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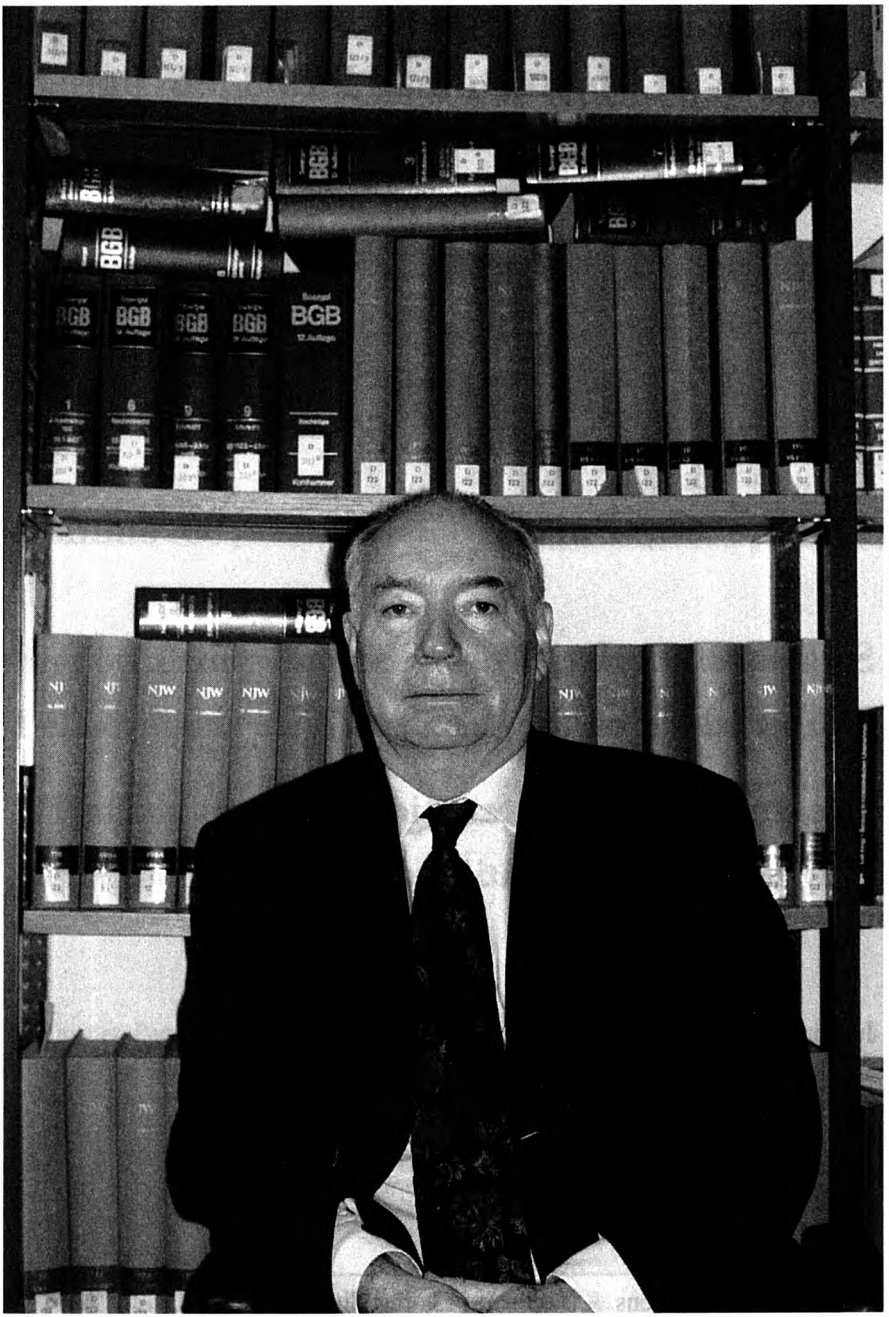

Professeur Dr. Dr. h. c. Erik Jayme,
Président de la soixante neuvième session, Berlin, 1999

Institute of International Law

Yearbook

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Deliberations of the Institute

The Institute of International Law

Origins and organization

Justitia et Pace

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Institut de Droit international

Annuaire

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Session de Berlin, 1999 - Deuxième partie

Délibérations de l'Institut

L'Institut de Droit international

Origines et organisation

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Table des matières

Session de Berlin, 17 - 25 août 1999

Séance solennelle d'ouverture

Réunions de l'Institut en séances administratives

Première séance administrative
Mardi 17 août 1999 (après-midi)

- Composition du Secrétariat
- Election des deux Commissaires vérificateurs des comptes
- Désignation des membres de la Commission de dépouillement des scrutins
- Désignation des membres du Comité de rédaction
- Election des deuxième et troisième Vice-Présidents
- Election du Trésorier
- Election des nouveaux Membres honoraires
- Election des nouveaux Associés
- Modification des Statuts et du Règlement de l'Institut

Deuxième séance administrative
Mardi 18 août 1999 (matin)

- Suite de l'élection des nouveaux Associés

Troisième séance administrative
Vendredi 20 août 1999 (après-midi)

- Déclaration sur le Statut de la Cour pénale internationale
- Prix Louis Renault
- Présentation des rapports du Trésorier et des Vérificateurs des comptes
- Création d'un Comité constitutionnel
- Création d'un Groupe de travail sur les problèmes de bio-éthique

Délibérations de l'Institut en séances plénières

Textes adoptés lors de la 69ème Session

L'Institut de Droit international

Bureau de l'Institut de Droit international pendant la Session de Berlin 1999

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Bureau de l'Institut de Droit international à la suite de la Session de Berlin 1999

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Avant-propos

De longues et difficiles années virent la belle cité de Berlin révéler *urbi et orbi* la profonde déchirure qui divisait la communauté intenationale. Aujourd'hui rendue à son destin, elle a été pour l'Institut un lieu de rencontre particulièrement apprécié.

Le Président Jayme, ses collaborateurs, nos confrères du groupe allemand, ont mis à accueillir notre compagnie un soin délicat, offrant à nos travaux le cadre de la *Berliner Bandenburgische Akademie der Wissenschaften,* et à nos heures de loisir les découvertes d'un environnement culturel d'une qualité exceptionnelle.

Dans un pays où le fédéralisme est bien vivant, l'Institut a eu le privilège d'être honorés de l'attention des autorités fédérales et de celles des *Länder.*

Tous ont été sensibles à la réception amicale offerte en son Château de Bellevue par le Président de la République fédérale, ainsi qu'au discours de Madame le ministre fédéral de la Justice lors de la séance solennelle d'ouverture, et à son charmant accueil quelques jours plus tard.

Le maire de Berlin, lui aussi, a tenu à s'adresser à notre Compagnie le premier jour de la Session et à recevoir ses membres. Le *Land* de Brandebourg, dont l'Institut allait fouler les terres à l'occasion de l'excursion de Potsdam, honora la séance d'ouverture de la présence de son ministre de la Justice, et grâce à l'hospitalité de son *Minister präsident* à Sans-Souci, offrit à notre Compagnie une conclusion de qualité à une bien belle journée.

Le programme des travaux scientifiques était particulièrement chargé. Il fallut renoncer à aborder la question de la compétence extraterritoriale des Etats (Dix-neuvième Commission) dont le Rapporteur, M. F. Rigaux, accepta de bonne grâce que la discusson en fût reportée à la prochaine Session.

Trois Résolutions ont été adoptées, dont le texte est reproduit dans le présent volume. Elles ont pour titre:

- La prise en considération du droit international privé étranger
  Taking Foreign Private International Law to Account
  (Quatrième Commission, M. Kurt Kipstein)

- Le règlement judiciaire et arbitral des différends internationaux impliquant plus de deux Etats
  Judicial and Arbitral Settlement of International Disputes Involving More Than Two States
  (Onzième Commission, M. Rudolf Bernhardt)

- L'application du droit international humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquels prennent part des entités non étatiques
  The Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties
  (Quatorzième Commission, M. Milan Sähovic)

Quant à la question du *Consensus* (Sixième Commission, M. Sohn), qui avait déjà fait l'objet d'un débat à Strasbourg (*Annuaire*, vol. 67-I, pp. 195-215), elle a donné lieu à un échange d'idées consécutif à la présentation par le Rapporteur d'un exposé complémentaire. En fin de compte, l'Institut a estimé qu'il n'y avait pas lieu pour lui d'adopter sur ce sujet une résolution normative, tout en soulignant l'intérêt des travaux entrepris.

Diverses propositions ont été faites en vue des travaux futurs de l'Institut dont trois ont été retenues, donnant lieu à la création de trois nouvelles commissions:

- Huitième Commission :

  La protection internationale des droits de la personnalité face au développement technologique
  The International Protection of Personality Rights in the Light of Technological Development

- Dixième Commission :

  La compétence en droit international des organisations internationales autres que les Nations Unis de recourir à la force armée
  The Authority Under International Law of International Organizations Other Than the United Nations to Use Armed Force

- Dix-septième Commission :

  La compétence universelle en matière pénale à l'égard du crime de génocide, des crimes contre l'humanité et des crimes de guerre
  Universal Criminal Jurisdiction With Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes

L'Institut s'est également préoccupé de son propre fonctionnement et de ses méthodes de travail.

Une modification a été apportée aux Statuts et au Règlement, à l'effet de donner une nouvelle structure à la Commission des travaux et d'en préciser le rôle et les responsabilités. Le but est d'assurer une conduite des travaux scientifiques plus ferme et plus continue.

En outre, l'Assemblée a décidé la création d'un Comité constitutionnel (voir *infra* 3ème séance administrative) chargé d'examiner le mode de fonctionnement de l'Institut et de revoir les textes qui le régissent. Ce Comité présentera un premier rapport lors de la Session de 2001.

Au début de la Session, trois de nos Confrères ont été élus Membres honoraires, MM. Monaco, Schwind et Truyol y Serra, alors que onze nouveaux Associés ont été admis: Mme Burdeau, MM. Ando, Dimitrijevic, Momtaz, von Hoffmann, Rao, Reisman, Treves, Vinuesa, Weeramantry et Yusuf.

Huit Associés sont devenus Membres titulaires à l'issue de la Session de Berlin: Mme Pérez Vera, MM. Cassese, Dugard, Guillaume, Lagarde, Lipstein, Makarczyk et Müllerson.

La composition du Bureau a été modifiée conformément aux Statuts. MM. Broms et Rosenne, au début de la Session, ont été remplacés par MM. Zemanek et Pinto en qualité de deuxième et troisième Vice-Présidents.

Lors de la Session de clôture, M. McWhinney a été élu Président de l'Institut pour deux ans, et M. Shahabuddeen, premier Vice-Président.

L'Institut a été invité à siéger en 2001 dans la cité canadienne de Vancouver.

Tous les collaborateurs du secrétariat, sous l'autorité du professeur Pierre Klein, n'ont pas ménagé leur peine pour ofrir des services de qualité. Je les en remercie.

Toujours aussi fidèles et dévoués à la cause de l'Institut, Mesdames Wehberg, Gerardi et Lachenal, ainsi que M. Mulhauser, ont apporté un concours particulièrement précieux à la réussite de la Session.

Le Secrétaire général
Christian Dominicé

Genève, le 10 janvier 2000

Membres et Associés présents à la Session de Berlin

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1. Castro-Rial y Canosa (Juan M.)
2. Van Hecke (Georges)
3. Mosler (Hermann)
4. Schachter (Oscar)
5. Schwind (Fritz)
6. Truyol y Serra (Antonio)

Membres titulaires

7. Abi-Saab (Georges Michel)
8. Amerasinghe (Chittharanjan Felix)
9. Anand (Ram Prakash)
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13. Bindschedler-Robert (Denise Mme)
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17. Caflisch (Lucius)
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26. Doehring (Karl)
27. Dominicé (Christian, Jules)
28. Dugard (John)
29. El-Kosheri (Ahmed Sadek)
30. Feliciano (Florentino P.)
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34. Gannagé (Pierre)
35. Guillaume (Gilbert)
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37. Higgins (Rosalyn Mme)
38. Jayme (Erik)
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40. Lagarde (Paul)
41. Lalive (Jean-Flavien)
42. Lalive (Pierre A.)
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44. Lipstein (Kurt)
45. Loussouarn (Yvon)
46. Lowenfeld (Andreas F.)
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48. Makarczyk (Jerzy)

49. Matscher (Frantz)
50. McWinney (Edward Watson)
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60. Pinto (Moragodage Christopher Walter)
61. Ress (Georg)
62. Rigaux (François Ernest Robert)
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65. Rudolf (Walter)
66. Săhovic (Milan)
67. Schermers (Henry)
68. Schindler (Dietrich)
69. Schwebel (Stephen M.)
70. Seidl-Hohenveldern (Ignaz)
71. Shahabuddeen (Mohamed)
72. Shihata (Ibrahim)
73. Sinclair (Ian McTaggart Sir)
74. Skubiszewski (Krzysztof Jan)
75. Sohn (Louis B.)
76. Sucharitkul (Sampong)
77. Suy (Erik)
78. Torres Bernárdez (Santiago)
79. Verhoeven (Joe)
80. Vignes (Daniel)
81. Vischer (Frank Benedict)
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83. Waelbroeck (Michel)
84. Weil (Prosper)
85. Yankov (Alexander)
86. Zemanek (Karl)
87. Ziccardi (Piero)

Membres associés

88. Ando (Nisuke)
89. Burdeau (Geneviève Mme)
90. Cançado Trindade (Antônio A.)
91. Dimitrijevic (Vojin)
92. Droz (Georges A.L.)
93. Fadlallah (Ibrahim)
94. Foighel (Isi)
95. Fox (Hazel Lady)
96. Frowein (Jochen Abr.)
97. Gros-Espiell (Hector)
98. von Hoffmann (Bernd)
99. Keith (Kenneth Sir)
100. Mensah (Thomas Aboagye)
101. Meron (Theodor)
102. Morin (Jacques-Yvan)
103. Owada (Hisashi)
104. Park (Choon-Ho)
105. Pocar (Fausto)
106. Ranjeva (Raymond)
107. Sarcevic (Petar)
108. Tomuschat (Christian)
109. Treves (Tullio)
110. Vinuesa (Raul Emilio)

Séance solennelle d'ouverture de la Session

Mardi 17 août 1999

La séance solennelle d'ouverture de la soixante-neuvième Session de l'Institut de Droit international s'est tenue le mardi 17 août 1999, à 10 h 00, au *Konzerthause am Gendarmenmarkt* à Berlin.

*

Discours de Monsieur Eberhard Diepgen, Maire de Berlin

Madame Minister,
Dear Colleague Minister Bräutigam,
Professor Jayme,
Professor Dominicé,
Ladies and gentlemen,

Let me welcome you most cordially to your meeting this year at the Konzerthaus Berlin. It is a pleasure for me that during the next ten days Berlin will serve as an *"Areopagus"*, so to say, for renowned international lawyers.

In its 126th year the *Institut de Droit international* has become something of a timeless institution: it is not a fixed research institution, nor an academy in the proper sense of the word. It is, I should say, a global co-operation network that is committed to universality and always strives to improve, complement and advance the concepts of current law. Since the creation of the Institute, its Members have brought forth pioneering and useful ideas, which again and again have decisively influenced the codification and the development of public and private international law. The Nobel Peace Prize, which was awarded to the institution in 1904, is only *one* testimony to its renown and importance.

Gustav Radbruch once said: "Law is not intended to serve only as an instrument of judgement, but also as an effective force and a main gate, by which it leaves the world of ideas to enter the world of reality". At the close of the millennium this "world of reality" involves a lot of complex theoretical and practical work in the fields of public and private law – and also elsewhere.

Since the fall of the Wall ten years ago, it has become evident in the past few years how much the divided world gave the impression of false stability. The conflicts in the Balkans and the NATO operation in Kosovo have again shown us the tremendous challenges facing us at the end of this millennium, which sometimes even force us to enter completely new territory.

This is also the starting point for the intellectual work of an institute, which, according to its Statutes, has seen itself for the past 126 years as part of the legal conscience of the civilised world. It is no coincidence that your meeting at the end of the "Decade of International Law" proclaimed by the United Nations deals with these new challenges in order to develop an academic opinion on concrete issues and to provide an intellectual impetus for the continuous revision of law.

Almost daily the media give proof of how important your work actually is. Be it arbitration proceedings in conflicts involving more than two States or the definition of the territorial scope of a law against the background of globalisation – in this context let me only mention the *Helms-Burton Act* – in all these areas applied law needs to be continuously revised in theory and in practice. We must do everything in our power, for instance, to see to it that strong economic powers cannot abuse positive law created by themselves to reinforce their dominant role. Generally speaking, up to now, classic international law has been applied only in international conflicts, while domestic conflicts are governed by the principle of non-intervention. The fact that the majority of armed conflicts in the world today involves groups below the level of the State also represents a completely new challenge for international law.

I am convinced that the atmosphere of this place will help you develop new ideas, because your conference is being held in the right place at the right time. Ten years after the fall of the Wall, Berlin started a few months ago to serve again as the capital of Germany. And Berlin has already become what every capital should be: a meeting place of the nation, a market place of ideas, the burning glass of German sentiments and, finally, the gauge of political and social change.

The move of the Federal Government to Berlin will benefit not only our city. The country as a whole will profit, because reunited Germany will directly feel the pulse of the time. Because of its dynamism, its cultural diversity, but also its urban problems, Berlin will become the centre of public opinion in our country and a market trading and evaluating political and social ideas, and, as Johannes Gross said, be a place where the élite of the country will measure their skills with one another.

In Berlin, everything presents itself in condensed form, in politics as well as in culture. Those who want to discover Germany and the current sentiment of the population should go to Berlin. They will visit a meeting place of the nation, a pioneering place for many developments. Despite all the vicissitudes Berlin has had to live through, it has always preserved this pioneering spirit, which Alfred Kerr described in his books at the beginning of this century. This role will again and again attune the Government and the Parliament to the future – a future in freedom and peace.

Henry Ford once said: "Coming together is just the beginning. Working together is what makes for success". This could be the secret of the 126 years of the *Institut de Droit international*. For this reason, I should like to welcome you once again and wish your conference every success. At the same time, I would ask you to take the time, despite your busy working programme, to discover the beauties and attractions of our city – you won't regret it !

Discours de Madame Prof.Dr. Herta Däubler-Gmelin, Ministre fédéral de la Justice

Mr Mayor,
President Jayme,
Excellencies,
Members and guests of the Institut de Droit international,
Ladies and Gentlemen,

A warm welcome to the Institut de Droit international, its members and its guests! It is a very special pleasure for me to welcome you here today - of course on behalf of the Federal Government as well - to Berlin, the new seat of the Federal Government.

As you know, several days ago the Federal Ministry of Justice moved from the Rhine to the Spree - with bag and baggage and, of course, with all our files, which, as you can imagine, we are trying hard to find again at the moment. We have moved right to the centre of this lovely part of the cosmopolitan city of Berlin To Hausvogteiplatz, only one minute's walk from here - you simply have to cross to the far corner of the square. We feel very comfortable here in Berlin - I hope that you feel the same.

We are very pleased that you are holding your session here in Germany, as, in the 126-year history of the Institut de Droit international, you have come here but four times : to Munich ten years after the Institute was founded, to Heidelberg in 1887, to Hamburg in 1891 and to Wiesbaden in 1975 - not yet to Berlin.

It won't take long to notice that a great deal has changed here since your meeting in Wiesbaden nearly 25 years ago. At that time, Europe, Germany and Berlin were still divided. At that time, it would not have been possible for us either to hold this meeting here to imagine the Federal Ministry of Justice being near the Gendarmenmarkt. In several weeks' time, we will be celebrating the tenth anniversary or the fall of the Berlin wall - and the fact that the world has changed fundamentally since then cannot be felt any more intensely anywhere else than in Berlin.

II.

The purpose of your Institute is to promote academic work on and general interest in international law - the law of nations, conflict of laws, comparative law and international harmonisation of law. This has never been more relevant, more necessary than it is today.

Whoever wants peace must strengthen the law. Whoever wants global peace must strengthen international Law. We are all confronted with the terrible pictures of Kosovo and of other parts of the world torn by military and civil war. The rule of law, the power of law instead of the law of the powerful - this is the issue at stake. To be able to settle conflicts within and between states, to be able to enforce values and the respect for human rights we need internationally recognised standards and rules which can also be internationally enforced.

As we all know, the United Nations declared the decade now coming to a close to be the Decade of International Law and placed the emphasis on four important points :

- promotion of the acceptance of and respect for the principles of international law,

- promotion of means and methods for the peaceful settlement of disputes between sates, including resort to and full respect for the International Court of Justice,

- encouragement of the progressive development of international law and its codification,

- encouragement of teaching, study, dissemination and wider appreciation of international law.

Much work has been done and a great deal has been achieved - with your support as well. Thanks to all of you for this achievement. Your statute declares that you aim to be the organ of legal conscience of the civilised world. And indeed, that is just what you are.

III.

"*Justitia et pace*" - this is the motto of your Institute. It must also be the motto for international relations, especially in the legal field.

Gustav Radbruch - the Mayor has already quoted him - Gustav Radbruch, the well-known legal philosopher and minister of justice in the 1920s, stated in this respect that justice is the second most important task of law; the most important, however, being to ensure certainty of the law and peace.

The co-founders of your Institute such as Rolin-Jacquemyns or Mancini emphasised that only sustained and tenacious work on international law can bring the world closer to peace. This is indeed the case. To this end, international law and democratic states governed y the rule of law have to cooperate, especially in this day and age, where we all face new and complex problems.

In the 1970s, our Federal President at the time, Gustav Heinemann, stressed the task of peace and conflict research and conflict prevention with great vigour and with great political success. However, what is not surprising in view of the situation of Germany at that time in a divided Europe and still in the post-war era : this question remained at that time more an academic issue. Neither did international law of armed conflict play a particularly large part Generations of legal professionals only heard the mere basics of this subject during their academic training. Several editions of one of our most renowned textbooks on international law were published int the 1970s and 80s with the restrictive subtitle "not including international law of armed conflict".

Today the situation is different : along is the changes which have taken place in the world in the last ten years, the Germans' sense of responsibility in the international community has also grown - and is increasingly being exercised : in Somalia, (only) technical and humanitarian aid was provided, although parts of the Bundeswehr were involved; in Yugoslavia, there was involvement in peace-keeping and peace-making operations also involving armed force within the NATO Alliance. Nowadays,

the constitutional pre-conditions for Bundeswehr operations and, particularly, the international law issues concerning all aspects of Chapter VII of the Charter of the United Nations are once again an integral component of the textbooks and standard curricula of university law faculties.

We are all aware that since 1989, the Federal Republic of Germany itself has been in a virtually ideal position. For the first time in European history, Germany is surrounded not only by friendly neighbours, but - apart from Switzerland with its neutral status - by EU - or NATO member states. These are excellent conditions for ensuring lasting "justitia et pax".

IV.

The Federal Republic of Germany takes international law and its international responsibility very seriously. Especially today we are painfully aware of how much is still to be done on the path towards the global rule of law.

The issue here is peace between sovereign nations, but, equally, the global enforcement of human rights. The issue is also the protection of people from human rights violations deliberately planned and purposefully carried out - such as those we have repeatedly experienced, not only in the past ten years, not only in the former Yugoslavia. And the issue is preventing human rights violations there as well as in other parts of the world.

The establishment during the next few years of the International Criminal Court, decided on at the Diplomatic Conference in 1998, is therefore a great achievement. And I am happy to tell you that the Federal Republic of Germany will ratify the Court's Statute and make the required amendment to our constitution in the coming months. You are all familiar with the problematic history of the creation of the International Criminal Court of the United Nations. It is not yet up and running. However, important steps towards this have been made.

The two international criminal tribunals for the former Yugoslavia and Rwanda were initially less a triumph of the force of law but more a measure born of helplessness. As it was not possible their and then to provide

support in time, we were left with the determination to at least bring those responsible to justice later, as it could be foreseen that national systems of justice would be neither capable nor willing to do so.

In the meantime, the International Criminal Tribunal for the former Yugoslavia has long since emerged from the shadows of diplomatic and military efforts : it is a success that today, the name of the Yugoslavian president not only appears at the bottom of the documents of Dayton and the Kosovo settlement, but also after all on an arrest warrant of the International Criminal Tribunal for the former Yugoslavia. In spite of many problems it has become clear that the diplomatic settlements of a military conflict does not eliminate personal responsibility; International Criminal law has become a separate and independent pillar of conflicts settlements.

It is a good thing that the resolution of the UN Security Council on the special criminal tribunals for the former Yugoslavia and Rwanda in the end cleared the way for negotiations on the Statutes of the International Criminal Court. In adopting the Statutes, all negotiating parties and signatories have recognised its binding character for themselves.

V.

Ladies and gentlemen, let me come back to the idea of strengthening international law, the notion used by the United Nations to label their "decade of international law", now coming to a close.

As you will know, after it became public that terrible violation of international law were being committed against Kosovo Albanians, the Government of the Federal Republic of Germany, acting on the basis of the resolution passed by our Federal Parliament - the Bundestag - and in concert with NATO, carried out air strikes aimed at military targets in Yugoslavia for several weeks. You will understand that this was probably the most difficult decision of conscience and law imaginable for a member of Government.

We all know that the United Nations Charter accords central importance to human rights, but that it allows the use of military force only on the basis of a UN Security Council decision - except in the case of defence against attack by another state.

In the opinion of the Federal Government - both the former and the present - NATO air strikes were nevertheless legal because this was the only possible way of stopping the ethnic cleansing, mass expulsion, use of force and shootings taking place - and thus of preventing further humanitarian catastrophes like the ones we have had to observe several times in the Balkans during the last ten years. This was the right decision. I by no means want to depart from this now.

My attention is focussed on another question, which I have often heard posed with concern, which I also have posed myself and for the answer to which I would ask you - as the most important experts in the field of international law - to give your considered advice. It is the question of how to proceed and what criteria to use in the event of similar future crises and catastrophes.

It is not likely that such crises or catastrophes will never occur again, regardless of how much we emphasise the necessity of conflict research, conflict prevention and conflict settlement - the events in Kosovo once again make it particularly clear that military intervention cannot solve conflicts, event if they are sometimes the only option for creating the preconditions to do so.

How to proceed ? On the domestic level, we already faced a very similar question with the conflict in Bosnia and Herzegovina. In a kind of supplementary interpretation of the Basic Law, our German Federal Constitutional Court, to which this matter had been submitted, held that armed intervention is lawful, but that a decision in favour of such intervention may not be made by the Government acting alone but shall require the constitutive approval or Parliament.

Initially, this decision was heavily criticised because it was said to have no direct link with the wording of our Basic Law of 1949, which, as you know, was drawn up in a completely different national and international situation. In the meantime, there has been general acceptance of this decision as well as of the procedure, which guarantees that military intervention cannot be ordered or exercised by the Government acting alone or on a unilateral basis.

In the history of international law there have always been those who have considered intervention to be justified vis-à-vis the principle of state sovereignty in cases where the authorities are flouting human rights in a manner threatening their existence and those who have made an absolute imperative out of state sovereignty or the ban on the use of force.

Gustave Rolin-Jaecquemyns commended a procedurally encouraging approach : while declaring encroachments on the sovereignty of another state to be inadmissible on principle, he nevertheless held that, in the event of existential human rights violations, a conference of all civilised states was to be convened to decide on the appropriate measures to be taken. At least since 1989, we have assumed that such a conference already existed in the form of the United Nations Security Council. I want to stick to this assumption; the Security Council itself also affirmed this view in its Resolution of 11 June 1999.

We are aware that NATO initially acted unilaterally because the blockade - that did indeed follow in the Security Council - was foreseeable and there were simply no mechanisms available for eliminating or surmounting these obstacles. Not to act would have meant accepting that human rights protection existed only on paper - not in reality. But nevertheless : this mode of proceeding - even if unavoidable in an individual case - is more than unsatisfactory for the international law system.

The Federal Government has repeatedly emphasised that whoever wants to strengthen international law must strengthen the role of the United Nations. That is what we want. And that is why it is particularly important to reconsider - with care and with creativity - the decision-making mechanisms of the Security Council and their functioning so that the necessary decisions ca be made to empower the international organisations concerned to intervene and - in the distant future- to oblige them to intervene.

Some experts have submitted the proposal that the great powers' right of veto should be abolished. I do not think it will be possible for this demand to be met in the short or medium term. Also, the approach of having a judicial or quasi-judicial review of the justification for exercising a veto would probably encounter exceptional difficulties.

A more promising approach to start with would perhaps be to get the permanent members of the Security council to make less use of their right of veto. In this respect, I see two points where a start can be made, the first being in the diplomatic and political arena.

The UN Security Council Resolution of 11 June 1999 was not - as seems to be suggested by the wording of Article 27 paragraph 3 of the Charter of the United Nations - adopted with the votes of all permanent members but with one of these members abstaining, the People's Republic of China. This "Chinese way" could be developed as a possible model : it should be internationally acceptable for a permanent member to be outvoted in the Security Council and should not be regarded as involving a loss of face.

The second starting-point could be a legal one. We would have to begin identifying the cases where exercising the so-called right of veto would still be acceptable so as to confine the exercise of this right to a few central issues where the international order as a whole is affected.

I am quite sure that the inputs towards such a "Code of Conduct" will not come from governmental conferences. However, I hope that in free discussions conducted by specialists in international law not bound by short-term interests, criteria might be established to prevent arguments of "humanitarian intervention" on the one hand of "blockade of the Security Council" on the other being abused for arbitrary wars of aggression and oppression.

VI.

Justice and peace, the rule of law and power of law instead of the law of the powerful - these are the issues at stake. In the 126 years of your Institute's history you have consistently, dedicatedly and untiringly committed yourselves to these two tasks. For all of this we express our deepest thanks.

I am sur that his year's Conference will encourage the tackling of these problems and the promotion of legal progress in the 21st century. I do hope you will have stimulating lectures and debates at this important

Conference. You are most welcome here in Berlin, and I am looking forward to seeing you all again at the reception in the Opernpalais tomorrow evening.

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***Discours de Monsieur Otto Bräutigam, Ministre de la Justice et des affaires fédérales et européennes du* Land Brandenburg**

Mr. President of the Institut de Droit international
Mr. Governing Mayor,
Your Excellencies,
Chancellors of Universities,
Mrs. Federal Minister of Justice,
Members of the Institut,
Ladies and gentlemen,

It is indeed a great honour and a personal pleasure for me to cordially welcome you on behalf of the Government of the State of Brandenburg. Ministerpresident Stolpe who is, unfortunately, not able to attend this opening has requested me to convey his best regards to you.

As the Governing Mayor of Berlin, I consider it a great honour that the Institut has chosen the Berlin-Brandenburg Academy of Sciences as the venue for its meeting. I am sure that this place, which is so rich in traditions, will provide a good inspiration for your work.

About 300 years ago, on 11 July 1700, the then Brandenburg Elector, Frederick the Third, signed the foundation charter of the Electoral Brandenburg Society of Sciences which, as the first academy in Europe, brought together the Arts and the Natural Sciences thus becoming a model for almost all the academies of younger date in Europe. The first President of the Society, Gottfried Wilhelm Leibniz, described the task of the academy as to serve the *bonum commune*, that is to say, the general welfare. This was, indeed, no easy task at the end of the 17th century. The ravages caused by the Thirty Years' War had not yet been overcome in Germany. The economy had not recovered and there was bitter poverty throughout the country. The newly founded Society of Scholars was at that time called upon to contribute to the

development of the country but, beyond that, also to make a contribution to the emerging community of European States.

Naturally, the tasks and duties of the Institut de Droit international cannot be compared with the Academy, but I understand its mandate to mean that the Institut was likewise committed to the *bonum commune* of the community of nations. Hence, you have chosen an appropriate place for your deliberations.

Ladies and gentlemen, the Berlin Meeting of the Institut is being held at a time when the European order is under great strain, caused in the first place by the conflicts in the Balkans. It is true that the military intervention of the NATO Member-States has put a halt to the severe violations of human rights in Kosovo, but the problem has not yet been solved. An extraordinarily difficult peace-making process has been set in motion on the basis of a mandate issued by the United Nations. There can be no doubt that this major operation will be extremely difficult, protracted, and also costly. Through these events, Europeans have once more been made aware that, after the end of the East-West confrontation, peace in Europe, the respect for human rights and the protection of minorities are still not properly secured.

The Institut was founded in 1873, two years after the end of the German-French war, that severely affected peace in Europe at that time. Today, a war between Germany and France, just like a war between the other Member-States of the European Union, is inconceivable. This is one of the great changes that have been achieved in Europe since the end of the Second World War, the significance of which can hardly be overestimated. Yet this is not the case in other regions of the world as we time and again painfully experience. This makes the work of the Institut, which serves global peace through the strengthening of the international legal system, all the more important and urgent. We should like to encourage you in your efforts and give you our emphatic support. History has taught us that peace in this region, as in other parts of the world, can only be secured on a lasting basis by the respect for the rule of law and by striving for social justice.

Ladies and gentlemen, I address you here as the representative of an East German Federal State that was established as a result of a peaceful revolution nearly 10 years ago. This was one of the great moments in German history. Due to our painful experience with socialism in the GDR, the people in the State of Brandenburg have a particular sensitivity for civil rights and liberties and also for issues relating to social justice. It is our desire that our neighbouring States in the East, too, will be able to secure, on a lasting basis, what we have achieved here in 1989 and 1990, under very favourable conditions. I trust that the Members of the Institut will have this region also in mind during their stay in Berlin.

Ladies and gentlemen, I wish you good deliberations during the next few days, stimulating talks outside the official part of the meeting and last but not least I wish an outcome to your work that will be satisfactory to you and to the international law community throughout the world.

In conclusion, allow me to add a remark which is not directly related to the meeting of the Institut. Many of you will be aware that we have seen in recent years, above all in East Germany, attacks and violence against foreigners who are living here. There have also been signs of a new brand of chauvinism. You should know that these acts are being committed by fringe groups in our society who have not been able to cope with the radical changes that have taken place since 1989. These events are a source of great concern to us. I am, nevertheless, confident that they will not jeopardise democracy and the rule of law in Germany. The politicians - and indeed society as a whole - feel the obligation to do their utmost to ensure respect for human rights and human dignity in this country, and this, indeed, for all people who live or stay in Germany, irrespective of their origin, their nationality, their religious belief or political conviction.

Dear guests - next Sunday you are going to visit Postdam. We look forward to welcoming you there.

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Discours de Monsieur le professeur Erik Jayme, Président de l'Institut de Droit international

Monsieur le *Regierender Bürgermeister*,
Madame le Ministre Fédéral de la Justice,
Monsieur le Ministre de la Justice du *Land* Brandenburg,
Excellences, Messieurs et Mesdames les Ambassadeurs
Magnifizenzen et Spectabiles, mes chers Collègues,
Monsieur le Secrétaire général de l'Institut,
Mes chères Consoeurs, mes chers Confrères,
Mesdames et Messieurs,

L'Institut de Droit international vous remercie vivement pour le grand honneur que vous lui faites de votre présence lors de cette séance inaugurale de sa soixante-neuvième Session, la Session de Berlin. Aux membres et associés de notre Compagnie qui sont venus à Berlin, je souhaite la bienvenue la plus cordiale. Le groupe allemand est fier du fait que l'Institut ait, lors de sa Session de Strasbourg, accepté notre invitation de tenir la prochaine Session dans l'ancienne et la nouvelle capitale allemande, une Session particulièrement importante en ce qu'elle a lieu à la veille du nouveau millénaire et à la fin de la Décennie des Nations Unies pour le droit international qui s'achèvera en 1999.

Nous sommes très reconnaissants aux autorités fédérales et aux représentants des Länder pour l'appui constant donné à cette Session. L'Institut de Droit International sait bon gré à Monsieur le Président de la République de son amabilité de nous recevoir jeudi soir au Château de Bellevue. Je voudrais, particulièrement, vous remercier, Madame le Ministre de la Justice, pour votre appui et votre amicale attention tout au long de la période de la préparation de cette Session. Monsieur le *Regierender Bürgermeister*, Berlin nous a accueillis avec enthousiasme et j'aurai l'occasion ce soir de vous exprimer notre gratitude. Monsieur le Ministre de la Justice du *Land Brandenburg* : nos remerciements les plus chaleureux s'adressent à vous. Potsdam, pour les internationalistes, marque, par la Conférence de 1945, la période d'après la seconde guerre mondiale jusqu'à nos jours. En outre, les charmes de Potsdam, résidence de Frédéric le Grand, nous attendent et nous nous en réjouissons.

La Session aura lieu à l'Académie des Sciences berlino-brandebourgeoise et aussi à l'Université Humboldt, institutions d'une grande tradition scientifique et morale et nous remercions vivement leurs présidents pour le soutien accordé à nos efforts pour préparer la Session.

J'exprime nos remerciements profonds aux sponsors dont les représentants sont ici présents. Sans l'aide substantielle des fondations et des entreprises ainsi que des personnes privées nous n'aurions pas pu offrir un accueil digne de cet événement aux célèbres autorités de la science du droit international. Au cours de ce siècle, c'est - après la Session de Wiesbaden de 1975 sous la présidence de M. Wilhelm Wengler, berlinois et inoubliable membre honoraire de notre Compagnie - la deuxième Session seulement qui a lieu en Allemagne, tandis que, au dix-neuvième siècle, trois Sessions y trouvèrent place : Munich (1883) , Heidelberg (1887) et Hambourg (1891). Ce sont les vicissitudes de l'histoire de l'Allemagne au vingtième siècle qui ont empêché d'autres réunions scientifiques internationales de l'Institut en Allemagne. La Session de l'Institut de Droit International à Berlin marque donc un tournant : la science du droit international élit comme lieu des débats et discussions l'Allemagne pour aboutir à des résolutions pouvant servir de guide pour résoudre, pacifiquement, les questions complexes du droit international actuel. Et nous espérons que les résultats de la Session de Berlin figureront en bonne place quand l'Assemblée générale des Nations Unies se réunira en séance plénière le 12 novembre pour marquer la clôture de la Décennie.

Le choix de la ville de Berlin comme lieu de la dernière Session de ce siècle se prête à des réflexions particulières. L'histoire de Berlin, dans la seconde moitié de notre siècle, est le symbole de la force du principe de l'autodétermination des peuples qui a résisté à toute pression extérieure. Récemment, Berlin est devenue la capitale de l'Allemagne unifiée. La coupole transparente de l'édifice du Reichstag, siège du parlement fédéral, apparaît comme signe de la démocratie. Notre Session a lieu au moment du déménagement du gouvernement de Bonn à Berlin. Nous respirons l'air frais d'un début qui - espérons-nous - se transmettra à nos travaux scientifiques.

L'Institut, dès sa fondation, unit les publicistes et les privatistes du droit international. A l'époque de Pasquale Stanislao Mancini, premier président de l'Institut, le droit international public et le droit international privé apparaissaient comme deux branches d'une matière unique. Plus tard, à l'extérieur de l'Institut une séparation eut lieu. Le droit international public ne liait que les États, le droit international privé concernait seulement les individus. Ce schisme a perdu de son importance. Aujourd'hui, nous assistons, d'une part, à une certaine privatisation du droit international public, et, d'autre part, à une tendance du droit international privé à se baser de plus en plus sur des conventions internationales. L'individu et les associations formées par des individus sont reconnus, par le droit international public, comme titulaires de droits et d'obligations. Les droits de l'homme forment le pont entre les deux matières. L'Institut dispose du grand avantage d'unir les représentants des deux disciplines par un dialogue fructueux. C'est ainsi que deux des quatre sujets de nos délibérations en séance plénière concernent des problèmes qui se trouvent à cheval sur le droit international public et le droit international privé.

Les développements internationaux récents constituent un défi pour la science juridique. Le système du droit international n'est plus réduit à des règles interétatiques. Ce sont les individus qui deviennent de plus en plus importants en droit international public. La souveraineté des États est en train de céder aux exigences de la protection des droits de l'homme. D'autre part, les frontières entre les "affaires qui relèvent essentiellement de la compétence nationale d'un État" expression de l'article 2 paragraphe 7 de la Charte des Nations Unies, et les affaires qui touchent les intérêts de la communauté internationale ne sont pas encore clairement définies, un fait qui a comme résultat une incertitude inquiétante.

L'Institut a suivi ces développements par ses travaux. Je rappelle, surtout, la Résolution de Lausanne de 1947 sur "les droits fondamentaux de l'homme, base d'une restauration du droit international", et la Résolution de Saint-Jacques de Compostelle de 1989 sur "la protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des États". L'avantage de la science est son autonomie à l'égard de la politique et, en ce qui concerne notre Compagnie en particulier, l'amitié qui lie ses membres et associés indépendamment des écoles de pensée respectives.

"L'Institut de Droit International est une association exclusivement scientifique et sans caractère officiel", dit l'Article premier, paragraphe 1 des Statuts. Nous sommes citoyens d'une République des Sciences qui a comme but de contribuer, par ses travaux, à la résolution des problèmes du droit international. La devise de l'Institut, *Justitia et Pace*, fut, à l'époque de sa fondation, la réponse d'une "action scientifique collective" (Albéric Rolin, p. 12) aux calamités de la guerre franco-allemande de 1870-1871 ; elle reste toujours actuelle.

Le droit international privé, c'est ma conviction profonde, aura une grande importance pour résoudre ce qu'on a nommé les conflits de cultures ou de civilisations, sujet dont nous sommes en train de préparer une résolution. Le terme juridique qui reflète bien, en conflits de lois, ces problèmes et qui constitue la clé pour les solutions appropriées, c'est le principe de "l'équivalence fonctionnelle", autre sujet de nos délibérations en séance de commissions, et objet des riches réflexions de la récente jurisprudence de la Cour fédérale allemande. Il faut respecter les diversités, mais l'on doit trouver la base commune pour vivre ensemble pacifiquement.

L'autre grand problème du droit international de nos jours est la protection de la personne humaine face à la globalisation. Plus particulièrement, le commerce électronique conduit à des dangers pour les consommateurs. Dans la situation de l'histoire contemporaine, où les États semblent céder aux marchés, il faut trouver un équilibre entre le respect des lois des pays de l'origine des marchandises et des services et les règles protectrices des pays des consommateurs, autre thème qui nous occupera à l'avenir.

Mesdames et Messieurs,

alors que nous vivons dans une période transitoire du droit international dont les structures nouvelles ne sont pas encore clairement visibles,

je me permets, à la fin de ce discours, de citer un poème de Bertolt Brecht, d'un poète allemand qui représente bien cette partie de Berlin où notre Session se déroulera :

"Tausend Jahre fiel der Tau.
Morgen bleibt er aus.
Sterne treten ungenau
in ein neues Haus."

Français
Pendant mille années tombait la rosée.
Demain elle manquera.
Les étoiles entrent, imprécises
dans une maison nouvelle.

English
Thousand years the dew fell.
Tomorrow it will miss.
Stars enter imprecisely
in a new house.

Les étoiles - ce sont les principes du droit international à la veille du millénaire. C'est le défi de notre travail scientifique de leur rendre la précision nécessaire pour la sauvegarde de la paix.

Merci.

Rapport de Monsieur le professeur Christian Dominicé, Secrétaire général de l'Institut de Droit international

Frau Bundesministerin der Justiz,
Herr Minister der Justiz des Landes Brandenburg,
Herr Regierender Bürgermeister von Berlin,
Monsieur le Président de l'Institut de Droit international,
Mesdames et Messieurs les représentants des autorités universitaires,
Excellences, Mesdames et Messieurs, chers Confrères,

Mon premier propos est celui de la gratitude. Nous remercions le pays qui nous accueille, ses autorités fédérales, régionales, municipales, universitaires. Nous exprimons notre reconnaissance à nos confrères du groupe allemand, singulièrement à notre Président, ainsi qu'à tous ses collaborateurs.

On l'a déjà rappelé, c'est pour la cinquième fois dans son histoire que l'Institut de Droit international est accueilli en Allemagne, et pour la première fois à Berlin.

Les précédentes Sessions eurent lieu à Munich en 1883, Heidelberg en 1887, Hambourg en 1891, puis il faut attendre jusqu'en 1975 pour retrouver l'Institut à Wiesbaden.

Cette dernière Session, présidée par Wilhelm Wengler trente ans après la fin de la Deuxième Guerre mondiale, réunit notre compagnie dans un pays qui était alors divisé. Nous siégeons aujourd'hui dans un pays retrouvé, en paix avec lui-même et avec ses voisins, qui donne un bel exemple de démocratie et de fédéralisme, et dont la contribution, depuis un demi-siècle, à la construction d'une Europe unie, libérée de ses vieux démons, est impressionnante.

Pour quelques jours nous sommes les hôtes de Berlin, cette ville où, au mois de mai de cette année, l'élection du nouveau Président fédéral coïncidait avec le cinquantième anniversaire de la loi fondamentale de 1949, l'importante *Grundgesetzt*, bel exemple d'une Constitution qui sert de solide assise à la vie d'un peuple.

Hier encore, meurtrie par une blessure douloureuse qui la divisait en deux, Berlin était un lieu d'affrontement. Aujourd'hui, elle est le témoin de la réconciliation, et c'est de ce symbole qu'elle se veut désormais porteuse.

L'école allemande tient dans la science juridique une place remarquable, et le droit international, tant public que privé, doit beaucoup à d'éminents savants issus de la tradition germanique.

L'Institut de Droit international en est assurément bien conscient, lui qui a le privilège d'avoir compté, et de compter toujours en son sein, des juristes allemands de renom, de talent, d'authentique humanisme.

Nous sommes reconnaissants au groupe allemand de sa fidélité à l'Institut, ainsi que de l'amitié et du dévouement mis à nous recevoir sur les rives de la Spree.

Nous avons conservé un fort souvenir de notre dernière Session, à Strasbourg, où nos Confrères français nous ont reçus avec goût et générosité.

Je ne m'arrêterai pas ici aux travaux accomplis en 1997 au Palais de l'Europe. Ils furent substantiels. Ils sont publiés dans notre *Annuaire* (Volume 67-II). Les quatre Résolutions que nous avons adoptées - une sur l'enseignement du droit international et trois sur l'environnement - sont intéressantes et méritent l'attention.

C'est précisément en m'interrogeant sur les moyens d'une meilleure diffusion de nos Résolutions que j'ai formé un projet qui, je pense, rejoint certaines des préoccupations exprimées par notre Confrère Sir Elihu Lauterpacht dans son intervention en assemblée plénière à Strasbourg (*Annuaire*, vol. 67-II, p. 63).

Il serait utile de créer une collection, modeste dans sa dimension, qui serait composée de brochures, peu volumineuses et faciles à diffuser, dont chacune contiendrait une Résolution assortie d'un commentaire rédigé par le Rapporteur. Dans le cas de notre Session de Strasbourg, je me suis efforcé de préparer deux brochures, l'une sur l'environnement, l'autre sur l'enseignement du droit international. Le projet a pris du retard, car il me

manque encore des textes, mais j'ai bon espoir de vous faire parvenir prochainement le premier fascicule de cette série. Pour un coût peu élevé, nous pourrions assurer une meilleure diffusion aux résultats de nos travaux.

Depuis notre Session de Strasbourg, notre Compagnie a suivi avec attention, émotion aussi, la marche cahotante du monde, qui voit l'humanité, dans une curieuse alchimie, présenter tout à la fois le beau visage de progrès sociaux et de réalisations harmonieuses, et la face hideuse de la haine et des animosités destructrices.

La contribution des juristes de droit international, et particulièrement des membres de notre Compagnie, à la construction d'une société pacifique, démocratique, soucieuse du sort des plus faibles, est importante et doit mobiliser nos énergies.

Au cours des deux ans qui se sont écoulés, nous avons vu disparaître quelques-uns de nos confrères. Une brochure vous a été distribuée, qui rend hommage à ceux de nos Membres dont l'itinéraire terrestre a trouvé son terme, et qui souligne également les mérites de ceux qui, se rendant compte qu'ils ne sont plus en mesure de participer à nos travaux, ont pris la décision de démissionner. Ces hommages seront publiés dans l'*Annuaire*.

Nous conservons la mémoire des Membres de notre Compagnie qui sont décédés, nos Confrères Haopei Li, Eero Manner, Stephan Verosta, Endre Ustor, celle aussi des Membres émérites qui ne sont plus, John R. Stevenson et Myres S. McDougal.

Nos voeux et amicales pensées accompagnent ceux qui, après avoir démissionné, ont accédé au titre de Membres émérites, nos Confrères Francesco Capotorti, Ronald Macdonald, Sir Francis Vallat, Yuichi Takano. Nous leur exprimons notre gratitude pour leur activité au sein de l'Institut.

Notre travail s'est poursuivi sur les deux plans scientifique et institutionnel. C'est ce que je voudrais brièvement évoquer en commençant par notre activité scientifique.

Comme l'indique le programme de la présente Session, quatre Commissions ont pu achever leurs travaux. C'est un résultat satisfaisant.

On peut rappeler que l'une de ces Commissions, la Onzième (Rapporteur M. Bernhardt) a pu se réunir à Genève en août 1998. Ces réunions hors Sessions peuvent apporter beaucoup à la réflexion scientifique, si elles sont précédées de travaux préparatoires substantiels.

Cette Commission, rappelons-le, présente à Berlin son rapport sur le sujet "Le règlement judiciaire et arbitral des différends internationaux impliquant plus de deux Etats". Il s'agit d'une contribution de l'Institut à la Décennie du droit international, comme l'ont été nos travaux de Strasbourg sur l'environnement et l'enseignement du droit international.

J'ai pu, au nom de l'Institut, adresser un rapport au Secrétaire général de l'ONU sur notre contribution à cette Décennie.

