse le plus directement les travaux de la 16e Commission.

Cette disposition est rédigée comme suit :

> « Article 8.
> Sans préjudice des dispositions de l'article 7, les autorités d'un Etat contractant qui ont statué sur la réclamation en aliments sont considérées comme compétentes au sens de la Convention si ces aliments sont dus en raison d'un divorce, d'une séparation de corps, d'une annulation ou d'une nullité de mariage intervenu devant une autorité de cet Etat reconnue comme compétente en cette matière, selon le droit de l'Etat requis. »

93. La reconnaissance due en vertu de l'article 8 ne se limite pas à la partie du dispositif relative aux aliments de la décision même qui a prononcé le divorce, l'annulation ou la nullité du mariage, mais elle s'étend aux décisions par lesquelles, le cas échéant, d'autres autorités du même Etat « ont statué sur la réclamation en aliments ».

> Voy. en ce sens le vote unanime de la 3e Commission, *Actes et Documents de la 12e session*, t. IV, p. 235.

L'une des conditions d'application de l'article 8 est que la compétence des autorités de l'Etat d'origine en matière de divorce, d'annulation ou de nullité du mariage soit reconnue dans l'Etat requis selon le droit de cet Etat. Si la Convention du 1er juin 1970 est en vigueur entre les Etats contractants, l'article 8 de la Convention du

2 octobre 1973 a pour effet de soustraire à l'inapplicabilité de la première convention aux condamnations accessoires exclues de son domaine matériel (art. 1er, al. 2) la partie du dispositif relative aux aliments (voy. rapport Verwilghen, n° 53).

Le chef de compétence indirecte prévu par l'article 8 s'ajoute à ceux que vise l'article 7. En d'autres termes, la condamnation à des « aliments dus en raison d'un divorce, ... d'une annulation ou d'une nullité de mariage » doit aussi être reconnue ou mise à exécution si l'autorité de l'Etat d'origine était compétente en vertu de l'article 7. Dans ce cas, il n'est évidemment plus nécessaire de vérifier si la compétence de cette autorité en matière de divorce ou d'annulation de mariage est reconnue dans l'Etat requis.

94. La Convention du 2 octobre 1973 concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires ne règle pas, même sous la forme d'une règle de compétence indirecte, la compétence requise pour modifier une décision en matière d'obligations alimentaires qui doit être reconnue conformément à cette Convention. L'hypothèse de la modification n'est explicitement abordée que dans l'article 2, alinéa 2, mais c'est pour y prévoir l'application de la Convention « aux décisions ou transactions modifiant une décision ou une transaction antérieure, même au cas où celle-ci proviendrait d'un Etat non contractant ». Pour que cette décision doive être reconnue, il faut qu'elle satisfasse aux conditions posées par les articles 7 ou 8. Toutefois, au cas où deux décisions successives dont l'une a modifié l'autre doivent être toutes deux reconnues dans l'Etat requis ou si l'une de ces décisions a été prononcée dans l'Etat requis, les autorités de ce dernier Etat ont un pouvoir discrétionnaire pour donner exécution à l'une ou à l'autre de ces deux décisions (art. 5, 4), ce qui leur permet, le cas échéant, de préférer la décision la plus ancienne, bien qu'elle ait été modifiée par la plus récente.

Durant les travaux, M. von Overbeck a affirmé que, « étant donné la révisibilité des décisions en matière d'aliments, c'est en général la dernière décision qui devra l'emporter » (*Actes et Documents de la 12e session*, t. IV, p. 232). Il est regrettable que cette proposition, qui ne semble pas avoir été plus longuement discutée durant les travaux, n'ait pas été introduite dans le texte de la Convention ou, à tout le moins, dans le rapport. Voy. aussi l'observation de M. Lette, *ibid.*, p. 193.

On notera au surplus que la faculté pour l'Etat requis de refuser de reconnaître la décision rendue dans un autre Etat contractant mais incompatible avec une décision rendue dans le premier Etat n'est pas subordonnée à la condition que les autorités de cet Etat soient compétentes selon les règles de compétence indirecte de la Convention (art. 5, 4). Pareille exigence n'est pas davantage prévue en cas de litispendance (art. 5, 3).

2° *La loi applicable aux obligations alimentaires entre les ex-époux.*

95. Bien que, comme la Convention du même jour concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires, la Convention du 2 octobre 1973 sur la loi applicable aux obligations alimentaires fasse un sort particulier à celles de ces obligations qui subsistent après le divorce ou l'annulation du mariage, il n'existe pas un complet parallélisme entre les dispositions du premier et celles du second instrument.

Dans la Convention sur la loi applicable, les obligations alimentaires entre les ex-époux sont partiellement soustraites aux règles de conflit de lois du droit commun. Elles font l'objet d'un régime dérogatoire, consistant à les rattacher à « la loi appliquée au divorce » ou, le cas échéant, à la nullité ou à l'annulation, à la condition, toutefois, que la décision ayant dissous le mariage ait été prononcée ou soit reconnue dans l'Etat où se pose la question de loi applicable. De plus, l'article 14, 3, permet à chaque Etat contractant de se réserver le droit de ne pas appliquer la Convention aux obligations alimentaires entre les ex-époux si la dissolution du mariage a été obtenue par défaut dans un pays où la partie défaillante n'avait pas sa résidence habituelle (voy. *supra*, n° 50).

Si l'acte de dissolution du mariage n'est pas reconnu dans un Etat contractant, ou que cet Etat ait fait la réserve permise par l'article 14, 3, la loi applicable aux aliments entre les ex-époux est déterminée conformément aux articles 4 à 6 de la Convention. Sont en principe applicables, la loi interne de la résidence habituelle du créancier d'aliments (art. 4), subsidiairement, la loi nationale commune (art. 5), plus subsidiairement encore, la loi de l'autorité saisie (art. 6).

96. Le dualisme des solutions appliquées aux obligations alimentaires entre les ex-époux est plus apparent que réel. En effet, dans l'Etat où n'est pas reconnu l'acte de dissolution prononcé à l'étranger,

les époux ne sont pas réputés avoir perdu cette qualité et il est dès lors logique que leurs obligations alimentaires ne soient pas soumises à la règle de conflit de lois propre à l'hypothèse du mariage dissous. Une difficulté risque toutefois de se présenter si la dissolution du mariage est reconnue dans le pays dont la loi est déclarée applicable en vertu des articles 4 ou 5. Il serait séduisant, selon la théorie de la question préalable, de décider selon les règles de droit international privé du pays de la résidence habituelle du créancier d'aliments (art. 4) si le mariage de celui-ci subsiste ou non. Pareille solution paraît cependant exclue en raison de la signification donnée par la Conférence de La Haye à l'expression « loi interne », qui condamne toute mise en œuvre des règles de droit international privé du pays dont la loi est déclarée applicable.

97. La solution inscrite dans l'article 8 de la Convention sur la loi applicable est justifiée par le lien entre les causes du divorce et la nature et l'étendue des obligations alimentaires qui survivent à la dissolution du mariage. Cette motivation paraît moins convaincante si l'on se rappelle que la loi appliquée au divorce s'identifie de plus en plus souvent aujourd'hui à la *lex fori* et qu'on fasse observer qu'il est contestable de déduire d'un fait ponctuel, l'acte de dissolution du mariage, la compétence d'une loi qui suivra les époux jusqu'à leur dernier jour. En outre, il y aurait avantage à ne pas régler le conflit de lois abstraction faite du contenu des lois en présence et à prendre en meilleure considération les conflits de juridictions.

Pour assurer la cohérence du « statut du divorce » (liaison entre le choix des causes et la détermination des effets), il faut — ce que la Convention du 1er juin 1970 s'est abstenue de faire — conférer la plus large efficacité internationale aux mesures prises par le juge ayant prononcé le divorce ou par les autorités du même Etat ayant ensuite procédé au règlement des relations patrimoniales entre les ex-époux. Les règlements qualifiés de « transactionnels » (« settlements »), le versement d'un capital pour solde de tout compte doivent, quand il est possible, être encouragés par l'efficacité internationale qui devrait être reconnue aux mesures de cette nature régulièrement prises par les autorités du pays dans lequel le mariage a été dissous. On ne saurait non plus, comme l'ont fait les deux Conventions de La Haye du 2 octobre 1973, dissocier les accords

(« settlements ») convenus en matière alimentaire d'un règlement plus global des intérêts patrimoniaux des ex-époux.

La situation la plus délicate est celle où la garantie offerte par le « statut du divorce » à l'un des deux ex-époux (l'époux au profit duquel le divorce est prononcé) est le maintien du droit à une véritable pension alimentaire, dont le montant peut être augmenté si les ressources du débiteur se sont accrues et dont l'exécution peut être poursuivie contre la succession de ce dernier après son décès. L'étendue d'une telle obligation doit-elle demeurer soumise à la loi appliquée au divorce, quel que soit, par la suite, le pays dans lequel les deux parties ont leur résidence habituelle ? Il est permis d'en douter.

98. Une autre question plus directement liée au contenu du droit matériel applicable est celle de l'incidence de la dissolution du mariage sur le droit à une pension de survie. Pareille dissolution, et notamment le divorce, ne met pas nécessairement fin au droit de l'ex-conjoint survivant à une pension de survie. Ainsi qu'on l'a déjà constaté, le principe et l'étendue de ce droit dépendent de la loi applicable au régime de pension. Le régime légal ou contractuel de la pension de survie considérée se réfère assez naturellement aux concepts du droit familial de l'Etat dans lequel ce régime est organisé. Si le mariage a été dissous dans un autre ordre juridique, la difficulté a pour objet la détermination du concept préjudiciel, c'est-à-dire la vérification de l'équivalence entre la condition à laquelle est subordonné le droit au maintien d'une pension de survie et l'existence de cette condition selon le dispositif de la décision ayant dissous le mariage.