Parmi les questions qui seront discutées au cours de notre Session de Berlin, toutes impostantes, intéressantes et difficiles, je tiens à souligner, compte tenu des tragiques drames humanitaires dont nous sommes les témoins, l'importance qui s'attache aux travaux de la Quatorzième Commission sur "l'application du droit international, notamment humanitaire, dans les conflits armés auxquels prennent part des entités non-étatiques".

On pourrait, il est vrai, perdre courage en observant combien le droit humanitaire est foulé aux pieds, chaque jour. Et pourtant il faut sans relâche envisager les règles de ce droit humanitaire à la lumière des nouvelles formes de conflits, et surtout proclamer haut et fort que les principes humanitaires fondamentaux doivent être respectés en toutes circonstances.

N'oublions pas que notre Institut a été créé en 1873, notamment pour contribuer à un meilleur respect du droit des conflits armés.

Il y a quelques jours, jeudi dernier 12 août, le Comité international de la Croix-Rouge organisait à Genève une cérémonie particulièrement émouvante pour marquer le Cinquantième anniversaire des Conventions de Genève du 12 août 1949.

Ce ne fut pas une célébration. Ce fut l'occasion d'un *vibrant appel* signé par *quatorze personnalités* de renom international, apportant des témoignages très divers et authentiques, venant d'horizons aussi différents que ceux de Kofi Annan ou Géraldine Chaplin.

On y lit notamment: "Souvent bafoués et violés, les Conventions de Genève et les principes qui les fondent gardent néanmoins toute leur valeur et leur actualité. C'est l'opinion de milliers d'individus qui, à travers le monde, ont souffert de la guerre dans leur chair et leur esprit". Et le texte culmine en un profond appel au respect de la dignité de l'être humain.

Souhaitons que nos travaux, s'inscrivant dans cette perspective, soient empreints d'une irréprochable solidité juridique et d'une grande force morale.

Evoquer nos travaux, c'est aussi s'interroger sur la manière dont nous sélectionnons les sujets à étudier, et les méthodes que nous utilisons.

Laissons pour l'heure le fonctionnement global de l'Institut. Le système qui nous régit a ses mérites. Par exemple, le renouvellement relativement rapide des postes du Président et des trois Vice-Présidents permet d'associer à la conduite des affaires des Membres aux sensibilités différentes, en ayant le souci d'une répartition géographique satisfaisante, et en tenant compte des thèmes inscrits à l'ordre du jour de chaque Session, de manière à bien ordonner la présidence des séances plénières. Et cela nous vaut l'honneur et le plaisir d'être accueillis, pour chaque Session, dans le pays de notre Président.

Ce qui est préoccupant est le défaut de conduite scientifique suffisamment affirmée et continue. Je m'étais déjà exprimé à ce sujet dans le rapport que je vous ai présenté à Strasbourg (*Annuaire*, vol. 67-II, p. 41). Les Commissions Lalive et Rosenne, finalement réunies, sont parvenues à la même conclusion, ce qui est à l'origine de la modification statutaire que vous serez appelés à examiner cet après-midi.

Cette modification, vous le savez, vise à consolider la Commission des travaux sous une nouvelle forme.

Avec une Commission des travaux dynamique, active dans l'intervalle des Sessions, soucieuse de procéder à des études exploratoires et d'adapter nos méthodes de travail, nous pouvons espérer donner à notre Compagnie davantage de force, et la capacité d'être à la hauteur de sa tâche dans un monde en mouvement.

Ce monde, et plus précisément l'humanité qui le constitue, celles et ceux que nous rencontrons au quotidien, doivent être constamment au centre de nos préoccupations.

Contribuer à élaborer des règles juridiques sûres et justes, veiller à leur respect, c'est bien notre mission.

Elle nous est rappelée par notre devise *Justitia et Pace*. Il y a sans doute là une part de rêve, ce rêve qui inspire les poètes, mais qui doit aussi motiver les femmes et les hommes de bonne volonté.

Nous pouvons alors conclure en empruntant quelques mots à Goethe, ce géant de la littérature, que la culture allemande a donné à la culture universelle. Goethe qui fait dire à Manto:

"*Den lieb ich, der Unmögliches begehrt*"
(J'aime celui qui rêve l'impossible).[1]

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[1] Le second Faust, Acte II, Le bas Pénéios

Session de Berlin

Délibérations de l'Institut en séances administratives et plénières[1]

Session of Berlin

Deliberations of the Institute during Administrative and Plenary Meetings[1]

1 Les travaux préparatoires sont publiés dans l'*Annuaire de l'Institut de Droit international,* vol. 68, tome I, Session de Berlin, 1999.

The preparatory works are published in the *Annuaire de l'Institut de Droit international,* vol. 68, part I, Session of Berlin, 1999.

Réunions de l'Institut en séances administratives

Première séance administrative

Mardi 17 août 1999 (après-midi)

La séance est ouverte à 15 h 15 sous la présidence de M. *Jayme*, Président de l'Institut.

Le *Président* souhaite la bienvenue aux Membres de l'Institut.

Le *Secrétaire général* communique le nom des membres du Secrétariat, dont la collaboration est particulièrement utile. Les secrétaires-rédacteurs, placés sous l'autorité de M. Pierre Klein, maître de conférences à la Faculté de droit de l'Université Libre de Bruxelles, seront les suivants : Mmes Laurence Boisson de Chazournes, professeur à la Faculté de droit de l'Université de Genève; et Anne-Marie La Rosa, juriste au Bureau international du Travail, MM. Alain-Denis Henchoz, avocat, docteur en droit; Olivier Corten, maître de conférences à la Faculté de droit et à l'Institut d'études européennes de l'Université libre de Bruxelles ; Nicolas Angelet, docteur en droit et chercheur à l'Université libre de Bruxelles; Oliver Liang, consultant au Bureau international du travail; René Provost, professeur à la Faculté de droit de l'Université McGill; et Maurice Sheridan, avocat, associé de la Foundation for International Environmental Law and Development à Londres, visiting lecturer University of Manchester Institute of Science and Technology; M. Jean-François Gareau, avocat et assistant à la Faculté de droit de l'Université de Genève assurera la traduction des documents traités lors de la présente session. Les secrétaires-dactylographes sont Mmes Wendy Beaman, Solange de Claparède, Anne Handley, Elisa Krahenbuhl, Jocelyne Lefranc, Marianne Quirin, Paulette Quirin et Claudine Schwab. Le Secrétaire général pourra en outre compter sur la précieuse aide de

Mmes Madeleine Wehberg et Isabelle Gerardi. Mme Nika Witteborg, conseillère académique à l'Université de Heidelberg, sera l'assistante du Président, et M. Paul Mulhauser celui du Trésorier.

Le Secrétaire général indique ensuite le nom des Membres qui, ne pouvant pas participer à cette session, se sont excusés : MM. Boutros-Ghali, Ferrer Correia, Sir Robert Jennings, MM. Mbaye, Nascimento e Silva et Pescatore, Membres honoraires ; MM. Adede, Arangio Ruiz, Bardonnet, Bennouna, Bos, Carrillo Salcedo, Fatouros, González Campos, Ikehara, Mádl, Mbaye, Monaco, Moura Ramos, Ni, Pastor Ridruejo, Riad, Salmon, Sette Camara, Valticos, Wang, Sir Arthur Watts et M. Wildhaber, Membres titulaires.

Il procède ensuite à l'appel des Membres et Associés présents.

Election des deux Commissaires vérificateurs des comptes

Sur proposition du Bureau, MM. Pierre Lalive et Matscher sont élus Commissaires vérificateurs des comptes, par acclamation.

Désignation des membres de la Commission de dépouillement des scrutins

Le *Président* indique que le Bureau suggère de confier les opérations de dépouillement à Mme Pérez Vera et à MM. Makarczyk, Müllerson et Ben Achour.

Ces derniers sont désignés par acclamation à cette fonction.

Désignation des membres du Comité de rédaction

Le *Président* indique que le Bureau suggère que le Comité de rédaction se compose de Mme Bindschedler-Robert, MM. Meron, Vignes et Franck.

La suggestion du Bureau est approuvée par acclamation.

Election des deuxième et troisième Vice-Présidents

Le *Président* indique que le Bureau propose l'élection de MM. Pinto et Zemanek aux fonctions de Vice-Présidents.

A l'issue du vote, M. Zemanek est désigné aux fonctions de Deuxième Vice-Président et M Pinto à celles de Troisième Vice-Président.

Election du Trésorier

Le Président rappelle que M. Vischer a exprimé, lors de la 68ème Session de l'Institut, son désir de céder sa place. Le Bureau a examiné la question de son remplacement. Il fait la proposition de nommer M. Pocar, membre associé de l'Institut, comme futur trésorier. Il acquérera le statut de membre à l'issue de la session de 2001. Le Bureau informe les membres de l'Institut que M. Vischer accepte d'être réélu jusqu'à la prochaine session et qu'il travaillera de pair avec M. Pocar.

La suggestion du Bureau est approuvée par acclamation.

Election de nouveaux Membres honoraires

Le *Président* rappelle que MM. Monaco, Schwind et Truyol y Serra sont présentés pour accéder à la qualité de Membres honoraires.

Les Membres honoraires et Membres titulaires prennent part au scrutin, qui réunit 71 votes auxquels s'ajoutent 17 votes par correspondance. MM. Monaco (87 voix), Schwind (85 voix) et Truyol y Serra (87 voix) sont élus Membres honoraires. Ils sont applaudis.

Election des nouveaux Associés

La liste des candidatures s'établit comme suit :

Candidats venant de pays ayant un groupe national	*Candidats venant de pays sans groupe national*
M. Nisuke Ando (Japon)	M. Vojin Dimitrijevic (Yougoslavie)
Mme Geneviève Burdeau (France)	M. Kari Hakapää (Finlande)
M. Oriol Casanovas (Espagne)	M. Maurice Kamto (Cameroun)
M. Jacob Dolinger (Brésil)	M. Jerzy Kranz (Pologne)
M. Gerhard Hafner (Autriche)	M. Ahmed Mahiou (Algérie)
M. Bernd von Hoffmann (Allemagne)	M. Djamchid Momtaz (Iran)
M. David McClean (Royaume-Uni)	M. Didier Opertti (Uruguay)
M. Michael Reisman (USA)	M. Hüseyin Pazarci (Turquie)
M. Christos Rozakis (Grèce)	M. Sreenivasa Rao (Inde)
M. Antoon Struycken (Pays-Bas)	M. Amos Shapira (Israël)
M.Tullio Treves (Italie)	M. Diego Uribe Vargas (Colombie)
	M. Raul Emilio Vinuesa (Argentine)
	M. Christopher Weeramantry (Sri Lanka)
	M. Abdulqawi Yusuf (Somalie)

Le *Secrétaire général* précise que, après l'élection de trois nouveaux Membres honoraires, onze places sont disponibles lors du premier tour de scrutin.

Le *Président* indique que le Bureau propose d'attribuer cinq sièges à la liste des candidats venant de pays ayant un groupe national et six sièges à la liste des candidats venant de pays sans groupe national. Cette répartition a été faite en tenant compte du nombre des candidats figurant sur chacune des listes. Cette proposition est acceptée.

Mr *Schachter,* in raising the candidacy of Mr Reisman, noted the extraordinary number of high quality candidates proposed for election. He wished to draw attention to the *curriculum vitae* of Mr Reisman, from which one could see an extensive body of writing on a variety of international legal subjects. Many of those writings displayed great originality, and all displayed

intellectual verve. Whilst Mr Reisman was primarily a public international lawyer, particularly in the field of human rights, he wrote on and taught private international law. Hence, like Mr Lowenfeld, he was properly to be regarded as both a public and a private international lawyer. Mr Schachter recommended him highly for election.

Mr *Oda*, introducing the candidacy of Mr Ando, highlighted the fact that Mr Ando, currently Professor at Kyoto University, had consistently published academic writings of a high standard on the subject of human rights and in other international legal areas. Two years previously Mr Ando had, as President of the Japanese Society of International Law, presided over the Symposium held to mark the centenary of that body. That event had been further marked by the publication of the Symposium's Proceedings. That publication alone evidenced the high quality of the academic work produced in Japanese international law circles. Following the nomination of Mr Takano as Emeritus Member, the Japanese group was now only three in number. In Mr Oda's opinion, the Institute would benefit greatly from the introduction of Mr Ando, also a member of the UN Human Rights Committee, as the new Japanese Member.

Mr *Pinto* wished to draw the attention of the Members to the candidacy of Mr Weeramantry, who as Judge at the International Court of Justice, was well known to all. Mr Pinto preferred to highlight the extensive range of legal activities of Mr Weeramantry, the youngest judge at the Supreme Court of Sri Lanka, and an extensive writer in international law, in particular in human rights law. His judgments needed no introduction, and Mr Pinto recommended him as a strong candidate for election.

M. *Castro-Rial y Canosa* estime raisonnable de répartir le nombre des postes vacants entre les deux listes selon un critère numérique. Il tient toutefois à rappeler l'importance donnée au cours de l'histoire de l'Institut aux groupes nationaux. Il apporte en ce sens son soutien au candidat du groupe espagnol, M. Casanovas. Il souligne tous les mérites scientifiques du candidat.

Mr *Anand* wished to voice his strong support for the candidacy of Mr Rao, Legal Adviser to the Government of India. Further to a brilliant career, including Masters degrees from India and from Yale, and a Doctorate from Yale, Mr Rao had written extensively, particularly in the area of Law of the Sea, and was currently a member of the International Law Commission. Mr Anand highlighted that India currently had only one Member at the Institute which, in his view, was not properly reflective of the contribution such a large country could make to the Institute.

M. *Abi-Saab* voudrait soutenir la candidature de M. Yusuf. Ce dernier a fait ses études en Somalie, en Italie et en Suisse. Son parcours de fonctionnaire international est exemplaire. Il est à l'heure actuelle jurisconsulte de l'ONUDI. Il a en parallèle mené une carrière scientifique en publiant des articles de grand intérêt. Sa connaissance de questions juridiques de grande technicité serait d'un grand apport pour les travaux de l'Institut. M. Abi-Saab souligne en outre que M. Yusuf est directeur de l'*Annuaire africain de droit international* depuis dix ans.

Mr *Schermers*, while questioning whether individual Members of the Institute recommending particular candidates for election could have an impact on voting preferences (as Members will have seen CVs of all the candidates), wished to promote specifically Mr Struycken. The latter was a true Dutch expert in private international law, was President of The Hague Conferences on Private International Law and was a leading Dutch public and private international lawyer. Mr Schermers strongly recommended his candidacy to the Members.

Mr *Lauterpacht* wished to recommend to the Members Mr McClean, who had been proposed unanimously by the UK group. As a private international lawyer, Mr McClean was perhaps not so well known to the public international lawyers present in the Institute, but he had, over the years, completed a significant number of important writings, as his CV indicated, and had carried out extensive work in The Hague Conferences.

Mr *Zemanek* had originally not intended to intervene but, in the light of the other interventions, he felt that to fail to do so would amount to an injustice to Mr Hafner. Mr Hafner had a brilliant academic career, and an

impressive list of publications. He also stood out by his work in the United Nations, and was the only Austrian involved in its activities on the Law of the Sea, including having participated from the beginning in the Sea-bed Commission. He was an author of the First Framework Report and a member of the International Law Commission.

M. *Ziccardi* rappelle à l'attention des membres de l'Institut la candidature de M. Treves. Ce dernier a exercé des fonctions en droit international public, notamment en droit de la mer, ainsi qu'en droit international privé. Il est aussi un spécialiste de droit international pénal et est l'auteur d'importantes publications.

Mrs *Higgins* strongly recommended Mr Dimitrijevic, a candidate proposed under Article 8 (d) (ii) of the Rules of the Institute. He was known to her from his days on the UN Human Rights Committee during the Socialist era, throughout which he remained a beacon for democracy. He had suffered all the difficulties that might be imagined in his work as a Serbian human rights proponent. He was a first-class candidate for election to the Institute.

Il est procédé au premier tour de scrutin.

Le *Secrétaire général* annonce le résultat des élections des Membres associés.

Il rappelle que les statuts exigent l'obtention d'une double majorité lors du premier tour de scrutin, à savoir, "la majorité absolue des votes des Membres et Associés présents, et la majorité absolue des votes des Membres et Associés présents et des Membres absents qui ont régulièrement pris part à l'élection" (Article 16, al. 5 du Règlement de l'Institut).

Liste des candidats venant de pays ayant un groupe national

Sur 98 bulletins rentrés, 93 sont valables, auxquels s'ajoutent 12 votes par correspondance. La majorité absolue s'établit à 53, celle des Membres présents à 47.

Résultats, portant entre parenthèses le nombre de votes des Membres et Associés présents :

M. Nisuke Ando (Japon) : 47 (43) ; Mme Geneviève Burdeau (France) : 72 (65) ; M. Oriol Casanovas (Espagne) : 29 (26) ; M. Jacob Dolinger (Brésil) : 24 (21) ; M. Gerhard Hafner (Autriche) : 42 (39) ; M. Bernd von Hoffmann (Allemagne) : 60 (55) ; M. David McClean (Royaume-Uni) : 36 (31) ; M. Michael Reisman (USA) : 59 (53) ; M. Christos Rozakis (Grèce) : 18 (14) ; M. Antoon Struycken (Pays-Bas) : 33 (27) ; M.Tullio Treves (Italie) : 54 (47).

Le *Secrétaire général* rappelle que cinq sièges étaient disponibles lors du premier tour pour cette première liste. Quatre nouveaux Associés ont été élus : Mme Burdeau et MM. von Hoffmann, Reisman et Treves.

Liste des candidats venant de pays sans groupe national

Sur 98 bulletins rentrés, 97 sont valables auxquels s'ajoutent 12 votes par correspondance. La majorité absolue s'établit à 55, celle des Membres présents à 49.

Résultats, portant entre parenthèses le nombre de votes des Membres et Associés présents :

M. Vojin Dimitrijevic (Yougoslavie) : 59 (56) ; M. Kari Hakapää (Finlande) : 38 (34) ; M. Maurice Kamto (Cameroun) : 39 (34) ; M. Jerzy Kranz (Pologne) : 22 (20) ; M. Ahmed Mahiou (Algérie) : 43 (39) ; M. Djamchid Momtaz (Iran) : 40 (38) ; M. Didier Opertti (Uruguay) : 20 (19) ; M. Hüseyin Pazarci (Turquie) : 32 (29) ; M. Sreenivasa Rao (Inde) : 50 (49) ; M. Amos Shapira (Israël) 37 (33) ; M. Diego Uribe Vargas (Colombie) : 22 (20) ; M. Raul Emilio Vinuesa (Argentine) : 40 (37) ; M. Christopher Weeramantry (Sri Lanka) : 55 (47) ; M. Abdulqawi Yusuf (Somalie) : 59 (57).

Le *Secrétaire général* indique que deux candidats de cette liste obtiennent les deux majorités requises pour être élus au premier tour. Il s'agit de M. Vojin Dimitrijevic et de M. Abdulqawi Yusuf. Quatre places sont encore disponibles.

Le Secrétaire général rappelle alors qu'il est possible de voter pour un maximum de un candidat sur la liste des candidats venant de pays ayant un groupe national et pour un maximum de quatre candidats dans la liste des candidats venant de pays sans groupe national.

Il est procédé au deuxième tour de scrutin, dont les résultats seront communiqués lors de la deuxième séance administrative.

Le *Président* invite l'Assemblée à examiner le point de l'ordre du jour consacré à la modification du Statut et du Règlement de l'Institut. Il demande à M. Rosenne, en tant que Président de la Commission de la révision du Règlement, de présenter le texte du projet de modification.

Mr *Rosenne* expressed his thanks to the President. He noted that on the eve of the new century and millennium and looking at the challenges facing us, it is time for the Institute to take stock of itself and see what needs to be done to enable it to carry out its tasks. The Institute is still working on a Statute which is essentially that which its founders drew up over 125 years ago. It is a good Statute, and nothing in it should be changed simply for the sake of change.

However, since the centenary meeting in Rome in 1973 it has become more and more evident that a thorough re-examination is required of the work programme, including especially the manner in which topics for study are chosen and the progress of the work is followed. Discussions in different sessions since then have shown that piecemeal adjustment of the constituent instruments is inadequate. Over the last six years the Bureau has invited two working groups, one chaired by Pierre Lalive to examine the Statute, and the second chaired by himself to examine the Rules. He recalled that the discussion at Strasbourg, and especially the intervention of Mr Lauterpacht, had brought out that a more intensive approach to the matter was needed.

Mr Rosenne noted that, at its January 1998 Session, the Bureau had asked his group as a first step to direct its attention to the *Commission des travaux*, to be translated in English as *Programme Committee.* On the basis of consultations with the Lalive Group and the Secretary-General, by

correspondence and at an intersessional meeting in Geneva in 1998, the conclusion was reached that the first step must be to put the Programme Committee on a regular statutory basis. This requires an amendment to the Statutes to establish the Committee, and amendment to the Rules to regulate its functioning in relation to the Institute as a whole, as well as its other Commissions, in particular the Bureau. He stressed that the amendments to the Statutes and the Rules were an integrated whole and that the Bureau wished them to be put to a single vote. If adopted, the Bureau will propose that the election of the new Programme Committee be held within a few days.

Mr Rosenne then highlighted the main features of the proposal : firstly, the Programme Committee is an advisory body. Its decisions regarding the programme of work are subject to the approval of the Institute. This has always been the practice since the Committee was first set up in 1947. Secondly, it is essential that the scientific work of the Institute should be properly controlled, and that the Programme Committee and the Bureau should work in close contact. The President of the Institute is, following current practice, *ex officio* President of the Programme Committee. It is now proposed that the Programme Committee should elect two Vice-Presidents, one for the field of private international law and one for the field of public international law. This proposal is therefore designed to ensure that the immediate programme of work, including the possibility of intersessional meetings of Commissions, should be commensurate with the available financial resources. This is completed by the suggestion that a joint meeting of the Bureau and the Programme Committee should be held at least once in every two-year period. Thirdly, he relayed the feeling of the group that the composition of the Programme Committee should contain a built-in element of both continuity and change, leading to suggest a system of staggered terms of office, ensuring that one third of the Members of the Committee are elected at each Session of the Institute. The Group suggested that the immediate task of the Programme Committee is to prepare a programme of work for the next ten years, and submit it to the next Session in 2001.

He relayed the feeling of the Bureau that the establishment of the Programme Committee as suggested was a matter of urgency and that the Bureau should establish a special constitutional commission to examine in

depth the Institute's constitution and its functions in this new era. This commission should produce its first report at the Session of 2001.

He thanked Mr Pierre Lalive for the work of his group and for his co-operation and that of his colleagues with his group, and thanked also Messrs. Amerasinghe and Bardonnet for their valuable assistance in preparing the report. The Secretary-General and his colleagues in Geneva also undertook some basic research into the history of the *Commission des travaux*, for which he wanted to record his appreciation.

Finally, he repeated that the proposed amendments to the Statutes and Rules were an integrated whole. He hoped that they were not controversial and that they could be adopted today in a single vote.

The *President* thanked Mr Rosenne for all the work done. This is a very important issue because the Programme Committee (*Commission des travaux*) now works without a statutory basis.

Mr *Lauterpacht* expressed his gratitude to Mr Rosenne and all the other Members of his group for completing a very important task. He had considerable doubt as to the draft in its present form because it was an inadequate expression of the view voiced in Strasbourg in favour of a far-reaching review. But in the end, he thought it better to go with what was in front of the Institute now, and stated that he would support the Resolution. He would, however, also support the creation of a constitutional committee, and expressed the hope that it could be done at the present session. He in fact proposed a Resolution to create such a constitutional committee. He considered that there should be no further delay before creating a body to look at all the relevant issues.

He referred to a letter he wrote to the President in 1998, in which he had enumerated a list of matters calling for attention by this committee: first, the size of the Institute, including its composition, the distinction between Members and Associates and the role of non-academic Members. Second, the procedure related to elections of Members, including nominations and voting procedures. Third, the functioning of the Institute, covering, among other, its goals of codification and development of international law, of

exploration of new areas requiring legal regulations, and of offering an opportunity for Members to meaningfully exchange. Fourth, the method used to select subjects for study by the Institute. Fifth, its method of work, including the selection of Rapporteurs and the funding of their work, as well as the distinction between the written and oral phases of the work of a Commission both during and between Sessions. Sixth, the presentation of the outcome of the Institute's work, covering the wisdom of using Resolutions as the main reflection of the Institute's work, given that the need to secure agreement often produces Resolutions which are insufficiently specific or which do not constitute a significant contribution to the law. Seventh, the frequency of sessions and the need for additional interim sessions of particular commissions. Eighth, the location of sessions, whether it should remain the same for all sessions or keep changing each time. Ninth, the composition of the Bureau and of Committees and the possibility of resorting to open elections for the selection of their members. Tenth, the selection of the President and Vice-Presidents, including the links to the National Group of the state hosting the session. Eleventh, the programme of the session, covering the need to devote the first two days to opening formalities and the fact that Resolutions are adopted at the very end of the session at a time when many Members have already left. Twelfth, the recording of debates and the desirability for Members to file with the Secretariat summaries of their own interventions within 24 hours of making them on pain of omission of any reference to them in the *Annuaire*. Thirteenth, the duration of sessions. And finally, fourteenth, the finances of the Institute, including the need to circulate, prior to the opening of the session, the accounts of the Institute, the desirability of using part of the assets of the Institute to support research assistance employed to help Rapporteurs, the need to contribute to the costs of participation of Members.

No work has been done so far on these matters save for the proposal put forward by Mr Rosenne. He urged the immediate creation of the constitutional committee with broad terms of reference to cover the above issues. In response to his letter, the President had expressed concern over the scope of his remarks, but had noted the particular importance of the size and composition of the membership of the Institute and stated that they should be discussed at the Berlin Session. He regretted that the matter was not on the agenda for this Session.

M. *Rigaux* marque son accord à la fois sur le principe et sur le contenu de la proposition de M. Rosenne. Il suggère toutefois d'amender le texte du nouvel article 13 des Statuts de manière à permettre à la Commission des travaux de faire des propositions non seulement sur le programme des travaux, mais aussi sur la désignation des rapporteurs.

Mr *Skubiszewski* expressed his support for the proposal put forward by Mr Rosenne, as well as for Mr Lauterpacht's proposal on the creation of a constitutional committee.

Mr *Blix* endorsed the Resolution proposed by Mr Rosenne. He also joined Mr Lauterpacht in many of his concerns. First, even in international organizations with constitutive instruments drafted after the Second World War there had been a need for revision; all the more for this Institute, whose Statute is now more than 125 years old. In particular, the procedure to elect new Members should be made faster and smoother. Secondly, he noted that there was widespread desire for broader geographic distribution, as well as more balanced gender and age distribution. He, however, remarked that the status of *emeritus* Member is designed to create more space, which is laudable.Third, he opined that ten days was a very long duration for any scientific meeting. In closing, he expressed support for the points made by Mr Lauterpacht.

Mr *Amerasinghe* wished to address the concerns expressed by Mr Lauterpacht. The Members of the preparatory group did consider his proposals but had refrained from incorporating them out of a fear of including proposed amendments not fully analysed. He had thought that there should be a permanent committee entrusted with the task of looking at all issues that were of concern.

Mr *Orrego Vicuña* supported the proposed amendments to the Statutes and Rules as both necessary and well drafted. He also thought it important to take action on the issues raised by Mr Lauterpacht with respect to the Rules and long-term outreach of the Institute. On another topic he wondered whether there was an established policy to put forward nominations for new associate Members only under the age of 65. Should that be so, he asked that the policy be clarified.

M. *Pierre Lalive* tient tout d'abord à préciser qu'il n'existe aucune règle statutaire ou réglementaire relative à l'âge du candidat. L'âge est une considération qui peut, le cas échéant, intervenir dans les discussions internes à l'Institut mais, en cette matière, tout est question d'espèce. Par ailleurs M. Pierre Lalive remarque qu'un consensus semble déjà s'être dégagé pour soutenir à la fois le texte présenté par M. Rosenne et la proposition de M. Lauterpacht. Il suggère qu'un vote ait immédiatement lieu sur ces deux points.

Mr *Gaja* noted that there was an inconsistency in the suggested amendments to the Rules of the Institute which specified that the Programme Committee shall consist of 12 elected Members, thus not reflecting the fact that the President was the *ex officio* chair of the Committee.

Mr *Rosenne* thanked Mr Gaja for his very useful remarks. He thought that this was a technical adjustment which could be made after the vote.

Il est procédé au vote sur le texte présenté par M. Rosenne, tel qu'amendé par M. Rigaux. La modification des Statuts et du Règlement est adoptée par 89 voix contre 0 et une abstention.

The *President* congratulated Mr Rosenne for his excellent work. He proposed to proceed to examine the question raised by Mr Lauterpacht on the creation of a constitutional committee. He noted, however, that the Rules of the Institute require a written proposal.

Mr *Shihata* endorsed the proposal and stated his wish that the new constitutional committee address the question of whether Resolutions adopted by the Institute reflected adequately the diversity of views within the community of international lawyers as well as within the membership of the Institute.

M. *Rigaux* suggère que l'on procède immédiatement à un vote sur le principe de la création de la Commission constitutionnelle, un texte précisant le statut, les compétences et le fonctionnement de cette commission pouvant être soumis au vote lors de la prochaine séance administrative.

L'Assemblée se prononce en ce sens par 90 voix contre 0 et une abstention.

The President announced that the text of a Resolution to create a constitutional commission would be examined at the next administrative meeting.

Mr *Bernhardt* wondered if a text was really necessary given that it was clear that the constitutional committee should examine all relevant issues. If created immediately, the committee could be set up and start its work without further delay.

The *President* noted that the Rules clearly require a written proposal and asked Mr Lauterpacht if he could prepare the text for the next meeting.

Mr *Lauterpacht* agreed to do so.

La séance est levée à 17 h 45.

Deuxième séance administrative

Mercredi 18 août 1999 (matin)

La séance est ouverte à 9 h 30 sous la présidence de M. *Jayme*.

Le *Secrétaire général* annonce les résultats du deuxième tour de scrutin pour l'élection des nouveaux Associés. Il rappelle qu'il y avait une place disponible pour la liste des candidats venant de pays ayant un groupe national et quatre places pour la liste des candidats venant de pays sans groupe national. Le nombre des bulletins rentrés pour la première liste de candidats est de 97. Il y a quatre bulletins nuls. Le nombre de bulletins valables est de 93. La majorité requise est de 47.

Les résultats des élections des candidats venant de pays ayant un groupe national sont les suivants : M. Nisuke Ando (Japon) : 31 ; M. Oriol Casanovas (Espagne) : 10 ; M. Jacob Dolinger (Brésil) : 3 ; M. Gerhard Hafner (Autriche) : 17 ; M. David McClean (Royaume-Uni) : 16 ; M. Christos Rozakis (Grèce) : 2 ; M. Antoon Struycken (Pays-Bas) : 13.

Le *Secrétaire général* constate qu'aucun candidat n'a été élu, faute d'avoir pu obtenir la majorité absolue de 47 voix, et qu'il reste en conséquence encore un siège à pourvoir dans la première liste. Il indique que conformément à l'article 16, alinéa 6, du Règlement, un troisième tour de scrutin peut être organisé en conservant les deux candidats ayant obtenu le plus grand nombre de voix, c'est-à-dire, dans l'ordre du nombre de voix obtenues : M. Nisuke Ando (Japon) et M. Gerhard Hafner (Autriche).

Le nombre de bulletins rentrés pour la liste de candidats sans groupe national est de 97. Il y a un bulletin nul. Le nombre de bulletins valables est de 96. La majorité requise est de 49.

Les résultats des élections des candidats venant de pays sans groupe national sont les suivants : M. Kari Hakapää (Finlande) : 22 ; M. Maurice Kamto (Cameroun) : 27 ; M. Jerzy Kranz (Pologne) : 10 ; M. Ahmed Mahiou (Algérie) : 39 ; M. Djamchid Momtaz (Iran) : 28 ; M. Didier Opertti (Uruguay) : 14 ; M. Hüseyin Pazarci (Turquie) : 13 ; M. Sreenivasa Rao (Inde) : 54 ; M. Amos Shapira (Israël) : 24 ; M. Diego Uribe Vargas (Colombie) : 14 ; M. Raul Emilio Vinuesa (Argentine) : 40 ; M. Christopher Weeramantry (Sri Lanka) : 56.

Le *Secrétaire général* indique que M. Sreenivasa Rao (Inde) et M. Christopher Weeramantry (Sri Lanka) sont élus. En conséquence, il reste encore deux places à pourvoir.

Il indique que conformément à la disposition susmentionnée du Règlement, un troisième tour de scrutin peut être organisé en conservant les quatre candidats ayant obtenu le plus grand nombre de voix, c'est-à-dire, dans l'ordre du nombre de voix obtenues : M. Raul Emilio Vinuesa (Argentine), M. Ahmed Mahiou (Algérie), M. Djamchid Momtaz (Iran) et M. Maurice Kamto (Cameroun).

L'Assemblée se prononce en faveur d'un troisième tour de scrutin pour les deux groupes de candidats.

Le *Secrétaire général* annonce les résultats du troisième tour de scrutin. S'agissant de la liste de candidats venant de pays ayant un groupe national, 86 bulletins de vote sont rentrés et tous sont valables. La majorité absolue est fixée à 44.

Le Secrétaire général annonce que M. Nisuke Ando est élu (49 voix).

S'agissant de la liste des candidats venant de pays sans groupe national, 86 bulletins sont rentrés. La majorité absolue est fixée à 44.

Un candidat est élu, M. Raul Emilio Vinuesa (52 voix). Une place demeure vacante pour les candidats de la deuxième liste. L'Assemblée peut donc décider de procéder à un quatrième tour de scrutin, en retenant comme candidats MM. Mahiou et Momtaz.

L'Assemblée se prononce en ce sens.

Le *Secrétaire général* communique les résultats du quatrième tour de scrutin. Concernant la liste des candidats venant de pays sans groupe national, 87 bulletins sont rentrés. Il y a un bulletin nul. Il y a donc 86 bulletins valables. La majorité requise est de 44 voix. MM. Mahiou et Momtaz obtiennent tous deux 40 voix.

Conformément au Règlement de l'Institut, et à la demande de l'Assemblée, un cinquième tour de scrutin est organisé en vue de pourvoir le dernier siège vacant, en retenant comme candidats MM. Mahiou et Momtaz.

Le *Secrétaire général* annonce les résultats du cinquième tour de scrutin. 83 bulletins sont rentrés, tous valables. La majorité requise est de 42. M. Momtaz est élu par 45 voix.

Le Secrétaire général annonce que les onze places vacantes ont été pourvues. Il félicite les élus et remercie les scrutateurs.

La séance est levée à 10 h 00.

Troisième séance administrative

Vendredi 20 août 1999 (après-midi)

La séance est ouverte à 16 h 00 sous la présidence de M. *Jayme*.

Déclaration sur le Statut de la Cour pénale internationale.

Le Président ouvre tout d'abord la discussion sur le projet de déclaration relatif au Statut de la Cour pénale internationale préparé par M. Rosenne. Ce texte se lit comme suit :

"The Institute of International Law,

Recalling Article 1, paragraph 2(d), of its Statutes, by which one of the purposes of the Institute is to "promote the progress of international law ... by contributing, within the limits of its competence, either to the maintenance of peace or to the observance of the laws of war" ;

Welcomes the adoption on 17 July 1998 of the Rome Statute of the International Criminal Court ; and

Expresses the hope that all outstanding issues will be successfully resolved to general satisfaction ;

Requests the Secretary general to forward this Resolution to the Preparatory Commission for the International Criminal Court."

Traduction en français

"L'Institut de Droit international,

Rappelant l'article 1, paragraphe 2 d), de ses Statuts, en vertu duquel l'un des buts de l'Institut est de: "favoriser le progrès du droit international ... en contribuant, dans les limites de sa compétence, soit au maintien de la paix, soit à l'observation des lois de la guerre" ;

Se réjouit de l'adoption, le 17 juillet 1998, du Statut de Rome de la Cour pénale internationale ; et

Exprime l'espoir que les questions encore pendantes seront résolues à la satisfaction générale ;

Demande au Secrétaire général de transmettre la présente Résolution à la Commission préparatoire pour la Cour pénale internationale."

*

The *President* invited Mr Rosenne to introduce his draft Resolution to the Assembly.

Mr *Rosenne* recalled that Article 1, paragraph 2 of the Statutes of the Institute set out in ringing terms the purposes of the Institute. These included that the Institute make a contribution to the maintenance of peace and to the observance of the laws of war.

Since its foundation in 1873 the Institute had made a major contribution to the development of what was today called international humanitarian law. Indeed, the Institute's programme for the Berlin Session included a topic of particular delicacy currently, the application of humanitarian law in armed conflicts in which non-State entities were parties.

It commenced by recalling a Resolution adopted at Neuchâtel by the Institute over one hundred years ago, in 1890.

When looking through all the Resolutions adopted over the years by the Institute, Mr Rosenne had been astonished to find that there was not a single mention made of observance of the laws of war. In 1872, one of the Institute's founders, Gustave Moynier, had put forward a suggestion for the establishment of permanent international machinery for the enforcement of the Geneva Convention. However, nothing had come of it all at the time and, as far as could be ascertained, the Institute had thereafter never looked at this question.

Since that time, of course, the international community, through the United Nations, had taken a great step forward with the adoption in 1998 of the Rome Statute of the International Criminal Court. The Institute should not let that event pass unnoticed. That was why Mr Rosenne had suggested to the Bureau that it should present this draft Resolution to the Institute.

He trusted that the Resolution would not prove controversial. He was aware of different reactions to it, including that it was considered not to go far enough. In fact, it did two things. It took note of the adoption of the Rome Statute and it expressed the hope that all outstanding issues would be successfully resolved to general satisfaction. These outstanding issues were being dealt with in the Preparatory Commission which had just completed its second session.

Mr Rosenne suggested further that the *Commission des Travaux* give proper consideration to putting the topic of the International Criminal Court on the Institute's work programme. This was not intended, of course, to do anything that would stand in the way of the Preparatory Commission. It had to be recognized that there was an enormous number of issues which still awaited an agreed solution. Some, certainly, were more difficult than others, but, in his view, the Institute could assist by providing

practice-oriented-in-depth studies and thus contribute to resolving these questions. In the past, the Institute had served as a catalyst for the resolution of seemingly intractable practical problems. The last instance of this that he could recall was in 1963 when, under the leadership of Wilfried Jenks, and with the close cooperation of Philip Jessup and Grigori Tunkin, the Institute had adopted its Resolution on Outer Space, laying the basis for the United Nations Declaration of Principles on Outer Space and the later treaties which formed the basic instruments governing Man's activities in Outer Space. That was the kind of role he had envisaged the Institute might have in relation to the International Criminal Court.

He was aware that it had been questioned whether such a Resolution as this was appropriate for an Administrative Session. The reality of the matter was that the Rome Statute had been adopted between the Strasburg and the Berlin Sessions, and it had not been practically possible to create a Commission to prepare a draft Resolution. However, in 1991 at Basel, the Institute had adopted an important Declaration concerning the environment at an Administrative Session, and then went on to appoint a Rapporteur and the two working Groups that had gone on to prepare the important series of Resolutions adopted at Strasburg in 1997. The procedure was unusual, but it had to be recognised that the circumstances were unusual. He expressed his hope that, given its non-controversial character, those who felt unable to support the Resolution would abstain in any vote on its adoption.

Mr *Caflisch* thought that it was important the Institute take a position on this major development in public international law, but was of the view that the text could go further. He suggested adding, after the second paragraph, "*Hopes* that that Statute will be widely ratified".

M. *Torres Bernárdez* appuie la proposition faite par M. Caflisch. Il voudrait aussi demander à M. Rosenne la signification à donner à l'expression "questions encore pendantes" figurant au paragraphe 3 de la Résolution.

Mr *Rosenne* stated that the list of outstanding questions was enormous. One core question still outstanding was the elements of the crimes to be dealt with by the Criminal Court. Certain crimes, which, to his mind were international crimes *par excellence*, notably drugs trafficking, were not listed.

Mr *Dugard* considered the Institute should go beyond merely welcoming the adoption of the Rome Statute, and he therefore supported the amendment proposed by Mr Caflisch which made it clear that the Institute was in favour of the Statute as a whole. He, too, was concerned about the paragraph relating to the "outstanding issues to be resolved". In view of the fact that a number of States regard the Statute as unacceptable, the paragraph might be interpreted as saying that there were points open for reconsideration.

M. *Bedjaoui* remarque que le 17 juillet 1998, date de l'adoption du Statut de la Cour pénale internationale, est une date historique et représente un tournant très important en droit international. Il remercie M. Rosenne pour sa proposition qui rappelle la mission de l'Institut et fait usage d'une rédaction intelligente et prudente. M. Rosenne a su éviter de faire mention de questions qui auraient pu diviser les Membres de l'Institut. Dans ce contexte, M. Bedjaoui appelle ses confrères à renoncer à leur droit de parole. Il propose de passer immédiatement au vote de la Résolution telle qu'amendée par M. Caflisch.

The *President* put Mr Bedjaoui's proposal to the vote. It was adopted by 47 votes in favour, 6 against and 13 abstentions.

Mr *Bernhardt* asked that it be made clear whether the amendment proposed by Mr Caflisch would be put to a vote.

Le *Président* met au vote l'amendement de M. Caflisch qui se lit comme suit :

"*Hopes* that that Statute will be widely ratified;"

The amendment was adopted by 62 votes in favour, 0 against, with 7 abstentions.

Mr *Bernhardt* proposed that paragraph 3 of Mr Rosenne's Draft Resolution be deleted, as it provided wording which, he believed, an uninformed person would find difficult to understand. This was not because he disagreed with the hope expressed in that paragraph that "outstanding issues [...] be resolved", but because he thought it might create confusion.

Mr *Frowein* stated that the Institute could not ignore the fact that one important Power was opposed to the Rome Statute. The Institute should not be seen as being in favour of renegotiations. He proposed to redraft paragraph 3 of Mr Rosenne's Draft Resolution to read as follows: "*Expresses* the hope that all outstanding issues will be successfully resolved *in the Preparatory Commission* to general satisfaction." It would then be clear that the Institute was against renogotiation.

Mr *Shihata* was in favour of deleting the third paragraph of Mr Rosenne's Draft Resolution. The Institute's task was not to "hope" but to help. If the Institute was unable to do so, it should, in his view, rather remain silent on the matter.

Mr *Rosenne* proposed a vote on the deletion of paragraph 3.

The *President* put the deletion of paragraph 3 to a vote, which was adopted by 41 votes in favour, 13 against, with 14 abstentions.

Mr *Meron* wished to explain what the Institute had done by its last vote. The amended text was, in his view, now at odds with the Resolution adopted by the United Nations General Assembly, which recommended that the Rome Statute be widely ratified and requested the Preparatory

Commission to make such ratification possible. As previously stated in the discussions, this, *inter alia*, required that the elements of the crimes to be dealt with by the Criminal Court be defined.

M. *Conforti* fait observer que son abstention est due au fait qu'il a été décidé de voter sur une question de grande importance sans qu'un débat ait pu prendre place.

Mr *Dinstein* stated that the Institute should not be more radical than the United Nations. Mr Frowein's proposal offered a compromise solution and should be put to a vote.

The *President* proceeded to a vote on Mr Frowein's proposal, which was adopted by 44 votes in favour, 3 against, with 23 abstentions.

Mr *Tomuschat* indicated that it was important that the paragraphs on ratification and on the outstanding issues be placed in the correct order, and therefore suggested a reversal of their current positions.

The *President* then proceeded to a vote on the Resolution as a whole subject to the alteration suggested by Mr Tomuschat. The text was adopted by 56 votes in favour, 1 against, with 15 abstentions[2]

M. *Rigaux* explique son abstention en observant que le sujet traité est d'une très grande importance, et qu'il a pourtant été traité de manière inadéquate. Il considère que l'Institut n'a pas mené un travail suffisamment sérieux sur cette question.

Mr *Franck* wished to make it clear that he had abstained for the same reasons as Mr Rigaux.

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[2] Le texte de la Résolution adoptée est reproduit ci-après, p. 408.

Prix Louis Renault.

The *President* moved the discussion on to Point 2, the Prix Renault and invited the Secretary General to present the response of the Institute to an essay submitted for consideration for this Prize.

Le *Secrétaire général* rappelle que le Règlement du Prix Renault prévoit qu'il soit décerné tous les quatre ans à l'auteur d'un ouvrage inédit. Le thème proposé était: "Les tribunaux internationaux institués par le Conseil de Sécurité". Le Secrétaire général donne lecture du rapport présenté par le Président du Jury du Prix Louis Renault, M. Pastor Ridruejo. Outre M. Pastor Ridruejo, le Jury était composé de MM.Antonio Cassese et Felipe Paolillo. Un seul ouvrage a été déposé. Il était intitulé: "Il fondamento giuridico del Tribunale *ad hoc* per l'ex-Jugoslavia", et écrit en langue italienne. Selon les renseignements fournis par le professeur Cassese, la partie la plus importante de l'ouvrage avait déjà été publiée. L'ouvrage présenté au Prix Renault ne comportait que de petites retouches de forme. En conséquence, le jury a considéré que l'ouvrage n'était pas original, et ne satisfaisait de ce fait pas aux conditions d'attribution du Prix prévues par le Règlement. Certes, la dernière partie de l'ouvrage, consacrée au Statut de la Cour pénale internationale, adopté à Rome le 18 juillet 1998, ne figurait pas dans la publication initiale. Mais, de l'avis du jury, cette partie nouvelle ne réunissait pas en elle-même les mérites nécessaires pour l'attribution du Prix. Pour ces raisons, le jury a estimé à l'unanimité que le travail présenté ne pouvait pas être retenu au titre du Prix Renault.

Le Secrétaire général informe que la Commission des travaux proposera un nouveau sujet pour l'obtention du prochain Prix qui sera dénommé Prix Rolin-Jaequemyns. Il appelle les Membres de l'Institut à lui faire des suggestions à cette fin.

M. *Rigaux*, remarquant le faible nombre de réponses, se demande si les informations relatives au Prix Renault sont suffisamment diffusées.

Le *Secrétaire général* indique que des informations et affiches ont été transmises aux facultés de droit et instituts. Des annonces ont en outre été publiées dans diverses revues scientifiques.

Présentation des rapports du Trésorier et des Vérificateurs des comptes

The *President* then moved the discussion on to Point 3, presentation of the reports by the Treasurer and the Auditors of the accounts of the Institute and the Auxiliary Foundation.

The *Treasurer* presented the accounts of the Institute as well as of the Auxiliary Foundation for the years 1997 and 1998. He indicated that the Foundation's Council was composed of Messrs. Jayme, Dominicé, Pescatore, Schindler, Vignes and himself. The Treasurer then proceeded with a detailed overview of the accounts. He indicated that Messrs. Pierre Lalive and Matscher were currently the Auditors and, as the latter was absent, invited Mr Pierre Lalive to present his report.

M. *Pierre Lalive* présente le rapport des vérificateurs des comptes. M. Pierre Lalive précise que M. Matscher et lui ont procédé à l'examen des documents préparés par STG Coopers & Lybrand et Pricewaterhouse Coopers relatifs aux comptes de l'Institut et de la Fondation pour les années 1997 et 1998. Ils sont satisfaits de l'ensemble des documents et proposent de donner décharge au Trésorier de sa gestion au cours des exercices 1997 et 1998. Ils lui expriment, ainsi qu'à son assistant M. Mulhauser, la reconnaissance de l'Institut pour leur excellent travail.

The Assembly approved by consensus the accounts and the reports of the Auditors.

Création d'un Comité constitutionnel

The *President* then moved the discussion on to Point 4, the establishment of a Constitutional Committee, the text of a Resolution for the creation of which reads as follows:

Draft Resolution: Establishment of a Constitutional Committee proposed by Sir Elihu Lauterpacht

"The Institute resolves to establish a Constitutional Committee to review generally the constitution of the Institute, including but not limited to its objects, structure, membership, functioning, method of work and finances, and to make such recommendations for the amendment of its Statute, Rules and practices as it deems appropriate.

The Committee shall seek the views of the Institute, take into account relevant earlier suggestions and prepare an interim report in time for circulation before, and discussion at, the 2001 Session.

The expenses of the Committee shall be borne by the Institute.

The Committee shall consist of the following Members : MM. Zemanek (Chairman); Lauterpacht (Rapporteur), Blix, Dinstein, Feliciano, Gaja, Gannagé, Pierre Lalive, Orrego Vicuña, Schwebel and Shihata ."

Traduction en français

Projet de résolution : Création d'un Comité constitutionnel proposé par Sir Elihu Lauterpacht

"L'Institut décide la création d'un Comité constitutionnel chargé de revoir globalement la constitution de l'Institut, ce qui comprend entre autres

ses buts, sa structure, sa composition, son fonctionnement, ses méthodes de travail et son financement, et de formuler les recommandations qu'il estimera appropriées quant aux amendements à apporter aux Statuts, Règlement et pratiques de l'Institut.

Le Comité devra solliciter les avis de l'Institut, tenir compte des suggestions pertinentes précédemment avancées et préparer un rapport provisoire en temps voulu pour que ce rapport soit distribué et son examen entrepris lors de la Session de 2001.

Les dépenses du Comité seront à la charge de l'Institut.

Le Comité comprendra les Membres suivants : MM. Zemanek (Président), Lauterpacht (Rapporteur), Blix, Dinstein, Feliciano, Gaja, Gannagé, Pierre Lalive, Orrego Vicuña, Schwebel et Shihata."

Sir Elihu Lauterpacht hoped that the kind words earlier addressed by Mr Bedjaoui to Mr Rosenne's proposal might be considered equally applicable to his own proposed Resolution. Following on from the discussion that took place during the first Administrative Session, the principle of a Constitutional Committee had been agreed. He therefore hoped that his Resolution might receive ready acceptance from the Members.

He wished to emphasize that the whole idea of the Constitutional Committee, and its review of all matters relating to the goals, structure, composition and so forth of the Institute, involved no adverse reflection on any officer or person of the Institute. All the Members were greatly in debt to the officers of the Institute for their work over the years. However, it had to be recognized that they were compelled to work within a framework established many years previously, and that it was that framework which required change.

Turning to his Resolution, he highlighted that paragraph 1 called for the establishment of a Constitutional Committee in the broadest possible terms. That did not imply that all elements relating to the Institute would be dealt with at once, but rather, that the Committee would consider relevant issues on a step by step basis.

Paragraph 2 of the Resolution required the Committee to canvass the views of the Institute. A questionnaire would be sent to the Members, hopefully provoking their thoughts, and Sir Elihu Lauterpacht not only asked the Members, but urged them to respond in as much detail as they considered appropriate. The Committee would also take into account suggestions made previously by the Institute as to its own operations, such as those produced by Mr Schachter in 1973. Paragraph 2 required the Committee further to prepare an interim report before the 2001 Session of the Institute. The interim report would be subject to discussion at that session and he trusted that at least one day would be set aside for this purpose. As the report would be interim, clearly, not all issues for the attention of the Constitutional Committee could be considered for inclusion by that stage. This notwithstanding, it was hoped that the interim report would contain important proposals which would have a beneficial effect on the work of the Institute, so that changes might be carried through within the shortest possible time.

He wanted to stress that the operation of the Constitutional Committee would not conflict with the work of the Programme Committee. First, the Programme Committee would only assume office in 2001 ; secondly, the Programme Committee was concerned only with the specific content of each session on a session-by-session basis; thirdly, the Constitutional Committee was to re-establish the framework within which the sessions would operate. In his view, the Constitutional Committee and the Programme Committee were complementary and would, of course, consult. It might well be that the Constitutional Committee felt constrained to make recommendations in general terms for the consideration of the Programme Committee, and perhaps as to the manner in which the latter might operate :

for example, it had to be considered whether it was really necessary for the sessions to operate only on the current basis of Reports compiled and Resolutions proposed, or whether a less formalized series of reports addressing more immediately topical issues might be more desirable.

The third paragraph of the Resolution proposed that the expenses of the Constitutional Committee be borne by the Institute. It was not considered that such expenses would be very high, but they would be required for, for example, matters such as interim meetings, or to pay for some assistance in analysing the responses received to the questionnaire.

The final paragraph contained suggestions for the membership of the Constitutional Committee. All those named had been consulted and had agreed to serve. In drawing up the names proposed, it had been intended to ensure that all elements in the Institute, as to geographical spread and input on substantive matters, were duly represented. That degree of representation, plus the standing of those Members, would, it was hoped, ensure that the recommendations of the Constitutional Committee would be acceptable to the majority of the Members. Mr Zemanek would serve as Chairman, and, as he was for the time being Second Vice-President of the Institute, his presence would ensure that the Bureau was kept fully informed of the activities of the Committee.

Sir Elihu Lauterpacht respectfully commended the Resolution to the Institute for its support.

Mr *Makarczyk* wished to signal his full support for the idea of and proposals for the Committee.

After further discussion, *Sir Elihu Lauterpacht* confirmed to the Assembly that the Constitutional Committee would consult all the Members of the Institute regardless of the category of their membership.

Mr *Rosenne* proposed that the Assembly move immediately to vote on the proposed Resolution.

The *President* then proceeded to a vote on whether to approve the Resolution, which was adopted with 65 votes in favour, none against, with 5 abstentions. He thanked Sir Elihu Lauterpacht for his proposal and, in common with all the Members, looked forward to the completion of the work of the Constitutional Committee.

Création d'un Groupe de travail sur les problèmes de bio-éthique

The *President* then moved the discussion on to Point 5, consideration of the creation of a new Commission to study the issue of bio-ethics, and invited Mr Bedjaoui to present the results of his working group which had carried out a preliminary review in this area.

M. *Bedjaoui* rappelle que, lors de la Session de Strasbourg, il avait été décidé de la constitution d'un groupe de travail comprenant MM. Broms, Rigaux et lui-même. Il tient tout particulièrement à rendre hommage à M. Rigaux pour la qualité du travail qu'il a fourni. Le groupe de travail a constaté l'extrême importance du sujet, attestée notamment par son traitement actuel par de nombreuses organisations et institutions internationales, comme l'UNESCO, qui vient d'adopter une "Déclaration sur le génome humain et les droits de l'homme". Les progrès fabuleux de la génétique ont suscité d'immenses espoirs, que ce soit sur le plan de la sécurité alimentaire ou dans le domaine des soins et traitements thérapeutiques, qui connaissent actuellement des progrès véritablement fulgurants. La génétique maîtrise la reproduction, régit la vie et recule les frontières de la mort. Aujourd'hui, l'homme est devenu l'ingénieur de l'homme. Mais, si l'on n'y prend garde, le rêve peut tourner au cauchemar. Tous les acquis de la protection des droits de la personne de plus d'un demi siècle risquent d'être emportés si aucune réglementation ne réussit à encadrer les progrès de la science, en particulier si l'on sait que le clonage de la

personne humaine se profile à court terme. Le droit se voit donc confier une mission fondamentale pour l'avenir de l'humanité. L'Institut de Droit international doit donc consacrer tous ses efforts à relever l'un des défis majeurs du prochain millénaire.

Avec l'accord du Bureau, le groupe de travail suggère donc qu'une commission soit rapidement créée, de manière à ce que cet enjeu puisse faire l'objet de l'adoption d'une Résolution dès la prochaine session. M. Bedjaoui invite donc les Membres et Associés qui le souhaiteraient à manifester leur intérêt auprès du Secrétaire général.

The *President* proposed that Mr Bedjaoui's proposal be adopted, which it was by consensus.

Mr *Meron* wished to signal his support for Mr Bedjaoui's proposal as one dealing with a matter of great importance for the future. He trusted that Mr Bedjaoui and his Committee would seek scientific advice so as to ensure the most useful outcome followed from a joint legal-scientific approach.

The *President* indicated that such an approach had already been discussed and approved by the Bureau.

Mr *Sarcevic* also supported Mr Bedjaoui's proposal and wished to draw the attention of the Assembly to a forthcoming seminar in Oxford addressing these very matters, which seminar had been carefully organised so as to ensure participation by scientists.

Mr *Owada* wished, further to Mr Meron's proposal for the inclusion of scientists, to recommend to the Committee that it ensure due representation of cultural values in the world in its membership, not only amongst those who expressed a wish to participate in the Committee, but also in the actual composition of the Committee.

Mr *Blix* wished to raise a point of order. Whilst in favour generally of streamlined bureaucratic approaches, he would prefer to have the discussion relating to a proposal take place before the proposal was voted on.

Mme *de Magalhães Callaço* insiste pour que l'une des femmes Membres de l'Institut participe activement aux travaux de la Commission.

Sa suggestion est approuvée par consensus.

La séance est levée à 17 h 40.

Quatrième séance administrative

Mardi 24 août 1999 (matin)

Le *Président* ouvre la séance à 12 h 15, et invite le Secrétaire général à exposer la proposition du Bureau relative au prix Rolin-Jaequemyns.

Prix Rolin-Jaequemyns

Le *Secrétaire général* rappelle que, selon le règlement du prix, son nom change lors de chaque nouvelle attribution, conformément à une liste préétablie. Après discussion, le Bureau a décidé de proposer le sujet suivant, élaboré à partir d'une proposition de M. Rosenne : "Les mesures conservatoires en droit international devant les juridictions internationales" (*Provisional Measures Under International Law Before International Courts and Tribunals*). Le Secrétaire général insiste pour que chacun contribue à la publicité du prix Rolin-Jaequemyns, afin que davantage de candidats se manifestent.

M. *Tomuschat* suggère que l'on inclue la pratique d'organes comme le Comité des droits de l'homme ou l'ancienne Commission européenne des droits de l'homme. S'il ne s'agit sans doute pas de véritables juridictions, ces organes ont développé une jurisprudence considérable et du plus haut intérêt dans le domaine des mesures conservatoires.

The *President* thought that nothing should be added to broaden the topic, given that the authors would be quite young. He asked Mr. Tomuschat whether he had any suggestions.

Mr *Broms* seconded the President's view because he felt that the title was sufficiently broad.

The *President* put the matter to a vote, and the topic proposed by the Bureau for the Prize was adopted by 40 votes in favour, none against and no abstention. He then proceeded to open the debate on the topics for future commissions suggested by the Programme Committee.

Création de nouvelles commissions

Le *Secrétaire général* présente les trois sujets qui ont été retenus par le Bureau, en précisant que les autres propositions seront prises en compte par la nouvelle Commission des travaux, qui déterminera dans une perspective plus large les sujets qui pourraient être proposés à l'avenir. Le premier des sujets retenus se rattache plus au droit international privé, alors que les deux autres relèvent du droit international public.

Le premier sujet est intitulé "La protection internationale des droits de la personnalité face au développement technologique", "*The International Protection of Personality Rights in the Light of Technological Development*". Il semble évident que ses particularités dictent une composition mixte de la commission qui devrait comprendre tant des publicistes que des privatistes.

Le *Président* précise néanmoins qu'un seul rapporteur sera désigné.

M. *Ress* se demande s'il ne serait pas plus opportun de nommer deux rapporteurs, l'un publiciste et l'autre privatiste. Cela devrait permettre d'assurer une collaboration plus étroite entre les deux disciplines.

M. *Pierre Lalive* comprend bien la proposition de M. Ress, mais craint qu'elle ne se heurte à l'expérience qui, au sein de l'Institut, a montré que la nomination de deux rapporteurs ne s'était pas révélée très heureuse. Cette option ne devrait être utilisée que s'il s'avérait impossible de trouver un rapporteur dont les intérêts et les compétences s'étendent à la fois au droit international public et au droit international privé.

Mr *Zemanek* disagreed with Mr Pierre Lalive and recalled the early work of the Commission on the extraterritorial jurisdiction of States, presided by Mr Rigaux, where the appointment of a single Rapporteur had not been felicitous.

Sir Ian Sinclair informed the Assembly that he had raised the issue in the Commission and had been convinced by the arguments put forward by Mr Pierre Lalive. He now was of the view that there should be one Rapporteur, with interests spanning both public and private international law, supported by a Commission in which both fields of international law were broadly represented.

Le sujet proposé est retenu par consensus.

Passant à la présentation du premier sujet de droit international public, le *Secrétaire général* commence par donner lecture de son intitulé : "La compétence des organisations régionales et de défense collective de recourir à la force", "*The Legal Authority of Regional and of Collective Self-Defence Organizations to Use Armed Force*".

Le sujet concerne donc les organisations régionales mais aussi des organisations qui, à l'instar de l'OTAN, se présentent comme des organisations de défense collective, au sens de l'article 51 de la Charte. En tout état de cause, les actions de l'ONU sont clairement exclues du champ de recherche envisagé.

Mr *Dinstein* disagreed with the title as presented although he had no objection to a study on this topic. The idea that collective self-defence organizations may resort to force other than under Article 51 of the United Nations Charter was untenable; such organizations do not have a right to use force that transcends Article 51.

Le *Secrétaire général* remarque qu'il s'agit là d'une question de fond, qui n'est nullement tranchée par la simple énonciation du sujet. Rien n'interdit par exemple de penser que, à l'avenir, l'Institut exclue toute possibilité d'action armée en dehors des hypothèses prévues par l'article 51 ou le Chapitre VII de la Charte.

Mr *Dinstein* argued that the title should read "The Legal Authority of International Organizations Other Than the United Nations to Use Force".

The *President* noted that a variation of this title had been considered by the Commission, but that the current positive formulation had been preferred.

Mr *Frowein* strongly supported the proposal made by Mr Dinstein, which avoided the difficulties raised by the present title.

Mr *Gaja* observed that the current title referred to two types of issue, one of which was whether an action was permissible pursuant to the constitutive instrument of a given organization: this issue should not detain the Institute.

Mr *Skubiszewski* expressed his support for the proposal by Mr Dinstein. Should the other one nevertheless be retained, then the French should refer to "légitime défense collective". Further, the word "armée" should be added at the very end to avoid any debate as to what amounts to the use of force.

Mr *Schachter* agreed with Mr Dinstein and noted that the Commission would have to look at collective self-defence organizations acting pursuant to Article 51 of the United Nations Charter.

The *President* concluded that the title should read: "The Legal Authority of International Organizations Other Than the United Nations to Use Armed Force".

Mr *Zemanek* supported the comment made by Mr Gaja and opined that the reference to the "legal authority" would require looking at constitutive instruments.

Mr *El-Kosheri* stated his complete aversion to the use of force and thought that other, more suitable topics, required the attention of the Institute.

M. *Pierre Lalive* estime que le texte actuel doit être interprété comme couvrant tous les aspects du sujet. Il se demande d'ailleurs comment l'on pourrait appréhender la question sans analyser les actes constitutifs des organisations internationales concernées.

Mr *Gaja* remarked that the topic as phrased would require the Commission to determine, for example, whether the NATO Treaty allowed for the recent actions against Yugoslavia. This would involve examining NATO's new strategic doctrines and the Member States' consent to them. There were complex issues that the Institute was not specially qualified to address.

M. *Waelbroeck* appuie la position de M. Gaja. Le rôle de l'Institut de Droit international n'est pas d'interpréter les actes constitutifs d'organisations internationales particulières. L'optique doit plutôt être de présumer que l'action des organisations concernées est conforme à leurs actes constitutifs, et de centrer l'analyse sur la conformité de cette action au droit international général. M. Waelbroeck interprète en tout cas en ce sens l'énoncé actuel du sujet.

M. *Degan* pense qu'il existe un droit - et même un devoir - résiduel d'intervention humanitaire, qui permet à des organisations de réagir militairement à l'usage de la force par un gouvernement contre une partie de la population civile. On est donc en présence d'un sujet très important.

Mr *Shahabuddeen* agreed that the Institute was concerned only with international law and that the topic should be interpreted accordingly. The Commission should therefore not conclude that it ought to consider whether the constitutive instrument of a particular organization allowed a given use of force.

The *President* suggested inserting the words "under international law" after the word "authority".

M. *Rigaux* suggère que l'on énonce le sujet de la manière suivante : "The legal authority under international law of international organizations other than the United Nations to use armed force".

M. *Waelbroeck* estime que le terme "legal" devient alors inutile.

The *President* then stated that the topic now read "The authority under international law of international organizations other than the United Nations to use armed force".

Mr *Gaja* stated that, if it was clear that the topic concerned only questions of general international law and United Nations law, he did not object to the suggested formulation, although the legality under the constituent instruments also raised questions of international law.

The *President* suggested leaving it as it was and called for a vote. The topic was adopted by 35 votes in favour, none against and 3 abstentions.

Le *Secrétaire général* présente alors le deuxième sujet de droit international public, intitulé : "La compétence universelle en matière pénale à l'égard des violations graves du droit international humanitaire et des crimes contre l'humanité", "*Universal Criminal Jurisdiction with Regard to Grave Breaches of International Humanitarian Law and Crimes Against Humanity*".

Il précise que M. Meron, à qui l'on doit la proposition de mettre ce sujet à l'étude, en a légèrement amendé l'intitulé, et qu'il suggère la formule suivante : "*Universal Criminal Jurisdiction With Regard to Crimes of Genocide, Crimes Against Humanity and War Crimes*". La notion de droit international humanitaire est en effet trop restrictive, dans la mesure où on considère généralement qu'elle reste limitée à l'hypothèse des conflits armés.

Mr *Meron* stated that he had reinserted the reference to international humanitarian law but would be happy to agree with the formula put forward by the Secretary General. The topic should avoid referring to "grave breaches", as this was a concept limited to the Geneva Conventions which posed no problem with respect to universal jurisdiction.

Mr *Vukas* underlined one aspect of the significance of the principle of universal criminal jurisdiction, that is its links to original criminal jurisdiction. He thought that the Commission's work should also focus on this important issue.

The *President* noted that the issue of priority between national and international tribunals had been discussed in the Programme Committee and was considered to squarely fall within the topic.

M. *Rigaux*, tout en étant conscient qu'un libellé ne préjuge pas du résultat des travaux, marque sa préférence pour une limitation aux crimes de guerre revêtant une certaine gravité.

M. *Waelbroeck* se demande quant à lui ce qui motive l'exclusion de l'étude des crimes contre la paix.

Mr *Meron*, although he found the suggestion by Mr Waelbroeck very interesting, could not favour it. The Conference on the International Criminal Court had proven this issue to be a very controversial one, not quite yet ready for consideration vis-à-vis universal jurisdiction.

Sir Ian Sinclair agreed entirely with Mr Meron and thought that the suggestion would create problems for the Institute.

The *Secretary General* announced that the topic should read "Universal Criminal Jurisdiction With Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes", "*La compétence universelle en matière pénale à l'égard du crime de génocide, des crimes contre l'humanité et des crimes de guerre*".

The *President* put the matter to a vote and the topic was adopted with 37 votes in favour, none against and 1 abstention.

La séance est levée à 13 h 05.

Cinquième séance administrative et de clôture

Mercredi 25 août 1999 (matin)

La séance est ouverte à 10 h 30 sous la présidence de M. *Jayme*.

Groupe d'étude sur la bio-éthique

Le *Président* annonce la composition du groupe d'étude sur la bio-éthique.

Il est proposé qu'il soit présidé par M. Bedjaoui et composé de M. Broms, Mme Burdeau, MM. Gros-Espiell, Owada, Rigaux, Rosenne.

La proposition est acceptée par acclamation.

Commission des travaux

Le *Président* indique la proposition qui est faite pour la composition de la nouvelle commission des travaux, recomposée conformément au nouvel article 13 des Statuts et à l'article 1bis du Règlement. Elle se compose de MM. Amerasinghe, Bedjaoui, Broms, Caflisch, Fadlallah, Ferrari-Bravo, Mme Higgins, MM. Jayme, Lagarde, Lowenfeld, Schermers, Torres Bernárdez. Les membres suppléants sont : MM. Anand, Degan, El-Kosheri, Owada, Parra Aranguren, Roucounas.

La proposition est acceptée par acclamation.

Nouveaux Membres titulaires

Le *Secrétaire général* communique ensuite à l'Assemblée le nom des Associés qui, conformément à l'article 4 des Statuts, deviendront Membres titulaires à l'issue de la présente session. Il s'agit de MM. Cassese, Dugard, Guillaume, Lagarde, Lipstein, Makarczyk, Müllerson et de Mme Pérez Vera.

Mr *Philip* wished to take the present opportunity to make an observation concerning the composition of the Institute. He regretted that the number of Members who studied or practiced private international law was limited. He pointed out that before the Berlin Session, the private international law group was already underrepresented in the membership of the Institute. If the numbers of those studying or practicing private international law continued to diminish, the existing imbalance in the Institute between privatists and publicists would be exacerbated. He requested that the Bureau, in its deliberations on candidates for membership to be presented at the next meeting of the Institute, would fill its obligations set forth in Article VIII(e) of the Statutes of the Institute, which required a balance between the various international legal disciplines. He added that his comments were not meant to detract from the newly elected Associate Members, whom he believed were fully qualified for membership; he regretted, however, that in the elections of the current Session, very few private international lawyers had been elected.

The *President* indicated that he had received a letter from Mr Schwind which contained similar comments as those made by Mr Philip.

Le *Secrétaire général* observe que trop peu de propositions de candidatures de spécialistes du droit international privé sont soumises par les groupes nationaux et les Membres de l'Institut. Il renouvelle son appel à soumettre plus de candidatures de privatistes. Il remarque également que le recrutement des Membres féminins devrait faire l'objet de la même attention.

Mr *Philip* wished to point out that a number of important and highly qualified candidates had been on the ballot for election as Associate Members in 1999. The fact that very few of these candidates were elected resulted in a certain amount of frustration among the privatist group. He felt that it would be difficult to propose more candidates who studied private international law in view of the fact that even the highly qualified candidates which were up for election this session had failed to be elected.

70ème Session de l'Institut

Le *Président* annonce que M. Morin lui a fait part de l'invitation des membres et associé canadiens d'accueillir la prochaine session de l'Institut au Canada. M. Morin propose aussi que la présidence de l'Institut soit dévolue à M. McWhinney, le plus ancien membre canadien de l'Institut.

M. *McWhinney* confirme l'invitation des membres et associé canadiens à accueillir la prochaine session de l'Institut dans la ville de Vancouver en 2001.

Cette invitation est acceptée avec reconnaissance. M. McWhinney est élu Président de l'Institut par acclamation.

Le *Président* informe l'Assemblée que le Bureau propose de nommer M. Shahabuddeen Premier Vice-Président.

M. *Shahabuddeen* est élu Premier Vice-Président de l'Institut par acclamation.

Le *Secrétaire général* remercie ensuite les membres du secrétariat et les interprètes pour le travail accompli pendant la session.

Le *Président* déclare close la 69ème Session de l'Institut et lève la séance à 10 h 45.

Réunions de l'Institut en séances plénières

Première question

Taking Foreign Private International Law to Account

La prise en compte du droit international privé étranger

Quatrième Commission

Rapporteur : *M. Kurt Lipstein*

Troisième séance plénière

Jeudi 19 août 1999 (matin)

La séance est ouverte à 9 h 45 sous la présidence de M. *Jayme,* Président de l'Institut.

The *President* expressed his admiration for the Rapporteur's work, which consisted in an analysis of all the relevant legislation and case law on the taking into consideration of foreign private international law. This had never been done before. There were a number of recent developments in this field, such as a German law which prescribes *renvoi* even for property rights, as well as a Tunisian law restricting *renvoi*. However, these recent developments did not affect the substance of the work. The President then gave the floor to the Rapporteur to present his Resolution which reads as follows :

"*Whereas* the task of private international law is the search for the legal rules most appropriate to be applied in the individual case and

Whereas in this search States are free to formulate rules of private international law in the absence of specific rules sanctioned by customary international law or of any relevant International Conventions and

Whereas the legal system most appropriate to be applied in the individual case is that which ensures certainty, effectiveness, uniformity or compliance with the common intention of the parties and

Whereas certainty is achieved by the reliance on the same law in respect of situations created and transactions concluded and

Whereas effectiveness can be achieved by paying special regard to the law which exercises factual control and

Whereas uniformity of decision is only achieved if the relevant choice of law rules of the countries concerned either contain identical connecting factors interpreted uniformly or if one of the different connecting factors is accorded precedence and

Whereas even if uniformity of decision cannot be obtained, a degree of uniformity may be achieved in the individual case if the referring court takes foreign private international law into consideration and

Whereas these aims can be furthered best if in some situations not only foreign domestic law but also foreign private international law is taken into account by the referring court,

Resolves

The Taking into Consideration of Foreign Private International Law

1. Should not be excluded altogether, irrespective of whether it involves a reference back or on ;

2. Should not be restricted to situations where uniformity is in issue;

3. Should be considered :

(a) if the validity or the effectiveness of an act or a transaction is regarded as desirable by the court and assured thereby ;

(b) if a uniform treatment and recognition of an act or a transaction can be achieved;

(c) if the parties enjoy a free choice of law, have exercised it expressly and have included foreign private international law ;

(d) if in a conflict of laws in time an act or transaction valid according to the choice of law rules of the law applicable at the earlier time is questioned incidentally in later proceedings governed by the domestic law of the same applicable law ;

(e) if the application of the law governing the main question including its choice of law rules should result in the invalidity of an act or transaction while the application of the law governing the preliminary question including its choice of law rules treated as a main question would ensure its validity ;

4. Ought not be considered :

(a) if the forum contains alternative choice of law rules operating either on an equal footing or as substitutes for others (subsidiarity) ;

(b) if mandatory rules of a third legal system are applied displacing the applicable law ;

(c) if the parties enjoy a free choice of law, have exercised it expressly and have not included foreign private international law ;

(d) if the applicable foreign law treats the matter as one of jurisdiction other than its own and abstains from acting ;

(e) in the discretion of the court if the *lex fori* and the law referred to contain identical substantive rules or lead to the same result."

Traduction en français :

"*Attendu* que la fonction du droit international privé est de déterminer les règles juridiques dont l'application est la plus appropriée dans un cas donné ; et

Attendu que, à cette fin, les Etats sont libres de formuler des règles de droit international privé en l'absence de règles spécifiques consacrées par le droit international coutumier ou par des conventions internationales pertinentes ; et

Attendu que les règles juridiques dont l'application est la plus appropriée dans un cas donné sont celles qui assurent la certitude, l'efficacité, l'uniformité ou le respect des intentions communes des parties ; et

Attendu que la certitude est obtenue de par le recours aux mêmes règles de droit en ce qui a trait aux effets créées et aux transactions conclues ; et

Attendu que l'efficacité peut être atteinte en portant une attention particulière au droit qui exerce un contrôle de fait ; et

Attendu que l'on ne peut parvenir à une uniformité des décisions que lorsque l'on retrouve, dans les règles de conflit de lois pertinentes des pays concernés, des critères de rattachement identiques et interprétés de façon similaire, ou encore lorsque l'un des critères de rattachement se voit accorder préséance ; et

Attendu que même lorsqu'on ne peut aboutir à l'uniformité des décisions, une certaine mesure d'uniformisation peut cependant être atteinte dans un cas donné si le tribunal opérant le renvoi tient compte du droit international privé étranger ; et

Attendu que ces objectifs seront poursuivis plus efficacement lorsqu'en certaines circonstances, le tribunal opérant le renvoi tiendra compte non seulement des règles du droit interne étranger, mais aussi de celles qui relèvent du droit international privé étranger ;

Résout ce qui suit :

La prise en compte du droit international privé étranger

1. ne devrait pas être exclue d'office, peu importe si telle prise en compte implique un renvoi au premier ou au second degré ;

2. ne devrait pas se voir limitée aux situations dans lesquelles l'uniformité est remise en question ;

3. devrait être prise en considération :

(a) si la validité ou l'efficacité d'un acte ou d'une transaction est tenue pour souhaitable par le tribunal, et se voit ainsi assurée ;

(b) si l'uniformité de traitement et de reconnaissance d'un acte ou d'une transaction peut être ainsi réalisée ;

(c) si les parties bénéficient du libre choix du droit applicable et, l'ayant exercé expressément, y ont inclus le droit international privé étranger ;

(d) si, lors d'un conflit de lois temporel, un acte ou transaction, valide en vertu des règles de conflit de lois selon le droit applicable antérieurement, se voit remis en question de façon incidente lors de procédures subséquentes régies par des règles internes relevant de ce même droit applicable ;

(e) si l'application des règles régissant la question principale, y inclus ses règles de conflit de lois, résulterait en l'invalidité d'un acte ou d'une transaction, alors que l'application de la loi régissant la question préliminaire, incluant les règles de conflit de lois considérées comme une question principale, en assurerait la validité.

4. ne devrait pas être prise en considération

(a) si le for comporte des règles alternatives de conflit de lois opérant soit sur un pied d'égalité, soit à titre de substituts à d'autres (subsidiarité) ;

(b) lorsque des règles obligatoires du système juridique d'un Etat tiers sont appliquées en lieu et place du droit applicable ;

(c) si les parties bénéficient du libre choix du droit applicable et, l'ayant exercé expressément, n'y ont pas inclus le droit international privé étranger ;

(d) si le droit étranger applicable traite le sujet comme relevant d'une autre compétence que la sienne, et s'abstient d'agir ;

(e) si, selon l'appréciation discrétionnaire de la cour, la loi du for et le droit auquel on renvoie contiennent des règles matérielles identiques, ou conduisent au même résultat."

*

The *Rapporteur* recalled that the topic had been dealt with by the Institute twice before. It gave rise to discussions which were essentially theoretical, and no result was reached. Professor Wengler and other members of the Institute then proposed to turn the question around and to start from the relevant practice. In following this approach, the Commission did not try to lay down rules, but principles. The aims pursued, which were expressed in the preamble, were certainty, effectiveness, uniformity or compliance with the common intention of the parties. The two basic principles were laid down in Articles 1 and 2 of the Resolution. In view of the fact that the method was not universally applied, Article 1 provided that the taking into consideration of foreign private international law should not be excluded altogether.

Article 2 reflected the fact that the application of *renvoi* does not necessarily achieve uniformity. Uniformity could only be obtained if the States concerned applied the same rules and interpreted the connecting factors uniformly, or if precedence was given to one of the different connecting factors. Article 2 therefore provided that the taking into consideration of foreign private and international law should not be restricted to hypotheses where it was certain that uniformity would be achieved.

Article 3(a) took account of the courts' frequent concern to assure the validity or the effectiveness of an act or a transaction. The reference to foreign private international law could be used for that purpose. Article 3(b) expressed that the same technique could be used if uniform treatment and recognition of an act or a transaction was desired. Article 3(c) referred to the parties' choice of law including foreign private international law. However, the Rapporteur did not regard this as an important principle, because parties exercising their free choice of law seek certainty in respect of the applicable law, and will therefore prefer not to include a reference to foreign private international law.

This left two questions open, which were partly dealt with on the basis of practice, and partly on the basis of literature. Article 3(d) addressed the hypothesis that in a conflict of laws in time an act or transaction valid according to the choice of law rules of the law applicable at the earlier time, is questioned incidentally in later proceedings governed by the domestic law of the same applicable law. The classical example in this respect was the case where the validity of a marriage was first questioned in one country, and then questioned in another country in respect of the legitimacy of the children.

Article 4 addressed situations in which the taking into consideration of foreign private international law ought not to be considered, and had been flexibly drafted. The hypothesis under Article 4(a) of alternative choice of law rules operating on an equal footing, could be illustrated by the Hague Treaty on formalities in respect of wills which lists five alternatives on which the validity may be based. In such a case, there was no need to duplicate the list by including a reference to private international law. The hypothesis of subsidiarity mentioned in the same Article 4(a) could be illustrated by the Hague Conventions on product liability and on car accidents, which provide

for alternative rules operating as substitutes for others. The hypothesis under Article 4(b) was that of Article 7 of the Rome Convention of 1980 on the law applicable to contractual obligations.

In respect of Article 4(d), the Rapporteur drew attention to the amendment distributed at the beginning of the session, which had been drafted on the basis of Mr Vischer's comments in Commission meetings. The Article related to what is sometimes referred to as the hidden *renvoi.* If a court referred to the jurisdiction of the court of another country and the latter denied its competence *e.g.* on the ground that the required domicile was lacking, this did not amount to a reference to the law of the domicile, or in other words, to the application of foreign law. The same hypothesis could occur in respect of nationality or habitual residence. This was why the amendment distributed earlier required further amendment to read as follows :

> "If a Court refers to the jurisdiction of the Court of another country and the latter denies its competence on the ground that the required nationality, domicile or habitual residence is lacking, the refusal to act does not contain a reference back to the substantive law of the referring Court."
>
> "Lorsqu'une Cour [saisie d'un litige] considère compétente une Cour d'un autre pays et que cette dernière décline sa compétence au motif de l'absence de domicile, de nationalité ou de résidence habituelle en l'espèce, ce refus de compétence ne constitue pas un renvoi-retour à la loi matérielle de la première Cour saisie."

Article 4(c) gave expression to the principle that, where the parties had exercised their free choice of law and did not include foreign private international law, there was no reason to interfere in their choice. Finally, Article 4(e), which had been put as a matter of discretion of the courts, related to the hypothesis that the *lex fori* and the law referred to contained identical rules or lead to the same result. The Rapporteur concluded his introduction by stating that there were no other situations in either the case law, legislation or literature which had been omitted.

M. *Pierre Lalive* souhaite à titre liminaire souligner la nature très particulière du sujet, et donc la tâche difficile qui incombait au Rapporteur. Il remarque que c'est la troisième fois que l'Institut traite de la question de l'application du droit international privé, et notamment du renvoi. Il évoque à ce titre les travaux de M. Maridakis. Il observe que M. Lipstein s'est référé à la notion de "gymnastique mentale" pour parler de l'appréhension de la notion de renvoi et se réfère à la mise en garde du professeur Otto Kahn-Freund - auquel il voudrait rendre hommage - contre les dangers de ce type d'exercice. M. Pierre Lalive note que le Rapporteur fait néanmoins preuve de réalisme et de souplesse. Son rapport contient des informations importantes qui en font un rapport de référence. M. Pierre Lalive se demande toutefois comment les recommandations pourraient être prises en compte. La sécurité juridique et la volonté d'uniformité des décisions sont des objectifs difficiles à atteindre dans un monde divisé entre quelques 200 souverainetés législatives.

Mr. *Vischer* congratulated the Rapporteur for his excellent work. He wished to draw attention to some fundamental changes in the conflict of laws system as well as in doctrine, which were reflected in the draft Resolution. What the Rapporteur proposed was to use *renvoi* as an *expédient,* as an instrument to help alleviate strict rules in a particular situation. While in former times *renvoi* was a very abstract concept, it now came closer to reality. Substantive considerations were taking place, concentrating on achieving the desired result.

M. *Lagarde* désire s'associer aux félicitations apportées au Rapporteur, en particulier pour s'être gardé sur un tel sujet de tout dogmatisme. L'approche retenue par le Rapporteur consiste à laisser le juge statuer sur l'admission ou le rejet du renvoi en fonction des solutions matérielles auxquelles conduirait son application ou sa non application. M. Lagarde craint que cette approche ne sacrifie la prévisibilité des solutions. Il aurait préféré une méthode liant le renvoi au sens de la règle de conflit en cause, comme celle retenue par la loi allemande de 1986.

Mr *Lowenfeld* indicated that the emphasis on certainty in the preambular part of the draft was misleading. Certainty was not really possible to achieve, neither was it a priority as compared with justice. Further, he

disagreed with the principle that when parties exercised their free choice of law and did not include foreign private international law, the taking into consideration of foreign private international law should not be considered. In the *Mitsubishi* case brought before the United States Supreme Court, the parties' contract provided for disputes to be settled by arbitration in Japan in accordance with Swiss law, which referred to the law of the United States as the law of the market concerned. This was an adequate solution. In the *Regazzoni* case, which was brought before the House of Lords, the contract was governed by English law, and valid under that law. But the House of Lords held that reference to "English law" entailed reference to English private international law as well, which led to the application of the Indian export control law imposing an embargo against South Africa, which the contract violated. As a consequence, the principle formulated by the Rapporteur was too dogmatic. It could apply when the legitimacy of a child was at stake but not where public law issues were involved.

The *President* agreed that arbitration raised specific issues, but invited the participants to concentrate on the general debate relating to the Draft's approach and method. The article by article discussion would be held subsequently.

Mr *Gaja* noted that the draft's heading - taking foreign private international law into consideration - implied a wider notion than *renvoi,* which was the subject-matter of the draft. As far as *renvoi* was concerned, he agreed with the Rapporteur's and the Commission's approach to formulate principles rather than rules. Having contributed to the introduction of *renvoi* in Italian legislation in 1995, he appreciated the draft's favourable attitude towards *renvoi.*

Mme *De Magalhães Collaço* remercie le Rapporteur pour son rapport et la richesse des informations qu'il contient. Elle se réjouit du caractère anti-systématique des solutions proposées par M. Lipstein et de l'attention portée aux objectifs recherchés par la résolution, tels qu'ils sont définis dans le préambule. Mme De Magalhães Collaço se réserve la possibilité de revenir sur ceux-ci à un stade ultérieur de la discussion. Elle se demande ensuite quel sera le statut des conclusions. Il n'est pas question pour elle de les comprendre comme des recommandations, étant donné que nous vivons dans un monde fait de diversité.

Le *Président* remarque que Mme De Magalhães Collaço a posé une question cruciale qui est celle du statut de la résolution. Contient-elle des recommandations ou des constatations ?

Mr *Sohn* wondered whether the issues involved in the *Guardianship case* might have been solved more adequately on the basis of the principles formulated in the Resolution.

Mr *van Hecke* joined the many participants who had already expressed their admiration for the Rapporteur's work. In Warsaw, the subject had given rise to a very dogmatic discussion until Mr Wengler suggested widening the discussion. Later on, Mr Wengler was joined by Mr Batiffol. It was thus under these auspices that the present refreshing attitude developed, which consisted of intertwining the method of conflict of laws with respect for substantive values. In Article 3(a) of the Resolution the question whether the validity and effectiveness of an act or transaction was desirable, was a question of substantive law to be decided on the basis of the *lex fori*. This was at the heart of the Rapporteur's very refreshing approach. In respect of the question raised by Mr Lagarde, Mr van Hecke believed that the recommendations formulated in the Resolution should in the first place be addressed to the courts, to the extent that the legislation was flexible enough to allow the judge to take these recommendations into account.

Sir Peter North approved the Rapporteur's general approach. He believed that the recommendations formulated in the Resolution should be addressed to both courts and legislators, rather than to courts in the first instance as suggested by Mr van Hecke. Indeed, the legislation of some countries provided for *renvoi* in general, while others did not, and still others applied *renvoi* on particular points. Furthermore, many courts wrongly applied the law of other States, and he had even less confidence that they would correctly apply foreign private international law. The judge and the legislator also operated in a different context. While the judge dealt with a particular case and was under a certain pressure to do justice in that case, the legislator was concerned with broader issues, and notably with the issue of where the costs of litigation lie. Rules might be needed which could lower the cost of litigation.

M. *Rigaux* fait part tout d'abord de son plaisir d'avoir participé aux travaux de la 4ème Commission conduits sous l'égide de M. Lipstein. Il voudrait prendre position sur plusieurs points qui sont ceux de la portée d'une résolution de l'Institut, des destinataires de cette résolution, à savoir le juge ou le législateur, et du rôle de la codification en droit international privé. Il recommande d'adopter une approche non dogmatique sur ces questions. S'agissant des destinataires de la résolution, la référence au juge constitue un critère objectif qui va dans le sens de plus de certitude juridique. Il revient au juge d'interpréter l'intention du législateur. M. Rigaux se dit peu favorable à la codification du droit international privé car celle-ci a pour conséquence de geler des situations et de conduire à des positions dogmatiques. Il préconise une attitude de scepticisme éclairé, qui pourrait donner au juge la latitude de suivre les recommandations contenues dans la résolution.

M. *Loussouarn* voudrait exprimer son admiration pour l'habileté de M. Lipstein, en même temps que son inquiétude par rapport à l'approche retenue dans la résolution. Il se demande si toutes les hypothèses sont couvertes. Si tel n'était pas le cas, il y aurait des situations qui tomberaient sous le coup de l'appréciation discrétionnaire du juge, risquant par là de remettre en cause la certitude juridique. M. Loussouarn incline en faveur de la technique du renvoi car il ne privilégie pas celle de l'application du droit étranger. Il remarque aussi que plus une législation est précise, plus il est difficile d'être en faveur ou défaveur d'une solution.

M. *El-Kosheri* exprime sa profonde admiration pour le travail réalisé par le Rapporteur. Il voudrait attirer son attention sur une difficulté rencontrée au sein d'un groupe d'Etats, ceux dotés du code civil inspiré du modèle égyptien. Le droit de la famille y est régi en fonction du droit national. On rencontre dans ces pays un système à deux niveaux, l'un qui privilégie des solutions modernes en matière de droit des affaires, l'autre qui prône un régime relatif au statut personnel et à la loi familiale d'essence religieuse. Les intérêts des femmes et enfants y sont très insuffisamment protégés et les juges sont impuissants pour remédier à cette situation car la loi a écarté explicitement la technique du renvoi. Cette situation témoigne de l'absence d'un minimum de valeurs communes à cet égard, que Savigny avait envisagé il y a plus d'un siècle comme base pour la prise en considération des systèmes juridiques applicables.

Le *Président* attire l'attention de M. El-Kosheri sur le fait que la 9ème Commission abordera les questions de conflits de culture.

Mr *von Mehren* congratulated the Rapporteur and the Commission for dealing with this issue that reflected the fundamental complexity of private international law. The Draft owed a great deal to the Rapporteur's experience in both comparative law and private international law. It was essentially the diversity of purposes, conceptions and legal notions that gave rise to the need to adapt the rules to the problems of particular situations. The Resolution dealt essentially with the tension between certainty on the one hand, and justice in specific situations on the other. The Resolution recognised this major problem which could not be reduced to a dogmatic formula. This was a great achievement and it was a great privilege to have been instructed on this subject by the Rapporteur.

The *Rapporteur* reiterated his intention that the Resolution should not instruct the legislature. Article 1 provides that foreign private international law should not altogether be excluded in cases involving choice of law. Article 3 deals with individual situations which may appear before a court. The Rapporteur acknowledged the point made by Mr Lowenfeld that the rules of private international law may differ with regard to contract law and to administrative law. In response to Mrs De Magalhães Collaço, Mr van Hecke, Sir Peter North, and Mr Rigaux, the Rapporteur agreed that he was formulating a Resolution to reflect existing law rather than a proposal. With regard to Mr Loussouarn's question about the notion of *désistement*, the Rapporteur said that this was not dealt with because it was an untenable argument of British courts which did not wish to deal with *renvoi.*

The *President* agreed that the Resolution was in essence a restatement of existing practice and opened the discussion of its specific Articles.

Mr *Gaja* pointed out that Article 3(c) provides that foreign private international law should be considered in cases where parties have a free choice of law, whereas under Article 4(c) foreign private international law ought not to be considered where a free choice of law was made. These were perfectly symmetrical texts. He believed that the Resolution should rather

indicate the presumption that the parties intend to choose only substantive rules. He furthermore believed that the word "expressly" in Article 3(c) and Article 4(c) should be dropped because there was no reason to make a distinction in this regard between an express and an implied choice. Finally, Mr Gaja suggested that Article 4(b) be deleted because it was obvious that if some rules of a third State were regarded as mandatory, they were not displaced by the private international law of the same State.

The *President* believed that the first question raised by Mr Gaja could be resolved by the Drafting Committee. As for the second question, he agreed that parties could not adopt mandatory laws of third parties without adopting general rules. The President then turned the discussion towards Article 1, which he believed was a reasonable Article.

Mme *De Magalhães Collaço* souligne que la version française de l'article 1 de la Résolution devrait être modifiée en substituant aux mots "exclue d'office" une expression qui rende la même idée que le terme "altogether" utilisé dans la version anglaise.

A cet égard *M. Pierre Lalive* propose d'utiliser les expressions "d'emblée" ou "en principe". Il suggère aussi de remplacer la version française de cet article par le texte suivant : "ne devrait pas être exclue d'emblée, que cette prise en compte implique ou non un renvoi au premier ou au second degré."

S'agissant toujours de la traduction du terme "altogether", M. *van Hecke* propose "de manière générale".

Mme *De Magalhães Collaço* insiste sur le fait que toute décision sur cet article de la Résolution ne doit d'aucune manière préjuger de la question qui a été soulevée lors du débat général et qui se réfère aux destinataires et au statut de la Résolution, et à laquelle une réponse devra être apportée.

Le *Président* se dit en accord avec l'intervention de Mme Magalhães Collaço et fait observer dans le même esprit que l'utilisation de l'expression "resolves", dans la version anglaise, devra être discutée afin d'en préciser la portée et la teneur.

M. *Rigaux* considère que l'expression "prise en compte" du chapeau du dispositif de la Résolution devrait être revue dans les deux versions afin que la coordination de ce chapeau se fasse plus aisément avec les articles qui suivent, notamment avec l'article 3 qui se réfère aussi à une "prise en considération".

Mr *Pocar* said he was not sure whether the discussion about Article 3 was simply a matter of drafting or whether it was a question of substance. He wondered whether it would not be useful to state more clearly that the recommendation is to consider whether to take into account foreign private international law or not, without suggesting a solution in either direction.

The *President* said he believed that the phrase "should be considered" simply meant that foreign private international law should not *a priori* be excluded.

Mr *Lowenfeld* asked for clarification about the terms "*renvoi au premier ou au second degré*" in the French text of the Resolution.

The *Rapporteur* indicated that this was a French technical term.

The *President* agreed, pointing out that this was a technical term used by continental lawyers with regard to *renvoi* either back to the law of the forum, or to the law of a third State.

Mme *De Magalhães Collaço* estime que les expressions "prise en compte" et "prise en considération" peuvent être trompeuses puisque les articles 1 à 4 de la Résolution ne couvrent manifestement pas tous les cas de prise en compte du droit international privé étranger, mais visent plutôt l'application de ce droit.

The *President* believed that the phrase "taking into consideration" was broader than the phrase "a reference back or on" and therefore captured better the notion that foreign private international law should not be excluded altogether.

Désirant s'exprimer sur l'article 2 de la Résolution, Mme *De Magalhães Collaço* se demande si l'expression "remise en question" ne devrait pas être remplacée par "mise en question".

The *Rapporteur* reminded the Members that Article 1 was a general rule and that Articles 3 and 4 covered specific issues raised by the general rule.

The *President* agreed with Mrs De Magalhães Collaço that the Article could be redrafted since the question of *renvoi* did not cover all situations regarding the consideration of foreign private international law.

Mr *Lowenfeld* agreed that the application of foreign law in general should be considered as well.

M. *Rigaux* observe que la prise en considération vise une réalité plus large que le renvoi. Selon lui, l'article 1 de la Résolution est juste puisqu'il ne traite pas des situations dans lesquelles il ne pourrait pas y avoir de renvoi étant entendu qu'il s'agit d'une prise en considération pure et simple. Toutefois, il constate que le préambule de la Résolution obscurcit le problème puisqu'il ne se réfère qu'à l'application qui, outre la prise en considération, peut impliquer le jeu d'une règle de conflits de lois.

The *President* put to a vote the retention of Article 1, as amended in the French text. The Article was adopted by 41 votes in favour and 4 abstentions. The President then opened the discussion on Article 2.

M. *van Hecke* estime que, s'agissant de l'uniformité, les mots "uniformity is in issue", dans la version anglaise, et "uniformité remise en question", dans la version française, devraient être remplacés par ceux utilisés dans le préambule, à savoir "uniformity is achieved" et "l'uniformité est atteinte".

M. *Gannagé* se demande si la formulation de l'article 2 ne gagnerait pas à être précisée de manière à ce que soit définie plus spécifiquement la portée de l'uniformité mentionnée.

Mr *von Mehren* contended that the use of *renvoi* should not be restricted to situations where uniformity was desired, as it could be useful in a number of other situations.

The *Rapporteur* pointed out that this Article was specifically directed at Mejer's rule in the Benelux Convention.

Mr *Pierre Lalive* reminded the Members that Article 3(a) used the word "desirable" and that the same word might be used in Article 2.

The *Rapporteur* reiterated his point that Article 2 was directed at specific legislation in Europe.

The *President* agreed that the consideration of foreign private international law should not be restricted to uniformity cases. Traditionally, uniformity was the first reason for the use of *renvoi*. The Article might be amended to reflect the notion that uniformity is desirable.

M. *Fadlallah* observe que l'article 2 traite de l'uniformité des résultats. Toutefois, des contradictions émergent du texte de la Résolution lorsque cet article est lu en conjonction avec l'article 4(e) qui prévoit pour sa part l'exclusion du droit international privé étranger "lorsque la loi du for et le droit auquel on renvoie contiennent des règles matérielles identiques, ou conduisent au même résultat."

Le *Président* souligne à cet égard la différence qui existe entre l'uniformité de la loi applicable et l'uniformité des résultats.

M. *Lagarde* s'interroge sur la pertinence de l'article 2. En effet, il relève que l'article 3 énumère des situations dans lesquelles le droit international privé étranger devrait être pris en considération, y compris l'uniformité (article 3(b)). Il estime dès lors que la Résolution gagnerait en clarté par la suppression de l'article 2.

Commentant l'intervention de M. Fadlallah, M. *Rigaux* estime qu'il n'y a pas de contradiction entre les textes des articles 2 et 4(e) puisqu'ils visent des situations différentes.

Mr *Lowenfeld* expressed his agreement with Mr Vischer and Mr Lagarde and his disagreement with the President. He contended that the notion of justice was more important than uniformity and that *renvoi* should be considered not as a doctrine but as a legal device which could be useful in a variety of cases. He therefore saw Article 2 as a distortion of the issue.

The *Rapporteur* again reminded the Members that Article 2 was written with Mejer's rule in mind. He felt that the development of European legislation with regard to *renvoi* was undesirable and that the Resolution should reflect this situation.

The *President* was of the opinion that readers of the Resolution should find familiar legal arguments. Article 2 as it stands would be particularly understandable for readers in Benelux countries.

Mr *Vischer* suggested that the Article be formulated as follows: "Should not be restricted to situations where uniformity is desired".

The *President* agreed that this was a good proposal.

Mme *De Magalhães Collaço* apporte son soutien à la proposition faite dans la mesure où il est entendu que l'article 2 peut être utilisé comme expédient en vue d'atteindre d'autres buts que l'uniformité.

The *President* then opened the vote on Article 2, as formulated by Mr Vischer. The Article was adopted by 28 votes in favour, 5 against, and 5 abstentions. The President then opened the discussion on Article 3(a).

Sir Peter North observed that the Resolution was aimed at courts, not legislatures. Specifically, Article 3(a) appeared to be aimed at courts. As a consequence, one would not know the significance of a law until it reached a court; law is therefore constructed so that litigation is necessary to reveal what is desirable. This tendency might not be welcomed by all.

The *President* suggested to strike out the words "by the court".

The *Rapporteur* commented that a similar formulation had been used in a previous draft of the Resolution.