99. La difficulté suscitée par le *Versorgungsausgleich* du droit interne allemand est de nature différente. Le règlement auquel il est procédé en droit interne allemand selon les §§ 1587 et suivants du BGB et qui apparaît sous des formes différentes en d'autres législations (voy. notamment : Jayme, NJW, 1978, 2420) s'efforce de mobiliser au profit d'un ex-conjoint une fraction du droit de pension de l'autre, notamment quand le premier ne peut faire valoir un droit propre équivalent.

L'embarras des projets de codification allemands face à ce règlement provient de ce que celui-ci est malaisé à mettre en œuvre en

dehors du pays dans lequel est organisé le régime de la pension ou des pensions à compenser. L'application du « statut du divorce » n'est convaincante que si, comme il est vraisemblable, l'action est poursuivie devant les autorités du pays où les époux ont leur résidence habituelle et où se localisent leurs droits de pension. Dans l'hypothèse — improbable — où les deux époux en instance de divorce ont droit à une pension dans un Etat autre que l'Etat dont les autorités sont saisies du divorce, rien n'empêche l'époux ou l'ex-époux qui y a intérêt d'inviter les autorités du premier Etat à tirer du divorce étranger les conséquences qui en découlent pour la compensation des droits de pension.

B. — *Les mesures relatives aux enfants issus d'un mariage dissous.*

1° *Première hypothèse : les mesures prises par l'autorité ayant statué sur une demande en annulation ou en dissolution du lien conjugal.*

100. Si l'on suppose que l'autorité ayant annulé le mariage ou admis le divorce se soit en même temps prononcée — comme elle y est parfois tenue selon les dispositions de son propre droit interne — sur l'attribution de la garde des enfants mineurs et sur le montant de la contribution des ex-époux ou de l'un d'eux à l'entretien de leurs enfants, la reconnaissance et l'exécution dans un Etat contractant d'une telle décision rendue dans un autre Etat contractant est, pour chacune des trois branches de son dispositif, réglée par l'une des trois conventions suivantes :

— La Convention du 1er juin 1970 détermine les conditions de la reconnaissance du divorce ou de l'annulation du mariage.

— La décision relative à la garde de l'enfant entre dans les prévisions, d'ailleurs plus larges, de la Convention du 5 octobre 1961.

— La mise à exécution de la condamnation à des aliments dépend de la Convention du 2 octobre 1973 concernant la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires.

Il est supposé que, conformément à l'article 29 de cette dernière convention, celle-ci a remplacé la Convention du 15 avril 1958 concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants.

101. A peine est-il besoin d'insister sur les critères très différents mis en œuvre dans chacun de ces trois instruments.

Comp. les articles 2 à 4 de la Convention du 1er juin 1970, les articles 1er, 3 à 5, de la Convention du 5 octobre 1961, l'article 7 de la Convention du 2 octobre 1973.

Il faut noter en effet que l'article 8 de la Convention concernant la reconnaissance et l'exécution est inapplicable aux obligations alimentaires à l'égard des enfants, ces aliments n'étant pas « dus en raison d'un divorce... ».

Il peut arriver qu'une décision qui s'est prononcée sur la garde de l'enfant mineur et sur les aliments ne satisfasse pas aux conditions cumulées de la Convention du 5 octobre 1961 et de la Convention du 2 octobre 1973. Tel est notamment le cas si ces mesures ont été décidées par les autorités du pays dont le mineur est ressortissant (Convention du 5 octobre 1961, art. 4) sans que soient réunies les conditions de reconnaissance de l'article 7 de la Convention du 2 octobre 1973, ou, au contraire, par les autorités d'un pays où le mineur n'a pas sa résidence habituelle et dont il n'a pas la nationalité, mais qui étaient compétentes en vertu de la résidence habituelle du débiteur d'aliments (Convention du 2 octobre 1973, art. 7, 1). Dans le premier cas, seule la mesure de garde doit être reconnue, dans le second seule la décision relative aux aliments.

2° *Seconde hypothèse: les mesures prises après le divorce ou après l'annulation du mariage.*

102. Quand elles sont prises après la dissolution du mariage et indépendamment de l'action ayant eu un tel effet, les décisions, le plus souvent conjointes, relatives à la garde d'un enfant mineur et aux aliments réclamés pour son entretien, sont reconnues aux conditions respectives de la Convention du 5 octobre 1961 et de la Convention du 2 octobre 1973. Les observations formulées sur la première hypothèse demeurent pertinentes.

3° *Troisième hypothèse: la révision dans un Etat contractant de mesures prises dans un autre Etat contractant et reconnues dans le premier.*

103. Seul exprimé dans l'intitulé, l'objet principal de la Convention du 5 octobre 1961 est de déterminer la compétence des autorités et

la loi applicable en matière de protection des mineurs (art. 1er à 6, 8 à 11), les mesures prises par les autorités compétentes en vertu des articles 1er à 6 devant être reconnues dans les autres Etats contractants (art. 7). La Convention du 2 octobre 1973 concernant la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires a un objet différent, très correctement exprimé dans son intitulé, et qui exclut toute règle de compétence directe.

Au caractère souvent conjoint du litige sur la garde et de la réclamation en aliments s'ajoute un élément commun aux deux questions, à savoir la faculté de revoir les décisions prises, notamment quand l'intérêt de l'enfant le requiert. Pour ce qui concerne la protection des mineurs et notamment les mesures de garde après divorce, la Convention du 5 octobre 1961 est un instrument complet, couvrant les trois séries de problèmes — compétence juridictionnelle, loi applicable, reconnaissance et exécution — tandis que seules la deuxième et la troisième questions ont été réglées à l'égard des obligations alimentaires, dans deux conventions du même jour, l'une sur l'exécution, l'autre sur la loi applicable.

104. Deux éléments caractérisent la Convention du 5 octobre 1961 : d'une part la quasi-totale absorption du conflit de lois par le conflit de juridictions, les autorités compétentes prenant « les mesures prévues par leur loi interne » (art. 2, voy. aussi l'article 4, alinéa 1er, l'article 5, alinéa 3) ; d'autre part, la volonté de coordonner l'action des autorités respectives d'Etats contractants différents, soit « au cas de déplacement de la résidence habituelle d'un mineur d'un Etat contractant dans un autre » (art. 5, al. 1er) soit au cas d'action concertée des autorités de l'Etat national et des autorités du pays de la résidence habituelle (art. 4 et 6) soit en cas d'urgence (art. 9). Dans l'hypothèse la plus caractéristique, celle d'un changement de résidence du mineur, l'article 5, alinéa 1er, exprime très clairement l'intention d'attribuer aux autorités de la résidence actuelle compétence pour « lever » ou « remplacer » les mesures prises dans un autre Etat contractant et reconnues dans le premier Etat conformément à l'article 7.

Or, ainsi qu'on l'a vu ci-dessus, la Convention du 2 octobre 1973 concernant la reconnaissance et l'exécution ne règle pas, même de manière indirecte, la compétence requise pour modifier une décision antérieure ayant accordé des aliments.

4° *La loi applicable.*

105. Quand après un divorce ou l'annulation d'un mariage il y a lieu de se prononcer sur les aliments dus aux enfants et par un ex-époux à l'autre, la loi applicable à ces deux questions n'est pas déterminée selon le même critère. L'article 8 de la Convention du 2 octobre 1973 sur la loi applicable régit exclusivement « les obligations alimentaires entre époux divorcés » (al. 1er) ainsi que celles qui survivent à la nullité ou à l'annulation du mariage (al. 2). Les aliments dus aux enfants sont déterminés par la loi désignée selon les règles de conflit des articles 4 à 6 (voy. *supra*, n° 95). Cette loi ne concorde pas nécessairement avec la *lex fori* en principe applicable aux litiges relatifs à la garde du même enfant.

Louvain-la-Neuve, le 20 août 1984

Projet de résolutions

Les effets du mariage dissous en droit international privé.

L'Institut de Droit international,

Considérant qu'après le prononcé du divorce, la constatation de la nullité ou l'annulation du mariage, l'union dissoute continue à produire certains effets, et qu'il y a lieu en conséquence de déterminer la loi applicable à de tels effets ;

Considérant que les problèmes de conflit de lois suscités par les effets du mariage dissous ne sauraient être réglés abstraction faite de la détermination de la juridiction compétente pour en connaître et de l'efficacité internationale des décisions déjà rendues et notamment de celle qui a dissous le mariage ;

Notant que les effets du mariage dissous se rattachent à plusieurs institutions de droit privé et que, pour être utiles, les résolutions relatives à cet objet particulier doivent s'insérer dans les ordres juridiques des divers Etats dans lesquels ces institutions risquent d'être soumises à des règles divergentes, sur le plan tant du droit international privé que du droit matériel ;

Tenant compte des résultats atteints par la Conférence de La Haye de droit international privé dans certains domaines couverts par les présentes résolutions, en ce qui concerne notamment la protection des mineurs, la reconnaissance des divorces, la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires et la loi applicable aux mêmes obligations ;

Constatant toutefois que la dispersion de certains effets du mariage dissous dans quatre instruments différents a pu entraîner des incohérences et des lacunes et que, tout en incorporant les principales

solutions des Conventions de La Haye, les présentes résolutions s'efforcent de les harmoniser et de les compléter ;

Notant la promulgation durant la dernière décennie de nombreuses codifications nationales de droit international privé et la publication récente d'importants projets de codification ;

Tenant compte de la vocation spécifique de l'Institut de Droit international dans le domaine du droit international privé et de la nécessité qui s'impose en cette matière de rendre plus aisée la réception par les institutions étatiques des règles et des directives contenues dans les résolutions de l'Institut ;

Adopte les résolutions suivantes :

I. — DÉFINITIONS.

1. Au sens des présentes résolutions, il faut entendre :

a) Par « dissolution du mariage » : la dissolution par le divorce ainsi que la déclaration de nullité et l'annulation du mariage.

b) Par « effets du mariage dissous » : hormis l'effet essentiel de l'acte de dissolution consistant à mettre fin pour l'avenir à la société conjugale, les effets que le mariage produit encore après cet acte, du vivant des ex-époux ou après le décès de l'un d'eux.

c) Par « ex-époux » : l'homme et la femme dont le mariage a été dissous par le divorce, déclaré nul ou annulé.