M. *Pierre Lalive* souhaite faire observer, dans le même sens que Sir Peter North, que la suppression des termes "par le tribunal" soulève à nouveau la question des destinataires de la Résolution. Il semble clair que les législateurs qui s'attaquent à une nouvelle codification de droit international privé en font partie.

Mr *Lowenfeld* remarked that this Article established the principle of *ut res magis valeat quam pereat*, and that the validity in question might not only apply to contractual situations, but to others as well, for instance to testamentary dispositions.

Mr *van Hecke* stated that the issue at stake was not whether validity was desirable, but rather that the question of whether validity should be regarded as desirable is to be resolved by *lex fori*.

M. *Fadlallah* apporte son soutien à la suppression des termes "par le tribunal" puisque les actions législatives ne doivent pas *a priori* paraître exclues du champ de la Résolution. Toutefois, s'agissant de l'article 4(a), il observe que la règle de conflits qu'on appelle alternative semble être exclue bien que, lorsqu'appliquée, elle puisse rendre souhaitable la validité ou l'efficacité d'un acte ou d'une transaction tel que prévus à l'article 3(a).

Mr *Sohn* wondered if the word "if" in the Article was too strong.

The *President* indicated that this question could be settled at the Drafting Committee. He believed that the Article represented an important shift from formal to substantive matters.

M. *Lagarde* observe que le libellé très large de l'article 3(a) peut soulever certains problèmes. Si la question qui est posée dans un litige est celle de la validité d'un acte, il ne peut être dit *a priori* que la validité de l'acte serait "tenue pour souhaitable" puisque c'est la validité même qui est remise en question. Dans un tel cas, la référence doit être faite à la loi applicable et non à la loi du for. Le renvoi peut favoriser la validité d'un acte

seulement lorsque la règle de conflit la privilégie en offrant plusieurs possibilités par le biais d'une règle alternative. Le texte de la résolution devrait être plus précis à cet égard. Compte tenu de son caractère général et abstrait, il considère que la suppression de l'alinéa (a) serait justifiée.

M. *Pierre Lalive* estime que l'alinéa (a) devrait être préservé puisqu'il s'agit d'une simple formule déclarative rappelant des situations dans lesquelles le droit international privé étranger devrait être pris en considération.

The *President* opened the vote on Article 3(a), amended as follows: "if the validity or the effectiveness of an act or a transaction is regarded as desirable and assured thereby;".

Article 3(a) is adopted by 25 votes in favour, 2 against and 13 abstentions.

The President then opened the discussion of Article 3(b).

Mme *De Magalhães Collaço* souligne que l'expression "est tenue pour souhaitable" de l'alinéa (a) est absente de l'alinéa (b) et se demande si elle ne devrait pas y figurer également.

The *President* agreed, suggesting that the formulation should be similar to that of Article 3(a) so as to read "if a uniform treatment and recognition of an act or a transaction is desirable and can be achieved;".

Mr *von Mehren* questioned whether Article 3(b) was needed since, in his view, the notion of uniformity was already contained in Article 3(a).

The *Rapporteur* responded that although Articles 3(a) and 3(b) bore a resemblance they addressed different jurisdictions. He wanted to ensure that the Resolution would be applicable to all kinds of jurisdictions.

Mr *von Mehren* was of the opinion that striving for recognition of foreign private international law in other jurisdictions, as set forth in the Article, was going too far.

The *Rapporteur* reiterated his position that Article 3(a) stressed the desirability of uniformity, whereas Article 3(b) underlined the importance of recognition in other jurisdictions.

Mr *Lowenfeld* suggested that Mr von Mehren's concerns might be addressed by linking the subdivisions of Article 3 with the word "or".

Mr *von Mehren* responded by stating that, in his view, Article 3(a) already addressed the issue of enforcement in other jurisdictions. He believed that the distinctions between subarticles (a) and (b) were too fine.

Mr *Pierre Lalive* expressed his agreement with the objection of Mr von Mehren and suggested that subarticles (a) and (b) be merged.

The *President* commented that in The Hague Convention on Marriage the term "recognition of validity" is used.

Mr *Vischer* suggested that the notion of recognition was also addressed by Article 3(a).

The *Rapporteur* expressed his unhappiness with the proposals before him. He reaffirmed his opinion that Article 3(a) addressed situations before a court, whereas Article 3(b) served to ensure that the Resolution would be recognised elsewhere.

Mme *De Magalhães Collaço* apporte son soutien à la proposition de M. Vischer selon laquelle l'uniformité de traitement couvre tant la validité et l'efficacité que la reconnaissance.

The *President* opened to a vote the question of whether Article 3(a) should at all be retained before deciding whether to strive for an amended version. It was decided by 15 votes in favour, 7 against, and 12 abstentions, to retain a form of Article 3(a).

Mr *von Mehren* indicated that he saw no purpose in Article 3(b). If the notion of recognition was moved from Article 3(b) to Article 3(a), then Article 3(b) would only apply to perfect cases where uniformity could actually be achieved.

The *President* suggested that if Article 3(b) were reformulated to read "if a uniform treatment of an act or a transaction is desirable and can be achieved" it would be reasonable. He opened this formulation of the provisionto a vote. Article 3(b) is adopted by 31 votes in favour and 4 abstentions. The President then opened the discussion of Article 3(c).

M. *Pierre Lalive* partage l'opinion exprimée plus tôt par M. Gaja et estime que le terme "expressly" devrait être omis étant entendu qu'un nombre considérable de systèmes juridiques nationaux admettent le choix implicite pour autant qu'il soit suffisamment certain.

Le *Président* appuie les propos de M. Pierre Lalive.

M. *Lagarde* estime que, dans la mesure où l'alinéa (c) est conservé, le terme "expressément" devrait être déplacé, dans la version française, après le participe passé "inclus". S'agissant d'une situation tellement exceptionnelle, il ne faudrait pas la faire supposer par le juge.

M. *Loussouarn* fait observer que cet alinéa vise la situation dans laquelle les parties ont expressément manifesté leur volonté d'être liées par le droit international privé étranger.

S'agissant de la volonté des parties, Mme *De Magalhães Collaço* privilégierait, pour sa part, un texte très général. Dans cet esprit, elle appuie la suppression du terme "expressément" en insistant sur le fait que l'exigence d'un choix exprès d'un droit international privé étranger ne devrait pas être requise. La question de savoir si les parties ont visé seulement le droit matériel devrait être laissée à l'interprétation de leur volonté. Le choix des règles de conflits ne devrait toutefois pas être exclu d'emblée du choix du droit applicable par les parties.

Le *Président* suggère à cet égard que soit consultée la Résolution de Bâle de 1991, dans laquelle l'Institut a traité de cette question.

M. *Pierre Lalive* souligne que, dans la pratique, une formule est fréquemment utilisée par les parties qui sont dans l'incapacité de s'entendre sur le choix du droit applicable. Selon cette formule tout différend doit être

jugé comme il le serait dans un pays donné. Il rappelle qu'une telle clause peut être interprétée comme un choix implicite du droit international privé applicable.

Le *Président* apporte son soutien à l'intervention de M. Pierre Lalive et estime également que ce type de clause se trouve fréquemment rencontrée dans la pratique.

Mr *Vischer* was of the opinion that the word "expressly" should be deleted, since it was implicit in the choice of law.

Mr *von Mehren* did not have a formulation in mind, but he did not want to use the word "expressly" as it precluded situations where parties refused to make a choice of law.

The *Rapporteur* indicated that he also had the situation of no choice being made in mind with regard to this Article.

The *President* put to the floor the question if the word "expressly" should be retained.

Mr *Sohn* remarked that the Article as it stood allowed parties to choose any law they wanted. This, in his view, was a dangerous assumption.

Mr *Lowenfeld* pointed out that the use of the term "parties" implied contract. Some of the cases within the scope of the Resolution would be cases involving other conflicts, such as testamentary dispositions, trusts, and similar unilateral acts. He further pointed out that in situations where there was a choice of forum, the choice of a law might be implied, rather than expressed.

Mr *Brownlie* commented that it should be clear that the choice of law included a choice of foreign private international law. For him, the notion of "expressly" addressed situations where parties had a choice of law and had expressly included foreign private international law. He then suggested that the Article be reformulated to read: "if the parties enjoy a free choice of law, have exercised such choice of law, and have unambiguously included foreign private international law".

The *President* put to a vote the question of whether at all to retain Article 3(c). It was decided by a vote of 30 in favour, 1 against, and 6 abstentions, to adopt in principle a form of Article 3(c).

M. *Rigaux* attache pour sa part peu d'importance au terme "expressément".

The *President* suggested that the word "expressly" could refer to the choice of foreign private international law, therefore covering such cases, for example, where parties have chosen Spanish law and have expressly included Spanish rules on foreign private international law.

M. *Rigaux* rappelle que la Convention de Rome de 1950 utilise une formule intermédiaire, à savoir "implicitement et de manière certaine".

M. *Pierre Lalive* appuie la suppression du terme "expressément."

M. *van Hecke* propose que la suppression du terme "expressément" soit mise au vote.

The *President* then put to a vote the question of whether the word "expressly" should be deleted from the Article. It was so decided by 27 votes in favour, 1 against and 7 abstentions.

La séance est levée à 13 h 10.

Quatrième séance plénière

Jeudi 19 août 1999 (après-midi)

La séance est ouverte à 15 h 05 sous la présidence de M. *Jayme.*

Le *Président* présente M. von Hofmann, nouveau Membre Associé de l'Institut, et lui souhaite la bienvenue. Il ouvre ensuite la discussion sur l'article 3 d) du projet.

Mr *Lowenfeld* said that he had difficulty understanding the words : "questioned incidentally in later proceedings governed by the domestic law of the same applicable law" in this provision.

The *President* said that this provision was addressed to inter-temporal issues, for example, the case of a marriage, with a subsequent divorce. On the preliminary question, whether the marriage was valid, the provision raised the issue whether a *renvoi* should be undertaken.

Mr *Vischer* suggested that this paragraph was really addressed to the case where an act was valid under the law under which it was created, there was a subsequent change of domicile or nationality, and the new law applicable thereunder treated the earlier act as invalid. However, if subsequently the validity of the act was challenged, and a *renvoi* was applied, one might return to the situation under the first applicable law so as to uphold the validity of the act initially created.

The *President* considered that the provision was, in essence, really concerned with ensuring that a change in applicable law should not be able to detract from the validity of an act which had originally been valid under an earlier applicable law.

Mme *De Magalhães Collaço* se demande s'il est bien indiqué de trancher dans cet alinéa le problème de la question préalable. La solution qu'exprime le texte n'est pas acceptée en doctrine, et il lui paraît donc inopportun de l'inclure telle quelle.

The *Rapporteur* reminded the Members that in his Report, at Section 31, under the title "*Situations acquises*", one was able to find what was intended to be addressed by Article 3 (d) explained in full. To recapitulate in brief, the case particularly in mind was the famous "Swiss-Russian Marriage Case". In that case, a Swiss uncle and niece had wanted to marry, but could not because under Swiss domestic law such a marriage was illegal. As a result, they went to Russia to marry, where such a marriage was legal. Under the Swiss private international law applicable at the time of the marriage, Russian law would apply and thus the marriage would be valid. If years later a child was born, and the question of legitimacy was later raised, for example, before the Dutch courts (supposing no *renvoi*) and under the then applicable Swiss domestic law such a marriage would be held invalid. The question posed was : Should the parties who had been considered at an earlier point in time under Swiss law as validly married be treated subsequently as invalidly married?

The *President* highlighted that in such a case the central issue before the court would be the legitimacy of the child, but the validity of the marriage was necessarily a preliminary question to addressing the issue of legitimacy.

Mme *De Magalhães Collaço* considère que le précédent qui vient d'être mentionné ne concerne pas la question préalable, mais plutôt le renvoi au deuxième degré, qu'il s'agissait en l'occurrence d'appuyer.

Mr *Vischer* fully endorsed Mrs De Magalhães Collaço's position. He, too, considered that a case as set out under Article 3(d) did not necessarily involve a preliminary question and, therefore, he joined in the proposal to delete the word "incidentally" from the text. To retain the word could be misleading, to delete it would assist in clarity.

The *President* indicated his support for this suggestion.

M. *Pierre Lalive* se déclare sensible à la préoccupation de Mme De Magalhães Collaço, qui se résume au refus de dicter une solution particulière, qu'il s'agisse de conflits de lois dans le temps ou de la question préalable. Il suggère donc de remplacer l'expression "should be considered" par "should not be excluded".

The *Rapporteur* restated his position that the issue of the preliminary question itself had been to the forefront of his mind, and that such a case could quite easily come before a court in a practical case. However, Article 3(d) was dealing rather with the situation where *at different points in time* the same legal questions were to be addressed. By including the word "incidentally" he had not intended to suggest that this paragraph should apply to the problem of the preliminary question. In effect, it was only intended to address the situation where, at a later date, a matter arising earlier was in issue again.

The *President* reiterated his support for the proposal that the word "incidentally" be deleted.

Mr *van Hecke* also supported deleting the word "incidentally". However, he had a further question for the Rapporteur. He queried whether Article 3(d) was really required in the Resolution, as, in his opinion, such a situation was already addressed in Article 3(a). He wondered whether the "Swiss-Russian Marriage Case" could really come within the latter provision, in that it seemed to present a case where it was desirable to support the validity of the marriage.

The *President* considered, however, that, in fact, Article 3(d) was addressed to a different issue.

Mr *Lowenfeld* said that the reference to "the same applicable law" in Article 3(d) would imply, in the example cited by the Rapporteur, a reference to Russian law whereas the "domestic law" applicable in that case would be Swiss law. Such a result would then imply that one was not dealing with a case of *renvoi*, whereas, as he read Article 3(d), that provision did imply that a *renvoi* was to be applied. Therefore, he questioned the inclusion of the words "domestic law" here.

Mr *Vischer* said that in all the earlier provisions of the Resolution it had been left open whether foreign private international law should be taken into account or not. By way of contrast, in his view, Article 3(d) was actually proposing a particular outcome, which proposal ran counter to the tenor of the whole Resolution, and the earlier provisions already considered. He suggested that Article 3(d) might be redrafted to include the words "if desired". He could envisage certain circumstances where upholding the validity of the marriage of the "Swiss uncle and niece" might give rise to a result which was not desirable.

The *Rapporteur* reiterated that what Article 3(d) was intended to address were what he had termed "*situations acquises*". That is, cases of acquired rights which had been considered to be valid at an earlier point in time, but which, at a later date, were in issue. Consideration, therefore, had to be given as to whether the earlier situation of the acquired rights was to be rescinded.

M. *Rigaux* considère que le problème de la question préalable relève de l'alinéa (e), l'alinéa (d) illustrant plutôt le précédent du "rocher de bronze". Il suggère donc de supprimer l'expression "de façon incidente" au sein de ce dernier.

Mme *De Magalhães Collaço* maintient que l'alinéa (d) traite de la question préalable. Elle s'interroge par ailleurs sur la portée du terme "applicable" qui clôture l'énoncé et en particulier sur le tribunal qui sera amené à trancher.

The *Rapporteur* felt bound to disagree as one was not necessarily dealing here only with a decision of a tribunal. If, for example, the uncle and niece had gone to a law professor who had told them to go to Russia in order to obtain a valid marriage, the marriage was the "act" that was thus to be considered valid. It was to such situations, too, that Article 3(d) was addressed.

Mr *Vischer* suggested that, rather than the simple reference to the "law applicable at the earlier time" in the second line of Article 3(d), wording such as "the law applicable when the act was created" be used. In his view, this would render the provision much clearer.

The *Rapporteur* indicated that he was happy to accept such an amendment.

M. *Rigaux* pense que l'expression "incidentally in later proceedings" devrait être supprimée, car elle laisse supposer qu'il a existé une procédure antérieure, ce qui n'est pas nécessairement le cas.

The *President* suggested, to take on board Mr Rigaux' suggestion, that perhaps the text could read, rather than "in later proceedings", "later" or "subsequently".

Mr *van Hecke* fully supported Mr Vischer's suggestion, which would underline the fact that one was dealing with the law that applied at the time the transaction or act came into being, but where the validity of that same transaction or act was raised, in fact, in "later proceedings". In his view, the use of the wording "in later proceedings" did not imply that there must necessarily have been "earlier proceedings". The point addressed was that the "proceedings" in question should arise "later" in time than the earlier act. He questioned, however, whether the words "in a conflict of laws in time" were necessary. In the example given, the same conflict rule as had existed earlier arose for consideration, but at a later point in time.

The *President* suggested that, to adopt these proposals, the text might read "if an act or transaction valid according to the choice of law rules of the law applicable when the act or transaction was created is questioned in later proceedings governed by the domestic law of the same applicable law". However, final formulation should be left to the Commission and the *Comité de rédaction*.

Mme *De Magalhães Collaço* se permet de mettre en garde le Président, dans la mesure où sa proposition semble mener à une reconnaissance générale du principe des droits acquis ce qui lui apparaît pour le moins contestable.

The *President* put to the vote the question of whether to adopt Article 3(d) along the lines as formulated in the discussions, with the final text to be elaborated by the *Comité de rédaction*. He then proceeded to a

vote on retaining a revised Article 3(d), which was adopted by 19 votes in favour, 1 against, with 11 abstentions.

The President opened the discussion on Article 3(e).

Mr *Lowenfeld* queried whether a case of *renvoi* was dealt with in this provision. His understanding was that it dealt with choice of law rules, with a preference stated as to result, but that no *renvoi* is involved.

The *Rapporteur* said that Article 3(e) was addressed to a case such as where the validity of a marriage was in question. Suppose an English girl and man eloped and got married in England, contrary to the wishes of her family. She had married a fraudster, the family wished a divorce, but no divorce was available in England. The man was prepared to accept money from the girl's family to go to Scotland so as to obtain a divorce, which was available in such circumstances. Later, the girl wished to marry again, but the divorce was not recognised in England so she returned to Scotland to marry again. She and her husband then moved back to England and had children. Subsequently, the legitimacy of the children was in issue. Under Scottish law, including its private international law rules, the children would be legitimate. Under English law, including its private international law rules, the answer would be the opposite.

M. *Pierre Lalive* rappelle que la discussion doit porter spécifiquement sur la prise en considération du droit international privé étranger, et non sur le problème du renvoi.

Mr *Vischer* felt compelled to reiterate the same doubts with regard to Article 3(e) which he had already expressed in the work of the Commission. He, like many Members, was familiar with the distinction arising between a main and an incidental question posed in a dispute before a court. However, in his view, the drafting of Article 3(e) left the matter somewhat ambiguous. If one was dealing with the case where the law governing the preliminary question would treat an act as invalid, but the law governing the main question, including its conflicts of laws rules, would treat the same act as valid, then he considered that such a situation would fall outside what was intended to be covered by Article 3(e). This was because

Article 3(e) was "one-sided", whereas all the other cases addressed in the Resolution were "double-sided".

The *President* wished to make the point that, as he understood it, the "double-sided" element had already been addressed, whereas Article 3(e) was dealing with the "other side", that is, the preliminary question.

The *Rapporteur* underlined the fact that Article 3(e) had been drafted so as to reflect actual practice in the courts.

The *President* proceeded to a vote on retaining Article 3(e), which was adopted by 25 votes in favour, 3 against, with 9 abstentions.

The President opened the discussion on Article 4(a).

Mr *Pocar* wished to put forward a point for the consideration of the Rapporteur. In his view, this provision put on the same level, and suggested the same result, where "alternative choice of law rules" operated either on "an equal footing" or "as substitutes for others". He queried whether it was desirable to exclude foreign private international law rules from consideration where one had a case of "alternative choice of law rules" operating "as substitutes for others", that is in a case of, as the text had it, "subsidiarity". The Report suggested that, in the latter case, successive rules retained their own place. He pointed out that, in the latter case, the subsidiary rule only applied when the main rule did not, because of the inapplicability of its connecting factor. Thus, when the main rule applied there was no reason to exclude the taking into account of the conflict rules of the foreign law referred to. He was aware that in many cases giving effect to the main rule, including foreign conflict of laws rules, or to the subsidiary rule might lead to the same result, *e.g.* in cases that imply only two connecting factors, such as nationality and domicile. In such cases, the connecting factor in the subsidiary rule and in the foreign conflict of law rule would coincide and refer to the same applicable law. However, this would not be the case when different connecting factors apply or differences in the interpretation of the same factors arise, as the Rapporteur has rightly pointed out. Therefore, he would favour deleting the reference to choice or law rules operating as substitutes for others.

The *President* suggested that the first option was clear as to its impact.

M. *Gannagé* avoue éprouver quelque hésitation à approuver l'alinéa. Il se rallie entièrement aux observations qui viennent d'être présentées par M. Pocar. Les règles alternatives ne peuvent être mises sur le même pied que les règles subsidiaires. Le renvoi peut être accepté sans hésitation dans le cas de règles subsidiaires alors que, dans le cas de règles alternatives, son application suscite davantage de discussion. M. Gannagé craint que, par sa rigidité, l'alinéa (e) ne tienne pas suffisamment compte de cette problématique.

Même si cela peut à première vue sembler un peu radical, M. *Rigaux* propose de supprimer purement et simplement l'ensemble de l'article 4. Cet article semble inviter à une exclusion ou à une limitation du renvoi, alors que l'objectif de la résolution est plutôt de l'encourager.

M. *Vischer* se rallie à cette proposition.

Le *Président* craint également que des contradictions puissent être décelées entre l'article 3 et l'article 4. Le maintien de ce dernier risque donc de créer de nouveaux conflits.

M. *Lagarde* appuie l'intervention de M. Gannagé. Concernant la proposition de M. Rigaux, elle ne peut être envisagée qu'à l'issue d'une analyse de chacun des alinéas, dont les particularités peuvent dicter des solutions différentes. M. Lagarde pense par exemple que, si l'alinéa (a) peut être supprimé, l'alinéa (c) doit incontestablement être maintenu.

M. *van Hecke* pense également que, en tout état de cause, l'alinéa (c) devrait survivre au naufrage que semble devoir subir l'article 4 du projet.

The *Rapporteur* expressed his firm view that if the proposals from Messrs. Rigaux and van Hecke were accepted, this would result in an "amputated" Resolution and the rejection of ideas set out in it merely on the grounds of personal preference. For himself, he was prepared to accept the "subsidiarity" option, but invited the Members to consider again in the

discussion, in the context of Article 4 (a), The Hague Conventions on Product Liability, and on Motor Accidents, and to bear in mind that, in rejecting his proposal here in full, they rejected an approach contained in such Conventions.

The *President* invited views on whether to delete Article 4 in total.

M. *Rigaux* ne comprend pas pourquoi il serait nécessaire de maintenir l'alinéa (c), vu la souplesse qui a été conférée à l'article 3(c) à l'occasion de la modification de sa formulation.

M. *Pierre Lalive* appuie le point de vue de M. Lagarde, selon lequel il convient d'examiner successivement chacun des paragraphes. Cela étant, il pense qu'une solution de compromis serait de remplacer, dans l'énoncé général de l'article 4, "ought not to be considered" par "need not to be considered".

Mr *Lowenfeld* suggested that a vote be taken on whether to include, with respect to Article 4 (a), a *chapeau* reading "ought not to be considered" or "need not be considered".

The *President* proceeded to a vote on including "need not be considered" in the *chapeau* of Article 4(a), which was adopted by 17 votes in favour, 9 against, with 11 abstentions.

The *President* then proceeded to a vote on whether to retain the first option in Article 4 (a) "on an equal footing", which was adopted by 13 votes in favour, 5 against, with 19 abstentions.

The *Rapporteur*, with respect to the second option in Article 4(a) - "or as substitute for others (subsidiarity)" -, stated that he had included this in order to take account of The Hague Convention on Wills. He had offered this option for the Institute to decide whether to support the position set out there.

The *President* proceeded to a vote on retaining the second option in Article 4(a), which was rejected by 14 votes against, 5 in favour, with 19 abstentions.

The President moved the discussion on to Article 4(b).

Mr *Vischer* confessed that he was not convinced by the need for this provision in the Resolution. In his view, if mandatory rules of a third legal system had to be applied, and he had particularly in mind the case of Article 7 of the Rome Convention, it could be useful to take into account the private international law rules of the foreign applicable law. He was unable to understand why such an outcome should be excluded.

The *Rapporteur*, whilst indicating his preference to retain Article 4(b), was prepared to accept its deletion in the light of Mr Vischer's argument.

M. *Lagarde* craint ne pas bien percevoir le sens de cet alinéa. L'article 7 de la Convention de Rome admet la possibilité d'appliquer les lois de police d'un Etat tiers dont la loi ne régit normalement pas le contrat. Cela implique nécessairement que l'on tienne compte du droit international privé de cet Etat tiers, qui voudrait imposer l'application de sa loi. En excluant la prise en compte du droit international privé étranger, l'article 4(b) entre donc en contradiction avec le système de la Convention de Rome.

The *President* then proceeded to a vote on retaining Article 4(b), which was rejected by 26 votes against, 1 in favour, with 8 abstentions.

The President moved the discussion on to Article 4(c).

M. *Pierre Lalive* est convaincu par l'argumentation de M. Rigaux, et se déclare dès lors en faveur de la suppression du paragraphe concerné.

M. *Lagarde* s'y oppose résolument. L'article 3(c) ne vise qu'une hypothèse relativement marginale, alors que l'article 4(c) énonce une solution que l'on retrouve dans toutes les législations qui traitent du sujet. Il craint que l'Institut ne se couvre de ridicule en ne mentionnant pas une solution unanimement acceptée et qui, de surcroît, est marquée du sceau du bon sens.

M. *Gannagé* suggère, en guise de compromis, de supprimer le terme "expressément".

Mr *Lowenfeld* wished to return to a point he had made earlier, and suggested that in this case, too, the *chapeau* should be "need not be considered". Other than in the area of public law, in his view, the current Article 4(c) set out a wrong principle. Even with this amendment, the problem that arose in the case of, for instance, a vendor and purchaser of a car would not be covered by paragraph (c). The position actually reflected in this paragraph should be more fully explained, that is, that the parties could not have a free choice of law if the law of the forum chose to apply a prohibitive law.

The *Rapporteur* responded to Mr Lowenfeld's point, highlighting that he considered that US and European private international law constituted different sets of rules. For example, one might have a free choice of law but still encounter the issue of illegality of contract. However, the latter case was not one of taking into account a point of private international law regarding the formation of the contract itself.

M. *Pierre Lalive* suggère que l'on passe à la discussion de l'alinéa (d) de l'article 4. L'Assemblée aura alors une vue d'ensemble et pourra décider de suivre la proposition Rigaux ou la proposition Lagarde.

Mr *Vischer* suggested a vote on whether to retain Article 4(c), and, if retained, the final wording could be formulated by the *Comité de rédaction.*

The *President* then proceeded to a vote on whether to retain Article 4(c), which was adopted by 21 votes in favour, 6 against with 11 abstentions.

Mme *De Magalhães Collaço* se demande s'il ne faudrait pas aligner l'alinéa (c) de l'article 4 sur l'alinéa (d) de l'article 3.

The *President* moved the discussion on to Article 4(d).

M. *Droz* remarque que l'alinéa (d) a fait l'objet d'un amendement. Il se dit désarçonné par cet amendement car il ne le comprend pas et ne voit pas l'intérêt de cet exercice. Il est par contre en faveur du texte tel qu'il figure dans le projet de la résolution. Il suggère néanmoins de remplacer l'expression "et s'abstient d'agir" par celle de "ne contient pas de règle à cet égard".

The *Rapporteur* wanted to stress that the purpose behind this provision was to address the so-called "hidden *renvoi*". This, in his view, really only arose in connection with divorce. It had been suggested by some commentators that, if an English court were approached for a divorce and refused jurisdiction on the grounds that the applicant was not domiciled in England, this would imply that the English court had made a reference to a foreign domicile of the applicant. This analysis was false as a foreign court would still, on an application for divorce by the same party, be able to apply its own law. As far as the English court was concerned, no issue of a reference back or forward arose. It had been his intention, through Article 4(d), to strike down this chimera.

Mr *Vischer* suggested that it would be better to delete Article 4(d) as, in his opinion, it did not really belong within the body of the Resolution. Further, he could see no reason why a court could not take into account foreign private international law rules when a relevant case came before it. Even in the amended version of Article 4(d) presented by the Rapporteur, the aim of the provision still escaped him.

The *President* also supported deleting paragraph (d).

M. *Pierre Lalive* propose de voter sur l'alinéa (d) de l'article 4 tel qu'il figure dans le projet de résolution.

M. *Gaja* raised the point that, in his opinion, the two versions of paragraph (d) appeared to say that there was no rule for private international law of a foreign country to be taken into account when a court abstained from hearing a case on grounds of jurisdiction. He considered that such a proposition was unrelated to the subject-matter intended for the Resolution, as paragraph (d) implied that there was no foreign conflict of law rule in issue. It therefore fell outside the scope of the Resolution.

Mme *De Magalhães Collaço* fait observer que les versions française et anglaise ne concordent pas. Elle se demande s'il s'agit d'une question de compétence ou de juridiction ?

Le *Président* lui répond qu'il faut en l'espèce traduire la notion de "jurisdiction" par celle de "compétence juridictionnelle".

The *President* proceeded to a vote on whether to retain Article 4(d) in any form, which was rejected by 25 votes against, 3 in favour, with 13 abstentions.

The President moved the discussion on to Article 4(e).

Mr *von Mehren* suggested that the words "in the discretion of the court" be deleted. He considered that all such cases envisaged under Article 4(e) were, in any event, matters for the discretion of the courts or the legislator, and it was not clear why the courts should be singled out for this purpose.

Mr *Vischer* queried whether this paragraph was in conformity with what was set out earlier in the Resolution.

Mr *Gaja* proposed that Article 4 (e) be deleted. He considered that it dealt with a more general issue, that is, the conformity existing between the *lex fori* and a foreign law, whether this was applicable by way of the *lex fori* conflict of laws rules or by foreign conflict of laws rules.

The *Rapporteur* wished to explain that he had included expressly the words "in the discretion of the court" so as not to propose a strict rule. The distinction was important because a foreign law may treat a matter as a foreign issue, whereas it might otherwise be considered as a reference to domestic law. If the former, the matter could only be taken as far as a court of second instance, if the latter, it could go to the third level of Cassation. He reiterated that his mandate had been to produce a complete statement of when foreign private international law was to be applied. He therefore cautioned against reductions in the text.

Mr *Lowenfeld* queried whether it was necessary to be concerned about the issue of *renvoi* if applying the law of country A and the law of country B led to the same result.

M. *Lagarde* se dit favorable à la suppression de l'alinéa (e). Un tel alinéa priverait les parties concernées d'une possibilité de recours additionnelle offerte au moyen d'un renvoi.

M. *van Hecke* rappelle à titre d'information qu'en Belgique la Cour de cassation se reconnaît la compétence de contrôler l'application de la loi étrangère.

The *Rapporteur* wished only to respond briefly to the point raised by Mr Lowenfeld, underlining that paragraph (e) was intended to address cases such as where New York law, in a particular case, required a reference to the law of Massachussetts, and that required a reference back to the law of New York. As a result, both laws said that New York law applied.

The *President* then proceeded on a vote on whether to retain Article 4(e) which was rejected by 29 votes against, none in favour, with 12 abstentions.

M. *Fadlallah* voudrait savoir pourquoi rien n'est prévu au cas où l'application de la loi est exigée par une convention internationale dont l'objet est d'harmoniser des règles de conflit.

The *Rapporteur* responded that a proviso to that effect had originally been included in the Resolution but had been deleted in the discussions within the Commission. The whole Resolution was to be read, however, subject to specific rules in international conventions. It was, in his mind, clear that the Resolution was only dealing with the position of courts, legislation and practice. The Resolution did not restate what occurred under international conventions.

Mr *Parra-Aranguren* questioned why, in a Resolution dealing with such important matters as set out under its four Articles, the Institute had not found a single case where it considered that the application of foreign private international law should *not* be permitted.

The *President* responded by explaining that the Resolution was not intended to set out a dogmatic approach.

Turning then to the Preamble, the President suggested that this be reformulated by the *Comité de rédaction* based on the text which had been adopted by the Assembly. It was so decided.

La séance est levée à 16 h 35.

Sixième séance plénière

Samedi 21 août 1999 (matin)

La séance est ouverte à 12 h 20 sous la présidence de M. *Jayme*.

The *Rapporteur* presented the first revised draft of the Resolution of the Fourth Commission regarding the "Taking into Account of Foreign Private International Law", which reads as follows:

"The Institute of International Law,

Considering that the task of private international law is the search for the legal rules most appropriate to be applied in the individual case ;

Considering that the legal system most appropriate to be applied in the individual case is that which ensures justice, certainty, effectiveness, uniformity or compliance with the common intention or justified expectations of the parties ;

Considering that certainty is achieved by reliance on the same law in respect of situations created and transactions concluded ;

Considering that effectiveness can be achieved by paying special regard to the law which exercises factual control ;

Considering that uniformity of decision is only achieved if the relevant choice of law rules of the countries concerned either contain identical choice of law rules interpreted uniformly or if one of different connecting factors is accorded precedence ;

Considering that even if uniformity of decision cannot be obtained completely, a degree of uniformity may be achieved in the individual case if the referring court takes foreign private international law into consideration ;

Considering that the taking into account of foreign private international law can lead to a result regarded as desirable ;

Considering that these aims can be furthered best if in some situations not only foreign domestic law but also foreign private international law is taken into account ;

Adopts the following Resolution:

The taking into account of foreign private international law

1. Should not be excluded altogether, irrespective of whether it involves a reference back or on ;

2. Should not be restricted to where uniformity is desired ;

3. Should be considered :

(a) if the validity or the effectiveness of an act or a transaction is regarded as desirable and assured thereby ;

(b) if a uniform treatment of an act or a transaction is desirable and can be achieved ;

(c) if the parties enjoy a choice of law, have exercised it, and have included private international law ;

(d) if the validity of an act or transaction valid according to the choice of law rules of the law applicable at an earlier point in time is questioned in later proceedings ;

(e) if the application of the law governing the main question including its choice of law rules would entail the invalidity of an act or transaction whereas the application of the law governing the preliminary question including its choice of law rules treated as a main question would maintain its validity ;

4. Ought not to be considered:

(a) if the forum contains alternative choice of law rules operating on an equal footing ;

(b) if the parties enjoy a choice of law, have exercised it, and have not included private international law."

Traduction en français:

"L'Institut de Droit international,

Considérant que la fonction du droit international privé est de déterminer les règles juridiques dont l'application est la plus appropriée dans un cas donné ;

Considérant que les règles juridiques dont l'application est la plus appropriée dans un cas donné sont celles qui assurent la justice, la certitude, l'efficacité, l'uniformité ou le respect des intentions communes ou des attentes justifiées des parties ;

Considérant que la certitude est atteinte par le recours aux mêmes règles de droit en ce qui a trait aux effets créés et aux actes conclus ;

Considérant que l'efficacité peut être atteinte en portant une attention particulière au droit qui exerce un contrôle de fait ;

Considérant que l'on ne peut parvenir à une uniformité des décisions que lorsqu'on retrouve, dans les règles de conflit de lois pertinentes des pays concernés, des règles de conflits de lois identiques et interprétés de façon uniforme, ou encore lorsqu'un des critères de rattachement se voit accorder préséance ;

Considérant que même lorsqu'on ne peut aboutir à une uniformité totale des décisions, une certaine mesure d'uniformisation peut cependant être atteinte dans un cas donné si le tribunal opérant le renvoi tient compte du droit international privé étranger ;

Considérant que la prise en compte du droit international privé étranger peut conduire à un résultat tenu pour souhaitable ;

Considérant que ces objectifs seront poursuivis plus efficacement lorsque, en certaines circonstances, non seulement les règles du droit interne étranger, mais aussi le droit international privé étranger, sont prises en compte ;

Adopte la résolution suivante :

La prise en compte du droit international privé étranger

1. ne devrait pas être exclue d'emblée, qu'elle implique ou non un renvoi au premier ou au second degré ;

2. ne devrait pas se voir limitée aux situations dans lesquelles l'uniformité est souhaitable ;

3. devrait être envisagée :

(a) si la validité ou l'efficacité d'un acte ou d'un contrat est tenue pour souhaitable, et se voit ainsi assurée ;

(b) si l'uniformité de traitement d'un acte ou d'un contrat est souhaitable et peut être atteinte ;

(c) si les parties jouissent du choix du droit applicable et, l'ayant exercé, y ont inclus le droit international privé ;

(d) si la validité d'un acte ou d'un contrat valable selon les règles de conflit de lois du droit applicable au moment où l'acte ou le contrat a été accompli est remise en question lors d'une procédure subséquente ;

(e) si l'application de la loi régissant la question principale, y inclus ses règles de conflit de lois, devait avoir pour conséquence la non-validité d'un acte ou d'un contrat, alors que l'application de la loi régissant la question prélalable, incluant ses règles de conflit de lois considérée comme une question principale maintiendrait sa validité ;

4. ne devrait pas être envisagée :

(a) si le for comporte des règles alternatives de conflit de lois opérant sur un pied d'égalité ;

(b) si les parties jouissent du choix du droit applicable et, l'ayant exercé, n'y ont pas inclus le droit international privé."

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The *Rapporteur* also introduced the following amendment to Article 3(e) as proposed by Mr Vischer:

L'article 3(e) est remplacé par ce qui suit:

"Si, en décidant une question préalable, la validité d'un acte peut être maintenue par application des règles de conflit de lois ou de la loi régissant la question principale ou de la loi régissant la question préalable".

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Delete existing Article 3(e) and substitute:

"If, when deciding an incidental question the validity of an act would be ensured either by application of the conflict rules of the law governing the main question or of the conflict rules of the law governing the incidental question".

The *President* recalled that the general discussion of the Resolution had been completed in a previous session and that the text, as amended, would now be put to a vote. He proceeded to submit Article 1 to a vote. The Article was adopted by 21 votes in favour, 1 vote against, and no abstentions.

The President then put Article 2 to a vote, which was adopted by 23 votes in favour, none against, with 1 abstention.

The President then put Article 3 to a vote.

Mr *von Mehren* suggested adding the words *"inter alia"* to Article 3.

Mr *Lowenfeld* suggested adding the words *"inter alia"* to both Articles 3 and 4.

The *President* put to a vote whether to add the words *"inter alia"* to both Articles 3 and 4. The addition of those terms was rejected by 14 votes, with 6 votes in favour, and 4 abstentions.

M. *Pierre Lalive* suggère que l'on vote sur la structure générale des dispositions, ce qui n'exclut pas certains aménagements formels qui pourraient être apportés par le Comité de rédaction.

Mr *Lowenfeld* contended that Articles 3(c) and 4(b) addressed an identical issue.

The *President* remarked that the vote in question concerned Article 3(a). He asked whether a vote should be taken on the structure of Articles 3 and 4.

M. *Rigaux* relève qu'un vote sur la fusion totale ou partielle des articles 3 et 4 ne peut être effectué *in abstracto*, mais requiert la soumission au vote d'un texte. La décision de fusionner pourrait d'ailleurs être prise après que l'on se soit prononcé séparément sur chacun des alinéas des articles 3 et 4.

The *President* declared that he would keep Mr Lowenfeld's comments in mind and deal with them at a later stage of the proceedings. He then put Article 3(a) to a vote, which was adopted by 25 votes in favour, none against, with 1 abstention.

A vote was then taken on Article 3(b), which was adopted by 24 votes in favour, none against, and no abstentions.

The *President* then submitted Article 3(c) to a vote. It was adopted by 30 votes in favour, none against and no abstentions.

Sur suggestion de M. *Rigaux*, il est entendu que, dans le texte de l'article 3(c), "les parties jouissent du choix" est remplacé par "les parties ont le choix".

The *President* opened the vote on Article 3(d).

Mme *De Magalhães Collaço* propose la suppression de cette disposition dont l'énoncé lui semble susciter de graves problèmes d'interprétation. De manière générale, l'article 3 (d) révèle une certaine confusion entre le problème des conflits de lois dans le temps et celui de la prise en considération de la loi étrangère applicable. La mention d'une "procédure subséquente" laisse par exemple entendre l'existence d'une procédure antérieure, sans que l'on n'en trouve aucune trace dans le reste de l'article. Par ailleurs, Mme de Magalhães Collaço se demande pourquoi on ne retrouve plus trace, dans les alinéas (d) et (e), du caractère souhaitable de la solution, que l'on retrouve dans les alinéas (a) et (b), et qui assouplit avec bonheur les énoncés qui y sont contenus. Tel quel, l'article (d) peut mener à admettre la prise en considération de la loi étrangère même lorsque la solution apparaît inopportune. En matière de statut personnel, cela peut être le cas lorsqu'il n'existe aucun lien entre la loi applicable là où l'acte a été accompli et la loi qui serait applicable d'après les règles de conflit de for.

M. *Rigaux* suggère, pour tenir compte de la critique de Mme De Magalhães Collaço, de remplacer l'expression "est remise en question lors d'une procédure subséquente" par "est ultérieurement remis en question".

The *President* recalled that this particular Article addressed a special case, and therefore adding the word "desirable" would not be relevant.

The *Rapporteur* pointed out that the Article stresses what "should be considered" and provides for no obligations.

The *President* opened the vote on the question of whether to delete Article 3(d). This was rejected by 21 votes, with 4 votes in favour and 4 abstentions.

A vote was then taken on whether to adopt Article 3(d) as formulated by Mr Rigaux. The Article, as amended, was adopted by 23 votes in favour, 1 against, with 4 abstentions.

The *President* then opened to a vote Article 3(e), as amended by Mr Vischer.

Mr *Gaja* considered Mr Vischer's text an improvement on the draft Article. However, he believed there was insufficient justification for a general rule upholding the validity of an act by referring to two different systems of conflict of laws. He therefore suggested that sub-paragraph (e) be deleted.

The *President* indicated that this Article was necessary because it addressed a specific situation raised by the *Schwebel v. Ungar* case.

Mr *Vischer* suggested that the words "if desirable" could be added to the Article.

M. *Pierre Lalive* exprime la conviction que, comme c'était déjà le cas pour l'alinéa précédent, la discussion révèle un grave malentendu. Le texte ne fait que prévoir que, si une situation survient, on "devrait envisager"

la prise en compte du droit international privé étranger. Il ne s'agit pas de dicter ou d'imposer cette prise en compte. Peut-être le texte anglais ("*should be considered*") est-il moins clair que le texte français.

M. *Droz* appuie l'intervention de M. Pierre Lalive et plaide pour le maintien de la disposition.

M. *Rigaux* suggère deux aménagements d'ordre terminologique dans le texte français de l'alinéa révisé par l'amendement de M. Vischer. D'abord, la phrase devrait commencer par "si, pour la décision d'une question préalable". Dans la deuxième phrase, il suggère par ailleurs d'adapter les versions française et anglaise en supprimant le terme "ou" entre l'expression "conflit de loi" et "de la loi", et en remplaçant ensuite "ou de la loi" par "ou celle de la loi".

M. *Gaja* n'insiste pas sur sa proposition d'amendement, sans avoir été réellement convaincu par les objections qu'elle a suscitées. Plutôt que d'ériger en général la validité d'un acte comme un objectif prioritaire, il aurait préféré que l'on ajoute l'expression "s'il est souhaitable", en suivant la formule de l'article 3(a).

Mr *Lowenfeld* voiced his concern that this Resolution would be read by judges and lawyers who were not experts with regard to some of the technical aspects of foreign private international law.

The *President* once again recalled that Article 3(e) was drafted with *Schwebel v. Ungar* in mind.

Mme *De Magalhães Collaço* craint de devoir rappeler que, concernant le problème de la question préalable, le texte ne reflète pas les nuances de la doctrine et de la pratique existantes. Le critère de la validité semble écarter la prise en compte d'autres valeurs qui peuvent parfois s'avérer essentielles, notamment en matière de statut personnel. Mme De Magalhães Collaço considère par ailleurs que, si l'expression "devrait être envisagée" équivaut à "peut être envisagée", il faudrait l'indiquer plus clairement.

The *President* disagreed with Mrs De Magalhães Collaço and did not believe that the statement regarded preliminary questions at all.

The *President* opened the vote on Article 3(e), as amended by Mr Vischer. The Article was adopted by 20 votes in favour, 2 against, with 6 absentions.

The President then asked whether Article 4 should be retained.

Mr *Lowenfeld* suggested that Articles 4(b) and 3(c) should be combined.

M. *Pierre Lalive* rappelle à M. Lowenfeld que M. Lagarde, dont chacun connaît les compétences et a pu apprécier la sagesse, a insisté pour que l'on maintienne l'article 4(b) à côté de l'article 3(c).

M. *Rigaux* approuve la position de M. Lowenfeld. La lecture de l'article 3(c) rend inutile l'introduction d'un article 4(b), la règle exprimée dans celui-ci étant implicitement contenue dans celui-là.

M. *Fadlallah* concède que, sur le plan de la logique sémantique, l'argumentation de MM. Lowenfeld et Rigaux est inattaquable. Il rappelle toutefois que, comme l'avait indiqué M. Lagarde, la situation la plus courante est celle qui est couverte par l'article 4. A choisir, il préférerait encore que l'on supprime l'article 3(c).

The *President* opened the vote on Article 4(b). The Article was adopted by 22 votes in favour, 1 against, with 3 abstentions

Mme *De Magalhães Collaço* précise qu'elle s'est abstenue en raison du double emploi qui résulte de l'adoption des articles 3(c) et 4(b).

The *President* then opened to a vote the preamble. He recalled that the Preamble had been amended in light of the comments made during the general discussion.

Mr *Lowenfeld* lauded the revised Preamble and indicated his satisfaction that it made reference to justice and justified expectations.

M. *Pierre Lalive* préférerait que l'on remplace "*legal systems*" par "*legal rules*".

The *Rapporteur* indicated that this was not his preferred formulation, but that he would have no objection to the suggestion.

Mr *Lowenfeld* suggested that the second consideration in the Preamble be formulated as follows:

> "*Considering* that the task of private international law is to evaluate the development of justice as well as the need for certainty, effectiveness, uniformity, and compliance with the common intention or justified expectations of the parties;".

Mr *von Mehren* pointed out that in the second sentence of the Preamble a number of values were listed. These values were not all of equal importance. He suggested that a formula might be found which would indicate the priority of justice over other values, such as, for example, certainty.

The *Rapporteur* responded that this sentence merely provided a menu of general principles which were addressed in greater detail in subsequent lines of the Preamble.

Mme *De Magalhães Collaço* craint que le texte du préambule soit totalement inadapté au reste de la résolution. L'objet des articles qui ont été adoptés est de prévoir des règles et critères relativement précis, destinés à constituer des guides pour la pratique. Au contraire, le préambule s'engage dans des considérations générales qui relèvent de la théorie du droit international privé et qui, au demeurant, peuvent prêter le flanc à la critique. Ainsi, on se demande pourquoi la fonction du droit international privé serait exclusivement de déterminer les règles juridiques applicables. Par ailleurs, il n'est nulle part indiqué que le renvoi peut impliquer des choix entre deux ou plusieurs valeurs qui s'opposent. Mme De Magalhães Collaço invite le Comité de rédaction à reformuler l'ensemble du préambule en ce sens.

M. *Rigaux* propose que, au sein du deuxième considérant, on remplace "assurent la justice", qui constituse peut-être une formule trop carrée, par "favorisent la justice".

Mr *Vischer* acknowledged his agreement with the comments made by Mr von Mehren. He pointed out, however, that the second consideration of the Preamble was an explanation of the first.

Mr *El-Kosheri* suggested to replace the words "which ensures" with the phrase "are more in conformity with".

The *President* opened the vote on the Preamble, which was adopted by 19 votes in favour, 2 against, with 4 abstentions.

The *President* then submitted the entire text for an initial vote. The text, as to be amended by the Drafting Committee, was approved by 22 votes in favour, none against, with 4 abstentions.

La séance est levée à 13 h 15.

Huitième séance plénière

Lundi 23 août 1999 (après-midi)

La séance est ouverte à 16 h 30 sous la présidence de M. *Jayme*.

The *President* indicated that after the Institute's vote at a previous session, Revised Draft Resolution No.1 of the Fourth Commission was referred back to the Commission, whereafter it was submitted to the Drafting Committee. The Institute had now before it Revised Draft Resolution No. 2 of the Fourth Commission, which reads as follows:

"The Institute of International Law,

Considering that the task of private international law is the search for the legal rules most appropriate to be applied in the individual case ;

Considering that the legal rules most appropriate to be applied in the individual case are those which promote justice, certainty, effectiveness, uniformity or compliance with the common intention or justified expectations of the parties ;

Considering that certainty is achieved by reliance on the same law in respect of situations created and transactions concluded ;

Considering that effectiveness can be achieved by paying special regard to the law which exercises factual control ;

Considering that uniformity of decision is only achieved if the relevant choice of law rules of the countries concerned either contain identical choice of law rules interpreted uniformly or if one of different connecting factors is accorded precedence ;

Considering that even if uniformity of decision cannot be achieved, a degree of uniformity may be achieved in the individual case if the referring court takes foreign private international law into consideration ;

Considering that the taking into account of foreign private international law can lead to a result regarded as desirable ;

Considering that these aims can be furthered best if in some situations not only foreign domestic law but also foreign private international law is taken into account ;

Adopts the following Resolution :

The taking into account of foreign private international law

1. Should not be excluded altogether, irrespective of whether it involves a reference back or on ;

2. Should not be restricted to situations where uniformity is desired;

3. Should be considered :

(a) if the validity or the effectiveness of an act or a transaction is regarded as desirable and assured thereby ;

(b) if a uniform treatment of an act or a transaction is desirable and can be achieved ;

(c) if the parties enjoy a choice of law, have exercised it, and have included private international law ;

(d) if the validity of an act or transaction concluded according to the choice of law rules of the law applicable at the time when the act or transaction was concluded is questioned in later proceedings ;

(e) if, when deciding an incidental question, the validity of an act would be ensured either by application of the conflict rules of the law governing the main question or of the conflict rules of the law governing the incidental question ;

4. Ought not to be considered :

(a) if the forum contains alternative choice of law rules operating on an equal footing ;

(b) if the parties enjoy a choice of law, have exercised it, and have not included private international law."

Traduction en français :

"L'Institut de Droit international,

Considérant que la fonction du droit international privé est de déterminer les règles juridiques dont l'application est la plus appropriée dans un cas donné ;

Considérant que les règles juridiques dont l'application est la plus appropriée dans un cas donné sont celles qui favorisent la justice, le caractère certain de ces règles, leur efficacité, leur uniformité ou le respect des intentions communes ou des attentes justifiées des parties ;

Considérant que le caractère certain de ces règles est obtenu par le recours aux mêmes règles de droit en ce qui a trait aux effets créés et aux actes conclus ;

Considérant que l'efficacité peut être atteinte en portant une attention particulière au droit qui exerce de fait le contrôle ;

Considérant que l'on ne peut parvenir à une uniformité de décision que lorsqu'on retrouve, dans les règles de conflit de lois pertinentes des pays concernés, des règles de conflits de lois identiques et interprétées de façon uniforme, ou encore lorsqu'un des critères de rattachement reçoit priorité ;

Considérant que, même lorsqu'on ne peut parvenir à une uniformité totale de décision, un certain degré d'uniformisation peut cependant, dans un cas donné, être atteinte si le tribunal opérant le renvoi tient compte du droit international privé étranger ;

Considérant que la prise en compte du droit international privé étranger peut conduire à un résultat tenu pour souhaitable ;

Considérant que, en certaines circonstances, ces objectifs seront poursuivis plus efficacement lorsque non seulement les règles du droit interne étranger, mais aussi celles du droit international privé étranger, seront prises en compte ;

Adopte la résolution suivante :

La prise en compte du droit international privé étranger

1. ne devrait pas être exclue d'emblée, qu'elle implique ou non un renvoi au premier ou au second degré ;

2. ne devrait pas se voir limitée aux situations dans lesquelles l'uniformité est souhaitable ;

3. devrait être envisagée :

(a) si la validité ou l'efficacité d'un acte ou d'un contrat est tenue pour souhaitable et est ainsi assurée ; ou

(b) si l'uniformité de traitement d'un acte ou d'un contrat est souhaitable et peut être atteinte ; ou

(c) si les parties ayant le choix du droit applicable et, l'ayant exercé, ont inclus dans ce droit le droit international privé ; ou

(d) si la validité d'un acte ou d'un contrat établi conformément aux règles de conflit de lois prévues par le droit applicable au moment où l'acte ou le contrat a été établi, est ultérieurement remise en question ; et ou

(e) si, en décidant d'une question préalable, la validité d'un acte peut être maintenue soit par application des règles de conflit de lois régissant la question principale, soit par application de la loi régissant la question préalable.

4. ne devrait pas être envisagée :

(a) si le for comporte des règles alternatives de conflit de lois opérant sur un pied d'égalité ;

(b) si les parties ont le choix du droit applicable et, l'ayant exercé, n'ont pas inclus dans celui-ci le droit international privé."

*

The *Rapporteur* stated that the French and English versions of the sixth preambular paragraph appeared to be different. The English version should read as follows :

> "Considering that even if *total* uniformity of decision cannot be achieved ...".

Mr *Lowenfeld* indicated that he had previously made a proposal which had received a positive vote, but which appeared not to have been taken into account by the Commission.

The *President* stated that the Institute had voted on the need for Mr Lowenfeld's proposal to be considered. Then, however, a number of paragraphs were suppressed. He was not sure whether, under these circumstances, it was necessary to vote on the replacement of the word "ought" by "need" in Article 4.

Mr *Gaja* suggested that the Resolution's title would be linguistically improved if it was amended to read: "Taking Foreign Private International Law into Account".

Mr *van Hecke* had two remarks concerning a lack of conformity of the two versions of the draft Resolution. In the French version of Article 3, the various situations in which foreign private international law could be considered were linked by the word "*ou*". This word did not appear in the English version. Mr van Hecke wondered whether there was a linguistic reason for this discrepancy. Further, the English version of Article 3(e) was clearly better than the French version. The English version referred to both the conflict rules of the law governing the main question, and the conflict rules of the law governing the incidental question. The French version corresponded to the English version where it referred to the "*règles de conflit de lois régissant la question principale*", but then proceeded with "*la loi régissant la question préalable*", which was entirely different from what was meant in the English text. The French version should be amended so as to be in accordance with the correct English text.

The *President* stated, in respect of Mr van Hecke's first remark, that the word "or" should be added between paragraphs (d) and (e) of Article 3.

M. *Rigaux* se rallie à ce que vient de dire M. van Hecke et propose d'amender l'alinéa (e) de l'Article 3 de la manière suivante : "si, pour la décision d'une question préalable, la validité d'un acte peut être maintenue soit par application des règles de conflit de lois de la loi régissant la question principale, soit par application des règles de conflit de lois de la loi régissant la question préalable."

M. *Pocar* remarque que dans l'alinéa (c) de l'Article 3 le mot "ont" devrait remplacer celui de "ayant".

Mr *von Mehren* suggested that in the third paragraph of the Preamble, the words "certainty *can* be *achieved*" should be replaced by "certainty *may* be *advanced*". The same applied to the fourth preambular paragraph.

Mr *Lowenfeld* wanted to make the same point. It really made a difference whether the words "can" or "may" were used. Further, justice was referred to in the second preambular paragraph, but then disappeared from the Resolution. He suggested adding a further reference to justice in the sixth

preambular paragraph, which could read: "*Considering* that even if uniformity of decision cannot be achieved *along with the demands of justice,* a degree of uniformity may be achieved ...".

M. *Gannagé* remarque que les versions anglaise et française du troisième considérant du préambule présentent des divergences.

M. *Pierre Lalive* propose de voter le texte de la résolution en prenant en compte les amendements proposés par MM. von Mehren et Gannagé.

The *President* declared that the Preamble would be put to a vote paragraph by paragraph, so as to make it possible for Mr Lowenfeld to introduce his amendment. He then proceeded to a vote on each Article of the Resolution.

Article 1 was adopted by 42 votes in favour, none against and no abstention.

Article 2 was adopted by 46 votes in favour, none against and no abstention.

Article 3(a) was adopted by 42 votes in favour, none against and 1 abstention.

Article 3(b) obtained 43 votes in favour, none against and no abstention.

Article 3(c) was adopted by 42 votes in favour, none against with 1 abstention.

Mr *van Hecke* then indicated that the French version of Article 3(d), which ended with the words "*et ou*", should be amended so as to end with "*ou*".

The *President* put Article 3(d) as amended in accordance with Mr van Hecke's suggestion to a vote. The Article was adopted by 41 votes in favour, none against with 2 abstentions.

The President then proceeded to a vote on Article 3(e) with the French version proposed by Mr van Hecke. The Article was adopted by 40 votes in favour, 1 against with 4 abstentions. The President then asked Mr Lowenfeld to repeat his proposal in respect of Article 4.

Mr *Lowenfeld* referred to his previous comments on what had now become Article 4(b), and in particular to the *Mitsubishi* case, in which the arbitrators decided to apply the law of the United States, being the law of the market concerned, on the basis of a reference to Swiss private international law. His proposal was to introduce Article 4 either with the formula: "Ought *in general* not to be considered", or with the words: "*Need* not be considered".

The *Rapporteur* reminded that, as Mr Lagarde had previously indicated, the predominant position in European countries was that the parties' choice of law should generally be respected and considered not to include a reference to foreign private international law. An exception to this principle was only made when the parties had expressly included foreign private international law or when such inclusion should be implied in view of the circumstances of the particular case. The exception was provided for in Article 3(c), whereas Article 4 reflected the "*règle de bronze*". To reverse it all would be inconsistent with existing practice.

M. *Pierre Lalive* remarque que le texte français s'accommode des deux propositions de modification faites en anglais, à savoir "ought" ou "need".

The *President* then put Mr Lowenfeld's proposal to replace "ought not to" by "need not" to a vote. The amendment was rejected by 25 votes against, 5 votes in favour with 11 abstentions.

Mr *van Hecke* then made a drafting comment on Article 4(a) which related to both the French and English texts, although the former version's inadequacy was more striking. As far as the French text was concerned, the words "si le for comporte des règles" should be replaced by the more usual formula : " si la loi du for comporte des règles".

Mr *Lowenfeld* agreed with Mr van Hecke's suggestion that the English version should also be amended on this point, so as to read "if the law of the forum contains rules".

The *President* then put Article 4(a), as amended in accordance with the proposal of Messrs van Hecke and Lowenfeld, to a vote. The article was adopted by 42 votes in favour, none against with 2 abstentions. Thereupon, Article 4(b) was voted and adopted by 39 votes in favour, 1 against, with 3 abstentions.

The *President* then proceeded to a vote on the Preamble. In view of the objections made in this respect, the Preamble would be voted upon paragraph by paragraph. The first paragraph was adopted by 45 votes in favour, none against with no abstention.

M. *Tomuschat* remarque que le deuxième considérant du préambule présente un problème de rédaction dans sa version française.

M. *van Hecke* propose que l'on remplace l'expression "caractère certain des règles" par celle de "sécurité juridique".

The *President* then put the second paragraph to a vote with the French version as amended in accordance with Mr van Hecke's proposal. It was adopted by 45 votes in favour, none against with no abstention. The President then invited Mr Lowenfeld to repeat his proposal in respect of the third preambular paragraph.

Mr *Lowenfeld* recalled that Mr von Mehren proposed to replace the words "certainty is achieved" by "certainty may be advanced". He supported this proposal and added that paragraph 4 of the Preamble should be amended accordingly.

M. *Gannagé* rappelle sa proposition de remplacer "effets créés" par "situations créées".

M. *van Hecke*, pour aller dans le sens de la proposition de M. Lowenfeld, suggère d'introduire l'expression "sécurité juridique".

The *President* then put Messrs. von Mehren and Lowenfeld's amendment, and the proposal for the French version by Messrs. van Hecke and Gannagé, to a vote. The proposals were adopted by 39 votes in favour, 1 against with 3 abstentions.

Mr *Lowenfeld* stated that if the French version referred to "*sécurité juridique*", the English version should refer to "legal certainty".

The *Rapporteur* agreed with this suggestion.

The *President* then put the third preambular paragraph to a vote, with the French text as proposed by Mr van Hecke and the English version suggested by Mr Lowenfeld. The paragraph was adopted by 44 votes in favour, 1 against and 1 abstention. The President then proceeded to a vote on Mr Lowenfeld's proposal to replace the words "can be achieved" in the fourth preambular paragraph by "may be advanced". The amendment was adopted by 42 votes in favour, with none against and no abstention.

Mr *von Mehren* suggested deleting the fifth preambular paragraph. Although the statement contained in that paragraph was correct, it diverted the Preamble from its main thrust, as it did not formulate a principle that was determinative in respect of the use of *renvoi*.

The *Rapporteur* wished to draw attention to the fact that the paragraph dealt with an actual statutory provision in Benelux law, which was not in force but was based on proposals made by Mr von Mehren himself.

M. *Pierre Lalive* considère que la proposition d'amendement renferme une vérité élémentaire. Il suggère de passer immédiatement au vote.

The *President* then proceeded to a vote on the fifth preambular paragraph, which was adopted by 36 votes in favour, 3 against, with 3 abstentions.

Mr *Lowenfeld* recalled that he previously indicated that the first two preambular paragraphs referred to "the individual case" and the second to "justice", but that the Resolution made no further mention of these important

issues. He therefore suggested amending the sixth preambular paragraph so as to read:

> "*Considering* that even if uniformity of decision could not be achieved *along with the demands of justice,* a degree of uniformity may be achieved in the individual case if the referring court takes foreign private international law into consideration;".

The *Rapporteur* answered that Mr Lowenfeld's proposal was perfectly justified, except for the fact that the sixth preambular paragraph was merely intended to formulate a statement of fact, namely, that one could not be sure that uniformity of decision would be achieved by taking foreign private international law into consideration. Everything depended on where the case started. If the case was brought before a court in New York, reference might be made to French law which might refer back to the law of New York. If, on the other hand, the case was brought before a French court, reference might be made to the law of New York, which might refer back to French law.

Mr *Lowenfeld* still believed that the sixth preambular paragraph's formulation was inadequate. Uniformity could be achieved by the rule that if a widow lost her case in New York, she should also lose in France. Yet, the New York judge might esteem that justice demanded that the widow get a part of the heritage located in New York. This was why the sixth preambular paragraph should refer to the demands of justice.

The *Rapporteur* answered that this was not at stake in paragraph 6.

Mr *von Mehren* pointed out that two points had to be distinguished. The first one was whether the Resolution should make mention of justice as paralleling uniformity. He would answer this question positively. The second question was whether this should be expressed in the sixth preambular paragraph, and on this point, he agreed with the Rapporteur. The sixth paragraph merely contained a statement of fact and should not be complemented with considerations of justice. Mr von Mehren therefore suggested adding a new preambular paragraph, which could read: "In addition, courts should also take into account justice in the particular case".

M. *Pierre Lalive* apporte son soutien à la position adoptée par le Rapporteur et propose de voter le texte dans sa forme actuelle.

M. *van Hecke* propose de supprimer l'expression "opérant le renvoi" dans le 6ème paragraphe du préambule.

M. *Pocar* suggère d'insérer une référence à la justice dans le septième considérant du préambule.

The *President* invited Mr Lowenfeld to repeat his proposal.

Mr *Lowenfeld* answered that his proposal was to amend the sixth preambular paragraph to read as follows:

> "*Considering* that even if uniformity of decision cannot be achieved *along with the demands of justice*, a degree of uniformity may be achieved in the individual case if the referring court takes foreign private international law into consideration ;"

However, Mr Lowenfeld added that Mr Pocar's proposal was perfectly acceptable to him if his own proposal did not succeed.

The *President* then indicated that in view of Mr Lowenfeld's statement, he would proceed to a vote on the sixth preambular paragraph as it stood. Mr Pocar's proposal would be put to a vote at a later stage. The sixth preambular paragraph as modified in accordance with Mr van Hecke's proposal was adopted by 40 votes in favour, none against, with 2 abstentions.

Mr *Gaja* then pointed out that it was in the sixth preambular paragraph that the wording of the Resolution's title first appeared. He wondered whether it would be appropriate to discuss the wording at this stage. In his view, the title should read :

"Taking Foreign Private International Law into Account"

The *Rapporteur* answered that he had no objection to this but that the title's wording had been decided upon by the Institute.

Mr *Lowenfeld* indicated that the seventh paragraph could read :

"*Considering* that the interest of justice may be advanced by taking foreign private international law into account".

M. *Pierre Lalive* appuie la proposition de rédaction anglaise faite par M. Gaja.

The *President* declared his intention to put Mr Lowenfeld's proposal to a vote. It was adopted by 24 votes in favour, 1 against, with 16 abstentions.

Mr *Bernhardt* stated that this amendment entirely changed the paragraph, which now contained a very general statement. It should therefore be inserted at the beginning of the Resolution.

Mr. *Pierre Lalive* wondered whether Mr Lowenfeld would agree that in some international cases, justice would command that no reference be made to foreign private international law, and whether the Resolution should make this clear.

The *President* said that Mr Lowenfeld's amendment had been adopted, and that the Institute should proceed to a vote on the paragraph as it stood. The paragraph was adopted by 21 votes in favour, 7 votes against, with 17 abstentions.

Mr *Sohn* asked how the French version of that paragraph would be worded.

M. *Rigaux* indique que la version modifiée du septième considérant du préambule se lit comme suit : " *Considérant* que l'intérêt de la justice peut être favorisé par la prise en compte du droit international privé". Il observe que cette formulation n'entraîne pas une obligation de faire; elle contient seulement une possibilité d'invoquer le droit international privé.

The *President* then put the seventh preambular paragraph to a vote. It was adopted by 41 votes in favour, 1 against, with 5 abstentions.

Le *Secrétaire général* procède à l'appel nominal sur le vote de la résolution. La résolution est adoptée par 48 voix, sans opposition ni abstention. Votent en faveur : MM. van Hecke et Schachter ; MM. Abi-Saab, Bernhardt, Mme Bindschedler-Robert, MM. Broms, Degan, Diez de Velasco Vallejo, Dinstein, Dominicé, El-Kosheri, Feliciano, Gaja, Gannagé, Henkin, Jean-Flavien Lalive, Pierre Lalive, Lowenfeld, McWhinney, von Mehren, Parra Aranguren, Philip, Pinto, Ress, Rigaux, Rudolf, Sahovic, Schermers, Schindler, Shahabuddeen, Sir Ian Sinclair, MM. Skubiszewski, Sohn, Torres Bernárdez, Vignes, Zemanek, Mme Burdeau, MM. Droz, Frowein, Sir Kenneth Keith, MM. Lipstein, Meron, Morin, Pocar, Ranjeva, Sarcevic, Tomuschat ; M. Jayme.

The *President* thanked the Rapporteur and warmly congratulated him for his outstanding work.

La Résolution adoptée par l'Institut se trouve à la page 370 de l'*Annuaire.*

La séance est levée à 18 h 00.

Deuxième question

The Role and Significance of Consensus in the Forming of International Law

Le rôle et la signification du consensus dans l'élaboration du droit international

Sixième Commission

Rapporteur : *M. Louis B. Sohn*

*Les travaux de la Sixième Commission ont été publiés dans l'Annuaire Strasbourg - I (Volume 67-I, pp. 13-120). Ils ont fait l'objet des délibérations de l'Institut au cours de la Session de Strasbourg (Annuaire, Volume 67-II, pp. 195-215). L'Assemblée décida que la Sixième Commission devait poursuivre ses travaux. Lors de sa présentation à l'Assemblée plénière, à Berlin, le Rapporteur s'est référé à ces travaux complémentaires, qui sont publiés, en partie, en annexe au procès-verbal de la séance du 21 août 1999 (*infra, *p. 169)*

Sixième séance plénière

Samedi 21 août 1999 (matin)

La séance est ouverte à 9 heures 45 sous la présidence de M. *Pinto*, Troisième Vice-Président.

Le *Président* invite le Rapporteur à présenter son projet de résolution sur le rôle et la signification du consensus dans l'élaboration du droit international, qui se lit de la manière suivante :

The Institute of International Law,

Considering that international practice shows that in certain situations the use of consensus may contribute to the forming of international law ;

Taking into consideration that consensus may be usefully resorted to for the purpose of ensuring as much as possible that a new principle or rule of international law results from the cooperation by all interested States in the preparation and adoption of a text, with particular reference to the solving of all encountered problems to the satisfaction of the States concerned.

Bearing in mind that, in particular, the increasing role played by consensus in the work of international organisations and codification conferences, and the acceptance by the International Court of Justice of this method of forming international law ;

Believing that it may be useful, therefore, to provide a few guidelines for the use of consensus in the forming of international law ;

Having examined the comprehensive reports of the Sixth Commission, and taking into account the comments of the Members of the Institute made by correspondence and at the Strasbourg Session ;

Adopts the following Resolution :

Article 1

This Resolution is limited to defining the role played by a text adopted by consensus in the process of the forming of international law. A text should be considered as adopted by consensus when, upon its presentation to participants, none of them expresses an objection thereto which detracts from or affects essential or fundamental provisions of that text.

The presiding officer should announce that the text has been adopted by consensus, and this announcement should be recorded in the proceedings of the meeting.

Article 2

States participating in a meeting of an international organization or conference should indicate whether the text adopted by consensus and purporting to contain principles or rules of international law, is:

(a) an acknowledgment that these principles or rules have been generally accepted as a part of customary international law and must be observed by them as such ; or

(b) evidence of law-creating practices or of the opinion of States that the said principles or rules are binding (*opinio juris communis*), or both ; or

(c) an expression of the view that it is desirable for States to follow these principles or rules, and an expectation that these principles or rules will become international law.

This is without prejudice to the legal effect of resolutions of organs of international organizations."

Traduction en français :

"L'Institut de Droit international,

Considérant que l'utilisation du consensus peut en certaines circonstances, comme le démontre la pratique internationale, contribuer à la formation du droit international ;

Tenant compte de ce que l'on peut utilement recourir au consensus afin de s'assurer autant que faire se peut qu'un nouveau principe ou règle de droit international sera le fruit de la coopération de tous les Etats intéressés à la préparation et à l'adoption d'un texte, en portant une attention particulière au règlement de tous les problèmes rencontrés, à la satisfaction de tous les Etats concernés ;

Gardant à l'esprit, en particulier, le rôle croissant dévolu au consensus dans les travaux des organisations internationales et des conférences de codification, et le fait que cette méthode de formation du droit international a été entérinée par la Cour internationale de Justice ;

Croyant qu'il serait dès lors utile de fournir quelques lignes de conduite en matière d'utilisation du consensus dans la formation du droit international ;

Ayant examiné les rapports exhaustifs de la Sixième Commission, et compte tenu des commentaires soumis par les Membres de l'Institut tant par correspondance qu'à la Session de Strasbourg ;

Adopte la résolution suivante :

Article 1

La présente résolution porte uniquement sur la définition du rôle joué par un texte adopté par consensus dans le processus de formation du droit international. Un texte devrait être tenu pour adopté par consensus si, lors de sa présentation aux participants, nul n'a formulé à son égard d'objections qui se démarquent du texte ou affectent ses dispositions essentielles ou fondamentales.

Le président de la séance devrait annoncer que le texte a été adopté par consensus, et ceci devrait être consigné au procès-verbal.

Article 2

Les Etats participant à une session d'une organisation internationale ou d'une conférence internationale devraient indiquer si le texte adopté par consensus qui prétend contenir des principes ou règles de droit international :

(a) reconnaît que ces principes ou règles ont été généralement acceptés en tant que règles de droit coutumier et doivent être respectés par eux à ce titre ; ou

(b) constitue une preuve de pratiques créatrices de droit, ou de l'opinion des Etats que lesdits principes et règles sont obligatoires (*opinio juris communis*), ou des deux ; ou

(c) exprime le point de vue selon lequel il est souhaitable pour les Etats que ces principes ou règles soient observés, et l'espoir que ceux-ci deviendront des principes ou règles de droit international.

Ceci est sans préjudice des effets juridiques des résolutions des organes d'organisations internationales."

The *Rapporteur* noted that the Resolution had been completely revised since its last version was discussed in Strasbourg. Its main purpose is to call to the attention of the international community the fact that consensus has emerged as a new technique to create international law, a technique now used by international organizations and conferences, accepted by the International Court of Justice, and reflected in State practice. Article 1 of the Resolution contains a very narrow statement in response to the question of what is the extent of the usefulness of consensus as a means to create international law. The announcement which the Presiding Officer should make is a formality intended for greater certainty of the status of a text. Article 2, for its part, describes the three possible effects of a text adopted by consensus.

The *President* opened the general debate.

Mr *Schachter* expressed his appreciation for the work done by the Rapporteur. He noted that consensus is a problematic topic because it has three different meanings: first, an agreement amongst States on a proposition of customary law (*opinio juris*); second, the expression of a general agreement in support of a text in international bodies or conferences; third, a technical term for a non-voting procedure to adopt a text. This last meaning is the focus of the draft Resolution, which embodies proposed rules specifying when a text can be considered to have been adopted by consensus. As such, the Resolution is an unusual recommendation to international organizations and conferences to clarify their position with respect to the nature of rules of international law. He thought that Article 2(b) should

address more directly the phenomenon of crystallization and expressed some doubts as to the necessity of such a Resolution or indeed its usefulness for the work of international organizations and conferences. It was his view, and he thought the Commission's view, that consensus was not necessarily systematically the best technique to adopt an international text, despite the feeling of the Rapporteur.

Mr *Ress* welcomed the opportunity to discuss the issue of consensus. He saw a difficulty in stating in Article 2 that States "should indicate" the nature of the rule or principle just adopted and thought it would be better to suggest that States "may" or "might" so indicate. The problem addressed by the Resolution is the following: what are the legal conditions under which State behaviour should be taken as indicating the customary status of a rule, or an *opinio juris*, or an indication of the desirability of a rule.

Mr *Degan* expressed his support for this very useful text. He noted that the three criteria found in Article 2 could be applied to provisions of any convention of codification, as for instance, those of the 1982 Law of the Sea Convention, as well as to provisions of some past Resolutions of the General Assembly, such as the 1948 Universal Declaration of Human Rights. He recalled that similar criteria had been proposed by Professor Jiménez de Aréchaga in his course at the Hague Academy of International Law namely on declaratory, crystallizing and on law creating effects, and suggested that the three elements of Article 2 should be made more distinguishable. He proposed the replacement of paragraph (b) with the following: "(b) a crystallization of prior practices or of the opinion of States (*opinio juris communis),* or both, that the said principles or rules are binding; or".

Mr. *Owada* acknowledged the work of the Rapporteur and thought that the Resolution is very useful because it addresses the elusive problem of consensus. He agreed with Mr. Schachter that the thrust of the Resolution is to recommend to international conferences that they clarify their practice. He wondered how useful the Resolution would be, but thought that a realistic text could prove a valuable tool for future participants in international conferences. He concurred with several earlier comments to the effect that the use of "should" in Article 2 *in limine* was problematic and suggested that

the language should be softened to indicate more simply the desirability for States to express their opinion as to the status of a rule or principle. He noted that the means by which a text is adopted constitutes only one piece of evidence of whether a rule is customary. He further observed that consensus is primarily used as a tool to avoid unnecessarily harsh confrontations, as it tends to make the extent of support for a text quite ambiguous. Consensus, however, does not necessarily imply the expression of a general view that a rule is one of the three types described in paragraphs (a), (b) and (c) of Article 2. As such, an insistence on clarifying the status of a rule in the text may lessen the usefulness of consensus at international conferences. With respect to Article 2 *in fine*, he commented that the principle embodied in the article could in fact be relevant to Resolutions adopted by organs of international organizations, as demonstrated by the adoption of the Resolution on Friendly Relations where consensus was used to cloak broadly divergent views.

Mr *Broms* congratulated the Rapporteur and underscored the usefulness of the Resolution in that it addresses the great uncertainty as to what consensus is. He doubted Article 2 *in limine*'s use of the word "should" in view of the fact that at times States are not willing to specify their intention. He mused that consensus can be a positive force in certain circumstances for example when, as with the Resolution on Friendly Relations, it is agreed at the outset that consensus is a *sine qua non*, which tends to encourage more open negotiations on the part of States and not necessarily a rush for the lowest common denominator. On a semantic note he thought that the word "that" should be deleted from the third paragraph of the Preamble.

Mr *Seidl-Hohenveldern* offered his congratulations to the Rapporteur. He remarked that it is often the practice of States to issue statements only after a Resolution has been adopted, as it had been the case with the Resolution on the Establishment of a New International Economic Order. In his view, Article 1 should address more squarely the issue of the timing of such objections. He suggested adding the words "and adoption by" after "presentation to" in Article 1, paragraph 1.

Lady Fox congratulated the Rapporteur and expressed her support for the Resolution. She wondered whether the reference to the process of the forming of international law in paragraph 1 of Article 1 covered only formal conferences or also more informal processes for the formation of international law. She observed that Article 2 has two objectives, first the clarification of the interface between consensus and the creation of customary law, and secondly the three possible consequences of a text adopted by consensus. She thought it unfortunate to seek to impose a method whereby States should indicate their intention and suggested the following formulation for Article 2 :

> "Such a text adopted by consensus and purporting to contain principles or rules of international law, according to the particular circumstances, may be construed as :
> (a) an acknowledgment that these principles or rules have been generally accepted as part of customary international law and must be observed by them as such ; or
> (b) evidence of law creating practices or of the opinion of States that the said principles or rules are binding (*opinio juris communis)*, or both ; or
> (c) an expression of the view that it is desirable for States to follow these principles or rules, and an expectation that these principles or rules will become international law.
> States participating in a meeting of an international organization or conference *may* indicate which of the above paragraphs apply to the text."

Mr *Frowein* congratulated the Rapporteur and agreed with the suggestion to replace "should" by "may" in Article 2 *in limine* because there is frequent disagreement amongst States as to the status of a text.

Mr *Orrego Vicuña* commented that the work of the Rapporteur and of the Commission was useful as there is often doubt as to the use of consensus. He felt that there was a general agreement not to impose too firm a requirement on States to indicate their intention, out of fear of creating obstacles to the adoption of resolutions by international organizations and conferences. He thus favoured replacing "should" by "may" in Article 2. He suggested that, in view of its content and topic, the Resolution should be adopted by consensus.

Mr *Skubiszewski* said that Mr. Schachter's characterisation of the Resolution as referring to consensus in its procedural meaning (a method of adopting a text) can apply to Article 1 only. Article 2 uses the term "consensus" in a different sense : the role of a text (adopted by consensus) in stating existing law and in contributing to the birth of a new law. Over and above any indication by the States as suggested by Article 2, one must look at the *travaux préparatoires* and the practice of States in order to assess the effect of a text.

Mr *Dugard* noted that the Resolution avoids any reference to the expression "soft law" which is now an important factor of international life, especially in the field of the environment. Ambiguity can be used constructively to hide disagreement amongst States as to the status of the principle or rule. Indeed if a conference expressly specifies that a principle is soft law that may actually delay its ripening into customary law. As such, although the Resolution seeks to promote certainty, he had some doubts as to its overall usefulness.

Mr *Brownlie* expressed his appreciation for the work of the Rapporteur but remained very sceptical as to the usefulness of this kind of work. Among the substantial problems of such an enterprise is the fact that it is very difficult and probably undesirable to try to regiment conditions under which customary law is formed. More broadly, he failed to see any qualitative difference between a resolution adopted by consensus and one adopted by majority vote with respect to the question of whether soft law has become customary. The answer to that question requires an assessment of all relevant elements, including preliminary reports, discussions surrounding the adoption of a text, and so on. He thought it somewhat odd to focus exclusively on consensus. One thing that could be said for sure was that the fact that a text is adopted by consensus does not prevent it from becoming customary, a conclusion of a limited usefulness.

Mr *Doehring* concurred entirely with Mr. Brownlie and wondered what was meant by the "forming of international law" as it is used in the Resolution. He also wondered what effect a resolution adopted by consensus would have on States which did not participate in the conference.

Mr *Meron* expressed his gratitude to the Rapporteur for his work. He saw two problems with the Resolution. First, Article 1 assumes that when a State remains silent as to the essential or fundamental elements of a text it supports the consensus, whereas practice shows that States often make statements deploring some procedural or formal aspects of the text, with the intention of masking deeper objections. Second, he agreed with several earlier comments shedding doubts on the wisdom of imposing on States a requirement that they specify the status of a rule or principle. There is a risk that such a requirement would bring out disagreements which would otherwise remain hidden and gradually fade away. Although he could agree to replace "should" by "may", he would prefer the following wording :

> "Article 2. A text adopted by consensus and purporting to refer to principles or rules of international law may be :
> (a) an acknowledgment that these principles or rules have been generally accepted as part of customary international law and must be observed by States as such ; or
> (b) evidence of law creating practices or of the opinion of States that the said principles or rules are binding (*opinio juris communis)*, or both ; or
> (c) an expression of the view that it is desirable for States to follow these principles or rules, and an expectation that these principles or rules will become international law.
> In considering whether the text might fall under (a), (b), (c), or any combination thereof, the entire context should be taken into account".

Mr *McWhinney* observed that there was nothing radical or revolutionary about the proposal. He reminded the assembly that consensus as a process of law-making had been a response to the desire of States neither to object nor to support certain resolutions. He suggested avoiding a narrow legalistic approach and wondered whether Article 2 was needed at all.

Mr *Kooijmans* had no problem with Article 1 if the amendment proposed by Mr Seidl-Hohenveldern was accepted, nor with the classification in Article 2. He did object, however, to the impression given by Article 2 that a text could only be one of the three alternatives, whereas resolutions often contained a mixture of *lex lata,* crystallized law, and *lex ferenda.* He feared

that requiring States to specify the status of a rule or principle would in some cases upset the consensus. This leads him to question the usefulness of the entire Resolution.

Mr *Feliciano* pointed out that what in a text is essential or fundamental is often a matter of debate amongst States. He agreed with Mr Brownlie that there was no justification to differentiate between resolutions adopted by consensus and those adopted by vote as to their customary status.

Mr *Müllerson* thanked the Rapporteur for all his work. He noted that the Resolution did not answer the question posed by its title as to the role and significance of consensus in the forming of international law. He agreed with Mr Brownlie that the response to this question requires comparing resolutions adopted by consensus and other types of resolution, as was done by Professor Dupuy in the award in the *Texaco-Calasiatic* case. Referring to paragraph 3 of the Preamble, he observed that to his knowledge the International Court of Justice had never mentioned consensus in a technical sense as it is used in the Resolution. Paragraph 1 of the Preamble, for its part, should specify in which circumstances consensus may contribute to the forming of international law. Finally, alluding to Article 2, he commented that States often prefer to leave matters ambiguous and that it was very difficult to grasp the exact moment at which a rule becomes customary.

Mr *Blix* thanked the Rapporteur for a Resolution which, in his view, brought clarity to diplomatic procedures and facilitated the adoption of rules. Such guidelines were necessary in view of the fact that there was no real international legislature. None the less, he shared the concerns of Mr Skubiszewski that the statements which were to be made regarding resolutions adopted by international organizations or conferences, as provided for by Article 2, might not be sufficient evidence in determining whether a text had become customary law. Mr Blix also shared Mr Owada's concern that the requirements set forth in Article 2 might discourage States from adopting a text. Furthermore, he noted that it was his experience that States might have serious objections to the text, but not to the adoption of the text. This distinction was not addressed by the Resolution. He regretted that, because of these reservations, he would have to abstain or vote against the Resolution.

Mr *Degan* remarked that the process of generation of customary law is a continuous process which never ends. He does not see a big difference for that process whether a declaration was adopted by consensus, unanimity or overwhelming majority. The proposed criteria in Article 2 of this Resolution should be read in the light of past Resolutions. He remarked in addition that all three criteria laid down in this Article can be deduced from the 1969 Judgment of the Hague Court in the *North Sea Continental Shelf* cases. He found them perfectly applicable for past and future resolutions adopted by consensus.

Sir Kenneth Keith, referring to his experience as counsel in an international case and as a national judge, voiced his doubts about the practical value of the Resolution. Texts which were adopted by consensus might be binding, non-binding, or adopted with reservations. Furthermore, States might express consensus only about certain parts of a text. Any international text adopted through consensus would have to be evaluated as to its contents and the context in which it was adopted in order to determine its status, if any, with respect to customary law.

Mr *Sarcevic* also congratulated the Rapporteur for his distinguished work. He wondered, however, whether Article 2 required States' representatives or heads of delegations to assume power of attorney when adopting a text by consensus in order to make the required statements. The Resolution might therefore come into conflict with the constitutional law of States.

Mr *Schwebel* pointed out that in his experience with the United Nations, prior to assuming his duties at the International Court of Justice, many texts were adopted by consensus for political reasons, often by persons who were ignorant of the principles of international law. He doubted whether resolutions adopted in such circumstances could really be construed as giving rise to legal consequences or even obligations. As an example, he recalled the Declaration on Friendly Relations, which was adopted by consensus. In this case, months of careful preparatory work ensured that this instrument had the backing of States. As a counter example, he recalled the Resolution on the Establishment of a New International Economic Order, which was also adopted by consensus solely for political reasons and yet was begrudged by

a number of States. He therefore believed that the draft Resolution was dangerous and unwarranted.

Mr *Rosenne* also offered his congratulations to the Rapporteur and to the Commission for their careful work. He asked Members who had had any experience as legal advisers to the United Nations whether the credentials of delegates to the United Nations, as opposed to the credentials of delegates to international conferences, allowed them to execute the actions required by Article 2.

Mr *Suy* responded that he believed that the credentials of delegates to the United Nations could allow for this. He also expressed his support for the motion to replace the would "should"with "may" in Article 2.

Mr *Rosenne* thanked Mr Suy and asked to reformulate his question. He asked whether the standard credentials of delegates to the United Nations allowed for these powers.

The *Rapporteur* acknowledged that the discussion revealed the many problems in preparing the text. He recalled that the International Court of Justice had, in some instances, drawn on consensus with regard to the Vienna Convention on Treaties and the Law of the Sea to make rulings, even though, as was the case of the Law of the Sea, the Treaty had not yet entered into force. He also observed that with the development of modern communications, delegates to the United Nations might be able to obtain authorisation from their foreign ministries to make the statements required by Article 2. He agreed to replacing the word "should" by the word "may" in Article 2.

Le *Secrétaire général*, observant que certains orateurs ont proposé que la Résolution soit adoptée par consensus, rappelle à l'assemblée que la proposition d'adopter cette résolution par consensus est incompatible avec l'article 41 du Règlement de l'Institut en vertu duquel "Le vote doit avoir lieu par appel nominal, si cinq personnes en font la demande. Il y a toujours lieu à appel nominal sur l'ensemble d'une proposition d'ordre scientifique". Cela étant, l'Institut se trouve, à ce stade de la discussion, devant un choix qui prend la forme d'une alternative. Soit l'Institut approuve le travail

scientifique qui a été effectué par la Commission et en particulier son Rapporteur, mais en s'abstenant d'adopter une résolution ; cette possibilité a déjà été utilisée à plusieurs reprises dans le passé, par exemple à l'occasion de l'approbation des travaux scientifiques des Commissions présidées par MM. Virally et Skubiszewski. Soit l'Institut décide de poursuivre la procédure classique de l'adoption formelle d'une résolution, auquel cas la discussion devra se poursuivre article par article, et intégrer l'examen des différents amendements.

M. *Suy* remarque que les travaux réalisés sous l'égide de M. Sohn s'inscrivent dans la lignée de ceux qui avaient été conduits par M. Virally puis par M. Skubiszewski. Il serait logique que la même solution soit adoptée et que l'on approuve donc simplement les travaux scientifiques de la Sixième Commission.

Mr *Broms* indicated that he felt strongly about putting the Resolution to a vote and adopting it. He felt that it would be unfair to the Rapporteur to simply take note of it.

Le *Président* met au vote la proposition de M. Suy qui est adoptée par 35 voix contre 17.

L'assemblée félicite et applaudit chaleureusement le Rapporteur, le remerciant une nouvelle fois pour le travail fourni.

La séance est levée à 12 h 05.

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Annexes

I. Draft Resolution (January 27, 1999) and observations by Messrs. Schachter, Diez de Velasco, Torres Bernárdez, Orrego Vicuña.

II. New Draft Resolution (April 20, 1999)

Annex I. Draft Resolution (January 27, 1999)

The Institute of International Law

Mindful of its Statute's exhortation that it should promote "the acceptance of principles recognized as in harmony with the needs of modern societies" ;

Considering that the Sixth Commission was requested to prepare a report on the topic "The Role and Significance of Consensus in the Forming of International Law," and that this resolution is strictly limited to the preparation and approval of texts designed to contribute to forming new principles or rules of international law ;

Noting that difficulties have been encountered with the traditional tripartite process of forming new principles and rules of international law by international treaties or other equivalent instruments, which usually require (a) the approval by at least two-thirds of the States members of the institution charged with preparing the text, i.e., about 120 States ; (b) ratification by at least 60 States ; (c) approval by national parliaments of these States, often requiring a two-thirds majority of the members of the parliament, or of one of its chambers ;

Noting further that, because of ratification difficulties, the final result may not be a universal agreement but only an agreement by a small part of the international community ;

Recognizing that consensus is being used by the International Law Commission, the General Assembly of the United Nations, other international institutions, such as the World Trade Organization, and various universal international conferences, in order to ensure more general acceptance of the texts that are intended to contribute to the formation of new principles or rules of international law ;

Taking into account that the International Court of Justice has recognized that what matters is no longer a text's final approval or its

ratification by a specified number of States, but the fact that a particular principle or rule has been approved by general consensus of the members of the international community during the negotiation of the text ;

Considering also that (a) the United Nations General Assembly and other international organizations, as well as special world-wide conferences, have been approving a variety of texts which differ from treaty obligations that, after their ratification, become legally binding on States, as these texts are considered instead to be only politically binding ; and that (b) these texts - declarations of principles, final acts, codes of conduct, guidelines, interpretative understandings, gentlemen's agreements, etc. - are often accompanied by an Agenda for Action and by political promises of the participating heads of State or government to act in accordance with these documents ;

Realizing that there is an increasing tendency to adopt the proposed texts not by a vote but by consensus ;

Considers that time has arrived to clarify the rules governing the use of the process of consensus in forming new principles or rules of international law, and agrees on the following guidelines :

1. The consensus process that leads to a consensus decision requires as a first step a preliminary analysis of all the issues that seem to be involved, a selection of the more difficult problems that are likely to arise, and assigning each of them to a working group, in which every State, large or small, that is interested in a particular problem, would be invited to participate.

2. The presiding officer selected for a working group would assign to a member of the group or to a small committee the task to arrange consultations with the States interested in a particular issue that might cause difficulties, and this member or committee would explore the available alternative solutions, until one is found that satisfied all the States concerned.

3. When all the working groups have been able to reach consensus on the issues assigned to them, a common drafting group would try to remove duplications, and to find solutions for texts inconsistent with other parts of the proposed document. If necessary, a joint working group might be established to find solutions for the issues causing special difficulties.

4. As soon as enough working groups have completed their preparatory work, a composite text would be prepared containing all the provisions on which agreement has been reached ; and later additional agreed provisions would be added to the text.

5. Any remaining texts that still cause difficulties would be sent to a new working group that would continue consultations on the yet unresolved issues, with the participation of all interested States.

6. At some point, when some problems still continue to cause trouble, the main leaders of the consultations would have to decide whether these difficult issues deserve further consultation, or should be omitted from the agenda and left for a separate later decision by a similar process.

7. Once all remaining texts have been agreed upon, a final text would be prepared that would be acceptable to all participants. Some States may be allowed to make statements for the record that they are still unhappy about some features of the document but, in view of other parts that are important to them, they will not object to the acceptance of the document by consensus.

8. At the closing plenary meeting of the institution or conference preparing the document, the presiding officer would thank everybody for helping to reach generally acceptance texts and would announce that these texts have been approved by consensus.

9. The Institute welcomes this new consensus process which enables the international community to reach a consensus on forming new principles and rules of international law, and expresses the hope that later practice of States will confirm that the proposed principles or rules are really generally accepted, and that the new system is working well.

Observations of Mr Oscar Schachter (February 11, 1999)

I have two general comments. I still share the doubts expressed by several members as the desirability of proposing specific "guidelines" (as you do) to deal with a great variety of possible cases. My feeling is that even if the guidelines are clearly optional, they may unnecessarily give rise to procedural controversies. My mind runs to the endless variability of the situations and the availability of common-sense or political solutions. Guidelines do not seem necessary and they may well be used to obstruct agreement.

My more important concern is that the draft does not take up the legal questions implicit in the title of the report i.e. "significance" of consensus. My comments sent to you two years ago raise some such questions of legal significance and I recall that other members of the Commission have done so.

Observations of Mr Manuel Diez de Velasco (March 13, 1999)

1. I clearly support the adoption of a Resolution by the Sixth Commission on this subject in view of the importance that consensus has a new way of forming and creating International Law, just as Mr Sohn has made clear in his reports. Practice proves that importance, demonstrated as much in United Nations Resolutions on the new international economic order or the environment, as in codification conferences (as in the case of the United Nations Third Conference on the Law of the Sea).

The adoption of a Resolution on this subject will contribute to the development of International Law as it regulates and facilitates the widest possible participation in the elaboration of its norms in the heart of both international organizations and codification conferences. Consensus enables the incorporation and integration of a dissenting or reluctant minority into the majority position, achieving its participation in order to make International Law progress. Definitively, consensus is a procedural means or technical instrument which allows and facilitates agreement among a community which is increasingly numerous made up of more than 180 States.

I share, therefore, the position of Messrs. Sahovic and Morin expressed in the debates of the Strasbourg Session (see *Rec.*pp. 203 *in fine* - 204 and 207-208). It is true that, on occasion, consensus makes agreement possible at the cost of a weakening of the normative text, and that it is not easy in procedures of this nature to distinguish what is a political component and what is juridical conviction or *opinio Iuris* in each consensus reached, as Messrs. Conforti and Schwebel advised in the debates of the Strasbourg Session (*Rec.* p. 200 *in fine* - 201 and 202). But, is it possible to separate politics and law in international reality ?

2. Professor Sohn has decided to thoroughly revise the latest proposal of 1 September 1997 and to present a new Draft for the Berlin Session. According to Mr Sohn's letter of 29 January, the new text takes the Strasbourg debates and the comments of members of the Commission and Institute into account.

3. I have no observations to make on the introductory explanation of the Resolution, which is well-conceived and I approve all of its provisons. However, the next text of the Resolution raises, above all, two difficulties.

The first difficulty consists of the excessively detailed explanation of the process of consensus-building, where working groups, presiding officers or small committees, common drafting groups, joint working groups and the main leaders of the consultations appear successively, until reaching a final text containing all the provisions on which agreement has been reached and that would be acceptable to all participants.

As we advise *infra.* in point 5, in certain cases negotiation has taken place without formalities ; in fact, in international practice there are various methods or procedures for reaching consensus. Therefore, we consider it risky and unrealistic to submit the success of consensus to a single standardised procedure such as that offered to us by Mr Sohn.

The second difficulty lies in the disappearance of any reference to the legal effects of consensus in the new text, if we compare Article 4 of the Second Draft Resolution presented by Mr Sohn in Strasbourg and paragraph 9 of the current Final Draft Resolution, which is a mere declaration of intentions. And so, we strongly recommend that Article 4 (*Rec.* p. 211) of the Draft presented by Mr Sohn at the end of the Strasbourg Session be restored, and which states the following:

> "Article 4: ***Effect of Consensus***
>
> Declarations, resolutions and other non-binding acts of universal international organizations or provisions of international agreements that contain normative provisions intended to contribute to the forming of international law may, if adopted by consensus, constitute evidence of the general principles of law or of international custom, or reflect the view of the international community on what the law should be".

My observations on the debates which took place in Strasbourg are the following. I believe that the first Draft Resolution presented to the Sixth Committee by Mr Sohn at the Strasbourg Session raised some problems, as demonstrated by certain interventions. In particular, the Draft Resolution ought to have been fuller, it should have specified not only how consensus is reached but also its legal effects, an aspect which was barely mentioned. Strictly speaking, it is absolutely essential to distinguish between consensus as a procedure (the expression of the will of an entity which sets aside the usual rules which apply) and the material contribution of consensus to the formation of International Law, as did Mr. Verhoeven in his intervention (*Rec.* p. 201). The first Draft Resolution was most hesitant in this respect and scarcely paid any attention to the legal effects.

For instance, can objections be made to consensus ? It would appear so, as long as they do not call for asking for a vote ; even though such objections are on record in the corresponding Acts, they cannot limit the effects of the consensus reached nor influence its interpretation (in this respect, see the intervention of Mr. Pescatore, *Rec.* p. 200).

Mr. Degan even proposed an alternative text, more specific and detailed, to Article 4 of the first Draft Resolution, dedicated precisely to the effects of texts approved by consensus (see *Rec.* pp. 203 *in fine*-205).

Another colleague, Mr. Müllerson, raised the problem of what legal effects are caused by contrary State practice to texts adopted by consensus, quoting as an example how the practice of torture continues despite texts adopted by consensus in the field of human rights. I understand, nevertheless, that that dilemma or problem does not exist because there are no normative differences caused by the procedure of adoption followed by some human rights texts. What is essential is that the agreement or general acceptance by the interested parties concerning the contents of conduct on human rights which concern us here (the prohibition of torture) be cleary understood. Thus, the means, form or procedure followed to attain that result is indifferent. If the result is legally binding, it is a false dilemma ; contrary practice will produce customary effects as it would either constitute a strongly opposing phenomenon or would not pass from the level of sporadic violations.

5. Despite the first Draft Resolution being succinct (Preamble and four Articles), the text went into unnecessary and even erroneous details. For instance, Article 3 (dedicated to consensus-building) mentions the forming of working groups and negotiating texts, *inter alia,* in the process which leads to consensus or general acceptance of a specific text. However, it is well known that this is not always so ; furthermore, in certain cases negotiation has taken place without formalities. In fact, there are various methods or procedures for reaching consensus, even if they all centre on one foundation (see, in this respect, the interventions of Messrs. Guillaume and Rosenne, *Rec.* pp. 201 and 203).

The use of the term "decision" in Article 2 (dedicated to the definition of consensus), was not, of course, appropriate because it seemed to restrict the scope of this procedure to binding texts, when the reality is that consensus is also used in the adoption of non-binding texts (such as the Resolutions of the General Assembly of the United Nations Organization). Messrs. Arangio-Ruiz (*Rec.* p. 205) and Morin (*Rec.* p. 208) opportunely pointed this out during the debates.

6. The second Draft Resolution (*Rec.* pp. 210-212) takes good note of all the observations made and offers a perceptible improvement of the content of all its Articles, as explained by Mr Sohn in the session of 1 September. Even though we do not agree with the solution offered by Article 5 of the second Draft to possible objections to consensus, as by definition consensus does not admit reservations. An objection, also by definition, cannot affect the core of a document, and although it is made officially and entered in the record, the relevant fact is that the State in question does not formally object to the document or ask for a vote. In view of this second version, I feel that perhaps the Sixth Commission could have approved a Resolution in this respect.