II. — RELATIONS ENTRE LES EX-ÉPOUX ET LEURS ENFANTS MINEURS.

2. Les droits et devoirs des ex-époux à l'égard de leurs enfants mineurs relèvent de la loi applicable aux relations entre parents et enfants, sans préjudice des mesures requises pour la protection des mineurs.

3. Les règles relatives à la reconnaissance et à l'exécution des décisions fixant la contribution des père et mère à l'entretien de leurs enfants mineurs et celles qui déterminent la reconnaissance et l'exécution des mesures de garde devraient être harmonisées.

Il est également souhaitable que la même loi soit déclarée applicable à ces deux questions.

III. — Reconnaissance et exécution des conventions et condamnations accessoires accompagnant l'acte de dissolution du mariage.

4. Les conditions auxquelles est reconnu l'acte par lequel une autorité étrangère a dissous un mariage s'étendent aux conventions et condamnations réglant pour l'avenir certains effets du mariage dissous. La présente disposition vise notamment les conventions et actes de liquidation de nature patrimoniale passés en justice ou devant une autorité publique de l'Etat dans lequel le mariage a été dissous, les mêmes conventions ou renonciations relatives aux obligations alimentaires ainsi que les décisions relatives à la compensation des droits de pension.

5. Les condamnations accessoires ne doivent pas être reconnues lorsque la décision de divorce, de nullité ou d'annulation de mariage a été rendue par défaut dans un Etat où la partie défaillante n'avait pas sa résidence habituelle.

Ne doivent pas non plus être reconnues les décisions de caractère répressif prohibant, limitant ou retardant le droit au remariage.

IV. — Régimes matrimoniaux, successions et pensions de survie.

6. Les droits patrimoniaux respectifs des ex-époux lors de la dissolution de leur mariage sont réglés conformément à la loi applicable à leur régime matrimonial.

7. La loi successorale est applicable aux droits qu'un ex-époux survivant peut faire valoir après le décès de son ex-conjoint et, notamment, sous réserve de l'application de l'article 13, au droit à une pension alimentaire à charge de la succession.

8. La loi de l'institution qui administre ou attribue une pension de survie aux ayants-droit des titulaires d'un droit de pension détermine le principe de l'étendue du maintien du droit à une pension de survie au profit d'un ex-époux.

9. La loi déclarée compétente en vertu des articles 6, 7 et 8 et, le cas échéant, les dispositions du contrat de mariage règlent l'incidence

sur le droit réclamé par un ex-époux des causes pour lesquelles le divorce a été prononcé.

V. — La compensation des droits de pension.

10. Il est souhaitable que les institutions publiques ou privées administrant une caisse de pensions prêtent leur concours à l'exécution des décisions par lesquelles les autorités étrangères ayant prononcé le divorce ont, conformément à la loi, compensé le droit à une pension d'un affilié de cette caisse.

VI. Le nom des ex-conjoints.

11. Les effets de la dissolution du mariage sur le nom que les époux ou que l'un d'eux ont acquis par l'effet du mariage sont déterminés, pour chacun, selon leur statut personnel.

VIII. — Les limitations et restrictions au droit de se remarier.

12. La loi applicable à l'aptitude au mariage de chacun des ex-époux détermine si ce droit est limité, restreint ou retardé après que le divorce a définitivement dissous le mariage. Les dispositions de cette nature ayant un caractère répressif ne doivent pas être respectées.

VIII. — Les obligations alimentaires.

13. Si en vertu de la loi appliquée à la dissolution du mariage ou de l'acte de dissolution du mariage et des conventions ou condamnations accessoires qui ont accompagné ou suivi cet acte, il a été mis fin à toute obligation alimentaire entre les ex-époux, pareille extinction des obligations alimentaires est reconnue dans les autres Etats.

L'obligation alimentaire n'est pas éteinte en vertu de la loi appliquée à la dissolution du mariage si celle-ci a eu lieu dans les circonstances décrites à l'article 5, alinéa 1er.

14. Quand l'obligation alimentaire entre les ex-époux n'est pas éteinte conformément à l'article 13, elle est déterminée selon la loi applicable aux obligations alimentaires.

15. Si deux décisions successives ayant déterminé l'étendue du droit aux aliments doivent être reconnues dans un Etat ou qu'une de ces décisions ait été prononcée dans cet Etat, il y a lieu de donner exécution à la plus récente de ces décisions.

Liste des principales sources conventionnelles et législatives

A. — *Traités internationaux*

12 juin 1902. — Convention pour régler les conflits de lois en matière de mariage.

12 juin 1902. — Convention pour régler les conflits de lois et de juridictions en matière de divorce et de séparation de corps.

5 octobre 1961. — Convention concernant la compétence des autorités et la loi applicable en matière de protection des mineurs.

1er juin 1970. — Convention sur la reconnaissance des divorces et des séparations de corps.

2 octobre 1973. — Convention concernant la reconnaissance et l'exécution de décisions relatives aux obligations alimentaires.

2 octobre 1973. — Convention sur la loi applicable aux obligations alimentaires.

B. — *Codifications et projets de codification récents.*

— Autriche : loi sur le droit international privé du 15 juin 1978 (BGBL 304/78), entrée en vigueur le 1er janvier 1979 (texte français, *Rev. crit. dip.*, 1979, 174) ;

— République fédérale d'Allemagne : Entwurf eines Gesetzes zur Neuregelung des Internationalen Privatrechts, projet de loi du Gouvernement fédéral, du 20 mai 1983 (Bundesrat, 222/83, 20 mai 1983), publié avec les propositions d'amendement du Max-Planck Institut, 47 *RabelsZ.* (1983), 691 ;

— Sénégal : dispositions finales du Code de la famille, porté par la loi n° 72-61 du 12 juin 1972 (*Rev. crit. dip.*, 1973, 382) ;

— Suisse : Message concernant une loi fédérale sur le droit international privé, du 10 novembre 1983, n° 82.072 ;

— Turquie : loi sur le droit international privé et la procédure internationale, n° 2675, du 20 mai 1982 (*Rev. crit. dip.*, 1983, 140) ;

— Yougoslavie : loi du 15 juillet 1982 sur les solutions des conflits de lois avec les dispositions des autres Etats dans le domaine de certains rapports (*Rev. crit. dip.*, 1983, 353).

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La loi applicable aux effets du mariage après sa dissolution

(*Seizième Commission*)

Rapport définitif

François Rigaux

1. Les travaux de la Seizième Commission ont débuté par un avant-projet de rapport préliminaire du 12 août 1980, auquel était annexé un questionnaire. Quatre membres de la Commission, les professeurs Graveson, Reese, Scerni et Ziccardi, ont accompagné leur réponse au questionnaire d'observations très pertinentes qui ont permis au rapporteur de remanier l'avant-projet et le questionnaire et d'adresser aux membres de la Commission un rapport préliminaire daté du 29 juillet 1981.

2. La Commission a tenu une première séance de travail à Dijon, le 27 août 1981, à laquelle ont participé, outre le rapporteur, MM. Evrigenis, Gamillscheg, Graveson, von Mehren, von Overbeck, Philip, Reese, Schwind et Ziccardi.

Un compte rendu de cette réunion auquel était annexé un nouveau questionnaire a été adressé aux membres de la Commission le 7 septembre 1981. Plusieurs membres de la Commission ont communiqué leurs observations à la suite de la réception de ce document, notamment MM. Evrigenis, Gamillscheg, Graveson, Jayme, von Mehren, Philip, Reese et Schwind.

3. La Commission tint une deuxième réunion le 27 août 1983, à Cambridge, à laquelle participaient MM. Evrigenis, Gamillscheg, Graveson, Jayme, P. Lalive, von Mehren, von Overbeck, Philip, Reese et Ziccardi.

Au terme de cette réunion, les membres de la Commission invitèrent le rapporteur à rédiger un rapport provisoire tenant compte

des diverses observations émises. La question si le sujet se prêtait à un projet de résolutions à soumettre aux délibérations de l'Institut fut expressément réservée.

4. Telles sont les origines du rapport provisoire du 20 août 1984 reproduit, avec l'avant-projet de résolutions qui y était annexé, dans le présent volume. On trouvera à la suite du présent rapport les observations communiquées par MM. Gamillscheg, Graveson, Jayme, von Mehren, Philip, Reese, Scerni et Ziccardi. En outre, M. Wengler, qui a pris connaissance du rapport provisoire en sa qualité de membre de la Commission des travaux, et M. Valticos, Secrétaire général de l'Institut, ont bien voulu communiquer au rapporteur des réflexions très précieuses. Le rapporteur est heureux d'exprimer sa reconnaissance à tous les membres de la Commission ainsi qu'à MM. Valticos et Wengler. Dans le présent rapport, parmi les observations qu'il a reçues, il a choisi de suivre celles qui lui ont paru suffisamment convergentes pour exprimer l'avis majoritaire de la Commission. En outre, il a pris en considération plusieurs observations particulières qui ont permis de compléter et d'améliorer certaines solutions proposées dans le rapport provisoire.

I. — Modifications apportées aux développements et aux conclusions du rapport provisoire.

A. — *L'étendue du mandat de la 16e Commission*

5. Sous réserve d'objections plus fondamentales qui seront examinées plus loin (n° 7), la majorité des membres de la 16e Commission appuie l'interprétation donnée par le rapporteur au mandat confié à cette Commission.

Un premier point, qu'il faut juger essentiel, a pour objet la modification de l'intitulé des travaux. Au libellé initial, visant seulement les problèmes de « loi applicable », il est proposé de substituer une expression qui couvre aussi les questions de juridiction, à savoir : *Les effets du mariage dissous en droit international privé.* Il appartiendra à l'Institut de se prononcer sur le changement proposé.

6. Bien que la question ait été longuement débattue au cours des deux séances de travail de la Commission, il paraît conforme au vœu de celle-ci d'inclure dans le concept de dissolution toutes les

causes mettant fin à la société conjugale du vivant des deux époux. Ainsi se trouve exclue l'hypothèse du décès, tandis que les déclarations de nullité (ou d'inexistence) et les annulations sont assimilées au divorce. La principale raison de procéder ainsi est que, ce faisant, l'Institut s'aligne sur une solution déjà mise en œuvre par plusieurs conventions de La Haye.

En outre, une décision canadienne communiquée au rapporteur par M. Wengler [1] fait apparaître qu'en droit interne le mariage dissous par le divorce a des effets propres, qui ne se vérifient pas en cas de décès. Tant le système de « reallocation of property » que le *Versorgungsausgleich* du droit allemand apportent un règlement spécifique aux intérêts patrimoniaux des époux divorcés.

Les observations contenues dans le numéro 8 du rapport provisoire doivent être complétées de ce qui précède. En outre, le point (d) des conclusions doit être modifié à la lumière des mêmes observations et il en a également été tenu compte dans le nouveau projet de résolutions. La même question a aussi fait l'objet de nouveaux développements qu'on trouvera ci-dessous (nos 11-16).

7. Les observations faites par notre confrère Allan Philip remettent en question de manière beaucoup plus radicale les travaux de la 16e Commission. De ce que tous les autres membres de la Commission et notamment le rapporteur s'accordent avec M. Philip pour nier qu'il existe un statut des effets du divorce (ou du mariage dissous) au sens d'une règle de conflit applicable à l'ensemble de ces effets, il ne s'ensuit pas que l'effort tenté par la 16e Commission est vain ni surtout qu'il est périlleux de grouper sous les résolutions en projet des questions que M. Philip estime disparates.

L'unité du thème des travaux de la 16e Commission est de nature essentiellement pratique : c'est au moment de la dissolution du mariage qu'il y a lieu de résoudre des questions de droit multiples, que les conseils des parties doivent affronter simultanément et qui seront parfois tranchées par le même juge. Tout thème particulier du droit international privé est nécessairement partiel : les lacunes ou les contradictions relevées dans les conventions de La Haye ayant réglé certains aspects seulement de la reconnaissance des jugements de divorce, des obligations alimentaires ou de la protection des mi-

[1] *Charpentier v. Smith-Doiron et al.*, 23 janvier 1981, 127 *D.L.R.* (3d), 529.

neurs font bien apparaître que toute réglementation partielle est nécessairement insatisfaisante.

Sans qu'il faille prêter aux résolutions de l'Institut une influence supérieure à celle qui leur appartient réellement — et le rapport provisoire est très circonstancié sur ce point — l'intérêt scientifique des travaux de l'Institut est de placer sous un éclairage propre un ensemble de questions auxquelles la dogmatique juridique traditionnelle réserve un traitement séparé. Il n'est pas plus artificiel d'étudier tous les effets du mariage dissous, en ce qui concerne notamment les obligations alimentaires, la liquidation du régime matrimonial, le partage de l'autorité parentale, que d'englober la problématique propre au divorce sous chacune des rubriques précédentes.

8. Une autre observation de M. Philip vise la terminologie du rapport, non, hormis la définition purement doctrinale de l'article I, 1, 6, celle du projet de résolutions.

La notion d'effets du mariage dissous est préférée à celle d'effets du divorce parce qu'elle permet de distinguer plus clairement de l'effet spécifique du divorce, à savoir l'aptitude au remariage, tous les autres effets qui se rattachent plutôt à l'union dissoute, même si, ce que nul ne conteste, l'acte de dissolution du mariage a introduit une mutation décisive dans les relations entre les ex-époux.

Une décision récente du Bundesgerichtshof sur laquelle M. Jayme a attiré l'attention du rapporteur indique un effet du mariage dissous auquel il n'avait pas été fait allusion dans le rapport provisoire. Il s'agit de l'obligation qui subsiste pour chacun des époux de fournir à l'autre des renseignements dont la communication, sans être préjudiciable à l'ex-époux dont l'information émane, peuvent être utiles à celui qui les reçoit [2]. En l'occurrence, le *Versorgungsausgleich* avait été refusé à l'une des parties par une décision coulée en force de chose jugée, mais l'ex-époux qui prétendait y avoir droit entendait se prévaloir des renseignements réclamés à l'autre pour étayer une action civile en responsabilité professionnelle dirigée contre son avocat.

[2] BGH 8 février 1984, *NJW* 1984, 2040.

B. — *L'élimination du problème du conflit de lois en faveur d'une application systématique de la* lex fori

9. Les réserves émises dans les observations de M. Reese ont pour fondement les solutions prévalant aux Etats-Unis et qui tendent à une application systématique de la *lex fori* aux principaux effets du mariage dissous. A la vérité, telles qu'elles ont été rédigées, la plupart des résolutions en projet ne font pas obstacle à l'application par le juge de son propre droit interne. Dans le rapport provisoire, le rapporteur a indiqué pourquoi il lui paraissait impossible non pas seulement de proposer une règle de conflit de lois rattachant l'ensemble des effets du mariage dissous à une loi désignée en vertu d'un critère de rattachement unique mais aussi de proposer des règles de rattachement particulières appelées à s'insérer dans les systèmes de droit international privé existants.

10. Il a été rappelé ci-dessus que plusieurs membres de la Commission et le rapporteur lui-même ont longtemps douté de la possibilité de soumettre à l'Institut un projet de résolutions ayant quelque utilité. Le rapporteur est très conscient de ce que le rapport se borne à présenter un état des questions — forcément incomplet et inadéquat — et à dessiner une problématique. L'idée maîtresse du rapport est que les règles de conflit de lois élaborées par l'Institut ont pour seule vocation de s'insérer dans des systèmes nationaux de droit international privé déjà élaborés et passablement complexes. C'est dans cette perspective que les résolutions en projet ne contiennent guère de règles de rattachement proprement dites, mais seulement des orientations méthodologiques destinées à éclairer la jurisprudence et la doctrine des différents Etats — et, le cas échéant, le législateur — sur les principales questions que suscitent les effets du mariage dissous. Par exemple, la résolution II, 3, a pour seul objet de détacher les droits et devoirs des époux à l'égard de leurs enfants mineurs d'un prétendu statut du divorce ; telle qu'elle est formulée, la règle doit être jugée compatible avec la solution du droit international privé américain soumettant ces relations au droit matériel de la *lex fori*.

C. — *Observations particulières relatives au règlement des intérêts patrimoniaux des époux divorcés*

11. Tant certaines réflexions communiquées par M. Wengler que les observations dc M. Jayme ont conduit le rapporteur à revoir les développements relatifs au règlement des intérêts patrimoniaux des époux divorcés. Au contenu des numéros 45 et 99 du rapport provisoire il y a lieu de substituer les développements suivants.

C'est à tort que le « partage des droits à la pension » a été présenté comme un simple appendice du droit à une pension de survie. Les deux institutions sont radicalement distinctes.

12. Pour ce qui concerne d'abord le droit à une pension de survie, les observations faites sous les deux premiers alinéas du numéro 45 du rapport provisoire demeurent inchangées. Il appartient à la loi (ou au contrat) accordant une pension de survie à l'un des époux après le décès de l'autre de déterminer si le survivant dont le mariage a entre-temps été dissous par un divorce conserve un droit à une pension de survie et quelle en est la quotité. Quand la loi ou le contrat régissant la pension de survie subordonne le maintien de celle-ci aux causes pour lesquelles le divorce a été prononcé, la seule difficulté — mais elle est notable — porte sur la détermination du concept préjudiciel : si le régime de pension relève d'un ordre juridique autre que celui de l'Etat dont la loi a été appliquée au divorce, il y a lieu de vérifier l'équivalence entre les causes pour lesquelles le divorce a été prononcé et les causes prises en considération pour l'octroi de la pension. L'exemple donné sous le numéro 45 du rapport provisoire est particulièrement significatif puisque le régime de pension subordonnant le maintien du droit à la pension de survie à la condition que le survivant n'avait pas été condamné au divorce en raison de ses fautes était celui d'une organisation internationale.

13. Toute différente apparaît la compensation des droits à la pension. L'exemple tiré du *Versorgungsausgleich* du droit allemand (rapport provisoire, n° 45, al. 3) nécessite de plus amples développements sur le plan tant du droit matériel comparé que du droit international privé.

Le paragraphe 1587 *b* du BGB (entré en vigueur dans cette rédaction le 1er juillet 1977) prévoit qu'en cas de divorce il est

établi une compensation entre les droits respectifs à une pension de survie et à une pension d'invalidité de chacun des ex-époux [3]. Le tribunal saisi de l'action en divorce doit d'office procéder à l'exécution de la loi sur ce point (ZPO, § 623, III).

Les règles établies par le droit interne allemand sont loin d'être isolées. La doctrine allemande a attiré l'attention sur les conséquences similaires que pourrait avoir la persistance d'une quotité des droits de pension de survie au profit du conjoint divorcé en vertu de la loi espagnole [4], encore que cette solution maintienne plutôt un droit propre à la pension de survie sans établir de compensation entre les droits de pension propres à chaque ex-époux.

Certains droits matériels internes, tel l'article 153 du Code civil néerlandais, permettent à l'époux défendeur à l'action en divorce de faire valoir le préjudice que lui causerait la perte de certains droits de survie, le juge pouvant alors subordonner l'admission du divorce à un règlement équitable des intérêts pécuniaires du défendeur. L'un des procédés utilisés à cette fin est le transfert à l'époux défendeur d'une partie des droits de pension propres au demandeur [5]. De même, le *Matrimonial Causes Act*, 1973, permet au juge anglais de subordonner l'admission du divorce à la condition que le demandeur ait pris au profit du défendeur les mesures financières jugées adéquates par le tribunal [6].

14. La jurisprudence allemande rattache le *Versorgungsausgleich* au statut des effets du divorce, c'est-à-dire à la loi applicable au divorce. Il en résulte que, si les tribunaux allemands admettent le divorce conformément à la loi allemande, il y a lieu de procéder à la compensation des droits de pension conformément au para-

[3] Voy. en outre : *Gesetz zur Regelung von Härten im Versorgungsausgleich*, 21 février 1983, *BGbl.* 1983, I, 105.