Observations of Mr Santiago Torres Bernárdez (March 17, 1999)

I see that you circumscribe the subject-matter of the operative part of the Draft Resolution to the procedure of consensus in institutional frameworks (international organizations or conferences). Paragraphs 1 to 9 are in fact devoted to the description of some of the main instrumental features of consensus as a procedural or technical device. Actually, those paragraphs would appear to be a development of the "consensus building" provision in Article 2 of the former Draft Resolution.

Because you are aware of the views expressed at the Strasbourg Session, I assume that you have made your own choice. I could get along with it providing that the Draft Resolution as a whole be consistent with the said initial choice. In this respect, and speaking generally, I think that several paragraphs of the Preamble should be deleted or redrafted.

The operative part is not dealing with consensus as the output of the application of a procedure of consensus or with the binding or other eventual legal effects for individual participating States of the said output, but with the procedure of consensus itself exclusively. The operative part is not concerned either with the question of consensus as equivalent for *opinio juris* in the process of creation of customary international law. However, paragraphs 3, 4, 6 and 7 of the Preamble as formulated seem to relate to those subject-matters which are alien to the operative part of the Draft Resolution.

The consensus described in paragraphs 1 to 9 of the operative part is a procedure of consensus inspired very much in the practice of UNCLOS III. Practice knows however other procedures which qualify also as procedures of consensus. For example, the fact that in a giving case a particular working group step is missing does not mean necessarily that the procedure concerned is not a procedure of consensus. In other words, the procedure of consensus in paragraphs 1 to 9 should be taken as a mere model of such procedure without prejudice of particular derogations in a given case. Not all the steps referred to in those paragraphs need to be present *in casu* in order to recognize a giving procedure as a consensus procedure. There is nothing imperative in the matter. Consequently, in the last Preamble paragraph, I am very much in favour of keeping the word "guidelines" while I would suggest to delete the words "the rules governing the use of".

Consensus is indeed a decision-making procedure among others such as unanimity, majority rule or non-objection. But, a decision-making procedure about what ? Doubtless, about the adoption of a given international text. It does not go further than that. Moreover, as a means for the adoption of the text it may be used quite independently of the kind of the instrument concerned (treaty, declaration, resolution, recommendation, final act, code of conduct, guidelines, understandings, agenda for action, etc.) as well as of the legal or political nature of the undertaking. This is an additional reason to revise present paragraphs 3, 4, 6 and 7 of the Preamble. From the fact, for example, that the text of a given treaty is adopted by consensus could not be inferred without further ado that

"ratification difficulties" are overcome, because such a treaty may be subject to ratification notwithstanding the adoption of its text by consensus. In any case, I would be against the transformism of making of the procedure of consensus a kind of "international legislation procedure". There is no basis in the practice of States for that.

Thus, consensus is a decision-making procedure for the adoption of the text of of international instruments. Its distinguishing features from other text adoption procedures are subjective as well as objective. Subjectively, the consensus procedure implies the existence of a given intentional positive purpose in the participating States, namely their assumption of the aim of reconciling opposing views through a process of well-acquainted negotiations involving all interested parties so as to produce a text having general or quasi general support before its adoption at least up to a point.

A consensus procedure encompasses always a deliberate effort or conscious determination of the participating States at achieving general agreement on the text through negotiations and consultations by having resort to working groups and/or the mediation or intervention of the presiding officers. It carries on a commitment of the participating States as to the manner thereby the text should be elaborated. Such a commitment is not present or does not have the same intensity in the case of other text adopting procedures. It is precisely because of this feature that the consensus procedure presents certain advantages for international law-making undertakings particularly when not ILC's draft articles are at hand or when the undertaking is aiming at formulate new law. The relative merits of the consensus procedure are consequently to be found in what the States assume to do before the adoption of the text rather than afterwards.

The objective or material elements of the procedure of consensus are questions such as : the initial indentification of more difficult problems, the intimacy of the negotiations and consultations which lead to the elaboration of the text, the fact that frequently those negotiations and consultations are held without official records, the participation in the negotiations and consultations of all interested States, the particular role of

working groups and presiding officers in the process, the establishment of a drafting group, the preparation of a composite negotiating text, the establishment of a final text, the announcement by the chairman that the text has been adopted by consensus without voting, the possibility of dissenting views (explanatory statements ; reservations) without objecting to the adoption of the text by consensus, etc. The operative part of your Draft Resolution is devoted to those objective or material elements of the consensus procedure. Some drafting improvements would be possible (for example, I think that the word "negotiation" should be inserted), but I do not see the point of doing it now. I would limit myself to draw your attention to the fact that the subjective element of the consensus procedure referred to above is missing in the Draft Resolution. I would give a certain importance to making room for it in the operative part (possibly as a new paragraph 1).

Observations of Mr Francisco Orrego Vicuña (April 21, 1999)

1. General structure of the Resolution. The Draft as it presently stands deals only with the question of consensus in respect of the adoption of soft law instruments related to the forming of new principles or rules of international law. While this type of instrument is increasingly common, and to that extent the Draft ensures an orderly process of consensus, it is not the principal way to establish principles or rules of international law wherein both treaties and customary law play a prominent role. In this context, it would be desirable to expand the treatment of consensus so as to cover all the relevant sources of international law, and in any case treaties.

2. Nature of soft law instruments. Precisely because governments participating in negotiations leading to the adoption of soft law instruments know beforehand that the texts approved will not be legally binding, they lend support to consensus with greater easiness. Should these very texts lead to the adoption of treaties a much greater care and scrutiny would be exercised by those very governments. It is therefore possible to suggest that consensus is qualitatively different in the case of soft law instruments and in the case of treaties. While the procedure suggested in the Draft

Resolution might be convenient to cover the first case it could fall short of the requirements appropriate for the reaching of consensus in respect to treaties or other sources.

3. Emerging principles and rules. Because of the above it is not quite appropriate to assign to soft law instruments the role of materializing new principles and rules of international law. They may certainly influence the process leading to such materialization and serve as an important evidence of the practice of States, but the will of States in respect of such new principles and rules would normally be expressed by the resort to treaties and eventually customary law. In other words, a soft law instrument based on consensus of a non-binding type should not substitute for treaties that are approved as a result of a consensus of the binding type.

4. Constitutional procedures. Also because treaties are meant to be binding is that constitutional procedures leading to their approval and ratification should not be bypassed by alternative soft law approaches. This situation is making of many soft law instruments a disguised procedure for constitutional manipulation, which is resulting in both a certain disrepute for such instruments and in the danger of upsetting the constitutional balances and the safeguards carefully adopted under domestic legal systems. In this same light it is suggested that the role of reservations should not be entirely ignored in favor of the more expedite system of declarations, although it is quite natural to restrict the practice of reservations.

5. Participation. The board participation in the pursuit of consensus envisaged in the Draft Resolution should be welcomed in respect to both soft law instruments and treaties. While theoretically consensus involves such a broad participation, in practice many negotiations are conducted or led in such a way that a number of countries are left out of a meaningful participation or expression of their real interests. Soft law instruments should not be tailored to the needs of those convening or leading the negotiations but be really representative of a world opinion if they aspire to have a significant legal role in international law, particularly in terms of the forming of new principes and rules.

Annex II. New Draft Resolution (April 20, 1999)

The Institute of International Law

Considering that international practice shows that in certain situations the use of consensus may contribute to the formation of international law ;

Taking into account, in particular, the increasing role played by consensus in the work of international organizations and codification conferences, both global and regional, and the acceptance by the International Court of Justice of this method of forming international law ;

Believing that it may be useful, therefore, to develop a few guidelines for the use of consensus in the forming of international law ;

Having examined the comprehensive reports of the Sixth Committee, and taking into account the comments of the members of the Institute made by correspondence and at the Strasbourg Session ;

Adopts the following resolution :

Article 1

This resolution is stricly limited to defining the role played by consensus statements in the process of formation of international law. In some instances, such statements recognize, reformulate or clarify an existing principle or rule of international law, in others they provide the final imprimatur to a ripening principle or rule (an *opinio juris communis*) and complete its crystallization into a principle or rule of customary international law. Other statements are *de lege ferenda*, as they present a new principle or rule that is considered necessary for the good of the international community, with the hope that the States participating in the drafting of this statement will act in accordance with it, and by their practice contribute to its crystallization into a binding principle or rule of customary international law.

Article 2

Consensus has been developed for the purpose of ensuring as much as possible that a new principle or rule of international law will not be imposed by a majortiy of States on a reluctant minority, but will be a result of cooperation by all interested States in the preparation and approval of the proposed statement. Its text is thus a result of solving all encountered problems by finding generally acceptable compromise solutions for them, and ensuring that all the States concerned are sufficiently satisfied. Consensus also differs from unanimity, as it does not require a State to have to vote for a decision that is generally acceptable to it but contains some minor provisions that are less satisfactory to it. In some situations, a State may be allowed to have its view noted in a report of the proceedings, provided that this note does not affect an essential part of the agreed text or a basic goal of the statement, and cannot be used to influence the statement's interpretation. Efforts to reach consensus should not have the effect of weakening any essential parts of the proposed statement. Should a minority continue to block a consensus, a resort to voting may be necessary. In such a case, the value of the statement might depend on the size and composition of the majority that is supporting it actively thereafter.

Article 3

A statement shall be deemed to have been approved by consensus if, at a meeting expressly held for that purpose, no State present formally objects to its approval by consensus, and the presiding person officially notes that fact and announces that the statement has been approved by consensus.

Article 4

When a meeting of an international organization or an international conference, either global or regional, in which all States concerned are entitled to participate, approves by consensus a statement containing normative principles or rules that are designed to contribute to the forming of customary international law, these provisions, if so intended and declared by the participating States, may be considered as :

(a) an official recognition that these principles or rules have for some time been generally accepted as a part of customary international law and must be observed by all States ; or

(b) a crystallization of prior practive of States by proclaiming that the view of the participating States (an *opinio juris communis*) is that from now on these principles or rules shall be considered as a part of customary international law ; or

(c) an expression of the view of the international community that it is desirable for the common good of all States to follow these principles or rules as much as possible ; and a presumption that these principles or rules will become a part of customary international law as soon as it becomes clear that all States concerned have actually accepted them as binding and have acted in conformity with them.

The chosen alternative may be indicated by the participating States in the Preamble or in the final clauses of the approved statement, or it may be made clear in the preparatory materials of the international organizations or the codification conference that one of these alternatives was generally accepted during the negotiations.

Troisième question

Judicial and Arbitral Settlement of International Disputes Involving More Than Two States

Le règlement judiciaire et arbitral des différends internationaux impliquant plus de deux Etats

Onzième Commission

Rapporteur : *M. Rudolf Bernhardt*

Première séance plénière

Mercredi 18 août 1999 (matin)

La séance est ouverte à 9 h 45 sous la présidence de M. *Bedjaoui,* Premier Vice-Président.

Le *Président* invite le Rapporteur à présenter son projet de résolution sur le règlement judiciaire et arbitral des différends internationaux impliquant plus de deux Etats qui se lit de la manière suivante :

The Institute of International Law,

Reaffirming that judicial settlement is one of the most important means to settle disputes between States in accordance with the Charter of the United Nations ;

Noting that international judicial dispute settlement is, in general, bilaterally conceived, and that the increasing multilateral character of international relations requires an adaptation of the traditional dispute settlement rules ;

Conscious that the consent of States concerned remains the basis of the jurisdiction of international courts and tribunals and that the equality of States does not permit deciding a dispute between more than two States without the consent of all States involved ;

Considering that without such consent either no settlement or only partial judicial settlement of the dispute is possible ;

Adopts the following resolution :

I. Principles

1. Judicial settlement of disputes, whether between two States or between more than two States, requires the consent of all States concerned.

2. There can be identified some general principles and similarity of provisions concerning intervention and other forms of third-State participation in statutes and rules of international courts and tribunals ; nevertheless the rules of each institution concerning jurisdiction and procedure may possess specific and unique features. Therefore the interpretation of the relevant texts is the starting point in all cases including those involving more than two States.

3. In case of doubt the principles concerning intervention and other forms of third-State participation valid for the International Court of Justice can also be applied to proceedings before other international courts and tribunals.

4. The principles concerning intervention and other forms of third-State participation apply also in cases involving *erga omnes* obligations.

II. Disputes involving three or more States Parties

5. Where two or more States have identical legal interests in a dispute they should consider applying jointly to an international court or tribunal. Joint action can only be undertaken if a jurisdictional link already exists between all States involved or if it is created *ad hoc*.

6. Unilateral application to a court or tribunal by one or more States directed against more than one State as respondents requires, in principle, parallel and separate proceedings if no previous agreement between the States involved can be reached.

7. Under the relevant texts, including the Rules of Court, the court or tribunal may join pending cases or order common proceedings taking into account all the circumstances of the cases.

8. The procedural consequences of a joinder of cases or of common proceedings without a formal joinder should be determined by the court or tribunal with due respect for the requirements of a fair procedure.

III. Intervention

9. Intervention by a third State in judicial proceedings between two States is an appropriate means to protect the interests of that third State.

10. There are two types of intervention referred to in Articles 62 and 63 of the Statute of the International Court of Justice:

(a) Intervention by a third State in cases where it considers that it has "an interest of a legal nature which may be affected by the decision in the case" ; and

(b) intervention by third States Parties to a multilateral treaty the construction of which is in question.

11. Intervention by a third State does not mean that this State becomes a "party" to the dispute: the intervening State cannot put forward its own claims. Parties and interveners have different positions and functions which cannot be combined without special agreements.

12. The consequences of intervention in cases concerning the construction of multilateral treaties (Article 63 of the Statute of the International Court of Justice and similar texts in other statutes) are explicitly circumscribed in the relevant texts. If the third State is a party to the treaty, it has a right to intervene and to participate as an intervener. The parties to the case as well as the intervening State are bound by the construction given to the relevant treaty provisions by the court or tribunal.

13. Intervention under Article 62 of the Statute of the International Court of Justice and similar texts in other statutes requires the existence of an interest of a legal nature on the part of the intervening State. That means that rights or obligations of this State under public international law can be affected by the final decision. Whether the State can claim such an interest and whether it may be affected by the decision of the court or tribunal has to be determined by the court or tribunal according to the specific features of each case. When the court or tribunal has found a legal interest to exist, the State applying for intervention should be admitted as intervener.

14. The Statute of the International Court of Justice and provisions in other relevant texts form a sufficient basis for intervention. Intervention does not require the existence of a jurisdictional link between the parties to the dispute and the third State.

15. The decision concerning the admissibility of the intervention is binding on the parties and the intervener.

16. In principle, the decision of the court or tribunal on the merits of the case does not have the character of *res iudicata* for the intervening State, nor is it binding on the latter under Article 59 of the Statute of the International Court of Justice. A State that has been admitted to intervene cannot, however, contend that the decision is not binding upon it in the relevant part(s). The decision is also binding for the full parties in their relations with the intervening State.

17. The following other rules and principles apply to intervention :

(a) Interventions are possible when the merits of the case are being examined as well as in proceedings confined to matters of jurisdiction and admissibility; in exceptional cases, it should be possible also in preliminary and incidental phases such as the indication of interim measures of protection.

(b) When a State intends to consider whether to intervene, it may request the court or tribunal to give the necessary information and to provide it with copies of the pleadings. The court or tribunal decides after ascertaining the views of the parties.

(c) The intervening State is not entitled to nominate a judge *ad hoc.*

(d) The intervening State has the right to take part in the written and oral proceedings. The extent of such participation depends on the relevant rules of the court or tribunal and on its power to conduct the proceedings in an effective and equitable manner.

(e) With the consent of all parties to the case an intervener which intends to do so, may become a full party to the proceedings.

IV. "Indispensable Parties"

18. If the rights or obligations of a third State are at the core of a dispute submitted by other States to a court or tribunal and if a decision on that dispute is impossible without prior decision as to the rights or obligations of the third State, the court or tribunal cannot take such a decision unless that third State becomes a party to the proceedings. This third State is an "indispensable party" to the dispute.

19. If the rights or obligations of the parties to the dispute can be separated from those of a third State, the court or tribunal may decide on that part of the dispute relating to these rights or obligations.

20. In order to enable the court or tribunal to decide the entire dispute, all States involved may agree that the "indispensable party" becomes a full party to the proceedings.

Traduction en français :

L'Institut de droit international,

Réaffirmant que le règlement judiciaire est l'un des modes les plus importants par lesquels les différends entre Etats sont réglés conformément à la Charte des Nations Unies ;

Observant que le règlement judiciaire international est en général entendu comme un processus bilatéral, et que le caractère de plus en plus multilatéral des relations internationales rend nécessaire une adaptation des règles traditionnelles du règlement des différends ;

Ayant à l'esprit que le consentement des Etats impliqués demeure le fondement de la compétence des cours et tribunaux internationaux, et que l'égalité des Etats ne permet pas de se prononcer sur un différend entre plus de deux Etats sans le consentement de tous les Etats impliqués ;

Considérant que l'absence d'un tel consentement interdit d'en arriver à un règlement judiciaire, ou ne permet qu'un règlement partiel d'un tel différend ;

Adopte la Résolution suivante :

I. Principes

1. Le règlement judiciaire des différends, entre deux ou plus de deux Etats, requiert le consentement de tous les Etats impliqués.

2. On peut dégager quelques principes généraux et des similitudes dans les dispositions relatives à l'intervention et aux autres formes de participation d'Etats tiers figurant dans les statuts et règlements des cours et tribunaux internationaux ; toutefois les règles de chaque institution portant sur la

compétence et sur la procédure peuvent présenter des caractéristiques particulières et uniques. L'interprétation des textes pertinents constitue donc le point de départ dans l'examen de toute affaire, y compris celles qui impliquent plus de deux Etats.

3. En cas de doute, les principes relatifs à l'intervention et aux autres formes de participation d'Etats tiers valables devant la Cour internationale de Justice peuvent être appliqués également devant d'autres cours ou tribunaux.

4. Les principes relatifs à l'intervention et aux autres formes de participation d'Etats tiers sont également applicables dans les affaires mettant en jeu des obligations *erga omnes*.

II. Différends impliquant au moins trois Etats parties

5. Lorsque deux ou plus de deux Etats ont des intérêts juridiques identiques dans un différend, ces Etats devraient explorer la possibilité de présenter à la cour ou au tribunal une requête conjointe. Une action conjointe ne peut être entreprise que dans les cas où un lien juridictionnel existe déjà entre tous les Etats impliqués, ou lorsque ce lien est établi *ad hoc*.

6. Une requête unilatérale devant une cour ou un tribunal, émanant d'un ou de plusieurs Etats et dirigée contre plus d'un Etat défendeur, requiert, en principe, l'introduction d'instances parallèles et distinctes, à moins que n'intervienne entre les Etats impliqués un accord préalable en sens contraire.

7. La cour ou le tribunal peut, en se fondant sur les textes pertinents, y compris le Règlement de la Cour, et au vu de toutes les circonstances de l'espèce, ordonner la jonction d'instances ou l'organisation de procédures communes.

8. La cour ou le tribunal devra, dans le respect des exigences du caractère équitable de la procédure, déterminer quels effets produira sur celle-ci la jonction d'instances, ou l'organisation, sans jonction formelle, de procédures communes.

III. Intervention

9. L'intervention d'un Etat tiers dans une procédure judiciaire impliquant deux Etats est un moyen approprié de protection des intérêts dudit Etat tiers.

10. Il est fait référence dans les articles 62 et 63 du Statut de la Cour internationale de Justice à deux types d'intervention :

(a) l'intervention par un Etat tiers qui "estime que, dans un différend, un intérêt juridique est pour lui en cause" ;

(b) l'intervention par des Etats tiers à un différend mettant en jeu l'interprétation d'un traité multilatéral auquel ils sont également parties.

11. L'intervention d'un Etat tiers ne le rend pas pour autant "partie" au litige : l'Etat tiers ne peut avancer de réclamations qui lui soient propres. Les parties et les intervenants occupent des positions et remplissent des rôles distincts qui ne peuvent être confondus sans accord à cet effet.

12. Les conséquences de l'intervention dans une affaire relative à l'interprétation d'un traité multilatéral (article 63 du Statut de la Cour internationale de Justice et textes similaires d'autres statuts) sont expressément circonscrites dans les textes pertinents. Si l'Etat tiers est partie au traité, il a le droit d'intervenir dans l'instance et d'y participer à titre d'intervenant. Tant les parties au différend que l'Etat intervenant sont liés par l'interprétation donnée par la cour ou le tribunal aux dispositions du traité en cause.

13. L'intervention en vertu de l'article 62 du Statut de la Cour internationale de Justice ou de textes similaires d'autres statuts exige que l'Etat intervenant ait un intérêt juridique à ce faire. Cela signifie que des droits ou obligations dudit Etat, relevant du droit international public, sont susceptibles d'être affectés par la décision finale. La cour ou le tribunal devra décider, selon les circonstances de l'espèce, si ledit Etat peut se prévaloir d'un tel intérêt, et si la décision rendue affectera ou non cet intérêt. Si la Cour

ou le tribunal constate l'existence d'un intérêt juridique, l'Etat sollicitant l'intervention devrait être admis à l'instance à titre d'intervenant.

14. Le Statut de la Cour internationale de Justice et les dispositions d'autres textes pertinents constituent un fondement suffisant pour l'intervention. Point n'est besoin d'un lien juridictionnel entre les parties au différend et l'Etat tiers.

15. La décision relative à la recevabilité de l'intervention lie les parties et l'Etat intervenant.

16. La décision de la cour ou du tribunal sur le fond de l'affaire n'a en principe pas autorité de la chose jugée à l'égard de l'Etat intervenant, pas plus qu'elle ne lie ce dernier en vertu de l'article 59 du Statut de la Cour internationale de Justice. Un Etat dont l'intervention a été admise ne peut toutefois pas soutenir que la décision ne le lie pas dans ses éléments pertinents. La décision est également obligatoire pour les parties principales dans leurs relations avec l'Etat intervenant.

17. Les autres principes et règles qui suivent s'appliquent à l'intervention :

(a) Il est possible de présenter une requête d'intervention lors de l'examen d'une affaire au fond, tout comme au stade de l'examen de la compétence et de la recevabilité ; dans des cas exceptionnels, elle devrait également pouvoir être présentée lors de procédures préliminaires et incidentes, telle l'indication de mesures conservatoires.

(b) Un Etat qui considère la possibilité de se porter intervenant dans une affaire peut demander à la cour ou au tribunal de lui fournir les informations nécessaires et de lui faire parvenir copie des mémoires et plaidoiries. La cour ou le tribunal décide, après avoir considéré les vues des parties sur le sujet.

(c) L'Etat intervenant n'a pas le droit de nommer un juge *ad hoc*.

(d) L'Etat intervenant a le droit de prendre part à la procédure écrite et orale. L'ampleur de sa participation dépendra des règles pertinentes de la cour ou du tribunal ainsi que de la capacité de la cour ou du tribunal de mener les procédures de manière efficace et équitable.

(e) Un intervenant qui en manifeste l'intention peut, moyennant l'accord de toutes les parties à l'affaire, devenir partie principale à l'instance.

IV. "Parties indispensables"

18. Si les droits ou obligations d'un Etat tiers sont au cœur d'un différend porté par d'autres Etats devant une cour ou un tribunal, et s'il s'avère impossible d'en arriver à une décision sans prendre préalablement parti sur les droits ou obligations de l'Etat tiers, la cour ou le tribunal ne peut procéder sans que ledit Etat ne devienne partie au litige. Cet Etat tiers est une "partie indispensable" au différend.

19. Si les droits ou obligations des parties au différend peuvent être distingués de ceux d'un Etat tiers, la cour ou le tribunal peut se prononcer sur la partie du litige concernant lesdits droits ou obligations.

20. Afin de permettre à la cour ou au tribunal d'arrêter une décision sur l'ensemble du litige, un accord peut intervenir entre tous les Etats impliqués, pour que la "partie indispensable" devienne partie principale à l'instance.

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The *Rapporteur* indicated that he had distributed a revised draft in November 1998. This was based on the outcome of the Commission's meeting in Geneva earlier that year, during which the Commission *inter alia* decided not to include a number of points, such as the *amicus curiae* and advisory opinions. As no further comments were made thereafter, the revised draft of November 1998 was included in the *Annuaire*. During the Commission's meeting, at the beginning of the session, a few changes were made which did not alter the substance of the draft. However, one sentence in the English text appeared to be missing in the French text.

Le *Président* ouvre le débat général.

Mr *Oda* congratulated the Rapporteur on his draft resolution. He recalled three particular instances of intervention at the International Court of Justice. Firstly, the Court had rejected Malta's request to intervene in the *Tunisia/Libya* case in which, in a separate opinion appended to the Court's Judgment, he had argued in favour of Malta's intervention. Secondly, in the *Libya/Malta* case, the Court had likewise rejected Italy's request to intervene. Mr Oda had, at that time, been one of five dissenting Judges in favour of intervention. Finally, in the *El Salvador/Honduras* case, the Court's Chamber had granted Nicaragua permission to intervene.

Turning to the Draft Resolution, Mr Oda noted that there appeared to be a number of differences between the English and French texts. For instance, the second paragraph of the English introduction reading "international judicial dispute settlement is, in general, bilaterally conceived" was difficult to understand while, in contrast, the French text reading "*le règlement judiciaire international est en général entendu comme un processus bilatéral*" might be more correct.

Mr Oda requested some additional explanation on the intended scope of the Draft, in particular its Part III. He wondered what "other forms of third-State participation valid for the International Court of Justice" were and what "other international courts and tribunals" the Rapporteur had in mind in Article 3 of the Draft. He asked whether the Commission intended to formulate uniform rules able to be extended from the International Court of Justice and applied to other courts and tribunals.

Mr Oda also pointed out that the concept of "indispensable parties" would apply only to intervention under Article 62 of the Statute. In his opinion, this point could not be overemphasized.

The *Rapporteur* recalled that in view of its mandate, the Commission could not limit itself to the International Court of Justice. A great number of texts relating to intervention in cases before other courts and tribunals were analysed in Annex I to the Report. Yet, the Commission was bound to concentrate on the International Court of Justice, which has the most

important practice in this field. This explained the Commission's approach in Part III of the Draft, as well as in its Articles 2 and 3 which, he believed, laid down a carefully balanced series of steps in interpretation. Further, the terms "and other forms of third-State participation" in Article 3 were open as to whether there are such other forms of participation.

M. *Doehring* observe que la résolution ne prend pas suffisamment en compte le fait que les décisions judiciaires ne produisent que des effets *inter partes*. Il se demande dans ce contexte si l'intervention produit des effets *erga omnes* comme semble le suggérer le principe 4 de la résolution. En outre, il s'interroge sur ce que recouvre la notion de "parties indispensables" et sur ce que pourrait faire une cour ou un tribunal s'il ne voulait pas rendre une décision. Devrait-il déclarer que la plainte est irrecevable ou infondée ?

The *Rapporteur* answered that it had been stated in literature that consent is not required as a basis for the Court's jurisdiction when *erga omnes* obligations are at stake. Article 4 was meant to rebut these statements, without going into further details. Further, in view of the International Court of Justice's jurisprudence on the matter, Part IV on "Indispensable Parties" was a necessary part of the Draft. Although Mr Torres Bernárdez disliked the notion of "indispensable parties", which is why the quotation marks were added, no objection was made in the Commission to the substance of Part IV. The International Court of Justice's refusal to decide a dispute in the absence of an indispensable party does not amount to a denial of justice. It is an inherent limitation of the Court's competence which flows from the fact that the Court cannot decide a dispute without the consent of all States involved.

Mr *Franck* congratulated the Rapporteur on his very useful Draft Resolution and strongly supported its adoption. He suggested that it might be even more useful if the subjects addressed were listed in three categories : joinder, separation and intervention. Rather than providing for a list of principles, these three headings could be dealt with in a preambular paragraph explaining the practical circumstances to which they relate. The first hypothesis may be illustrated by Croatia's action against Yugoslavia paralleling the case brought against the latter by Bosnia-Herzegovina, as an alternative to a joinder of both cases. In respect of the second hypothesis,

mention may be made of the separate actions brought by Yugoslavia against NATO countries. Finally, the *Timor* case illustrates the hypothesis of the indispensable party, where a State which does not wish to become a party to the dispute is necessary to a collateral action of other States.

The *Rapporteur* replied that the Commission considered that, while important differences existed between the three kinds of participation, a few general principles existed, notably that a dispute cannot be decided without the consent of all States involved. Further, many practical cases were taken into account by the Commission, and Mr Franck's examples were dealt with on an abstract level in one or other of the articles of the Draft. Abstract and sometimes vague formulas were needed, in order to embrace the specific circumstances of any given case. He had no opinion on whether the preambular part should be complemented as suggested by Mr Franck.

Mr *Schwebel* congratulated the Rapporteur and the members of the Commission who had actively contributed to its work. He supported the draft in general. However, the reference made to the jurisprudence of the International Court of Justice in Article 3 was very generous in view of the fact that the Court's treatment of the subject is not altogether clear or coherent. The Article should perhaps be omitted. There was also some difficulty in understanding the meaning of Article 4. The statement in Article 11 that "intervention by a third State does not mean that this State becomes a 'party' to the dispute" was based solely on the Chamber's decision in respect of Nicaragua and was too categoric. With regard to Article 17(b), the practice of the Court is not to provide a State considering whether to intervene with copies of the pleadings unless the parties consent. However, this approach is incompatible with the right to intervene as provided for in the Court's Statute. The Resolution should state more clearly that the views of the parties are not dispositive. Further, in Article 18 a third State is said to be an indispensable party to a dispute if its rights or obligations are at the core of the dispute and if a decision on that dispute is impossible without "prior" decision as to the rights or obligations of the third State. However, one wonders how procedurally that decision could be prior. It would be contemporaneous, as the Court's decision in the *Nauru* case illustrates. The word "prior" in Article 18 should be replaced by "concurrent" or "contemporaneous".

The *Rapporteur* agreed on Mr Schwebel's last point. He also admitted that Article 3 was not indispensable, but suggested that it should be decided later whether it should be retained or not. In respect of Article 17(b), the terms "the court or tribunal decides" left open the possibility for the court to decide to share the pleadings without the parties' consent. It would be inadequate to provide for the court's obligation to do so.

Le *Président* fait remarquer que la formule "en cas de doute" figurant à l'Article 3 n'est pas très claire. Il suggère d'utiliser la formule "en cas de besoin". Cela permettrait de souligner que l'Article n'évoque qu'une faculté offerte aux cours et tribunaux.

Mr *Brownlie* expressed his appreciation for the work done by the Rapporteur. However, the Resolution did not face the central issue with regard to intervention. When intervention is really called for by the nature of the case, its absence affects the quality of the administration of justice and the effective settlement of the dispute. Article 9 should be more positive in respect of intervention when there is a strong case for admitting it. It is not only a matter of protecting the interests of third States. Further, the reference to the International Court of Justice's uncertain jurisprudence on intervention was question begging. It was also unfortunate because the Court's general approach is conservative. The reference to the experience of the Court in Article 3 should be loosened. The true polarity is between arbitration on the one hand, and multilateral systems, where a proper background for admitting intervention and a penumbra of consent exist, on the other.

The *Rapporteur* answered that there were many ways of improving the effectiveness of dispute settlement. However, the Draft primarily aimed at determining the law as it stands. Thus, Article 9 of the Draft was perfectly in accordance with Article 62 of the Court's Statute, which provides that a State may intervene in order to protect its own interests.

Mr *Shihata* wondered which sentence in Article 16 was the operative one. If the second sentence was operative the first one was unnecessary.

Mrs *Higgins* wished to congratulate the Commission on its knowledgeable and distinguished work and the Rapporteur for the careful Resolution. In agreement with Mr Brownlie, she regretted the conservative nature of the Resolution. She did not view the role of the Commission as simply restating the existing state of law, especially when the latter is unsatisfactory. Recalling the Resolution of the Institute on the Legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties (1995) she believed that the Commission should adopt a forward-looking model for its work. In particular, Mrs Higgins regretted the conservative nature of Article 4, which in her view offered no new direction, especially with regard to the many new tribunals operating, for example, in the field of international trade. She furthermore expressed her opinion that the ICJ model of dispute resolution for cases involving more than two States seemed inappropriate. The principles of the resolution, she felt, did not address this problem.

As a second point, Mrs Higgins asked for clarification whether the Resolution regarded disputes "involving more than two States" or "between more than two States". The Preamble of the Resolution appears to have been written with the second interpretation in mind. Furthermore, the Preamble does not reflect cases where third parties have a legal interest in a dispute between two States. Finally, Mrs Higgins asked whether the Resolution covered cases where third parties had an interest in a dispute but decided to remain silent.

Mr *Schermers* stressed the need for legal certainty in disputes involving more than two States. He supported Mrs Higgins' call for a more progressive development in the Resolution. He also asked for clarification on the binding effect on intervening States as set forth in Article 16 of the Resolution.

Mr *Kooijmans* congratulated the Rapporteur for his work. He shared Mrs Higgins' and Mr Schermers' view that the Resolution reflects the current practice of the ICJ instead of providing for a more effective system of settlement. He asked whether the Institute should reflect current law or should show a way to make dispute settlement more effective and satisfactory.

Furthermore, Mr Kooijmans asked whether *erga omnes* obligations were properly dealt with under Article 4 of the Resolution. He cited Mr Abi-Saab's reply to the draft Resolution that with regard to *erga omnes* obligations not only third parties become involved, but the whole international community. He believed it was too easy to say that in regard to *erga omnes* obligations no *actio popularis* exists. Furthermore, he pointed out that at the Strasbourg Session a Commission had already been formed to study aspects of this problem. Finally, he asked why in Article 20 the word "may" was used, which, in his view, rendered the Article weak.

The *Rapporteur* responded that he could not delete *erga omnes* obligations and leave the matter open. He agreed that the task of the Institute was to make proposals for the improvement of the functioning of law. The views expressed in the Commission on this Resolution were very different, resulting in the removal of Articles which were considered superfluous. Under these circumstances, it was difficult to formulate a Resolution which was prescriptive in nature.

M. *Matscher* félicite la Commission de ses travaux qu'il approuve dans leur ensemble. Il souhaite néanmoins formuler quelques observations. Tout d'abord, l'Article 4 de la Résolution fait mention de la notion d'obligation *erga omnes*. M. Matscher aurait une certaine sympathie pour ceux qui voudraient supprimer ce paragraphe. Il observe toutefois qu'il serait étrange de ne rien dire sur cette notion dans la résolution. S'agissant de l'Article 5, M. Matscher propose de remplacer l'expression "intérêts juridiques identiques" par celle de "intérêts juridiques identiques ou semblables". M. Matscher voudrait également que l'Article 9 inclue l'expression "deux ou plusieurs Etats". Il observe ensuite qu'il y a des discordances entre la dernière phrase de l'Article 12 et l'Article 16. L'on pourrait distinguer la question des effets produits par l'interprétation donnée par un tribunal de celle de l'autorité de la chose jugée. Toutefois, en pratique, cette distinction sera difficile à réaliser.

S'agissant de l'Article 13, M. Matscher propose de supprimer la dernière partie de la troisième phrase, car il revient à la cour ou au tribunal de décider de la recevabilité de l'intervention. Pour ce qui est de l'Article 17(a), M. Matscher propose de reformuler la dernière partie de la

disposition en disant "lors de procédures préliminaires et mesures incidentes, telle l'indication de mesures conservatoires". En dernier lieu, M. Matscher se demande ce que doit faire un tribunal si un Etat tiers ne montre aucun intérêt à devenir partie au différend.

Mr *Zemanek* pointed out that the draft of the International Law Commission on State responsibility considers all States parties to certain multilateral treaties as affected States in the case of a violation of that treaty. He therefore wanted clarification as to the difference between affected States and States with a special interest in a dispute and how they would fit the categories in Article 10(a) and (b).

Mr *Lowenfeld* wished to follow up on the comments made by Mr Oda and Mrs Higgins. He believed that the Resolution was too focused on the current practice of the ICJ and did not take into consideration the WTO, which, in his view, was one of the most active multilateral dispute settlement bodies. He also agreed with Mr Shihata that Article 16 needed to be amended. He believed that the correct principle is that intervening States are bound by the judgment in the case; if an intervenor is not bound it has a function no different from an *amicus curiae*.

En tant que membre de la Commission, M. *Caflisch* appuie pleinement le résultat de ses travaux. Il tient toutefois à avancer quelques remarques et suggestions, concernant quatre problèmes spécifiques. D'abord, M. Caflisch remarque que les deux premiers paragraphes du préambule, ainsi que le premier article de la première partie du projet, évoquent seulement le règlement judiciaire des différends, en omettant le règlement arbitral. Comme son titre l'indique, la résolution est pourtant destinée à couvrir les deux hypothèses. La terminologie devrait donc être adaptée en ce sens, le cas échéant en utilisant l'expression générale de "règlement juridictionnel". Deuxièmement, M. Caflisch estime que, en dépit de l'impression que peut générer une première lecture du texte, le problème central n'est pas celui de l'intervention, mais celui des différends opposant une pluralité d'Etats parties, au plein sens du terme. La relative concision de la Partie II s'explique uniquement par le fait que, en cette matière, la multiplicité et la variété des solutions particulières rendent difficile la formulation de critères généraux. Troisièmement, M. Caflisch estime, à l'instar de plusieurs des membres de

l'Assemblée, qu'il serait opportun de réduire autant que possible les références au Statut de la Cour internationale de Justice, en particulier dans les articles 10, 12, 13 et 16 de la troisième partie du projet. Encore une fois, la résolution a vocation à embrasser l'ensemble des procédures juridictionnelles, y compris en matière arbitrale. Enfin, concernant le débat relatif au quatrième paragraphe de la Partie I, M. Caflisch précise qu'il ne s'opposerait pas à la suppression de cet article.

Mr *Oda* pointed out that most cases involving "indispensable parties" fell under Article 62 of the Statute of the International Court of Justice: that was true of the *Continental Shelf* cases (*Tunisia/Libya* ; *Libya/Malta*) ; of the intervention of Nicaragua in the case between El Salvador and Honduras ; and of the intervention of Equatorial Guinea in the dispute between Cameroon and Nigeria, a case currently pending before the International Court of Justice.

Mr Oda expressed his concern that future cases would arise more frequently under Article 63, as could have had occurred in the dispute between Bosnia and Herzegovina on the one hand, and Yugoslavia on the other, with regard to the application of the Genocide Convention, or in the recent *Breard* and *LaGrand* cases, concerning the interpretation of the Vienna Convention on Consular Relations, the latter of which was pending before the International Court of Justice. Mr Oda therefore hoped that the Resolution would also relate more to disputes concerning the interpretation of multilateral conventions, as provided for in Article 63.

Sir Ian Sinclair did not share Mr Oda's concern about Article 63 procedures, pointing out that most of the jurisprudence of the ICJ dealt with interventions under Article 62. What concerned him more was incoherent jurisprudence in this regard. He expressed his doubts on Article 3 of the Resolution. He believed that in regard to Article 62 of the Statute of the Court, the resolution should seek to balance the rights and obligations of intervening States and existing parties to a dispute. It is therefore important to determine the object and purpose of an intervention, the conditions an intervening State wishes to apply, and the effect of an intervention on existing parties. He expressed his concern that disputes which involved intervening parties would become more frequent in front of the ICJ,

especially with regard to maritime and land boundary disputes. He also reminded that a number of other tribunals could consider such cases. He therefore recommended that the Commission be cautious in its recommendations as the Resolution should not try to affect the work of other tribunals which were addressing such disputes.

M. *Conforti* félicite chaleureusement les membres de la Commission pour avoir réussi à traiter une matière aussi délicate et difficile, tant pour les juges directement impliqués que pour la doctrine amenée à commenter les précédents existants. La complexité du problème vient sans doute du fait qu'il recouvre deux aspects distincts, l'un contractuel et l'autre institutionnel. L'aspect contractuel est au coeur même du processus juridictionnel en droit international, dans la mesure où c'est de la volonté des Etats parties que dépendent l'existence et l'étendue de la compétence du juge. Dans cette perspective, les parties peuvent formuler des demandes impliquant plus ou moins directement les droits ou intérêts de tiers, ceux-ci étant théoriquement protégés par le principe de l'effet relatif des jugements. A l'inverse, l'aspect institutionnel de la problématique porte à considérer les mécanismes juridictionnels comme les fragments d'une justice de la communauté internationale. Dans cette optique, le juge s'attelle à protéger les Etats tiers, le cas échéant en les autorisant à intervenir, ou encore en refusant de se prononcer sur leurs droits. M. Conforti estime que l'Institut doit consacrer ses efforts à renforcer cet aspect institutionnel. L'argument selon lequel une telle tendance risque de décourager les Etats de recourir aux mécanismes juridictionnels ne le convainc pas. Le précédent de la Cour européenne des droits de l'homme montre l'aptitude des Etats à s'engager dans un processus fortement institutionnalisé, dans le cadre duquel le juge dispose d'une compétence statutairement définie et qui ne dépend plus du consentement des parties impliquées.

Mr *Feliciano* wished to draw on his experience on the Appellate Body of the World Trade Organization. The Appellate Body requires third parties to a dispute to have a substantial interest in the proceedings. The dispute settlement body is, however, relaxed in its requirements for third parties to demonstrate substantial interest. There is, therefore, in practice a right to become a third party to a dispute. Moreover, third parties are not bound by decisions made by the first instance bodies or by the Appellate

Body, nor is there an indirect binding effect on intervening parties through the doctrine of estoppel. Mr Feliciano further pointed out that if a member government felt that its interests were affected by a dispute between two States it could ask for a second panel to hear the dispute, even if a prior dispute is under way. In order to avoid a duplication of work the panel hearing the second case consists of the same persons who hear the first case, therefore creating two legally distinct but physically identical tribunals. He finally reminded the Commission that third participants are beneficial to some disputes and add further dimensions of argument.

Mr *Gaja*, as a member of the Commission, also supported the notion that the Commission should go beyond *lex lata*. He pointed out that the Draft Resolution was more innovative than it looked at first. Articles 12 and 16 stated the binding effect of judgments on intervening States and on States parties beyond the letter of Articles 62 and 63 of the Statute of the Court and also beyond what the Court said in its judgment in the *El Salvador* v. *Honduras* case, since no jurisdictional link was required according to the Draft Resolution.

Mr *Orrego Vicuña* opined that the Resolution was well-conceived. He raised the point that in arbitration the trend was towards broader flexibility for participating States, as is indicated by the increasing responsibilities of the WTO and *ad hoc* forums of arbitration. If the aim of the Resolution was to address arbitration, the Resolution would have to be amended. He therefore suggested restricting the Resolution to judicial settlement and providing a safeguard for different settlement options States may wish to pursue.

The *Rapporteur* responded to the previous comments by agreeing that the purpose of the Resolution was to provide for more effective dispute settlement. Nothing in the Resolution excluded other institutions of settlement if there was consent of all States involved. The Resolution could not, however, include other possibilities of settlement with regard to private individuals, as the Resolution only covered disputes between States.

M. *Ress* remarque que le titre de la résolution évoque les différends "impliquant plus de deux Etats", alors que son texte renvoie occasionnellement aux différends "entre deux ou plusieurs Etats". Cette dernière expression semble écarter une situation que l'on retrouve de plus en plus dans le système juridictionnel international. M. Ress pense au cas des différends impliquant des individus qui peuvent se porter demandeurs à l'égard de un ou plusieurs Etats, par exemple dans le cadre de la procédure instituée par la Convention européenne des droits de l'homme. Il demande au rapporteur, qu'il tient par ailleurs à féliciter pour ses travaux, si ce cas est couvert par la résolution.

The *Rapporteur* responded that the European Court of Human Rights provides adequate answers with regard to the cases brought up by Mr Ress. Specifically, the Eleventh Protocol provided for the possibility for the settlement of inter-State disputes.

Mr *Amerasinghe* indicated that he was in general agreement with the Resolution, which, in his view, covers judicial settlement as provided by the ICJ. He asked, however, whether ICJ principles could also apply to arbitral settlement, or, for example, in the case of the Tribunal of the Law of the Sea.

Sans vouloir d'une quelconque manière engager l'institution à laquelle il a l'honneur d'appartenir, le *Président* vient à formuler quelques remarques sur la psychologie qui sous-tend la position de certains juges de la Cour internationale de Justice. En ce qui le concerne, il confesse avoir le réflexe, peut-être inconscient, de chercher à protéger les Etats qui acceptent de faire confiance à la Cour en se soumettant à sa juridiction. C'est sans doute ce qui peut expliquer la réticence de la Cour à accepter l'intervention d'un tiers lorsque les Etats parties s'y opposent. Cela n'empêche pas que la Cour fasse preuve d'une certaine retenue, en se montrant particulièrement soucieuse des droits des tiers à tous les stades de la procédure. Le souci constant d'une bonne administration de la justice dicte en effet une certaine retenue, qui ne peut assurément pas être qualifiée de conservatisme. Le Président appuie donc le projet dans son état actuel qui lui paraît refléter les nuances et l'équilibre de la pratique existante.

La séance est levée à 13 h 15.

Deuxième séance plénière

Mercredi 18 août 1999 (après-midi)

La séance est ouverte à 15 h 15 sous la présidence de M. *Bedjaoui.*

Le *Président* rappelle que, lors de la précédente séance, l'Assemblée a procédé à un débat général sur le projet de résolution présenté par la onzième Commission. En conséquence, celui-ci peut maintenant être examiné article par article. Le Président propose de laisser provisoirement de côté le titre du projet. Quant au préambule, le Président rappelle que, lors du débat précédent, quelques intervenants ont exprimé le souhait de le développer de manière à lui conférer davantage d'étoffe et, notamment, à le faire embrasser le règlement arbitral par delà le règlement judiciaire. Cependant, la Plénière ne peut pas faire office de commission de rédaction. Dès lors, le préambule sera lui aussi examiné ultérieurement. Le Président suggère donc de passer au dispositif du projet de résolution et d'en entamer l'étude par le premier article de la première partie.

M. *Caflisch* observe que cette disposition mentionne uniquement le règlement judiciaire des différends alors qu'elle devrait également faire état du règlement arbitral, compte tenu du cadre fixé aux travaux de la onzième Commission. L'article en cause pourrait évoquer le règlement juridictionnel des différends ou le règlement judiciaire ou arbitral de ces derniers. Les autres parties du projet devraient être adaptées en conséquence.

Mrs *Higgins* wished to set out what might appear to be a grammatical point in relation to Part I, Article 1, but was in fact a substantive point, which might be met by revising the Preamble. In her view, some

comment should be made to the effect that one is not talking here of consent "to the judicial settlement" of disputes, but consent "to the jurisdiction" of the tribunal. As drafted, Article 1 was too broad and a reader might be led to think that it was "settlement" that required consent, whereas, obviously, it was "recourse to" settlement which was the issue. Article 1 might, to meet this point, thus read "Judicial settlement of disputes, whether between two States or between more than two States, requires the consent of both or all States concerned".

Sir *Elihu Lauterpacht* viewed with regret the action of the Institute, which, in his view, should be a leader of international legal thought, in offering to restate the principle of consent. Consent was a fundamental requirement, but that requirement was on the wane, and such a trend should be encouraged by the Institute. To restate the principle, when not needed, was unhelpful. Furthermore, as drafted, in his view, Article 1 was an error. Article 1 was unnecessary in the Resolution. The Resolution should rather identify the contexts when consent was *not* necessary, for example, where a third party is a party to a treaty being examined by a tribunal. One could also argue that consent was not necessary where, for example, a third-State asserted its legal interests in the case under examination. He proposed the deletion of Article 1.

Mr *Feliciano* considered that if Article 1 was to be retained in roughly its current form, the reference to the need for the consent of "all States concerned" might, by preference, be restated as the need for the consent of "all States parties to the dispute concerned".

M. *Pierre Lalive* s'étonne que cette disposition parle du règlement judiciaire des différends entre des Etats alors que le titre et d'autres passages du projet de résolution évoquent les différends impliquant plus de deux Etats, ce qui n'est pas la même chose. Il serait heureux de connaître la position du Rapporteur à ce sujet.

Mr *Franck* had the same concerns as Sir Elihu Lauterpacht. In his view it was not the case that, currently, all jurisdictions, the ICJ included, required the consent of States. It was theoretically possible for the Security Council to order two States to present their dispute before the ICJ; in addition, Article 36(2) acceptance effectively removed the need for individual consent for the submission of disputes to the ICJ, and granted the Court automatic jurisdiction. Unless one were dealing with a highly trained reader, without a study of the *travaux préparatoires* to Article 1, as drafted, he considered this Article gave out misleading signals.

He proposed a redraft as follows: "Jurisdiction to achieve judicial or arbitral settlements of disputes, whether between two or more States, normally results from the general or specific consent of the States concerned". Nonetheless, he considered that Article 1 might be deleted without adversely affecting the overall work of the Commission.

The Rapporteur had the impression that the Members had somewhat misunderstood the import of Article 1. In his view, this article never meant that consent must always be given in every concrete case. Obviously, there were cases of disputes dealt with by tribunals under an optional clause or arising under treaties providing for resolution of disputes in general terms. As a result, Article 1, in context, could not mean that consent was necessary in every concrete case. What Article 1 was intended to address was the case where there was *no* existing statement in any relevant instrument to the effect that consent for participation by a third-State in the resolution of disputes was necessary. The point could be clarified, however, as the Commission had not considered cases of *ad hoc* resolution of disputes as even in issue.

As the whole text of the Resolution was based on acceptance that consent was necessary - otherwise the references to "indispensable party" were not understandable - he considered that it was not possible to excise Article 1. The same considerations applied with regard to Article 2. The current draft of Article 1 represented the general situation concerning judicial and arbitral settlement of disputes in the present international legal order, but, obviously, had consequences more generally.