[4] Burghard Piltz, « Versorgungsausgleich nach spanischem Recht durch deutsche Gerichte ? », *IPRax* 1984, 193. Voy. : AG Gütersloh (FamG), 13 juillet 1983, *IPRax* 1984, 214.

[5] Voy. J.M.A. Waaijer, « Pensions and Divorce : a comparative study of the legal provisions in various European countries », *Neth. Int. L. Rev.*, 1984, 199.

[6] Voy. dans le même sens : *Family Law Reform Act*, 1978 (Ontario), qui permet au juge saisi d'une action en divorce ou en nullité de mariage de partager par parts égales « the family assets », même si ceux-ci sont propres à l'un des époux en vertu du régime légal de séparation de biens.

graphe 1587 *b* du BGB [7]. Quand le tribunal a appliqué une loi étrangère, il vérifie si celle-ci contient une disposition analogue, à défaut de quoi la compensation n'est pas opérée [8]. La difficulté de compenser deux régimes de pension dont l'un est localisé à l'étranger n'est pas douteuse et si elle devait être insurmontable, le tribunal devrait rechercher d'autres moyens d'atteindre un résultat financièrement équivalent [9].

Une décision de la Cour suprême du Québec a également exclu, conformément à la *lex fori*, applicable au divorce, une règle de partage prévue en cas de « marriage breakdown » par la loi de l'Etat (l'Ontario) où les époux s'étaient mariés et avaient fixé leur premier domicile conjugal[10]. Pour écarter l'application de la loi du régime matrimonial, la juridiction québécoise a notamment considéré que la règle de partage n'était prévue qu'en cas de divorce non après la dissolution du mariage par le décès.

15. Le projet de loi sur le droit international privé déposé par le Gouvernement fédéral allemand contient une règle de conflit particulière applicable au *Versorgungsausgleich* [11]. La question est en principe rattachée à la loi du divorce. Toutefois, tant dans sa version originelle que selon les propositions de remaniement du Max-Planck Institut, le projet contient une règle exclusivement unilatérale dont le commentaire est sans intérêt pour les travaux de l'Institut.

16. Revenant sur les conclusions contenues dans le numéro 99 du rapport provisoire, le rapporteur estime pouvoir se rallier à l'application de la loi du divorce au problème particulier de la compensation

[7] BGH 22 décembre 1982, *IPRax* 1984, 212 ; *NJW* 1983, 512 ; *FamRZ* 1983, 263.

[8] BGH 8 décembre 1982, *FamRZ* 1983, 255. Voy. aussi : OLG München, 14 juillet 1978, *NJW* 1978, 2450 ; OLG Stuttgart, 20 mai 1980, *FamRZ* 1980, 783 ; OLG Frankfurt/M, 6 mai 1983, *FamRZ*, 1983, 728 ; AG Gütersloh (FamG), 13 juillet 1983, *IPRax* 1984, 214.

[9] BGH 22 décembre 1982, cité note 7. Dans la doctrine voy. notamment : E. Jayme, « Versorgungsausgleich in Auslandsfällen », *NJW* 1978, 2417 ; L. Bergner, « Zum Versorgungsausgleich, wenn ein Ehegatte in der Volksrepublik Polen lebt», *IPRax* 1984, 189.

[10] *Charpentier v. Smith-Doiron et al.*, 23 janvier 1981, 127 *D.L.R.* (3d), 529.

[11] Voy. le texte du projet et des propositions d'amendement du Max-Planck Institut dans : 47 *RabelsZ* (1983), 701-702, et le commentaire, *ibid.*, 639-640.

des droits de pension. De plus en plus à l'avenir, cette loi coïncidera avec la *lex fori*.

Si l'on veut conjuger la prépondérance croissante de la problématique des conflits de juridictions dans la matière du divorce et de ses effets — et cela ne se vérifie pas seulement dans les pays de common law — avec la nécessité de favoriser un règlement aussi définitif que possible des relations patrimoniales entre époux divorcés, il paraît opportun de restreindre la possibilité ouverte à chacun des ex-époux de faire valoir contre l'autre, après la dissolution du mariage, de nouvelles prétentions d'ordre patrimonial. C'est pourquoi le projet de résolutions propose une distinction entre, d'une part, un règlement définitif des relations financières entre époux (par exemple par l'attribution d'une quotité des biens familiaux, le paiement d'un capital ou la cession, le transfert ou la compensation de droits de pension) et la survivance d'une obligation alimentaire de contenu indéterminé [12]. Dans le premier cas, la reconnaissance du divorce devrait s'accompagner de la reconnaissance du caractère obligatoire des mesures par lesquelles les autorités compétentes auraient assuré un partage équitable des biens et droits des époux. Si, en revanche, d'après la loi du divorce, il subsiste une obligation alimentaire dont l'étendue et les modalités sont susceptibles d'être revues par le juge, il ne paraît pas adéquat de soumettre indéfiniment à la même loi la détermination du droit à une pension alimentaire. Le régime de celle-ci relèverait de la loi désignée à cet effet par les règles de droit international privé du tribunal ultérieurement saisi (voy. déjà dans le même sens le rapport provisoire, n° 97).

[12] C'est par application du même principe que si un divorce reconnu exclut tout droit ultérieur à des aliments (notamment parce que l'époux condamné au divorce pour faute a perdu un tel droit), il ne paraît pas acceptable qu'un tel droit « revive » en vertu d'une autre loi. *Contra :* BGH 14 décembre 1983, *NJW* 1984, 2041. Après qu'une femme allemande (ayant aussi la nationalité belge de son mari) a été condamnée au divorce par un tribunal belge et perd, en vertu de l'article 301, § 1er du Code civil belge, tout droit à une pension, il ne paraît pas judicieux que cette femme obtienne ensuite une pension alimentaire en vertu du droit allemand, applicable au divorce en vertu de l'article 17 EGBGB, mais qui n'y a pas été effectivement appliqué et alors que la décision de divorce belge a été reconnue en Allemagne.

D. — *Autres observations particulières*

17. Un récent arrêt du Bundesgerichtshof cité dans les observations de M. Jayme est relatif à la révision du montant des aliments alloués à un enfant mineur par une décision étrangère reconnue dans l'Etat saisi de la demande de révision [13]. Selon l'arrêt, la reconnaissance de la décision étrangère ne fait pas obstacle à ce qu'elle soit modifiée pour l'avenir par les tribunaux du pays où elle est reconnue. M. Jayme critique, à juste titre, que soit emprunté au droit matériel appliqué par la décision étrangère reconnue le critère en vertu duquel une modification est permise (il s'agissait en l'occurrence d'une modification des circonstances de fait). On peut se demander en outre si cette solution n'est pas contraire à l'article 1er, alinéa 2, de la Convention de La Haye du 24 octobre 1956 sur la loi applicable aux obligations alimentaires envers les enfants, que le Bundesgerichtshof déclare appliquer. En cas de changement de la résidence habituelle du mineur, la loi de la nouvelle résidence détermine l'étendue du droit aux aliments sans pouvoir être limitée par le contenu de la loi antérieurement appliquée. Le droit aux aliments du mineur est, sur ce point, radicalement distinct des obligations alimentaires entre époux divorcés.

18. Il y a lieu de préciser à la fin du numéro 38 qu'un arrêt récent de la Cour de cassation de France a, pour écarter l'application de la Convention de La Haye concernant la compétence des autorités et la loi applicable en matière de protection des mineurs à une mesure de garde après divorce, fait état de la réserve formulée par le Gouvernement français conformément à l'article 25 de la même Convention [14].

II. — Modifications apportées au projet de résolutions.

19. Outre une correction mineure apportée à la résolution III, 4 (par l'insertion des mots « partage et de »), le rapporteur s'est rallié aux observations pertinentes de M. von Mehren relatives aux résolutions IV, 6 et 7. La résolution 6 est inutile parce que tautologique ;

[13] BGH 1er juin 1983, FamRZ 1983, 806.
[14] Cass. (1re ch. civ.), 3 juin 1982, *Rev. crit. dr. int. privé*, 1984, 126.

quant à la résolution 7, ayant pour objet un problème qui se pose après le décès d'un des époux, elle concerne une matière qui a été exclue par la Commission du domaine de ses travaux.

La suppression de ces deux articles justifie une restructuration du projet de résolutions. Il paraît plus judicieux de rejeter à la fin les points VI et VII qui ont des objets particuliers.

20. Ainsi qu'il a été précisé ci-dessus (nos 9-10), aucune des règles contenues dans le projet de résolutions ne fait obstacle à ce que la loi déclarée applicable coïncide avec la *lex fori*. Cette observation vaut principalement pour les résolutions II, 2, IV, 7, et V, 9.

21. M. *Graveson* a soulevé un risque de double emploi entre les résolutions III, 5, alinéa 2, et VII, 12, du premier projet. A la vérité, les deux règles ont des objets distincts. Dans l'article 5, alinéa 2, est visé le dispositif judiciaire particulier limitant le droit au remariage, tandis que l'article 12 se réfère à la règle de droit matériel ayant le même effet. L'observation de M. Graveson a toutefois rendu le rapporteur attentif à l'inconvénient de séparer ces deux dispositions. C'est pourquoi l'alinéa 2 de l'article 5 a été placé sous l'article 12.

Louvain-la-Neuve, le 17 janvier 1985.

Projet (définitif) de résolutions

Les effets du mariage dissous en droit international privé

L'Institut de Droit international,

Considérant qu'après le prononcé du divorce, la constatation de la nullité ou l'annulation du mariage, l'union dissoute continue à produire certains effets, et qu'il y a lieu en conséquence de déterminer la loi applicable à de tels effets ;

Considérant que les problèmes de conflit de lois suscités par les effets du mariage dissous ne sauraient être réglés abstraction faite de la détermination de la juridiction compétente pour en connaître et de l'efficacité internationale des décisions déjà rendues et notamment de celle qui a dissous le mariage ;

Notant que les effets du mariage dissous se rattachent à plusieurs institutions de droit privé et que, pour être pertinentes, les résolutions relatives à cet objet particulier doivent s'insérer dans les ordres juridiques des divers Etats dans lesquels ces institutions risquent d'être soumises à des règles divergentes, sur le plan tant du droit international privé que du droit matériel ;

Tenant compte des résultats atteints par la Conférence de La Haye de droit international privé dans certains domaines couverts par les présentes résolutions, en ce qui concerne notamment la protection des mineurs, la reconnaissance des divorces, la reconnaissance et l'exécution des décisions relatives aux obligations alimentaires et la loi applicable aux mêmes obligations ;

Constatant toutefois que la dispersion de certains effets du mariage dissous dans quatre instruments différents a pu entraîner

des incohérences et des lacunes et que, tout en incorporant les principales solutions des Conventions de La Haye, les présentes résolutions s'efforcent de les harmoniser et de les compléter ;

Notant la promulgation durant la dernière décennie de nombreuses codifications nationales de droit international privé et la publication récente d'importants projets de codification ;

Tenant compte de la vocation spécifique de l'Institut de Droit international dans le domaine du droit international privé et de la nécessité qui s'impose en cette matière de rendre plus aisée la réception par les institutions étatiques des règles et des directives contenues dans les résolutions de l'Institut ;

Adopte les résolutions suivantes :

I. — *Définitions.*

1. Au sens des présentes résolutions, il faut entendre :

a) Par « dissolution du mariage » : la dissolution par le divorce ainsi que la déclaration de nullité et l'annulation du mariage.

b) Par « effets du mariage dissous » : hormis l'effet essentiel de l'acte de dissolution consistant à mettre fin pour l'avenir à la société conjugale, les effets que le mariage produit encore après cet acte, du vivant des ex-époux ou après le décès de l'un d'eux.

c) Par « ex-époux » : l'homme et la femme dont le mariage a été dissous par le divorce, déclaré nul ou annulé.

II. — *Relations entre les ex-époux et leurs enfants mineurs.*

2. Les droits et devoirs des ex-époux à l'égard de leurs enfants mineurs relèvent de la loi applicable aux relations entre parents et enfants, sans préjudice des mesures requises pour la protection des mineurs.

3. Les règles relatives à la reconnaissance et à l'exécution des décisions fixant la contribution des père et mère à l'entretien de leurs enfants mineurs et celles qui déterminent la reconnaissance et l'exécution des mesures de garde devraient être harmonisées.

Il est également souhaitable que la même loi soit déclarée applicable à ces deux questions.

III. — *Reconnaissance et exécution des conventions et condamnations accessoires accompagnant l'acte de dissolution du mariage.*

4. Les conditions auxquelles est reconnu l'acte par lequel une autorité étrangère a dissous un mariage s'étendent aux conventions et condamnations réglant pour l'avenir certains effets du mariage dissous. La présente disposition vise notamment les conventions et actes de partage et de liquidation de nature patrimoniale passés en justice ou devant une autorité publique de l'Etat dans lequel le mariage a été dissous, les mêmes conventions ou renonciations relatives aux obligations alimentaires ainsi que les décisions relatives à la compensation des droits de pension.

5. Les condamnations accessoires ne doivent pas être reconnues lorsque la décision de divorce, de nullité ou d'annulation de mariage a été rendue par défaut dans un Etat où la partie défaillante n'avait pas sa résidence habituelle.

IV. — *Les obligations alimentaires.*

6. Si en vertu de la loi appliquée à la dissolution du mariage ou de l'acte de dissolution du mariage et des conventions ou condamnations accessoires qui ont accompagné ou suivi cet acte, il a été mis fin à toute obligation alimentaire entre les ex-époux, pareille extinction des obligations alimentaires est reconnue dans les autres Etats.

L'obligation alimentaire n'est pas éteinte en vertu de la loi appliquée à la dissolution du mariage si celle-ci a eu lieu dans les circonstances décrites à l'article 5.

7. Quand l'obligation alimentaire entre les ex-époux n'est pas éteinte conformément à l'article 6, elle est déterminée selon la loi applicable aux obligations alimentaires.

8. Si deux décisions successives ayant déterminé l'étendue du droit aux aliments doivent être reconnues dans un Etat ou qu'une de ces décisions ait été prononcée dans cet Etat, il y a lieu de donner exécution à la plus récente de ces décisions.

V. — *Les pensions de survie et la compensation des droits de pension.*

9. La loi de l'institution qui administre ou attribue une pension de survie aux ayants-droit des titulaires d'un droit de pension détermine

le principe et l'étendue du maintien du droit à une pension de survie au profit d'un ex-époux.

La même loi règle l'incidence sur le droit à une pension de survie des causes pour lesquelles le divorce a été prononcé.

10. La compensation des droits de pension est soumise à la loi appliquée au divorce.

Il est souhaitable que les institutions publiques ou privées administrant une caisse de pensions prêtent leur concours à l'exécution des décisions par lesquelles les autorités étrangères ayant prononcé le divorce ont, conformément à la loi, compensé le droit à une pension d'un affilié de cette caisse.

VI. — *Le nom des ex-conjoints.*

11. Les effets de la dissolution du mariage sur le nom que les époux ou que l'un d'eux ont acquis par l'effet du mariage sont déterminés, pour chacun, selon leur statut personnel.

VII. — *Les limitations et restrictions au droit de se remarier.*

12. La loi applicable à l'aptitude au mariage de chacun des ex-époux détermine si ce droit est limité, restreint ou retardé après que le divorce a définitivement dissous le mariage. Les dispositions de cette nature ayant un caractère répressif ne doivent pas être respectées.

Par dérogation à l'article 4, ne doivent pas être reconnues, les décisions étrangères de caractère répressif prohibant, limitant ou retardant le droit au remariage.

Annexe

Observations des membres de la Seizième Commission sur le rapport provisoire de M. François Rigaux.

1. Observations de M. Franz Gamillscheg

D-3400 Göttingen, 6 novembre 1984

Cher collègue et ami,

Je vous remercie, et je vous exprime toute mon admiration, pour votre exposé qui est un véritable traité de la matière dont s'occupe la 16e commission. Je ne pourrai personnellement contribuer que pour très peu de chose. Je vois comme vous comme il est difficile de formuler des propositions «supranationales» dans un domaine si étroitement lié à des droits nationaux dont la plupart se trouve dans un état de transition. Je partage votre scepticisme quant à la valeur scientifique d'une telle entreprise.

En ce qui concerne le droit allemand actuel, il est, comme vous savez, en pleine évolution. Pour satisfaire à l'impératif de l'égalité des sexes, on a abandonné le rattachement à la nationalité du mari sans pour autant adopter le rattachement pur et simple au domicile. Le projet de loi actuellement soumis à la Diète Fédérale combine les deux rattachements dans le cadre de la fameuse « échelle Kegel », et il est assez probable — vous l'avez très bien souligné — que les cas de l'application de la loi du for comme telle iront se multipliant. C'est sans doute un résultat peu souhaitable, surtout du point de vue d'un droit international privé supranational qui par définition ne dispose pas d'une « *lex fori* ».

Avec ce changement du rattachement on a quitté la base de bon nombre de solutions acceptées dans le passé. Surtout le statut unique pour les conséquences du divorce et l'immutabilité de ce statut se présentent dans une nouvelle lumière : un rattachement stable et inéquivoque qui depuis 200 ans a été reconnu dans nos pays comme le contact principal dans la matière a été remplacé par une solution qualifiée unanimement de « Verlegenheitslösung » : cela ne peut manquer d'avoir des répercussions profondes. Avec cette réserve, en ce qui concerne les propositions concrètes contenues dans votre rapport, je veux bien m'y rallier. Elles me semblent toutes convaincantes et acceptables ; en tout cas elles méritent toutes la plus attentive discussion.

En vous remerciant une nouvelle fois de ce beau travail, je vous prie, cher Collègue, d'accepter l'expression de mes sentiments les plus distingués.

Franz Gamillscheg

2. *Observations de M. Ronald Graveson*

London, 4th October 1984

My dear Confrère,

Thank your for sending me your Provisional Report on the work of the Sixteenth Commission. I am greatly indebted to you for your comprehensive and scholarly presentation of the relevant factors in a complex matter.

I am in substantial agreement with your Report and its draft Resolution and will not trouble you with a repetition of the comments I made in my letters of 6 November 1980 and 1 July 1983. However, there are a few general points that I should like to mention.

I find it helpful to distinguish in the case of a marriage that has been dissolved those effects that are affected by the event of dissolution from those effects that exist independently of whether the marriage is dissolved or not, such as support of children. For the first category to arise the two pre-conditions of marriage and its dissolution must co-exist; but for the second category only marriage is needed. Apart from other consequences of the distinction, it would seem inappropriate to link the choice of law or jurisdiction affecting the second category to the law or jurisdiction governing the dissolution, whether or not as a matter of coincidence the criteria happened to be the same. Secondly, I find the case for including nullity, annulment and other measures to dissolve or declare a marriage non-existing, greatly strengthened by the diversity of classification of identical aspects of the status. In English law, for example, wilful refusal to consummate marriage is a ground for annulment, but in some common law systems it is a ground for divorce. Thus it is a matter of characterisation whether a legal event is called nullity or divorce. Our resolution should be in general terms to allow any legal system to fit it into its own characterisation. Another consideration is that certain remedies are general and extend beyond dissolution, however defined. Orders for the financial support of dependent members of a family are often made in circumstances, e.g. separation of husband and wife, in which the marriage continues to exist.

I applaud your decision to build on the work of existing relevant conventions of the Hague Conference of Private International Law. We thereby make use of the work of our confrères and other experts and employ a foundation of already internationally accepted principles. I hesitated a little over the wider application of Resolution III 4 than that which is found in the Hague Convention on the Recognition of Divorces and Legal Separations, from which many consequential effects of divorce were deliberately excluded. It is a difficulty you mention in para. 105 of your Report. Resolution III 4 properly says nothing about the recognition of orders in matrimonial matters not following on divorce. Is it then acceptable that the resolution should comprise, and establish different criteria for the recognition of similar orders, notably of financial support, solely because they were consequential on divorce? We could accept this situation if we were prepared to recognise a non-exclusive jurisdiction and applicable

law in the making of the orders. I find nothing abhorrent in the prospect of concurrent jurisdiction in this subordinate though important matter, and on balance I would support the form of Resolution III 4.