Mr *Shahabuddeen* was led to agree with the Rapporteur that the whole document hinged on the principle of consent. Two instances had been given of litigation where consent was apparently absent: one concerning the Security Council ordering two States to litigate, the other where a State asserted its legal interest in the subject matter of the litigation.

It could be argued that both such cases were examples of *implied* consent. To take the former example, one could say that in the Statute of the ICJ, whilst two States were free to consent to litigate over a *res*, if the *res* belonged in reality to a third-State, then, for the resolution of the dispute in question, the consent of that third-State was also required. This was, in his opinion, a case of implied consent, not of an absence of consent. As to the second example, it could be argued that States which were subject to the Charter had impliedly agreed to the jurisdiction of the ICJ in such a case. As a result, he would urge, in fact, retention of the principle that consent be required for all international litigation.

Mr *Rosenne* expressed his full appreciation of the major points of substance made by Mrs Higgins, which should, in his opinion, be taken into account. He wished to propose an alternative text to reflect those points, for the consideration of the Commission: "The consent duly expressed of the States concerned is the basis for the jurisdiction of every international court and tribunal to settle a dispute between two States or more than two States". He wished to stress the first four words so as to take on board the comments of Mr Shahabuddeen on "implied consent".

Mr *Broms* referred to the wording of the title of the Resolution "Judicial and arbitral settlement of international disputes involving more than two States" and noted that in fact all reference to the word "arbitral" was dropped completely after the title. Article 1 should, in fact, make reference to "arbitral" settlement. He supported Mrs Higgins' proposal, with an adjustment to take account of the suggestion of Mr Rosenne.

Le *Président* relève que cette observation rejoint l'intervention de M. Caflisch. Le projet de résolution parlera de règlement juridictionnel ou rappellera le règlement arbitral.

Mr *Lowenfeld* wished to raise a question of substance following Mr Franck's comments. Suppose one had, as arose in the recent case of *Iran v. US*, the issue whether a particular dispute was within the scope of a particular treaty, the case in point being the *traité d'amitié*. The US had submitted that the subject matter of the dispute was unconnected with the treaty. The ICJ held, however, that the treaty had not been abrogated and that the subject matter of the case was properly to be considered within the scope of the treaty. What then should happen where a third-State wished to participate in the proceedings? He wondered whether the consent of both States was required, and, if so, did the State originally contesting jurisdiction have a further chance to block participation by the third-State. He invited comments from the Commission on this issue.

Mr *Dinstein* supported the Rapporteur's position, and was in no doubt that consent was required in all cases of international litigation between States. Article 1, as presently phrased, including the words "requires the consent" of all States concerned would, however, give a false impression that consent was required as a condition to the concrete litigation. He proposed an alternative wording along the lines that "*au fond,* jurisdiction has to be derived from explicit or implied consent". The word "derived" would cover cases such as had been raised regarding the Security Council, where consent was in fact "explicit", in that ratification of the UN Charter amounted to acceptance of the binding powers of the Council.

Mr *McWhinney* regretted that, as a member of the Commission, he had been unable to participate as fully as he would otherwise had wished, but recalled that the mandate of the Commission was to deal with third party intervention and cases of "indispensable parties". Consequently, he questioned whether the Resolution should concern itself with any wider issues. For this reason he wondered whether Article 1 should be retained.

Mr *Amerasinghe,* he too a member of the Commission, expressed his agreement with those Members who had stated their view that ultimately consent was the basis for the assumption of jurisdiction over disputes between States. However, when one came to the case of intervention, he

queried whether consent was required in this particular circumstance. In his view, Mr McWhinney's point was apposite, and he also wondered whether one was going too far in looking at the case of disputes between two States alone. If, on the other hand, the requirement of consent was expressly to be rejected, it should be stated upon what basis jurisdiction was in fact, in such a case, to be assumed by the tribunal.

The Rapporteur wished to comment on one particular point. If one considered Article 14, one could see that it clearly addressed the case of "intervention". In its first sentence, it stated that if a State accepted the jurisdiction of a court or tribunal in a relevant text, including the Statute of the ICJ, then they had accepted in principle that intervention was possible. Hence, in context, this particular element was clear and a separate jurisdictional link was not necessary for the tribunal to be seized of the case. The points made by the Members were covered by the text of the Resolution.

Mr *Brownlie* was concerned that the current text of Article 1 would distract attention from the core of the debate. Although he agreed with the general proposal presented by Mrs Higgins, if the Institute appeared to overturn the principle of consent, he considered that that might result in a great deal of misunderstanding by persons reading the Resolution. It was true that Article 1 was stated in general terms and that it begged some important questions, in his mind usefully, such as, what the nature of consent was. But, in his opinion, it was not necessary to elaborate any further on the wording of Article 1.

Mr *Schwebel* considered that the Rapporteur was entirely right to refer to Article 14, which was itself correctly worded, but wondered whether or not that article might in fact provide support for deleting Article 1. The latter either expressed a truism, accepted by all, and not necessarily connected with third party intervention before the ICJ, or, otherwise, placed undue stress on the requirement of consent.

Sir Ian Sinclair supported the intervention of Mr Rosenne. He himself had no doubt that the rephrasing the latter had suggested would produce the required solution. The question as to the nature of consent could be left aside. It was clear to all that consent to the jurisdiction of the ICJ, for example, could be indicated in various ways, whether, for example, by way of an optional clause, or by a general treaty provision. He was not troubled by reference to the term "consent". There was no doubt in his mind that consent was required whether for the settlement of disputes between two States or "involving two or more States". One could clearly initially have a dispute between States, but later involving more than two States. Perhaps some minor adjustment to the text proposed by Mr Rosenne might reflect this latter consideration.

Sir Kenneth Keith wished to take up a point made by Mr Amerasinghe, and referred to Article 3 of the Preamble. This reflected the words proposed by Mr Dinstein, and in his view no further reference to the requirement of consent was needed.

Mr *Gaja* supported Sir Kenneth Keith's intervention. Mr Rosenne's proposal was identical to paragraph 3 of the Preamble, which, in his view, could alone deal with this point.

Mr *Meron* wished to indicate his support for the suggestions of Sir Kenneth Keith and Mr Gaja.

M. *Verhoeven* appuie le maintien de l'article 1, quelle qu'en soit la forme exacte, afin que le projet reflète l'état du droit positif. En effet, l'article 3 se réfère à une pratique de la Cour internationale de Justice selon laquelle l'intervention ne dépend pas d'un consentement spécial, compte tenu notamment des articles 62 et 63 du Statut de cette juridiction. En l'absence de l'article 1, on pourrait déduire de l'article 3 une règle générale selon laquelle les parties principales et les intervenants n'ont pas à exprimer de consentement devant les tribunaux dont les statuts ne comprendraient pas une disposition analogue au Statut de la Cour internationale de Justice. Il convient d'éviter une telle conclusion.

Mr *Makarczyk* agreed that Article 3 of the Preamble was contained in Mr Rosenne's suggestion, but, rather than leave the point in the Preamble, he proposed that that article of the Preamble become itself Part 1, Article 1.

Mr *Doehring* disagreed, as it was not clear whether consent was fully provided for or not by that proposed solution. He suggested an alternative text : "Judicial settlement of disputes between one or more States produces effect only on those States having accepted jurisdiction". Hence, only those two States would be bound, and a third-State intervening would not be bound. However, if the full jurisdiction of the tribunal was accepted by the third-State, then binding effects of the judgment would extend to that third-State.

Mr *Sohn* suggested that the problems identified in earlier interventions could perhaps be solved with a complete restatement: "These principles shall apply where, in a dispute between two States, one or more States get involved".

The *Rapporteur* was unable to accept the last suggestion. The whole sentence in issue provided an indispensable statement on the consequences of needing the consent of the parties involved. The only question was whether reference in the Preamble was sufficient for the purposes of the Resolution. He had gained the impression that the opposition expressed against Article 1 also extended to parts of the Preamble. For the Commission, it was essential to include in the operative part of the Resolution the essential basis for a third party to become involved in disputes before tribunals, *i.e.* consent.

Le *Président* estime que le large tour d'horizon auquel l'Assemblée vient de procéder facilitera les réflexions de la Commission. Il suggère de passer à l'examen de l'article 2.

Mrs *Higgins* recalled her suggestion that the key principle was that set out at the end of Article 2. In her view, a redraft might assist : "It is for every court or tribunal to decide on what conditions or under what procedure

a third-State may intervene in a dispute between two States or become a party to such a dispute, bearing in mind the instrument under which such court or tribunal functions".

Le *Président* appuie Mme Higgins. Les premières phrases de l'article 2 n'énoncent pas vraiment des principes. L'essentiel se trouve à la fin de cette disposition et devrait figurer au début de celle-ci. Le texte pourrait être allégé.

M. *Conforti* soutient la proposition de Mme Higgins. Il se demande s'il ne faudrait pas ajouter au texte qu'en cas de doute (ou le cas échéant) on peut se référer, à titre d'interprétation subsidiaire, à des principes généraux dégagés d'un examen comparatif des statuts et règlements des tribunaux internationaux. L'analyse pourrait ainsi reposer sur trois sources différentes : les statut et règlement du tribunal concerné, les principes communs aux statuts et règlements des tribunaux internationaux et le Statut de la Cour internationale de Justice. Une référence explicite au Statut de la Cour serait sans doute inutile si le projet mentionnait déjà les statuts et règlements des tribunaux internationaux.

Mr *Meron* had some difficulty with the language of Article 2 in that it was descriptive rather than normative. This drawback could, in his view, be eliminated by adopting Mrs Higgins' suggestion, which he supported strongly.

The *Rapporteur* considered, while welcoming Mrs Higgins' suggestion, that, in its first part, it stressed the autonomy of each court and tribunal to admit third parties or a third-State. However, it was only at the end that reference was made to "taking account of relevant texts". In his view, these texts were to be considered first, and it was only thereafter that the Resolution was intended to apply. Mrs Higgins' text seemed to imply a complete freedom on the part of tribunals, which perhaps was not what was really intended.

M. *Abi-Saab* juge important que le projet se réfère aux principes généraux de procédure internationale, car tout le droit de la procédure internationale s'est développé par la pratique et à travers de tels principes. Cela dit, on pourrait sans doute formuler le projet d'une manière plus élégante. On pourrait préciser, par exemple, que les principes généraux de procédure servent de source subsidiaire si le statut de la juridiction concernée présente une lacune.

Mr *Dinstein* was of the view that it was necessary in this matter to balance the *lex generalis* with the *lex specialis*. The Rapporteur had suggested that one could have recourse to general principles, but nevertheless one could still apply the texts of the relevant instruments of the court or tribunal. Mrs Higgins proposed recourse to the *lex specialis*. He suggested that we could start with the *lex specialis*, adding that nevertheless there was room for a *lex generalis* either *de lege lata* or *de lege ferenda*. Some general principles have already begun to emerge and others should be developed by the *Institut :* after all, this was in part the mission and the *raison d'être* of the *Institut.*

Mr *Lowenfeld* supported the position put forward by Mrs Higgins and Mr Dinstein but found himself unable to agree with that of Mr Conforti. To look to the Statute of the ICJ might be of use in considering treaties of general participation, but was less relevant when one came to bilateral treaties or treaties involving restricted numbers of States, such as NAFTA. Mr Conforti's more general suggestion was therefore of less relevance to a case such as the latter.

M. *Caflisch* partage le point de vue de M. Abi-Saab. Il est bon et même essentiel de maintenir dans le projet une référence à des principes généraux. M. Caflisch serait flexible quant à l'endroit d'une telle mention. Il souligne que, dans sa formulation actuelle, le projet privilégie l'intervention par rapport aux autres formes de participation. Il souhaiterait que l'on parlât plutôt des "formes de participation des Etats tiers, y compris l'intervention". Cette observation vaut aussi pour les articles 3 et 4 de la Partie I.

Mr *Rosenne*, with regard to the last remark, wished to raise for consideration one particular instance of state intervention not mentioned in the Resolution. He was not suggesting that such a case be included, but rather that thought be given to it. The case in point was that of Yugoslavia's participation in the presentation of evidence in the *Corfu Channel* case. Thus a third-State, with the agreement of the Court and the States involved, submitted evidence and allowed the experts appointed by the Court to visit its territory. This was a further form of third-State participation.

Mr *Kooijmans* suggested a text which he thought might meet some of the concerns expressed during the afternoon: "Intervention and other forms of third-State participation are governed by the Statutes and Rules of international courts and tribunals. Therefore the interpretation of the relevant texts is the starting point in all cases including those involving more than two States. Although the rules of each institution concerning jurisdiction and procedures may possess specific and unique features, some general principles and similarity of provisions can be identified".

Le *Président* exprime la conviction que le Rapporteur et la Commission s'inspireront des débats et qu'ils prendront en compte la formulation proposée par M. Kooijmans. Il suggère de passer à l'examen de l'article 3.

Mr *Frowein* considered, in view of the comments made in the morning, that perhaps Article 3 might be clarified by reading: "In case of doubt the principles concerning intervention and other forms of third-State participation valid for the International Court of Justice may, if appropriate, also be applied to proceedings before other international courts or tribunals". The words in the current text "can also be applied", were, in his view, stronger than was necessary.

M. *Verhoeven* est embarrassé par deux aspects de cette disposition. Le premier est lié à la notion de "principes" qui est utilisée. Que signifie ce terme ? Comment distingue-t-on les principes des autres concepts employés dans la Partie I, tels les "principes généraux" ou les "similitudes" ?

Envisage-t-on les dispositions du Statut, la jurisprudence de la Cour ou les deux choses ? Le deuxième problème tient au fait que, selon le projet, les principes relatifs à l'intervention et aux autres formes de participation d'Etats tiers valables devant la Cour internationale de Justice peuvent être appliqués devant d'autres cours ou tribunaux. Cela signifie-t-il qu'une telle application serait interdite si on ne la permettait pas expressément ? La règle posée ne vaut-elle que pour les tribunaux autres que la Cour ? Veut-on simplement dire qu'il est bon pour les tribunaux de s'inspirer, le cas échéant, de la pratique d'autres tribunaux internationaux pour régler les questions qui ne sont pas expressément traitées dans les statuts qui les régissent ? Il serait embarrassant de paraître donner, en la matière, une prééminence à la Cour internationale de Justice.

Le *Président* considère que le projet ne confère aucune prééminence à la Cour. Il consacre simplement une faculté ("les principes ... *peuvent* être appliqués") en cas de doute.

M. *Conforti* soutient M. Verhoeven. On pourrait sans doute trouver une formulation qui ne donne pas l'impression de conférer une prééminence absolue à la Cour internationale de Justice.

Mr *Müllerson* queried the role of Part 1, which spoke of "Principles" whereas only Article 1 might be considered as a principle. Whilst in his view in Part II, Article 6 itself expressed a principle, there were no general principles, save in Article 1, set out in Part I.

M. *Pierre Lalive* soutient M. Verhoeven. L'article 3 est ambigu. Sa portée doit être clarifiée. On ne sait pas très bien si cette disposition se réfère à la pratique de la Cour, dont plusieurs orateurs ont déjà souligné qu'elle est contestable et incertaine, ou à des principes généraux du droit de procédure, qui découlent du fait que la quasi-totalité des Etats connaissent l'intervention dans des situations de ce genre. L'orateur rappelle avoir essayé de convaincre la Cour internationale de Justice que Malte avait le droit d'intervenir dans la procédure opposant la Libye et la Tunisie – sans succès d'ailleurs –, notamment en invoquant l'existence de principes généraux de droit, au sens de l'article 38 du Statut de la Cour, en matière de procédure d'intervention.

Mr *Oda* wished once more to raise a question he had put forward earlier. He was unable to understand what was meant by "other forms of third-State participation" (wording also to be found in Articles 2 and 4) other than the case of "intervention". In that context, Article 3 referred expressly to the International Court of Justice. He doubted whether there existed any principles governing other forms of third-State participation before the International Court of Justice. As to the suggestion made by one of the confrères that the presentation of evidence was one such "other form of third-State participation", it would, in Mr Oda's opinion, be better to make express mention of that point in the Resolution.

Mr *Shahabuddeen*, as a member of the Commission, acknowledged that some of the points made in respect of the language of Article 3 were well-founded. Mr Schwebel was correct to draw attention to the problems in the first line, which created the illusion that there existed certain established principles regarding intervention before the ICJ. As Mr Schwebel had pointed out, there was, rather, a lack of coherence in the ICJ case law on this point.

Turning to the issue raised by Mr Oda and the reference to "other forms of third-State participation valid for the International Court of Justice", he was himself also unable offhand to isolate any example of "third-State participation" in the ICJ other than intervention.

In his opinion, the Commission could consider rewording the text to address the problems posed by the language in Article 3. Perhaps the text might run along the lines of: "The developing principles concerning intervention in the International Court of Justice should be taken into account in instituting proceedings before other international courts and tribunals".

Mr *Franck*, expanding on the problem raised by Mr Oda, thought that reference to third-State participation was able to cover a multiplicity of probably unrelated situations, and for this reason, he suggested the text should address separately the three cases where such issues arise. As Mr Oda had suggested, the first case was where a State considered its interests were

at stake ; the second where a State was a litigant but opposed third party intervention on the ground that it would clutter the litigation with irrelevant or unwanted factual situations ; and the third was where one had what the Commission had categorized as the "essential party" situation. These were all very different cases of third-State participation and required very different rules.

Le *Président* suggère de passer à l'examen de l'article 4.

Mr *Schachter* expressed his puzzlement with Article 4 as, in his opinion, when *erga omnes* obligations were in issue, questions of legal interests arose which required very different treatment to those concerning other forms of third-State participation. He queried whether, in the context of the Resolution, Article 4 was necessary.

Mr *Meron* agreed with Mr Schachter. He personally had no quarrel with the content of Article 4, but appreciated the position put forward by the Rapporteur so as to avoid prejudicing any position the Institute might adopt with respect to *erga omnes* obligations. Article 4, as drafted, stated the obvious. The Resolution, however, did not seek to distinguish between different categories and obligations for any purpose, and hence the Resolution did not need to single out *erga omnes* obligations. If these obligations were to be addressed in the Resolution at all, they should be dealt with in a more profound manner. However, in his view, as there is no time available for this purpose in the context of the Resolution, Article 4 should be deleted or moved to the preamble.

M. *Pierre Lalive* rappelle, dans le sens de l'observation de M. Meron, les objections présentées par M. Kooijmans lors de la séance précédente. Il y ajouterait un argument en faveur de la suppression de cette disposition. Elle tient de la théorie générale du droit. Avec l'intervention, on est dans le domaine du droit de la procédure. En revanche, avec les obligations *erga omnes*, on est dans le droit matériel.

Mr *Frowein* was very reluctant to follow the three previous speakers. It was clear that *erga omnes* obligations did exist, but it was far from clear what consequences followed from their existence. To say that in cases where *erga omnes* obligations were in issue, intervention "may be" possible, would, in his opinion, be extremely helpful as it would signal that the Institute was aware of new categories of obligations arising in international law.

Mr *Shahabuddeen* would not be unhappy if Article 4 were deleted, but wished to say some words in support of its retention. There was an important point that could be made as to the distinction between the different nature of different obligations, and the competence of States to litigate over those obligations. Article 4 reflected a popular impression, even if partial, that because an obligation was in the nature of *erga omnes*, it therefore followed that States could litigate over them without regard to the requirement of consent. The text of Article 4 revived that false impression.

Mr *Zemanek* wished to recall the point he had made earlier, that, as long as it remained unclear whether the violation of an *erga omnes* obligation amounted to one or other of the types of intervention referred to in Articles 10(a) or (b) of the Resolution (giving rise to the different consequences set out in Articles 12 and following of the Resolution), he supported the suggestion made by Mr P. Lalive to delete Article 4.

Mr *Lipstein* commented that, as a private international lawyer and a comparative lawyer, he had looked at Article 4 as the expression of a substantive rule in a procedural context. As a result, he was concerned by the reference to *erga omnes* obligations. He wondered whether the ability to intervene could be stated to apply to any parties interested in the proceedings.

Mr *Rosenne* recalled that, in his correspondence with the Commission, he had set out his own hesitations with respect to Article 4. Having heard the explanations provided by the Rapporteur, and in the light of the discussion, he was of the view that Article 4 could be retained, subject perhaps to some linguistic modifications.

Mr *Kooijmans* said that, having listened to Messrs Frowein, Shahabuddeen and Rosenne, he was confirmed in his opinion that Article 4 should be deleted. In his view, they were entering upon a matter of such importance that any reference to *erga omnes* obligations would only provoke confusion. As these obligations were to be addressed by another Commission, the Institute should not pronounce on them before that Commission had reported its conclusions.

Mr *Gaja* expressed his support for Mr Kooijmans' proposal. He felt that the question of *erga omnes* obligations required a deeper study. In his view, Article 4 served little purpose as it did not say whether, in the case of *erga omnes* obligations, intervention was admissible or not.

Mr *Dinstein* favoured the deletion in Article 4 of a reference to *erga omnes* obligations. However, he suggested that reference to *erga omnes* obligations be included under Article 9. That provision postulated intervention by a third State with a view to protecting its interests. It is appropriate to add there that intervention could also be made in order to protect the interests of the entire international community, namely, where obligations *erga omnes* are concerned.

Sir Ian Sinclair supported entirely Mr Kooijmans' suggestion and that of others to delete Article 4. There was already a specific mandate for a Commission to examine this area. Its in-depth investigations should be available to the Members before comment was made on such a matter. He was unable therefore to support Mr Dinstein's suggestion.

Mr *Doehring* was firmly of the view that *erga omnes* obligations were of extreme importance. He posed the question for the Rapporteur's consideration, whether, when one State contended that another State's actions affected an *erga omnes* obligation, would all other States who might possibly be defendants in such a case be able to intervene ?

M. *Torres Bernárdez* est pour une référence aux obligations *erga omnes*, dans l'Article 4 ou dans une autre disposition du projet, et ce pour les

raisons exposées par MM. Rosenne, Shahabudden, Frowein et d'autres orateurs. Il est convaincu que de telles obligations ont un lien avec l'objet du projet de résolution, car elles présentent des particularités procédurales, en soulevant entre autres les questions de l'intérêt pour agir et de l'indivisibilité.

M. *Verhoeven* est favorable à la suppression de l'Article 4, qui n'a pas de raison d'être. Que l'obligation soit *erga omnes* ou non, il n'en demeure pas moins que la procédure est engagée par un Etat contre un autre Etat et que les Etats qui ne sont ni demandeurs ni défendeurs sont des tiers. Leur intervention sera nécessairement soumise, par exemple, aux règles de l'article 62 ou de l'article 63 du Statut de la Cour internationale de Justice. Rien dans le projet de résolution ne suggère le contraire. Si l'on veut tenir compte des implications éventuelles de cette notion dans le domaine considéré, on peut dire, dans le préambule du projet de résolution, que cela ne préjuge pas le contenu donné à des obligations *erga omnes* ou la portée de celles-ci, compte tenu notamment des travaux poursuivis par l'Institut.

Mr *Meron* considered that any substantive reference to *erga omnes* obligations in the body of the Resolution should require further study and reflection than could practically be offered by the Members in the time remaining. He supported Mr Verhoeven's position and also considered that appropriate mention might be included in the Preamble.

Mr *Owada* said that he had been left with the impression, by the discussion on Article 4, that there was a significant divergence of views. In his view, there remained too little time to address this matter adequately. He agreed with the two previous speakers that this was a matter to be addressed in a profound manner, but was of the opinion that no reference should be made to it in the Preamble.

Mr *Lipstein* wished to stress that, when he had spoken earlier, he had intended to say that one was dealing here generally with the particular case where *one* State was able to intervene, whereas, in the circumstance of *erga omnes* obligations, one could be dealing with an exceptional situation where intervention was of right for any State concerned.

Mr *Zemanek* pointed out that a State intervening in proceedings where obligations *erga omnes* were at stake was not necessarily doing so to protect its own interests but could be acting to protect the interest of the international community as a whole.

Le *Président* constate la persistance d'une profonde division entre les membres de l'Assemblée. Une première solution préconisée est la suppression pure et simple de l'article litigieux. Une seconde tendance plaide au contraire pour son maintien, moyennant un éclaircissement substantiel de la formulation. Une troisième option serait de déplacer l'article dans le préambule, tout en améliorant sa rédaction. Le Président demande au Rapporteur de tenir compte de cette variété des opinions.

Le Président ouvre ensuite le débat sur les articles 5 et 6.

M. *Matscher* estime l'expression "intérêts juridiques identiques" difficilement conciliable avec le souci de faciliter les requêtes conjointes. Il propose donc une formule plus souple, comme celle d'intérêts juridiques "identiques ou similaires".

Mr *Rosenne* remarked that Article 5 applies to the applicant State. He wondered what the implication of the rule would be in situations where there are two respondents, as well as situations where there are two applicants. He stated that both eventualities should be covered.

The *Rapporteur* pointed out that Article 5 covers only situations in which two or more States file an application with a court. Article 6, on the other hand, answers the question posed by Mr Rosenne.

Mr *Rosenne* suggested combining Articles 5 and 6 to clarify their meaning.

Mr *Lowenfeld* noted that the word "between" can cover more than two parties, so that it was not clear whose consent is required by the rule.

Mr *Dinstein* wondered why Part II of the Resolution was titled "Disputes involving three or more State Parties" rather than "more than two", which is the formulation used in the rest of the text.

Mr *Shahabuddeen* asked how Article 5 could apply to a situation where State A sues States B and C, as there could be no possibility of using the phrase "consider applying jointly to an international court or tribunal". That phrase refers to situations where there are two applicants. An applicant State could sue two States in separate actions or in a single action against two States.

Mr *Schwebel* stated his agreement with Article 6 as currently drafted. Two respondent States could not be forced to join in a single action as defendants. It is their choice whether to accept such a situation, a matter related to the nature of their interests and issues of strategy.

Mr *Franck* asked what the goal of Articles 5 and 6 was. On the one hand, Article 5 urges two or more States to join in bringing an action whenever it is reasonable. On the other hand, Article 6 takes no position as to whether there should be a joinder of defendants. He felt that there was a need to clarify the thrust of Article 6.

Mr *Frowein* wondered if it would not be necessary to make clear that there are exceptions to the rule embodied in Article 6, as exemplified by the *Nauru* and other cases. He suggested inserting, instead of "in principle", the words "except when the object of the dispute dictates otherwise".

The *Rapporteur* expressed his support for the point made by Mr Schwebel to the effect that neither applicants nor defendants could be compelled to join in the same case. He noted, however, that Article 7 states that a court may join cases in special circumstances, but that there must be a decision of the court to force joinder.

Mr *Lowenfeld* reflected that Article 6 was not about joint pleadings, but about whether an applicant (claimant) could bring two or more defendants into a single suit. It should be for defendants to apply to separate if joint action might prove prejudicial to their interest.

The *Rapporteur* referred to the case of Yugoslavia against NATO States where the International Court of Justice had to decide first whether there was any basis for jurisdiction in each case individually. Only as a next step, if the Court did find that it indeed had jurisdiction, could it then consider the question of whether it had the power to force a joinder. The answer in that case, as in all other cases, was that it depended on the circumstances.

Le *Président* appuie les propos du rapporteur de manière générale. Concernant le cas spécifique de l'affaire qui vient d'être évoquée, il précise néanmoins que la Cour n'était alors qu'au stade des mesures conservatoires. Elle ne pouvait donc se prononcer sur des questions de fond telles que la jonction des différentes instances.

M. *Ress* se demande dans quelle mesure l'article 6 couvre le cas évoqué aux paragraphes 18 à 20, où une partie indispensable refuse de donner compétence à la juridiction saisie.

The *Rapporteur* answered that paragraph 20 does try to cover this situation in recommending that indispensable parties become a party to the proceedings. If indispensable parties are not willing to join the proceedings, then Article 20 cannot apply.

Mr *Franck* agreed with the question formulated by the Rapporteur but could not follow the answer. If no specific answer can be given, then perhaps the Resolution should stay silent in this respect. He wondered whether there was indeed anything special to say on that issue.

The *Rapporteur* answered that Article 7 does try to say something specific on this point. According to the rules of the European Court of Human Rights, cases can be joined, as demonstrated by the proceedings against Spain and France with respect to Andorra, which were brought as a single case against the two States. He doubted whether it was necessary to agree that these States could have forced a separation of the case. Again, he insisted on the need to take into consideration the particular circumstances of each situation.

Le *Président* ouvre le débat sur les articles 7 et 8.

Mr *Broms* suggested that Articles 7 and 8 should be combined in the following way:

> "7. Under the relevant texts, including the Rules of the Court, the court or tribunal may join pending cases or order common proceedings without a formal joinder. The procedural consequences should be determined by the court or tribunal with due respect for the requirements of a fair procedure."

Mr *Frowein* noted a tension between Article 6 on the need for State agreement and the joinder rule in Article 7. He indicated that, clearly, Article 7 should be read to mean that the agreement of the parties was not required.

The *Rapporteur* agreed that Article 7 did not require the consent of the parties for the court to force a joinder. He pointed out that the reference to the "Rules of the Court" was not meant to refer exclusively to the International Court of Justice but, more broadly, to international courts and tribunals generally.

Mr *Rosenne* wondered whether replacing the word "Under" at the beginning of Article 7 by "Subject to" would not clarify the provision.

Mr *Franck* suggested that the title to Part II be changed to "Joint Actions, Joinders and Common Proceedings".

Mr *Lowenfeld* agreed with an earlier comment by Mr Franck to the effect that Articles 2 and 4 have quite different purposes. He then alluded to the meaning given to the expression "indispensable parties" in United States rules of civil procedure. If an indispensable party could not be brought into a case, the action must be dismissed; if the third party was merely "necessary", it should be brought in but if that was not possible the action could nevertheless continue. The doctrine of "indispensable party" is thus a device to be used by way of defense.

Le *Président* ouvre le débat sur la troisième partie du projet, en commençant par l'article 9.

M. *Jean-Flavien Lalive* s'interroge sur l'opportunité de maintenir l'article 9 qui ne fait qu'énoncer une évidence.

M. *Matscher* suggère dans ces circonstances de déplacer dans le préambule cet article qui contient non une règle spécifique mais un principe général.

Mr *Oda* noted that Articles 9 to 16 stated rules not requiring examination. In Part III, only Article 17, in fact, represented a new contribution. He therefore questioned whether Part III, with the exception of Article 17, should remain in the Draft.

The *Rapporteur* responded by noting that Articles 14 and 15 address difficult questions on the issue of the binding effect of a decision concerning the admissibility of the intervention. In his opinion, therefore, Part III was important and could not be deleted. In general, this part of the Resolution brings together several aspects of the law on intervention, even if some of them are clear and uncontested. Article 9, for its part, does not represent accepted principles of international law but rather the Commission's wish to encourage more interventions.

M. *Pierre Lalive* appuie la proposition consistant à déplacer l'article 9 dans le préambule.

Mr *Owada* suggested a new way of introducing Article 9 with the wording "In order to protect its interest, a third State may intervene to ..." and wondered whether that would not better capture the Rapporteur's intention.

The *Rapporteur* remarked that the suggestion had a thrust quite different from the existing Article 9. That being said, he did not want to overextend discussion of this article as it reiterated a principle already mentioned in the Preamble. Although he favoured retaining the article he would not insist if that were to jeopardise discussion of the remainder of the Resolution.

Le *Président* propose que l'Assemblée procède à un vote indicatif sur ce point. Une majorité se prononce pour le déplacement de l'article 9 dans le Préambule. Le président ouvre ensuite le débat sur l'article 10.

M. *Conforti* éprouve quelque difficulté à la lecture de l'article 10. Si l'objet est de distinguer de manière générale deux types fondamentalement différents d'intervention, il se demande quelle est l'utilité de se référer aux articles 62 et 63 du Statut de la Cour internationale de Justice. M. Conforti rappelle que la jurisprudence de la Cour est trop incertaine pour être érigée en modèle exclusif. Il préférerait dès lors une formule plus neutre, comme "la présente résolution s'applique à deux types d'intervention".

Le *Président* abonde en ce sens.

M. *Caflisch* appuie également la position de M. Conforti. Revenant sur le sort à réserver au paragraphe 9, il estime inopportun son déplacement dans le préambule. Ce paragraphe contient une définition et il n'est pas usuel de placer des définitions dans un préambule. Il y a donc lieu d'opérer un choix entre la suppression de l'article 9 ou son maintien pur et simple.

M. *Verhoeven* se demande si la suite de la résolution prend suffisamment en compte la distinction entre les deux types d'intervention opérée à l'article 9. Hormis les articles 12 et 13, il ne parvient pas toujours à déterminer si les règles énoncées sont valables seulement pour l'un ou l'autre d'entre eux.

Mr *Zemanek* observed that Articles 10 and 11 did not cover obligations *erga omnes*. For example, under the mandatory jurisdiction of the International Court of Justice according to the Vienna Convention on the Law of Treaties to decide issues related to *jus cogens,* is a third State to become a party or an intervenor according to Articles 10 and 11? He thought that the Resolution could not be silent on this point or, at the very least, that it should state that it was without prejudice to the application of obligations *erga omnes.*

The *Rapporteur* accepted the suggestion to omit the reference to the Statute of the Court in Article 10, and to simply retain the definitions of the various types of intervention. He thought that the Resolution could retain the quotes in Article 10 (a), as many statutes used this wording. Article 10 describes the two types of intervention which are now the most important. There may be other types of intervention which are not as important and which need not be covered here. He felt that Article 4 could not be retained in its present form as it caused too many misunderstandings vis-à-vis obligations *erga omnes*. Perhaps something to the same effect could be added to the Preamble.

Mr *Meron* hoped that it would indeed be possible to turn Article 4 into a preambular article. He recalled Mr Zemanek's comment on the difference between intervention by a third State to protect its own interest and that made to protect the interests of the international community. Every State had an interest in protecting certain fundamental norms of international law. He thought that Article 10 as it stood was broad enough to cover both alternatives and that there was no need for specific reference to the interests of the international community. In his view Article 10(a) referred to customary norms and Article 10(b) to conventional norms.

Mr *Rosenne* noted that the provision should not convey the impression that no other form of intervention existed. He suggested that Article 10 could start with the words "Except where otherwise provided for in the instrument creating the court or tribunal" so as to not foreclose the possibility of other types of intervention.

Mr *Oda*, in referring to Article 10(b), stated that there should be some limitation to the application of Article 63 of the Statute of the International Court of Justice because, in contrast with the situation that had prevailed in the early period of the International Court of Justice, there were now a great many of multilateral treaties. This danger was well illustrated by the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* and the cases concerning the *Application of the Vienna Convention on Consular Relations* (the pending *LaGrand* case and the discontinued *Breard* case), in which a large number of States could have intervened. He wondered whether the Commission had considered that problem.

Le président ouvre le débat sur l'article 11.

M. *Pierre Lalive* continue à s'interroger sur les suites à donner à la distinction énoncée au paragraphe 10. L'article 11 constitue un excellent exemple à cet égard. La règle selon laquelle l'Etat tiers "ne peut avancer de réclamations qui lui soient propres" vaut-elle pour les deux types d'intervention ? Tel quel, l'énoncé semble plaider pour une réponse affirmative, mais sans guère de motivation. M. Lalive remarque par ailleurs que la théorie générale de la procédure connaît de nombreuses formes d'intervention, comme les interventions principales et les interventions accessoires. Dans certains cas, l'intervenant peut avancer ses propres prétentions, dans d'autres il ne peut qu'appuyer la position de l'une des parties. M. Lalive ne parvient pas à déterminer si toutes ces hypothèses sont couvertes par le texte dans son état actuel.

M. *Guillaume* estime que la deuxième phrase de l'article 11 est sans doute la plus importante de tout le texte de la résolution. Tout l'édifice de la justice internationale repose sur le consentement des Etats. Il ne saurait être question de saper cet édifice en permettant à une juridiction d'étendre, à la faveur d'une requête en intervention, sa compétence à des questions que les Etats parties ne souhaitaient pas lui soumettre. Le souci de maintenir la confiance des Etats dans la justice internationale dicte donc le rejet de toute intervention active: un Etat intervenant ne peut être autorisé à présenter ses propres conclusions, mais doit rester cantonné à une attitude passive, consistant à soutenir et à étayer les conclusions de l'une des parties. Cette dernière forme d'intervention est la seule qui soit de nature à éclairer le juge, sans nuire aucunement à son autorité. Dans ces conditions, M. Guillaume appuie fermement le texte actuel de la résolution, dont tous les éléments, contenus notamment aux paragraphes 11, 14 et 17 alinéa c, sont reliés entre eux dans une même logique restrictive à l'égard de l'Etat intervenant. Il s'oppose donc résolument à ce que l'on remette en cause l'une ou l'autre de ces dispositions.

Mr *Gaja* suggested that in Article 11 the same terminology should be used as in Article 20, thus distinguishing the intervenor from a full party rather then from a party in inverted commas. Moreover, the word "dispute" should be replaced with "proceedings".

Même s'il est membre de la Commission, M. *Abi-Saab* continue d'éprouver quelque difficulté à admettre qu'un Etat intervenant ne puisse devenir une véritable partie à l'instance. Il lui semble difficile de limiter l'intervention à ce que M. Guillaume a appelé une "intervention passive". Les précédents existants concernent essentiellement des problèmes de délimitation maritime dans lesquels l'intervenant défend bien ses intérêts propres. Il existe d'ailleurs un précédent ou cette intervention "active" a finalement été acceptée. M. Abi-Saab plaide donc pour la possibilité d'admettre certaines formes, raisonnables et limitées, d'intervention active.

La séance est levée à 18 h 30.

Cinquième séance plénière
Vendredi 20 août 1999 (matin)

La séance est ouverte à 9 h 45 sous la présidence de M. *Bedjaoui*.

Le *President* ouvre le débat sur l'article 12. En l'absence de commentaires, le Président ouvre le débat sur l'article 13.

Mr *Frowein* wondered whether the third sentence was really helpful. He suggested that perhaps it should be deleted in order to frame the sentence and the rule in a positive mode.

Sir Ian Sinclair stated his preference to retain that sentence as it is important to underscore that the Court has full discretion to appreciate each application for intervention.

The *Rapporteur* agreed with Sir Ian Sinclair that the sentence was needed for the logical sequence of the provision, that is, first, an assessment of the existence of a legal interest and, second, if the Court does find a legal interest, a decision binding on the parties as well as the intervening States.

Mr *Rosenne* suggested adding to the last sentence the word "such" before "legal interest".

Mr *Feliciano* noted that the terms of the first sentence suggest that an interest of a legal nature is required independently of what the constitutive text or instrument of a court or tribunal actually provide. He pointed out that the statute or constitutive instrument of at least one international tribunal does not require an "intervenor" or third participant to have a "legal interest"

but rather a substantial interest in the subject matter of the dispute. He referred to the Dispute Settlement Understanding among the Member States of the World Trade Organization (WTO).

It was explained by Mr. Feliciano, that in the dispute settlement process of the WTO, Member States did not in practice challenge the interests of third participant Members. In the first place, the system was fairly relaxed and liberal in admitting third participant Members in any specific proceedings in the first instance. On the other hand, third participants did not, as such, become parties to the dispute. Third participants did not become bound by any decision rendered in the WTO dispute settlement process, either directly by virtue of *res judicata* or indirectly on the basis of *estoppel* or any analogous doctrine. If a third participant felt that its interests were sufficiently engaged in a particular dispute where either the complainant State or the respondent State objected to the third participant becoming a party to the dispute, the third participant could easily initiate its own proceedings. If the respondent had been involved in the earlier proceedings, and if the basic issues were the same, the panel subsequently formed could consist of the (same) persons constituting the earlier panel. The two proceedings could then be coordinated in their scheduling and perhaps, with the consent of all parties to the dispute, even be joined. In other words, the system and procedures of third Member States participation exhibited a significant degree of flexibility.

The *Rapporteur* indicated that the revised version of Article 10 underlined that the special rules of a given court or tribunal could allow for other types of intervention.

Mr *Broms* agreed with the comments of Sir Ian Sinclair and Mr Rosenne. In his view, it was both important and justified to recognise other types of intervention.

Mr *Schwebel* remarked that the second sentence refers to "the final decision" but that elsewhere the possibility was admitted that there could be intervention during other phases of the case. He wondered whether there was

an inconsistency and stated that the article should allow for intervention at other stages, for example, at the jurisdictional stage. He thought that the ambiguity flowed from the word "final" and recommended its deletion.

M. *Verhoeven* ne parvient pas à déterminer la portée précise des articles 12 et 13. Si l'objet est de préciser le sens des articles 62 et 63 du Statut de la Cour internationale de Justice, la mention du "tribunal" à la fin de l'article 12 est incompréhensible. Si, par contre - et cela est certainement préférable - il s'agit de poser des principes généraux applicables à toutes les juridictions, M. Verhoeven se demande sur quelle base on prétend étendre le champ d'application des articles 62 et 63 du Statut de la Cour.

The *Rapporteur* remarked that there were clauses similar to Article 62 in a number of other texts. If and only if a provision contains a specific rule Article 13 is discarded; otherwise that Article applies.

M. *Conforti* marque son accord avec M. Verhoeven. Encore une fois, il insiste sur la nécessité de limiter autant que possible les références au Statut de la Cour. Ce qui a été décidé au sujet de l'article 10 reste parfaitement valable pour toute la suite du texte.

Mr *Schwebel* insisted in the deletion of the word "final" before "decision", to make clear that decisions as to jurisdiction may affect the rights and obligations of third States. There was no need to extrapolate on what a decision on the merits might be.

The *Rapporteur* agreed with Mr Schwebel and underlined the links to Article 17(a) to conclude that the deletion of the final words would leave the court discretion to decide of the matter. Replying to Mr Conforti, he declared that the Commission had decided to delete the reference to the Statute of the International Court of Justice in Article 10. He added that it is useful, however, to retain that mention in Articles 12 and 13 in order to make clear that they referred only to the two types of intervention provided for by Articles 62 and 63 of the Statute.

Le *Président* ouvre le débat sur l'article 14.

Mr *Kooijmans* reflected that much had been written on the question of whether a jurisdictional link was necessary for intervention under the Statute of the International Court of Justice. He suggested changing the order of the provision in the following way:

> "Article 14. Intervention does not [normally] require the existence of a jurisdictional link between the parties to the dispute and the third State. The terms of the relevant provisions of the Statute of the International Court of Justice and of similar provisions in the instruments of other tribunals form a sufficient basis for intervention."

Mr *Orrego Vicuña* proposed adding after the reference to the Statute of the International Court of Justice the words "and similar provisions in other texts". As to the question of the need for a jurisdictional link for intervention, he thought it would be better to say that such a link was not "normally" required.

M. *Ranjeva* partage le point de vue de M. Kooijmans. L'inversion des deux phrases rendrait mieux compte de l'importance primordiale de la question du lien juridictionnel.

Mr *Shahabuddeen* wished to record his position that a jurisdictional link is basic in the scheme of the Statute of the International Court of Justice, and perhaps also in other international fora. That being said, the accession by a State to the Statute implied acceptance that the Court could grant leave to intervene to a third State whose interests were affected by a case.

M. *Abi-Saab* attire l'attention de l'Assemblée sur la distinction fondamentale qu'il convient d'opérer entre, d'une part, l'hypothèse du règlement arbitral et, d'autre part, celle du règlement judiciaire. Dans le premier cas, les parties sont les maîtres absolus de la procédure et peuvent limiter les possibilités d'intervention de façon discrétionnaire. Dans le

second, la cour ou le tribunal est assimilable à un organe de la justice internationale, ce qui explique qu'un lien juridictionnel préalable n'est pas indispensable à l'intervention. Le texte de l'article 14 devrait refléter plus clairement cette distinction.

Mr *Schwebel* agreed with both Mr Shahabuddeen and Mr Abi-Saab. As made clear by the *travaux préparatoires* of the Statute of the Permanent Court of International Justice, the problem is not one of consent but that the Statute embodies that consent. He thought that perhaps the Commission should consider the following text:

> "Article 14. Intervention does not require the existence of a jurisdictional link between the parties to the dispute and the third State beyond that contained in the Statute of the International Court of Justice and similar provisions in other relevant texts, which form a sufficient basis for intervention."

Mrs *Higgins* observed that there was a pre-issue here and it was necessary to start by asking whether Article 59 of the Statute of the International Court of Justice on the binding effect of a decision affords sufficient protection to a third State feeling that it has an interest in the matter. If it does not afford such a protection, then the third State should be allowed to intervene. Her feeling was that the jurisprudence of the Court was quite unsettled on this point but that the crux of the matter was that one could not look at the jurisdictional link without looking at the *question préalable*.

Mr *Doehring* suggested that the sentence "intervention does not require the prior existence of a jurisdictional link" would be preferable.

Le *Président* ouvre le débat sur l'article 15.

M. *Ranjeva* se demande si la notion de recevabilité ne devrait pas être précisée, pour exprimer plus clairement l'idée du caractère préliminaire de la procédure.

Le *Président* ouvre le débat sur l'article 16.

Mr *Makarczyk* suggested adding the words "to the same extent" after "The decision".

M. *Verhoeven* avoue sa perplexité quant à l'utilisation de l'expression "en principe". Il rappelle la distinction qui a émergé des débats antérieurs entre l'intervention "passive", dans laquelle l'intervenant s'abstient de déposer des conclusions propres, et l'intervention "active", dans laquelle tel n'est pas le cas. Dans le premier cas, M. Verhoeven remarque que le problème de la chose jugée ne se pose tout simplement pas. Ce n'est en effet que si l'intervenant défend sa position propre qu'il est susceptible d'être le destinataire de la décision. Par ailleurs, M. Verhoeven soulève la question de la compatibilité des articles 16 et 12 qui ne lui semble pas réglée par le texte actuel.

Sir Ian Sinclair expressed some uneasiness with the second sentence of Article 16 : the expression "in the relevant parts" was unclear and needed clarifying.

Mr *Caflisch* made the point that the goal of the provision was to describe the effect of the decision on third States. He proposed the following wording : "The decision of the court or tribunal is binding on the intervening State only in respect of the subject matter of the intervention", in French : "*La décision de la cour ou du tribunal ne lie l'Etat intervenant qu'en ce qui concerne l'intervention*".

Mr *Shahabuddeen* agreed with Sir Ian Sinclair and Mr Caflisch and noted that the problem flows from the question of the status of the intervening State. If a jurisdictional link is required and provided by accession to the Statute, then the subject matter is defined by the pleadings. The Article's second sentence provides for the binding nature of the decision for the intervening State whereas the third sentence does the same for the parties.

Mr *Gaja* observed that the first sentence tries to reflect the test of the judgment in the case of Honduras versus El Salvador, while the second sentence gives a different solution from the one accepted by the Chamber in that case. He suggested dropping the first sentence and indicating that the decision is binding both for the intervening State and for the parties, there being no reason to differentiate one from the others. Only interventions under Article 62 of the Statute of the International Court of Justice are covered by this provision, since Article 12 deals with the binding effets of judgments concerning interventions under Article 63 of the Statute.

Mr *Rosenne* reminded the members of the Institute that other types of intervention existed, and that Article 16 refers to all types of intervention. It would be useful, in his opinion, if, after an intervention had been admitted, judgments and awards indicated what the court or tribunal considered as relevant to the intervening State.

Mr *Frowein* favoured the second part of the provision holding that the intervening State is bound, but found the negative phrasing rather difficult. He would favour clarifying the principle even if the jurisprudence of the International Court of Justice was not well-settled on the issue.

Selon M. *Ranjeva*, la suppression de la première phrase de l'article 16 permettrait d'éviter toute confusion. L'orateur pense par ailleurs qu'une interversion des deuxième et troisième phrases rendrait plus fidèlement compte de la logique de la disposition. Enfin, M. Ranjeva accueille favorablement les commentaires de M. Rosenne, qui précisent utilement la notion d'"éléments pertinents". Ces commentaires devront être pris en compte lors de l'interprétation de cette partie de la résolution.

Mr *Broms* agreed with Mr Caflisch on the need to clarify Article 16.

Mr *Feliciano* observed that the principle embodied in the second sentence was not true at least for one international tribunal. He concurred with Sir Ian Sinclair that the reference to the "relevant parts" must be clarified ; did it refer to the distinction between *ratio decidendi* and *obiter*

dicta ? Or between different types of *dicta* ? He had difficulty understanding how an intervenor could be at the same time not a party to the proceedings and bound by the ensuing decision.

Mr *Schermers* supported Mr Caflisch's idea that the intervening State was bound only to the extent of its intervention, and also with Mr Makarczyk that the parties were likewise bound with respect to the intervening State to the extent of the intervention.

Le *Président* ouvre le débat sur l'article 17, et en premier lieu sur son alinéa (a).

Mr *Oda* reflected that Article 17(a) as worded called for the clarification of whether intervention at the stage of interim measures should be allowed.

Mrs *Higgins* welcomed the provision's departure from accepted practice. She thought that the use of the expression "preliminary phase" in contradistinction to "matters of jurisdiction and admissibility" was ambiguous and suggested instead the words "other interlocutory phases such as" in the second sentence.

Sir Ian Sinclair doubted that the Court would welcome an application for intervention under Article 62 at the interim measures phase in view of the urgency of such proceedings. A third state may make an informal communication to the Court at that stage but not apply for formal intervention.