May I finally draw attention to a small point of drafting? Is not the substance of Resolution III 5, paragraph 2, repeated in Resolution VII?

With my best wishes for a successful solution of a difficult problem.

Yours sincerely,

Ronald Graveson

3. *Observations de M. Erik Jayme*

D-6900 Heidelberg 1, 8-10-1984

Mon cher Confrère,

J'ai reçu votre aimable lettre du 31 août 1984 et le rapport provisoire sur « La loi applicable aux effets du mariage après sa dissolution », et je vous en remercie vivement. J'aimerais bien vous exprimer mon admiration pour ce travail exhaustif. Je vais limiter mes observations à quelques remarques sur la jurisprudence qui confirment les points de vue que vous exprimez ; d'autre part, je me permets de proposer une petite clarification en ce qui concerne la compensation des droits de pension.

1. La solution unique pour tous les effets n'est pas souhaitable

On pourrait citer en faveur de cette conclusion qu'une solution unique ne se prête pas à tous les effets du divorce, l'arrêt de la Cour de Justice des Communautés Européennes du 6 mars 1980 (affaire 120/79, Recueil 1980 I, 731) qui regarde la prestation compensatoire comme un effet accessoire du divorce. En ce qui concerne la juridiction selon la Convention de Bruxelles de 1968, la Cour a dit :

> « Les demandes accessoires relèvent du champ d'application de la Convention suivant la matière qu'elles concernent et non suivant la matière dont relève la demande principale. »

Cette décision qui regarde la juridiction, présuppose une distinction entre le divorce même et certains effets du mariage après sa dissolution, une distinction de matières qui reflète bien la situation en ce qui concerne la loi applicable. D'autre part, on pourrait se demander s'il serait souhaitable de retenir une solution unique pour tous les effets non concernés par des règles spéciales de droit international privé, comme une sorte de clause générale subsidiaire. Il y a des situations où les règles matérielles prévoient un effet difficilement qualifiable, et une telle clause subsidiaire qui tiendrait compte du lien matériel entre le divorce et ses effets pourrait faciliter la résolution des conflits. D'autre

part, la Cour fédérale allemande vient de se prononcer sur la loi applicable à un « droit à l'information » (*Auskunftsanspruch*) d'un époux concernant les biens de l'autre époux, dans le sens que, pour les effets du mariage après sa dissolution, la loi régissant les effets personnels du mariage est applicable (BGH, 8-2-1984, NJW 1984, 2040-2041). Cet arrêt est très intéressant parce que la Cour n'applique pas la loi régissant le divorce, mais elle recourt au droit applicable aux effets personnels du mariage avant sa dissolution.

C'est pour cela que je pense qu'une solution unique — la loi applicable au divorce régirait aussi les effets du mariage après sa dissolution — ne serait pas souhaitable. Chaque fois qu'on se trouve en face d'un effet postérieur du mariage, on doit chercher une solution particulière ; la loi régissant le divorce peut être applicable aux effets du mariage après sa dissolution, mais cette solution ne s'impose pas d'une manière nécessaire, elle doit toujours être justifiée par des raisons additionnelles.

2. Les Conventions de La Haye

a) *Obligations alimentaires — Modification des décisions*

Le rapport a proposé une solution qui donne, vis-à-vis de plusieurs décisions sur les obligations alimentaires entre ex-époux, la primauté à la décision la plus récente. Cette solution est très fondée. Le fait que deux décisions successives regardent le même objet des obligations alimentaires est dû, normalement, à un conflit mobile causé par le changement de résidence habituelle du créancier. Je me permets de signaler que la Cour fédérale allemande, en matière des obligations alimentaires envers les enfants, a élaboré une solution intermédiaire (BGH, 1-6-1983, FamRZ 1983, 806). Il s'agissait de résoudre le problème de savoir si le juge de l'Etat de la nouvelle résidence habituelle de l'enfant pouvait modifier une décision rendue dans l'Etat de la résidence habituelle antérieure. La Cour a appliqué, pour la question de la transformabilité, la loi applicable aux obligations alimentaires selon le droit international privé dans l'Etat de la résidence actuelle de l'enfant, mais, pour la question des critères qui déterminent les mesures alimentaires, la Cour a appliqué la loi du premier juge (étranger). Cette solution, pourtant, me paraît critiquable : Il est trop difficile d'harmoniser les deux lois divergentes. Une préférence donnée au juge second me semble, au plan international, la solution la plus souhaitable.

b) *La Convention sur la protection des mineurs*

Le rapport exprime l'avis que la Convention du 5 octobre 1961 est un « instrument complet ». Je me permets de mentionner que tous les problèmes du « *legal kidnapping* » ne sont pas résolus par la Convention, un fait qui a conduit à la conclusion de deux traités ultérieurs (Böhmer, Das Europäische und das Haager Übereinkommen über internationale Kindesentführungen von 1980, IPRax 1984, 282). D'autre part, ces problèmes ne relèvent pas des travaux de la commission.

La Convention de 1961 couvre les mesures de garde après le divorce, mais le compromis entre deux principes inconciliables (résidence et nationalité) a

causé des difficultés dans la pratique (voir *Jayme*, Gesetzliches Sorgerechtsverhältnis und Haager Minderjährigenschutzabkommen, à paraître dans IPRax). Je pense que l'Institut pourrait formuler une résolution indépendante de cette Convention.

3. La compensation des droits a une pension

Le rapport provisoire, en ce qui concerne le « Versorgungsausgleich », exprime l'avis que l'application du « statut du divorce » n'est convaincante que si l'action est poursuivie devant les autorités du pays où les époux ont leur résidence habituelle et où se localisent leurs droits de pension. A mon avis, il faut distinguer la loi applicable à la compensation et le régime des pensions qui relève, normalement, du droit public. La question est de savoir si un époux est obligé de dédommager l'autre qui n'a pas acquis des droits à une pension du mariage. Cette question fait partie du droit de la famille et présuppose une évaluation de l'existence de tous les droits peu importe où ces droits se localisent. Si le juge, en se décidant sur une compensation éventuelle, ne tenait pas compte de tous les droits de pension, il aboutirait à des injustices parce que le conjoint, ayant des droits localisés dans l'Etat du for, perdrait la moitié de ces droits, tandis que l'autre conjoint, ayant des droits à une pension localisée à l'étranger, maintiendrait non seulement ses droits, mais recevrait, cumulativement, la moitié des droits de son conjoint. C'est pour cela qu'une solution globale concernant tous les droits sans aucune limitation aux droits localisés au for, est souhaitable. Si l'évaluation d'un droit à une pension localisée à l'étranger n'est pas encore possible, la compensation doit être remise à une date plus éloignée (voir § 2 de la loi allemande du 21-2-1983, BGBl. 1983 I, 105).

Le texte de la résolution ne tient pas suffisamment compte de la distinction entre la compensation comme question de droit de la famille et l'incidence du divorce dans les systèmes qui ne connaissent que la solution de la sécurité sociale. L'article 8 concerne, à mon avis, seulement le droit social et non pas la compensation même. Si l'on adoptait l'article 8 sans la clarification mentionnée, la « compensation » ne serait pas possible, étant donné qu'un fractionnement de la loi applicable suivant les divers Etats où les institutions qui administrent les pensions ont leur siège administratif, conduirait, nécessairement, à des résultats injustes. Je me permets de mentionner que les tribunaux dans les Etats qui prévoient la compensation ont essayé — si possible — de tenir compte des pensions localisées à l'étranger (voir *Bergner*, IPRax 1984, 189) et je ne vois pas, dans la situation inverse, un obstacle à ce qu'un tribunal applique les règles du statut personnel étranger sur la compensation à un droit situé dans l'Etat du for (voir aussi Gilbert v. Gilbert, 442 So. 2d 1330, 1333 [Ct. App. Louisiana 1984]).

D'autre part, je suis d'accord avec l'article 10 de la résolution qui mettrait fin à la tendance contraire qui se manifeste dans les accords bilatéraux récents (voir la convention entre l'Autriche et la République Fédérale d'Allemagne du 29-8-1980, BGBl. 1982 II, 415, art. 28 nº 6; *Bergner*, IPRax 1984, 190).

Veuillez agréer, mon cher Confrère, l'expression de mes meilleurs sentiments.

Erik Jayme

4. *Observations de M. Arthur von Mehren*

Cambridge, Mass., October 31, 1984

Dear Colleague,

Thank you for your letter of August 31 and your Rapport provisoire (the latter arrived here only a couple of weeks ago).

I have now had a chance to read the Rapport. You are to be congratulated on an interesting and thoughtful discussion both of specific issues and solutions and of general methodological problems.

Your discussion in Part IV of the Rapport of the purposes that the Institut's resolutions might serve is very helpful. It makes eminently good sense for the Institut to build on the work of the Hague Conference.

I am not sufficiently expert in the subject matter to criticize the conclusions that you have reached with respect to various issues. What you proposed strikes me as reasonable but I do not pretend to have worked through the various problems.

Paragraphs 6 and 7 of the draft resolutions leave me somewhat uneasy because of the variations possible in the applicable choice-of-law rule. Presumably the answer is that the assimilation of choice of law for *droits patrimoniaux* and *droit à une pension alimentaire à charge de la succession* to, respectively, the law applicable to the regime matrimonial and to successions is required because of the affinity between the problem areas in question. But it is hard to have a sense of what may be at stake when the matter is put in these abstract terms.

The acceptability of paragraph 12 turns on the meaning assigned to « *caractère répressif* » and on the extent to which the new marriage in question would be centered in the community whose law governs the aptitude of the ex-spouse in question to remarry.

Those comments suggest why I find it so very difficult to offer helpful specific comments on the proposed resolutions. Without understanding more clearly than I do how the proposals would operate in different systems, I can only say that everything struck me as plausible but I am not in a position to test the propositions in terms of concrete situations.

I remember with the greatest pleasure my visit last spring to Louvain-la-Neuve.

With all good wishes,

Sincerely,

Arthur von Mehren

5. *Observations de M. Allan Philip*

DK-1265 Copenhagen K, October 9, 1984

Dear François,

Thank you for the draft report which I have read with great interest. It is most inspiring reading.

As you know from our discussions I believe that it is irrelevant to treat the various subjects which are included in your report together under a common heading. I conclude from remarks you make in various places and not least in no. 88 of the report that in effect you agree with me in this respect. As you say there, it is not possible to formulate one common rule of choice of law in respect of the subjects discussed in the report. It is necessary to treat each of these subjects separately in order to determine the law which ought to govern each of them.

Under these circumstances it seems to me that we ought not to pass a resolution which may give the impression that, nonetheless, we think there is an inherent connection between these subjects which makes it relevant to treat them together. This impression follows especially from the common title, effects of a dissolved marriage, and the preamble. Of course, we can always treat certain subjects in one resolution. But doing it in this way has implications which I believe are wrong and which could be harmful.

First of all, I believe that even from a purely theoretical or systematic point of view it is wrong to talk about effects of the marriage. If at all meaningful to talk about these subjects together it must be because they are caused by the dissolution of marriage.

Of course, without a marriage there will be no dissolution of it and, therefore, no effects of dissolution. This does not mean that it is relevant to talk about continuing effects of the marriage. This is especially clear in respect of matrimonial property rights. The facts that as a result of the divorce the community property of spouses who have been living under a community regime must be liquidated is not an effect of the marriage but of the divorce. The divorce is the fact which under the rules regulating the matrimonial property regime sets the procedure for liquidating the community property in motion.

Likewise with respect to most of the other subjects.

You rightly point out that the doctrine of characterization (qualification) is pertinent in respect of our subject. It seems to me that by bundling these subjects together under a common title we implicitly make a characterization which is wrong and which, looking at the individual points of the resolution, we do not espouse.

With respect to the relationship between parents and children this is particularly important.

Nowadays it is generally recognized even in the law that children and marriage are not necessarily linked together. Rules relating to custody are necessary in respect of all children whether born in or out of wedlock. When

in connection with divorce decisions are often made in respect of custody and guardianship it is because this is often the time when such a decision is necessary because the parents from then on no longer live together. However, the same situation may arise during marriage because of a factual or legal separation or with respect to children born to parents who cohabit without being married and who separate.

It is therefore, meaningless to connect a discussion of the applicable law in this respect or even recognition of this type of decisions to a discussion of effects of marriage or even to a discussion of effects of divorce.

You will understand that for these reasons I cannot support a resolution of the type you suggest where the subjects treated would be put together under a common hat.

This, of course, does not mean that I do not appreciate the value of the contributions you have made on each of the specific points treated in the draft resolution under II to VIII. However, I feel that many of these deserve separate treatment in separate resolutions and that such treatment should take place in connection with a full treatment of the subject in question.

With respect to the individual points of the resolution I have certain minor reservations. They are, however, unimportant compared to the above.

Let me make one more remark in respect of your discussion on the relation between choice of law and recognition. Where status is concerned I believe there is no choice. You either recognize a foreign decision or not. The conditions for recognition may include conditions relating to the choice of law made by the foreign court. If recognition is not granted of a divorce the spouses are still married.

Otherwise in respect of problems relating to matters such as custody or alimony or maintenance. Here you may recognize the foreign decision. But you may also choose not to recognize and make a choice of law of your own and apply your own law or *e.g.* the foreign law which was also applied by the foreign court whose decision you did not recognize - perhaps with the same result as the foreign court.

This letter, I am afraid, is not very helpful. I am sorry as I would have preferred to be able to support your resolution.

Très amicalement,

Allan Philip

6. Observations de M. Willis L.M. Reese

New York, October 30, 1984

Dear Professor Rigaux:

I apologize abysmally for my delay in answering your letter of August 31, 1984. I was away from Columbia for nearly five weeks while recuperating

from a hip operation. And then I was two weeks in the Hague. As a result, your letter and report only came to my attention about a week ago.

First of all, I wish to congratulate you upon your report. It shows an amazing knowledge of the law of a number of countries and is scholarly in the extreme. We must all be grateful to you.

On the other hand, I find it extremely difficult to pass judgment on your proposed resolutions. One reason, of course, is that in the United States a court usually applies its own law in deciding these questions. With us therefore, the question relates more to jurisdiction and the recognition of judgment than it does to choice of law. This system works pretty well with us. One reason, I suppose, is that all, or nearly all, of our states have essentially, similar laws on the matters you cover. Another reason is that a court will probably not have jurisdiction to hear a case unless the state in which it sits has an interest in having its law applied. Still a third reason is that our system provides flexibility for which there may be real need in situations where the parties change their respective states of domicile after the handing down of a decree. In such instances, there may be good reason why the law of the new domicile, or new forum, should be applied. This problem is raised by *Yarborough* v. *Yarborough*, 290 U.S. 202 (1933) with which I am sure you are familiar. The majority opinion in the United States today would favor the dissent in this case.

I can well understand why it would not be appropriate for the Institut to follow the U.S. example. Going the choice-of-law route, however, does raise certain difficulties. One is that a broad choice-of-law rule that is phrased in hard-and-fast terms is likely to lead to unfortunate results on occasion. And another difficulty is that the parties may move after the divorce or annulment and the state or states of their new domicile or domiciles may have the greatest interest in their welfare and hence would have a good claim to become the state of the applicable law.

Without being at all confident in my judgment, I have the uneasy sense that your proposed rules could lead to unfortunate results on occasion. Also I wonder if you should not permit the applicable law to shift in the case of certain issues in instances where the parties have changed their state of domicile.

I fear I have not been at all helpful. I send you the above however, for whatever it may be worth.

With all best vishes and renewed congratulations.

Faithfully,

Willis L.M. Reese

7. *Observations de M. Mario Scerni*

Gênes, le 21 décembre 1984

Cher et honoré Confrère,

J'espère avant toute chose que vous voudrez bien m'excuser pour le retard à répondre à votre lettre et surtout au rapport provisoire que vous avez bien voulu m'envoyer. Ce sont malheureusement des raisons de santé qui m'ont empêché de donner promptement suite à l'analyse de ce document remarquable.

Je m'empresse de vous déclarer mon complet accord à propos des solutions envisagées dans ce rapport provisoire sur le thème de la 16e commission, c'est-à-dire la loi applicable aux effets du mariage dissous.

Vous avez très efficacement démontré qu'il n'est pas question d'un « statut du divorce », i.e. de la loi sur la base de laquelle le mariage a été dissous, à fournir les règles juridiques relatives aux questions secondaires.

Je pense, comme vous, que l'apport d'une Résolution de l'Institut devrait consister avant toute chose à affirmer le lien qui unit les effets du mariage dissous à l'institution à laquelle se rattache chaque catégorie d'effets. Ce qui revient à dire qu'il n'y aura pas une seule loi applicable pour tous les effets du mariage dissous, mais plutôt différentes lois applicables, selon que les effets se rattachent à l'une ou à l'autre des catégories.

C'est avec grand intérêt que j'ai lu les pages du rapport dédiées à démontrer que, même après sa dissolution, le mariage peut continuer à produire des effets juridiques.

Dans le but de clarifier la matière, il me paraît très opportun de fixer les idées en incluant la définition des « effets du mariage dissous », comme il est fait dans le rapport. Les solutions proposées à l'Institut, à la fin du rapport, viennent couvrir tout le champ du problème.

L'indication analytique des différentes catégories d'effets et des différentes méthodes pour arriver à déterminer la loi qui devient applicable, constitue un mérite particulier du projet. En effet, cela clarifie l'objet de la recherche et démontre qu'elle n'est pas simplement théorique mais est au contraire une recherche tout à fait pratique ; on peut même arriver à la conclusion que, quelquefois, on a pas mal de difficultés pour régler surtout les effets secondaires.

Il est donc juste qu'une organisation scientifique, comme l'Institut de Droit international, se préoccupe de déterminer la loi applicable pour ces effets secondaires, puisqu'il est tout à fait de la mission de l'Institut d'aider la jurisprudence et la législation des différents Etats, dans la fixation de la loi qui se démontre être la plus adéquate à résoudre les problèmes juridiques en question.

Ce sont là des idées tout à fait simples et qui sont réflétées d'une façon très efficace dans votre projet de rapport

Je regrette de devoir me limiter à ces quelques considérations très modestes, mais j'ai des limitations, comme je vous ai dit, dues à mon état de santé.

J'espère vous revoir sans trop de délai et, entre-temps, je saisis l'occasion pour vous envoyer, cher Confrère, mes souhaits les plus amicaux pour les prochaines fêtes.

Mario Scerni

8. *Lettre de M. Piero Ziccardi*

Milan, le 26 novembre 1984

Mon cher Collègue,

Je vous prie de bien vouloir excuser le retard de ma réponse à votre lettre du 31 août, mais j'ai voulu auparavant étudier avec l'attention qu'elle mérite votre étude sur le sujet.

A la fin de l'étude et après examen de votre projet de résolution, j'ai voulu laisser passer du temps en vue de suggestions éventuelles à vous soumettre. Mais il n'y a eu aucune germination de ce genre, ce qui m'induit à supposer que la faute vous en revient car vous avez épuisé toute la question et choisi auparavant le juste point de vue.

Je n'ai, partant, rien d'autre à dire sauf à vous féliciter, cher Collègue, et à vous assurer de mon appui lors des discussions qui auront lieu fin août en Finlande.

Je vous prie d'agréer, cher Collègue, l'assurance de mes sentiments les meilleurs.

Votre

Piero Ziccardi

Imp. Bosc Frères, Lyon - Dépôt légal n° 7911 - mai 1985