M. *Ranjeva* fait part du malaise qu'il éprouve à la lecture de l'article 17. Il pense en effet que la légitimité d'une intervention devrait être admise lors de l'examen du fond, mais aussi lors d'une éventuelle procédure en indication de mesures conservatoires. Dans les deux cas, les droits d'un Etat tiers sont également susceptibles d'être affectés et M. Ranjeva ne voit donc aucune raison de leur réserver un sort différent. En revanche, il ne parvient pas à percevoir ce qui justifie une intervention au stade particulier

de la recevabilité, pendant lequel seules les parties sont véritablement impliquées. Un statut d'*amicus curiae* serait, dans ce cas, parfaitement suffisant. M. Ranjeva est parfaitement conscient du caractère quelque peu iconoclaste de sa position, qui ne reflète pas la pratique existante. Il est cependant convaincu de son bien-fondé.

Mr *Rosenne* experienced no difficulty with Article 17(a) in that it reflected practice. For example, in two cases at the International Court of Justice during the 1950s, Sir Hersch Lauterpacht commented that he would have welcomed intervention at the preliminary objections phase. Likewise, in the case which New Zealand attempted to present against France a few years ago, there were a number of attempted interventions even before the Court had decided whether or not to enter the case on its docket. Despite some difficulties with the text, he thought that it should be retained.

Mr *Meron*, in referring to Mr Abi-Saab's remark on the differences between judicial and arbitral proceedings, was troubled by the fact that the consequences of that difference had not been articulated. He wondered whether the Commission could try to specify which provisions applied to arbitral proceedings.

Mr *Owada* agreed with Mr Rosenne's comment while at the same time appreciating the difficulty underlined by Sir Ian Sinclair. In his opinion, it was for the Court to decide the matter because it could not be excluded that irreparable damage could be caused to a third State even at the interim measures phase.

M. *Torres Bernárdez* se prononce en faveur de ce paragraphe, qui lui semble intégrer harmonieusement un développement progressif et modéré du droit international. Une question lui paraît cependant ne pas avoir été tranchée par le texte actuel celle de la possibilité d'intervenir dans une procédure incidente (par exemple à l'occasion d'une demande de mesures conservatoires), sans intervenir ensuite dans l'affaire principale. M. Torres Bernárdez engage la Commission à examiner attentivement ce point particulier.

Sir Ian Sinclair was impressed by the points made by Messrs Rosenne and Owada. He suggested that the words "such as the indication of interim measures of protection" should be omitted in view of possible difficulties resulting from the urgency of a decision at that stage.

Mr *Kooijmans* supported the previous speaker's suggestion to delete the last leg of Article 17(a), as urgency is of the very essence of proceedings on the indication of interim measures. The interest of third States could be protected by simply making informal communications to the Court.

Mr *Shahabuddeen* saw a problem in the proposal made by Sir Ian Sinclair in that "matters of jurisdiction and admissibility" may be understood as covered by the expression "preliminary phases", as indeed it is in the practice of the International Court of Justice. There is therefore a need to explain what is meant by "preliminary phases". Generally speaking he supported a right of third States to intervene at the interim measures phase.

Mr *Schwebel* embraced the suggestion made by Mrs Higgins, which would allow an express reference to interim measures while still leaving them governed by general principles.

The *Rapporteur* supported the amendment proposed by Mrs Higgins but would retain the last words of the sentence as they still leave the Court full discretion to consider the urgency of the matter.

Le *Président* passe à l'examen de l'alinéa (b) de l'article 17.

Mr *Schwebel* referred to the practice of the International Court of Justice and noted that the words "after ascertaining" in Article 17(b) should be taken to mean that if a party objects to sharing the pleadings then they should not be shared. In his view, the provision seeks to encourage such a sharing, which should be underlined by adding at the end of the paragraph the words "which are not dispositive" or "which are advisory".

Mrs *Higgins* favoured the liberalisation embodied in Article 17(b) but would modify it to read as follows:

> "Article 17(b). When a State wishes to intervene, the court or tribunal shall ascertain the views of the parties. When a State requests a court or tribunal to provide it with the necessary information and copies of the proceeding so that it may decide whether to intervene in a case, that request should be acceded to unless there are weighty considerations to the contrary".

Mr *Rosenne* expressed his support for the suggestion made by Mr Schwebel and insisted on the need to protect the interests of States parties. He observed that the proposal put forward by Mrs Higgins referred to the time after which a third State had decided to intervene, whereas third States need access in order to decide whether to intervene. He concluded that there was a danger in taking transparency too far.

Mr *Dinstein*, referring to the first sentence of Article 17(b), suggested the deletion of the words "intends to" (the word "consider" would become "considers") and "give the necessary information and". Further, he thought that the last sentence would be clearer if it read "The court or tribunal will give its decision after due regard is given to the views of the parties".

M. *Ranjeva* partage entièrement le souci de transparence qui inspire l'alinéa (b). Cela étant, il lui semble que cette transparence doit également s'appliquer à l'état intervenant. Il estime dès lors que l'on devrait subordonner la transmission d'informations à un acte positif par lequel l'Etat tiers ferait Etat de sa qualité d'intervenant. M. Ranjeva considère par ailleurs que seules les pièces écrites et les compte-rendus des plaidoiries orales doivent être communiqués. Le greffe n'a, par exemple, pas à révéler des informations sur la stratégie judiciaire suivie par les parties.

Mr *Shahabuddeen* reflected that the proposal put forward by Mrs Higgins did not necessarily mean that the third State had already decided to intervene. He agreed with Mr Dinstein that the words "give the necessary information and" should be deleted as it was enough to provide copies of the pleadings. As to the addition of "which are not dispositive" suggested by Mr Schwebel, he wondered whether the change was really necessary as the sentence as it now stands bears that meaning, the Court having discretion to decide in any case.

Mr *Broms* agreed with Mr Shahabuddeen's last remark as there was no need to underline the discretion of the Court to decide of the admissibility of interventions.

M. *Abi-Saab* estime que la communication des conclusions des parties constitue une information nécessaire, mais qui peut aussi être considérée comme suffisante pour éclairer le tiers sur l'opportunité d'une intervention. La communication d'informations supplémentaires relève d'une politique judiciaire de transparence, mais n'est certainement pas indispensable. M. Abi-Saab revient par ailleurs sur les difficultés que suscitent souvent les cas de règlement arbitral, dans lesquels les parties peuvent parfaitement exclure toute communication d'informations dans le compromis.

Mr *Ress* noted the difficulty with respect to the expression "necessary information" in that it was not for the Court to put together specific information. He thought it more important to require from a third State information as to the nature of its interest in the object of the case, thus delineating the binding effect of any future decision as provided for in Article 16. This would further help the Court decide whether to retain certain parts of the pleadings not related to the intervention of the third State. He opined that the provision should specify that the Court must decide of the matter on the basis of information from the third State as well as from the parties.

Mr *Rosenne* cautioned against adopting too broad a principle, as third States may request pleadings without any intention of ever intervening. With respect to "necessary information", he observed that it is sometimes necessary for third States to obtain more than the pleadings, for example the dates and duration of the hearings, so that the formula used in the provision should not be too restrictive.

M. *Torres Bernárdez* fait remarquer que l'acte introductif d'instance, qui contient quantité d'informations pouvant permettre aux Etats tiers de se positionner, relève du domaine public. Cet aspect de la question mériterait un examen attentif de la Commission, dont il partage au demeurant entièrement le souci de réaliser un équilibre entre les intérêts des Etats parties et ceux des Etats tiers.

The *Rapporteur* alluded to the comments made by Messrs Shahabuddeen, Rosenne and Torres Bernárdez and concluded that it was clear that Article 17(b) concerns exclusively the phase before a decision by the Court on the admissibility of intervention. Indeed, he thought that there were good reasons to adopt a restrictive approach. After the Court has decided to admit an intervention, then Article 17(d) applies.

Le *Président* propose à l'Assemblée d'examiner la lettre (c) de l'article 17.

Mrs *Higgins* agreed with the general idea of the Article. She asked, however, that a wording be found to allow the nomination of *ad hoc* judges in certain circumstances. This notwithstanding, intervening States should not be entitled to nominate a judge *ad hoc*.

M. *Ranjeva* tient la proposition de Mme Higgins pour justifiée. En effet, une distinction doit être établie selon la nature de l'intervention et les conséquences de la qualification sur les suites de la procédure. Cela dit, il convient d'attirer l'attention de la Commission sur un problème très concret, touchant à l'équilibre interne de la juridiction saisie, arbitrale ou judiciaire. Il s'agit de la composition de cette dernière lorsqu'elle aura à prendre une décision ou à rendre une sentence.

Le *Président* suggère de passer à l'examen de l'alinéa (d) de l'article 17.

Mrs *Higgins* indicated that she believed that this provision was contradicted by Article 11 of the Resolution. In order to avoid this contradiction, she proposed that the second sentence of Article 17(d) be formulated as follows: "The manner by which an intervening State may partake in proceedings shall depend on the relevant rules of the court or tribunal and on its power to conduct the proceedings in an effective and equitable manner."

Mr *Dinstein* suggested that the words "its power" be replaced with "the need to conduct".

M. *Ranjeva* attire l'attention sur le fait que la lettre (d) mentionne l'ampleur de la participation de l'Etat intervenant. Cette notion est vague. La participation de cet Etat doit être appréciée de diverses manières et tenir compte de l'objet des interventions de l'Etat, de l'objet de ses conclusions, du moment de l'intervention et de la phase procédurale au cours de laquelle l'intervenant aura participé à l'instance. L'orateur propose de supprimer le mot "ampleur".

Mr *Rosenne* raised the point that the notion of "effective" as written in the Article can include but should not be limited to what the United Nations General Assembly has called "cost-effectiveness". Cost-effectiveness should not, however, come at the expense of justice.

Le *Président* suggère de passer à l'examen de l'alinéa (e) de l'article 17.

Mr *Dinstein* suggested that the word "intends" be replaced by "desires"and that the word "full" be dropped from "full party" both in this Articles and in other provisions where the expression "full party" is used (Articles 16 and 20) - there being a difference between "full party" and any other party.

Le *Président* ne juge pas satisfaisante la version française de la lettre (e). Elle rend l'expression anglaise "full party" par "partie principale". Celle-ci paraît mettre l'Etat intervenant au-dessus des parties originelles au différend. La Commission trouvera sans doute facilement une terminologie plus appropriée.

Mrs *Higgins* pointed out that once an intervenor becomes a full party to a dispute, all qualifications on intervening parties set forth by the Resolution, such as, for example, Article 17(c), fall away since the party is no longer an intervenor. She proposed that a saving phrase be inserted to reflect this fact.

Mr *Schwebel* agreed fully with Mrs Higgins.

Mr *Orrego Vicuña* asked whether consent of all parties to a dispute would constitute a jurisdictional link or if this could be done on an *ad hoc* basis. He suggested reformulating the Article as follows: "Subject to the satisfaction of the jurisdictional requirements an intervenor which intends to do so may become a full party to the proceedings".

Mr *Rosenne* took up Mrs Higgins' previous proposal and cautioned that once an intervening party became a full member to a dispute not all restrictions as set forth by the Resolution would necessarily fall away. This might be the case for an *ad hoc* chamber created under Article 26(2) of the Statute of the International Court of Justice. In the case of the intervention by Nicaragua, for example, the question of the composition of the *ad hoc* chamber could have arisen, although in this particular case Nicaragua waived its rights in this regard.

M. *Ranjeva* attire l'attention de l'Assemblée sur l'inclusion d'une éventuelle lettre (f), relative à la participation de l'Etat intervenant aux frais d'une procédure arbitrale. Il serait en effet injuste que l'intervenant s'enrichisse "sans cause" aux dépens des parties principales à la procédure.

Le *Président* ouvre la discussion sur la Partie IV, et plus spécifiquement sur l'article 18 du projet de résolution. Cette dernière traite de "parties indispensables". Une telle terminologie prête le flanc à la critique, car elle vise en fait des Etats qui demeurent des Etats tiers, même s'ils interviennent dans une procédure.

Mr *Franck* observed that in Part IV of the Resolution, the instrument was moving away from its previous admirable function of setting forth facilities for third parties to join in a dispute. The previous Articles had set up measures to make it easier for interested parties to join a dispute, which provided for greater judicial efficiency. In contrast, Part IV concerned "indispensable parties", which he pointed out were often used as a shield by original parties to a dispute to obstruct a settlement. Indeed, indispensable parties are usually unwilling in joining a dispute. Article 18 adopted the notion of "indispensable parties" without defining the term or limiting it. A limitation of the term, Mr Franck contended, would be necessary for effective litigation. He therefore proposed a reformulation of the Article as follows :

> "If the rights and obligations of two parties in a case cannot be determined by the court or tribunal without necessarily also determining those of other States, and these other interests are central to the matters at issue, these additional States are 'indispensable parties' without the participation of which the merits of the case cannot be decided. That a State not party to a dispute before a court or tribunal has an interest in the outcome of a dispute between two parties is not, however, in itself sufficient to constitute it an 'indispensable party' whose non-participation excludes the resolution of a case duly instituted by two disputants."

Mr *Oda* noted that the concept of "indispensable party" in Article 18 applies only to interventions pursuant to Article 62 of the Statute of the International Court of Justice.

M. *Ranjeva* tient la notion de "partie indispensable" pour intéressante, mais particulièrement délicate à mettre en oeuvre. D'une part, il n'existe aucun différend qui ne mette pas en cause les intérêts d'une autre partie. D'autre part, cette notion est essentiellement évoquée à des fins "quasi-dilatoires". Si l'on tient à la retenir, il s'impose donc d'en donner une définition très stricte. L'orateur rappelle la jurisprudence de la Cour dans les cas de délimitation de frontières. Dans l'affaire relative au *Différend frontalier entre le Mali et le Burkina Faso*, la Cour internationale de Justice a soulevé la question de la partie indispensable lorsqu'elle a dû déterminer le point triple. En effet, la détermination d'un tel point, par essence, met en cause les droits de trois parties : ceux des deux parties à la procédure et ceux de l'Etat tiers dont les intérêts peuvent être affectés par la décision à rendre. La Cour a renversé les termes du problème et la notion de partie indispensable ; elle a estimé qu'il ne s'agissait pas de se prononcer sur les droits d'un Etat tiers, mais de déterminer le point ultime de rencontre entre les droits des parties à la procédure. Cette approche a été consacrée de manière pratiquement irréversible par la Cour dans les autres affaires de délimitation de frontières. Le deuxième cas où des difficultés peuvent surgir avec des parties indispensables est apparu dans l'affaire du *Timor oriental* : la Cour a alors adopté une position qui ne satisfait pas l'orateur car elle aurait pu - et dû - se prononcer sur le droit à l'auto-détermination sans affecter les droits de qui que ce soit. Dès lors, si la notion de partie indispensable semble incontournable, il faut distinguer les objections dirimantes les objections non dirimantes. La seule hypothèse où une objection dirimante sera fondée se trouve, par exemple, dans les affaires de l' *Or monétaire* et des *Phosphates de Nauru*. Ce sont des cas tellement exceptionnels qu'ils ne se reproduiront sans doute pas à l'avenir. Il faudrait demander à la Commission d'être prudente et restrictive dans l'interprétation de la notion de partie indispensable.

M. *Conforti* se demande s'il ne faut pas établir un lien entre la notion de partie indispensable et le passage du projet relatif à l'intervention. La Partie III du projet de résolution accorde une protection suffisante à l'Etat tiers lorsque l'intervention est admise, par exemple dans les cas prévus aux articles 62 et 63 du Statut de la Cour internationale de Justice. La Partie IV

du projet pourrait viser les cas où le Statut du tribunal en cause ne permet pas à un Etat tiers d'intervenir.

Mr *Shahabuddeen* reiterated that the Resolution in essence protected the rights of parties which might wish to intervene in a dispute. He suggested that the matter at hand might be viewed from another perspective. In a case where two parties were in a dispute which significantly related to the interests of a third State which, however, had chosen not to intervene, it would be impossible for the court to fairly adjudicate over the matter. He pointed out that this was the situation in the *Monetary Gold* case. The Resolution should reflect this concern.

Mr *Feliciano* wished to add a note to Mr Shahabuddeen's remarks by indicating that in national jurisdictions, there was often a distinction between joinder and intervention. Intervention signified a party which was anxious to intervene, whereas joinder could refer to situations where there were permissive or compulsory reasons to join a case.

The *Rapporteur* said he believed that the Resolution must give an answer to the matter indicated in the title. He reiterated that where no jurisdictional link existed, no State was obliged to intervene in a dispute. In his view, it was important that the Resolution address situations where two States in a dispute sought to exclude a third State whose interests might be at stake.

Mr *Schwebel* suggested to delete the word "prior" in the Article.

Mr *Rosenne* was of the opinion that the term "indispensable parties" had been introduced into the vocabulary of international law and had indeed become a term of art. He therefore supported the retention of Part IV of the Resolution.

Mr *Sohn* recalled that in the *Monetary Gold* case the International Court of Justice dismissed the case because the main party did not fall under its jurisdiction.

Mrs *Higgins* indicated that she agreed with the statements made by Mr Conforti and the Rapporteur. She also observed that the question as to whether a third party's decision not to intervene in a dispute precluded in certain cases a settlement could not be discussed without reference to Article 59 of the Statute of the International Court of Justice.

Le *Président* ouvre le débat sur l'article 19.

Mr *Frowein* agreed with the tendency of the Article but suggested that it be reformulated as follows: "If the rights or obligations of the parties to the dispute can be decided without a finding on the legal position of the third State, the court or tribunal may decide on that part of the dispute relating to these rights or obligations.". He pointed out that in the *Nauru* case a separation was possible but this was precluded by a settlement. In *East Timor* the maritime boundary dispute and the dispute regarding the invasion were separated; however, the first issue could not be resolved without a decision of the second.

Le *Président* ouvre le débat sur l'article 20.

M. *Conforti* suggère que le paragraphe 20 prévoie qu'un accord "devrait" intervenir et non pas qu'il "peut" intervenir. Il s'agit en effet d'encourager les Etats à conclure un accord, non pas de se limiter à constater l'existence d'une possibilité, qui existe même en l'absence de cette disposition.

Mr *Kooijmans* argued that Article 20 was superfluous. He reiterated Mr Franck's point that indispensable parties were usually unwilling parties to a dispute. The question, therefore, was rather what to do in the case where a third party refused to intervene.

Mr *Rosenne* suggested that the words "may agree" could be substituted by the words "should be encouraged to agree". The purpose of this Article might be to encourage reluctant third parties to become parties to a procedure.

The *Rapporteur* recalled that this paragraph was not in former versions of the Draft. The idea of the Article was to be progressive and encourage all parties related in a dispute to become involved in its settlement. He noted that a revised text was being prepared that would include a new preamble which could be discussed later on.

Le *Président* constate que l'Assemblée est parvenue au terme de l'examen du dispositif du projet de résolution. Il remercie chaque intervenant pour la richesse de ses propos.

La séance est levée à 12 h 45.

Neuvième séance plénière

Mardi 24 août 1999 (matin)

La séance est ouverte à 10 h 15 sous la présidence de M. *Pinto*, Troisième Vice-Président.

The *President* first welcomed Messrs. Dimitrijevic, Treves and Vinuesa, who had been newly elected as Associate Members during the first administrative session. The new Members were warmly applauded and welcomed to the Institute. The President then introduced the revised Draft Resolution No. 1 of the Eleventh Commission on Judicial and Arbitral Settlement of International Disputes Involving More Than Two States, which reads as follows:

"*The Institute of International Law,*

Reaffirming that judicial and arbitral settlement is one of the most important means to settle disputes between States in accordance with the Charter of the United Nations ;

Noting that international judicial and arbitral dispute settlement is, in general, bilaterally conceived, and that the increasing multilateral character of international relations requires an adaptation of the traditional dispute settlement rules ;

Considering that eventual consequences of peremptory norms of international law and of *erga omnes* obligations are not addressed in this Resolution ;

Adopts the following resolution:

I. Principles

1. The consent of States is the basis of the jurisdiction of international courts and tribunals and consequently a dispute between more than two States also cannot be decided without the consent of all States concerned. Without such consent either no settlement or only partial settlement of the dispute is possible.

2. Provisions concerning jurisdiction and procedure in statutes and rules of international courts and tribunals often possess specific and unique features. Therefore the interpretation of the relevant texts is the starting point in all cases including those involving more than two States. Nevertheless, some general principles and similar provisions concerning intervention and other forms of third-State participation can be identified.

3. The general principles and rules concerning third-State participation applicable to the International Court of Justice may also be applied, if appropriate in the circumstances, to proceedings before other international courts and tribunals.

II. Disputes involving more than two States as Parties

4. Where two or more States have identical or similar interests of a legal nature in a dispute they should consider taking joint or common action before the competent international court or tribunal.

5. Unilateral application to a court or tribunal by one or more States directed against more than one State as respondents requires, in principle, parallel and separate proceedings if no previous agreement between the States involved can be reached.

6. Subject to the relevant legal instruments, the court or tribunal may join pending cases or order common proceedings taking into account all the circumstances. The procedural consequences of a joinder of cases or of common proceedings without a formal joinder should be determined by the court or tribunal with due respect for the requirements of a fair procedure.

III. Intervention

7. Subject to the provisions of the instruments governing the functioning of the court or tribunal, two principal types of intervention are:

(a) intervention by a third State in cases where it considers that it has an interest of a legal nature which may be affected by the decision in the case; and

(b) intervention by third States Parties to a multilateral treaty the construction of which is in question.

8. Intervention by a third State does not mean that this State becomes a full party to the proceedings. The intervening State cannot put forward its own claims. Parties and interveners have different positions and functions which cannot be combined without special agreement.

9. The consequences of intervention in cases concerning the construction of multilateral treaties (Article 63 of the Statute of the International Court of Justice and similar texts in other statutes) are explicitly set out in the relevant texts. If the third State is a party to the treaty, it has a right to intervene and to participate as an intervener. The parties to the case as well as the intervening State are bound by the construction given to the relevant treaty provisions by the court or tribunal.

10. Intervention under Article 62 of the Statute of the International Court of Justice and similar texts in other statutes requires the existence of an interest of a legal nature on the part of the intervening State. That means that rights or obligations of this State under public international law can be

affected by the decision. Whether the State can claim such an interest and whether it may be affected by the decision of the court or tribunal has to be determined by the court or tribunal according to the specific features of each case. When the court or tribunal has found a legal interest to exist the State applying for intervention should be admitted as intervener.

11. Intervention does not require the existence of a jurisdictional link between the parties to the dispute and the third State beyond the provisions of the Statute of the International Court of Justice and similar provisions in other relevant texts allowing intervention.

12. A State may apply to intervene on the merits as well as in proceedings confined to matters of jurisdiction and admissibility; in exceptional cases, it may also apply to intervene in other interlocutory proceedings.

13. When a State considers intervening, it may request the court or tribunal to provide it with copies of the pleadings. The court or tribunal shall decide after consulting the parties.

14. Should the relevant instrument provide for the appointment of a judge *ad hoc*, this does not apply to an intervening State.

15. The decision concerning the admissibility of the intervention is binding on the parties and the intervener.

16. The intervening State has the right to take part in the written and oral proceedings. The extent of such participation depends on the relevant rules of the court or tribunal and on the need to conduct the proceedings in an effective and equitable manner.

17. The decision of the court or tribunal is binding on the intervening State to the extent of the admitted intervention. To the same extent, the decision is binding on the principal parties in their relations with the intervening State.

18. With the consent of all parties to the case, an intervener may become a full party to the proceedings with the corresponding rights and obligations.

IV. Indispensable Parties

19. If the rights or obligations of a third State are the very subject-matter of a dispute submitted by other States to a court or tribunal and if a decision on that dispute is not possible without deciding on the rights or obligations of the third State, the court or tribunal cannot take such a decision unless that third State becomes a party to the proceedings. This third State is an "indispensable party" to the proceedings.

20. If the rights or obligations of the parties to the proceedings can be separated from those of a third State, the court or tribunal may decide on that part of the dispute relating to these rights or obligations.

21. All the States involved may agree that the "indispensable party" becomes a full party to the proceedings with the corresponding rights and obligations, in order to enable the court or tribunal to decide the entire dispute."

Traduction en français :

"L'Institut de Droit international,

Réaffirmant que le règlement judiciaire et arbitral est l'un des modes les plus importants par lequel les différends entre Etats sont réglés conformément à la Charte des Nations Unies ;

Observant que le règlement judiciaire et arbitral international est en général entendu comme un processus bilatéral, et que le caractère de plus en plus multilatéral des relations internationales rend nécessaire une adaptation des règles traditionnelles du règlement des différends ;

Considérant que les éventuels effets de normes impératives de droit international et d'obligations *erga omnes* ne sont pas traités par la présente résolution ;

Adopte la résolution suivante :

I. Principes

1. Le consentement des Etats est le fondement de la compétence des cours et tribunaux internationaux, et il en résulte qu'on ne peut pas se prononcer sur un litige impliquant plus de deux Etats sans le consentement de tous les Etats concernés. L'absence d'un tel consentement interdit d'en arriver à un règlement, ou ne permet qu'un règlement partiel du différend.

2. Les dispositions portant sur la compétence et sur la procédure figurant dans les statuts et règlements des cours et tribunaux internationaux présentent souvent des caractéristiques particulières et uniques. C'est pourquoi l'interprétation des textes pertinents constitue le point de départ de l'examen de toute affaire, y compris celles qui impliquent plus de deux Etats. On peut néanmoins dégager quelques principes généraux et des dispositions similaires concernant l'intervention et les autres modes de participation d'Etats tiers.

3. Les principes généraux et les règles relatifs à la participation d'Etats tiers valables devant la Cour internationale de Justice peuvent aussi être appliqués, lorsqu'appropriés selon les circonstances, devant d'autres cours ou tribunaux internationaux.

II. Différends impliquant plus de deux Etats parties

4. Lorsque deux ou plus de deux Etats ont des intérêts juridiques identiques ou similaires dans un différend, ces Etats devraient explorer la possibilité d'agir conjointement ou en commun devant la cour ou le tribunal international compétent.

5. Une requête unilatérale devant une cour ou un tribunal, émanant d'un ou de plusieurs Etats et dirigée contre plus d'un Etat défendeur requiert, en principe, l'introduction d'instances parallèles et distinctes, à moins que n'intervienne entre les Etats impliqués un accord préalable en sens contraire.

6. Sous réserve des instruments juridiques pertinents, la cour ou le tribunal peut, au vu de toutes les circonstances, ordonner la jonction d'instances ou l'organisation de procédures communes. La cour ou le tribunal devra, dans le respect des exigences du caractère équitable de la procédure, déterminer quels effets produira sur celle-ci la jonction d'instances ou l'organisation, sans jonction formelle, de procédures communes.

III. Intervention

7. Sous réserve des dispositions des instruments régissant le fonctionnement de la cour ou du tribunal, les deux principaux types d'intervention sont les suivants :

(a) intervention par un Etat tiers qui estime que, dans un différend, un intérêt juridique est pour lui en cause ;

(b) intervention par des Etats tiers à un différend mettant en jeu l'interprétation d'un traité multilatéral auquel ils sont également parties.

8. L'intervention d'un Etat tiers ne le rend pas pour autant partie principale au litige. L'Etat tiers ne peut avancer de réclamations qui lui soient propres. Les parties et les intervenants occupent des positions et remplissent des rôles distincts qui ne peuvent être confondus sans accord à cet effet.

9. Les conséquences de l'intervention dans une affaire relative à l'interprétation d'un traité multilatéral (article 63 du Statut de la Cour internationale de Justice et textes similaires d'autres statuts) sont expressément énoncées dans les textes pertinents. Si l'Etat tiers est partie au traité, il a le droit d'intervenir dans l'instance et d'y participer à titre

d'intervenant. Tant les parties au différend que l'Etat intervenant sont liés par l'interprétation donnée par la cour ou le tribunal aux dispositions du traité en cause.

10. L'intervention en vertu de l'article 62 du Statut de la Cour internationale de Justice ou de textes similaires d'autres statuts exige que l'Etat intervenant ait un intérêt juridique à ce faire. Cela signifie que des droits ou obligations dudit Etat, relevant du droit international public, sont susceptibles d'être affectés par la décision. La cour ou le tribunal devra décider, selon les circonstances de l'espèce, si ledit Etat peut se prévaloir d'un tel intérêt, et si la décision rendue affectera ou non cet intérêt. Si la Cour ou le tribunal constate l'existence d'un intérêt juridique, l'Etat sollicitant l'intervention devrait être admis à l'instance à titre d'intervenant.

11. L'intervention ne nécessite pas l'existence d'un lien juridictionnel entre les parties au différend et l'Etat tiers, au-delà des dispositions du Statut de la Cour Internationale de Justice et des dispositions similaires figurant dans d'autres textes pertinents permettant l'intervention.

12. Un Etat peut présenter une intervention au fond, tout comme au stade de l'examen de la compétence et de la recevabilité ; dans des cas exceptionnels, il peut également présenter une intervention lors d'autres procédures interlocutoires.

13. Un Etat qui envisage de se porter intervenant peut demander à la cour ou au tribunal de lui faire tenir copie des mémoires. La cour ou le tribunal décide après consultation des parties.

14. Lorsque l'instrument pertinent prévoit la possibilité de nommer un juge *ad hoc*, cette faculté n'est pas ouverte à l'Etat intervenant.

15. La décision relative à la recevabilité de l'intervention lie les parties et l'Etat intervenant.

16. L'Etat intervenant a le droit de prendre part à la procédure écrite et orale. L'ampleur de sa participation dépendra des règles pertinentes de la cour ou du tribunal ainsi que la nécessité de mener les procédures de manière efficace et équitable.

17. La décision de la cour ou du tribunal ne lie l'Etat intervenant que dans les limites dans lesquelles l'intervention a été accueillie. Dans les mêmes limites, la décision est obligatoire pour les parties principales dans leurs relations avec l'Etat intervenant.

18. Un intervenant peut, moyennant l'accord de toutes les parties à l'affaire, devenir partie principale à l'instance avec les droits et obligations correspondants.

IV. Parties indispensables

19. Si les droits ou obligations d'un Etat tiers constituent l'objet même d'un différend porté par d'autres Etats devant une cour ou un tribunal, et s'il ne s'avère pas possible d'en arriver à une décision sans prendre parti sur les droits ou obligations de l'Etat tiers, la cour ou le tribunal ne peut procéder sans que ledit Etat ne devienne partie principale au litige. Cet Etat tiers est une "partie indispensable" à l'instance.

20. Si les droits ou obligations des parties dans l'affaire peuvent être distingués de ceux d'un Etat tiers, la cour ou le tribunal peut se prononcer sur la partie du litige concernant lesdits droits ou obligations.

21. Un accord peut intervenir entre les Etats impliqués pour que la "partie indispensable" devienne partie principale à l'instance, avec les droits et obligations correspondants, afin de permettre à la cour ou au tribunal d'arrêter une décision sur le litige."

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The *Rapporteur* wished to recall that the revised draft before the session had been approved by consensus by all the Members of the Commission who were present at the drafting session. He indicated that the revised draft was a result of intense discussions between a number of competing schools of thought on the matter. He did not at this time intend to enumerate each provision of the Resolution. He did, however, wish to underline the fact that a good number of the provisions of the Resolution made it clear that the text only applied in cases of international disputes where there was a lack of clear rules in the provisions governing the procedure before the relevant tribunal.

The *President* announced that he would open the discussion of each specific Article and leave the discussion of the Preamble to the end. He then opened the discussion and vote on Articles 1, 2 and 3; in the absence of objections, these Articles were adopted by consensus.

The President then opened the discussion and vote on Articles 4 and 5, which were also adopted by consensus.

The discussion was then opened on Article 6.

Mr *Frowein* pointed out that it was not always desirable for separate or parallel cases to be joined in one case, although they might be addressed in one proceeding.

The *Rapporteur* responded that, in his opinion, Article 6 adequately addressed Mr Frowein's concerns. He pointed out that two defendants could not be compelled to join or to proceed together in litigation.

M. *Ranjeva* considère que la rédaction du paragraphe 5 est trop brève. Celui-ci traite du fait qu'un Etat demandeur doit introduire des actions parallèles et distinctes contre chaque Etat défendeur. Cette pluralité d'actions peut entraîner des problèmes de logistique, sinon de coûts pour l'Etat demandeur. Il aurait été bon d'indiquer que la jonction n'est que l'une des voies possibles en de telles circonstances.

The *President* then opened Article 6 to a vote. It was adopted by consensus. In the absence of observations, Article 7 was adopted by consensus as well.

The President then opened the discussion on Article 8.

The *Rapporteur* wished on this occasion to point out that the second sentence of Article 8 was highly controversial in the Commission. In his view, the second sentence allowed intervening States to explain their claims at a tribunal, but not to put forward their own claims or reach a decision towards final a settlement of claims. He submitted the decision on whether or not to retain the sentence to the plenary session. He personally supported the retention of the sentence, but he understood that it might cause confusion.

Mr *Shahabuddeen* indicated that, in his view, intervening States did become full parties to a proceeding to the extent that they put forth claims which reflected their interests and sought to have them adjudicated.

Mr *Waelbroeck* asked why absolute language had to be used in the Article. He suggested that the phrase "Subject to the provisions of the relevant instrument" be added to the beginning of the second sentence to render it less absolute.

The *Rapporteur* agreed that this would be an acceptable compromise solution. He also proposed that the second sentence of the Article could read "The intervening State normally cannot put forward its own claims."

Sir Ian Sinclair suggested that Article 8 be put to a vote, as the content of the second sentence was controversial. In his view, the sentence as it stood may be correct. It indicated that the State might explain its reasons to wish to intervene so as to protect its interests in the context of a decision by a tribunal. The State was merely putting forth its own claims, not deciding on the claims. The sentence also suggested that intervening parties could not impose conditions about an intervention to which other parties might object.

The *Rapporteur* requested that in the first instance a vote be taken only on the second sentence of the Article, as in his view the first and third sentences were uncontroversial.

M. *Rigaux* fait remarquer qu'il y a des problèmes de concordance entre les versions française et anglaise du texte de l'article 8. Il évoque à cet effet les notions de "partie principale au litige" et d'"Etat tiers" et leurs traductions respectives en anglais. Il souhaite qu'une harmonisation des deux versions soit réalisée.

M. *Pierre Lalive* considère souhaitable qu'il soit procédé à un vote séparé sur la seconde phrase de l'article 8. La formulation présente lui apparaît trop rigide. La suppression de la seconde phrase se justifie pour différentes raisons, entre autres parce que l'idée exprimée se retrouve dans la première phrase de l'article.

Sir Ian Sinclair also supported the idea of a separate vote on the second sentence of Article 8 and indicated that he could not support it as it stood.

Mr *Gaja* proposed that the second sentence of Article 8 read as follows: "The intervening State cannot put forward its own claims, except insofar as it is admitted by the relevant instrument." This formulation, he believed, could provide an adequate compromise.

Mr *Tomuschat* suggested that the second sentence in Article 8 be replaced by a phrase indicating that the court or tribunal concerned would not make a determination on the interests of an intervening State.

The *Rapporteur* suggested that a vote should be taken as to whether to delete the second sentence. If this measure were rejected, then the Commission could proceed to reformulate the sentence.

M. *Torres Bernárdez* apporte son soutien au Rapporteur pour passer au vote. Si la phrase était retenue, il faudrait alors la reformuler.

M. *Ranjeva* considère que la seconde phrase traite d'une question de fond. Il ne voit pas quel aménagement pourrait y être apporté.

The *President* then proceeded to take a poll as to whether to remove the second sentence of Article 8. This was tentatively approved by 19 votes in favour, 2 against, with 5 abstentions.

The *Rapporteur* declared that in view of the poll results, he was in favour of deleting the second sentence of Article 8.

The *President* submitted to a vote the deletion of the second sentence of Article 8. This motion was adopted by 32 votes in favour, none against, with 4 abstentions.

The *President* then proceeded to open the discussion and vote on Article 9.

Mr *Gaja* objected that the language in Article 9 seemed to suggest that this was the only Article which applied to intervention under Article 63 of the Statute of the International Court of Justice. In his view Articles 11 to 17 of the Resolution were applicable to interventions under both Article 62 and Article 63 of the Statute, and therefore the text should be amended to indicate this broader application. A number of matters addressed in these provisions of the Draft Resolution, such as jurisdictional link, decisions regarding admissibility, access to pleadings, and the appointment of *ad hoc* judges, were applicable to both types of intervention. He suggested that the last sentence of Article 9 be deleted as the question of the binding effect of the Court's decision was adequately dealt with in the new version of Article 17.

The *Rapporteur* did not agree and contended that Article 9 was the only provision which related to Article 63 of the Statute of the International Court of Justice. The rest of the Articles only referred to Article 62 of the Statute. He therefore felt that the last sentence should be retained.

Mr *Waelbroeck* insisted that this sentence did not increase the clarity of the Article. He firmly believed that Articles 11 to 16 of the Resolution applied to both kinds of arbitration. It appeared to him that the last sentence of Article 9 reserved it to Article 63 of the Statute of the International Court of Justice.

The *Rapporteur* pointed out that the term "admitted intervention" in Article 17 only referred to Article 62 of the Statute of the International Court of Justice. He recalled that in many multilateral treaties parties had an automatic right to intervene in disputes. He doubted that Articles 11 to 17 could be applied to Article 63 of the Statute. He therefore strongly felt that the final sentence should be retained.

Sir Kenneth Keith raised the concern that the second sentence of the Article would cause problems for bilateral tribunals which were adjudicating over a multilateral treaty by unconditionally allowing third parties to intervene. He suggested that saving words, as found in Article 7, could be inserted to protect the provisions of special instruments governing the functioning of a court or tribunal.

The *Rapporteur* responded that there was no need to follow up on Sir Kenneth Keith's suggestions as the first sentence of the Article makes a reference to provisions in relevant statutes. He also reiterated his view that Article 9 addressed the special case of interventions under Article 63 of the Statute and that this was not meant to be a general rule.

Sir Ian Sinclair proposed that the amendment to Article 9 should read : "The consequences of intervention in cases raising a question of construction of multilateral treaties ...".

The *President* opened the vote as to whether to accept Mr Gaja's proposal to amend the first sentence of Article 9. This motion was accepted by consensus.

The President then submitted the deletion of the last sentence of Article 9 to a vote. The amendment was rejected by 21 votes, with 9 in favour and 5 abstentions.

The *President* opened the discussion on Article 10.

M. *Gannagé* suggère de remplacer l'expression de "à ce faire" par "à le faire".

M. *Waelbroeck* ne considère pas que la modification proposée par M. Gannagé soit nécessaire.

The *President* put Article 10 to a vote. It was adopted without objection. In the absence of observations, Article 11 was also adopted by consensus.

The President then opened the discussion on Article 12.

M. *Ranjeva* exprime quelques réserves sur la notion de "procédure interlocutoire". Il se demande si cette notion est identique en droit civil et en *common law*. Il remarque aussi que l'intervention a une plus grande signification dans le cadre d'une demande en indication de mesures conservatoires qu'au stade des exceptions préliminaires. Il souhaiterait que cette idée soit reflétée dans la formulation de l'article 12.

The *Rapporteur* recalled that there had been controversy in the first plenary debate as to whether the Resolution should take into account interim measures of protection. He was under the impression that the Members were reluctant to provide for intervention at this stage of litigation. He pointed out that the Article leaves open the possibility for intervention in other phases, including interim measures, but that explicit provisions in this regard had been deleted.

Sir Ian Sinclair thanked the Commission for its efforts to address the problem of interim and provisional measures. He also pointed to problems of the French translation of the term "interlocutory". He suggested, therefore, that the word "interlocutory" should be replaced by "types".

M. *Torres Bernárdez* met en garde contre le danger de modifier un texte déjà négocié. Il exprime aussi sa préférence pour la version actuelle car elle permet l'intervention dans le cadre d'une demande en mesures conservatoires, tout en ne le disant pas explicitement.

M. *Pierre Lalive* souhaite la suppression de l'expression "procédures interlocutoires".

The *Rapporteur* recalled that the English text followed a proposal by Mrs Higgins and that a number of English-speaking Members had approved the text. He felt that it would be difficult to change the English text and pointed out that the Article only referred to interlocutory proceedings, not to decisions.

The *President* opened the vote on the substance of Article 12, as to be amended, which was adopted without objections. He then opened the discussion of Article 13.

Sir Kenneth Keith asked for clarification as to whether the word "consulting" could be replaced by "ascertaining". He recalled that the term "consulting" would allow the court to decide whether or not to grant access to copies of pleadings, whereas the term "ascertaining" would provide the concerned parties a right of veto.

The *President* submitted Article 13 to a vote. It was adopted by consensus. He then proceeded to submit Articles 14, 15, 16, 17 and 18 to a vote, which were all adopted unanimously. The President then opened the discussion on Article 19.

Mr *Frowein* recalled that he had suggested that the Article be formulated as follows : "If the rights or obligations of the parties to the dispute can be decided without a finding on the legal position of the third State, the court or tribunal may decide on that part of the dispute relating to these rights or obligations." He felt that a formulation of this kind would take into account such situations as the *East Timor* case, in which the maritime boundary dispute and the sovereignty dispute were separated, although it was impossible to settle one dispute without reference to the other.

The *Rapporteur* indicated that he felt the language in this Article was adequate.

M. *Ranjeva* évoque à propos de l'article 19 la nécessité de distinguer les droits procéduraux des droits substantiels.

M. *Rigaux* n'est pas satisfait de l'utilisation de la notion de "partie indispensable". Il préférerait parler de parties dont la présence ou la participation est indispensable.

The *Rapporteur* recalled that two French Members of the Commission had not objected to the term "parties indispensables". He agreed that this was not a term of art but a new expression which was coined to address situations where third parties played an indispensable role in a case.

The *President* opened Article 19 to a vote. It was accepted without objection. Article 20 was also adopted by consensus. The President then opened the discussion on Article 21.

M. *Waelbroeck* voudrait que la formulation de l'article 21 soit renforcée en disant qu'il serait souhaitable qu'un accord intervienne entre les Etats impliqués.

The *Rapporteur* recalled that in the first plenary discussion it was proposed that a provision make it clear that States could agree to make an indispensable party a full party to the proceedings. He believed that this Article, while vague, was useful because it made the above clear.

M. *Waelbroeck* ne partage pas l'avis du Rapporteur. Il suggère aussi de remplacer l'expression "décision sur le litige" par celle de "décision sur l'ensemble du différend".

The *Rapporteur* accepted the proposed revision of the French text.

The *President* submitted Article 21 to a vote. It was adopted unanimously. He then opened the discussion on the Preamble.

Mr *Tomuschat* pointed out that the word "eventual"in the third paragraph of the Preamble was incorrectly translated in the French text.

M. *Ranjeva* voudrait que les mots "les plus" soient éliminés du texte du premier alinéa du préambule.

The *President* opened the vote on the Preamble, as to be amended. The Preamble was adopted by consensus.

Le *Secrétaire général* procède à l'appel nominal sur le vote de la résolution dans son ensemble. La résolution est adoptée par 45 voix, sans opposition ni abstention. Votent en faveur : MM. Schachter, Abi-Saab, Bernhardt, Mme Bindschedler-Robert, MM. Broms, Degan, Diez de Velasco Vallejo, Dinstein, Dominicé, El-Kosheri, Feliciano, Gaja, Gannagé, Jean-Flavien Lalive, Pierre Lalive, McWhinney, von Mehren, Philip, Pinto, Ress, Rigaux, Rudolf, Sahovic, Schermers, Schindler, Shahabuddeen, Sir Ian Sinclair, MM. Skubiszewski, Sohn, Torres Bernárdez, Vignes, Vukas, Waelbroeck, Zemanek, Mme Burdeau, M. Frowein, Sir Kenneth Keith, MM. Meron, Pocar, Ranjeva, Sarcevic, Tomuschat, Treves, Vinuesa et M. Jayme.

La Résolution adoptée par l'Institut se trouve à la page 376 de *l'Annuaire.*

La séance est levée à 11 h 45.

Quatrième question

The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties

L'application du droit international humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquels prennent part des entités non étatiques

Quatorzième Commission

Rapporteur : *M. Milan Sahovic*

Septième séance plénière

Lundi 23 août 1999 (matin)

La séance est ouverte à 9 h 35 sous la présidence de M. *Zemanek*, Deuxième Vice-Président.

Mr *Zemanek* invited the Rapporteur to introduce his draft Resolution which, as the title indicated, was a sensitive subject and one giving rise to a great deal of emotion.

Le texte de la résolution révisée se lit comme suit :

Projet de résolution révisé N° 1

"L'Institut de Droit international,

Rappelant ses résolutions sur les "*Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*" (Session de Neuchâtel, 1900), "*Le principe de non-intervention dans les guerres civiles*" (Session de Wiesbaden, 1975) et "*La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats*" (Session de Saint-Jacques-de-Compostelle, 1989) ;

Rappelant aussi ses résolutions sur "*Les conditions d'application des règles humanitaires relatives aux conflits armés et aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*" (Session de Zagreb, 1971) et "*Les conditions d'application des règles, autres que les règles humanitaires, relatives aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*" (Session de Wiesbaden, 1975) ;

Considérant que les conflits armés auxquels prennent part des entités non étatiques sont de plus en plus nombreux et que leurs causes reposent de plus en plus souvent sur la haine ethnique, religieuse ou raciale ;

Notant que, dès lors, la population civile est affectée de manière croissante par les conflits armés internes et qu'elle supporte en fin de compte la plus grande grande part de cette violence, ce qui cause de grandes souffrances, la mort et la privation ;

Constatant que les conflits armés auxquels prennent part des entités non étatiques ne concernent pas seulement les Etats dans lesquels ils ont lieu mais qu'ils touchent les intérêts de la communauté internationale dans son ensemble ;

Ayant à l'esprit que pendant les cinquante dernières années les principes de la Charte des Nations Unies et les droits de l'homme ont substantiellement influencé le développement et l'application du droit humanitaire ;

Rappelant le prononcé de la Cour internationale de Justice selon lequel l'obligation consacrée à l'article 1 commun aux Conventions de Genève de "respecter et faire respecter" les Conventions "en toutes circonstances" découle de principes généraux du droit humanitaire, de sorte qu'elle a acquis le statut d'une obligation de droit international coutumier ;

Soulignant les conclusions de la Cour internationale de Justice selon lesquelles l'article 3 commun aux Conventions de Genève de 1949 reflète des "considérations élémentaires d'humanité" et selon lesquelles les règles fondamentales du droit humanitaire applicables dans les conflits armés "s'imposent ... à tous les Etats, qu'ils aient ou non ratifié les instruments conventionnels qui les expriment, parce qu'elles constituent des principes intransgressibles du droit international coutumier" ;

Considérant les prononcés du Tribunal pénal international pour l'ex-Yougoslavie selon lesquels un grand nombre de principes et de règles précédemment applicables aux seuls conflits armés internationaux s'appliquent désormais aux conflits armés internes et selon lesquels des violations graves du droit humanitaire commises durant des conflits de ce dernier type constituent des crimes de guerre ;

Appuyant la poursuite et la condamnation des responsables de crimes de guerre, de crimes contre l'humanité, de génocide et d'autres violations graves du droit humanitaire, ainsi que l'établissement de juridictions nationales et internationales affectées à cette tâche ;

Notant que le Conseil de sécurité a affirmé, par les actions entreprises sur la base du Chapitre VII de la Charte des Nations Unies dans les conflits armés auxquels prennent part des entités non étatiques, que le respect du droit humanitaire est un élément intégral du système de sécurité de l'Organisation mondiale ;

Se félicitant de la décision du Secrétaire général des Nations Unies du 6 août 1999 sur le respect du droit international humanitaire par les Forces des Nations Unies qui réitère l'obligation de ces dernières de respecter strictement ce droit, en vue notamment de protéger la population civile, et prévoit la poursuite des membres du personnel militaire de ces forces en cas

de violations du droit humanitaire, également dans des situations de conflits armés internes ;

Attirant l'attention sur l'importante action déployée par le Comité international de la Croix-Rouge (CICR) dans des conflits récents auxquels prenaient part des entités non étatiques, qui tendait à assurer la protection humanitaire de toutes les victimes et à demander aux parties aux conflits de respecter les principes élémentaires d'humanité, et notamment de protéger la population civile contre les effets de la violence et de la dévastation ;

Considérant qu'il est souhaitable de procéder à un réexamen et à l'adaptation du droit humanitaire aux nouvelles situations internationales en vue de renforcer son respect et la protection des victimes des conflits armés auxquels prennent part des entités non étatiques,

Adopte la résolution suivante :

1. Aux fins de la présente Résolution :

- l'expression "*conflits armés auxquels prennent part des entités non étatiques*" vise les conflits armés internes sur le territoire d'un Etat entre les forces armées du Gouvernement et celles d'une ou plusieurs entités non étatiques ou, dans le cas de l'effondrement de l'Etat, entre plusieurs entités non étatiques. Y sont aussi inclus les conflits armés internes dans lesquels interviennent des forces de maintien de la paix;

- l'expression "*entités non étatiques*" comprend les parties aux conflits armés internes qui s'opposent aux forces armées gouvernementales ou luttent contre des entités de même nature sur le territoire d'un Etat et qui remplissent les conditions prévues à l'article 3 commun aux Conventions de Genève de 1949 pour la protection des victimes de la guerre ou à l'article premier du Protocole de 1977 additionnel aux Conventions de Genève relatif à la protection des victimes des conflits armés non internationaux (Protocole II).

2. Toutes les parties aux conflits auxquels prennent part des entités non étatiques, indépendamment de leur capacité juridique, de même que les Nations Unies et les organisations régionales compétentes, ont le devoir impératif de respecter le droit humanitaire de même que les droits fondamentaux de l'homme. L'application des principes et des règles pertinents n'affecte pas le statut juridique des parties au conflit et n'est pas liée à la reconnaissance de la belligérance ou du statut d'insurgés.

3. Le respect du droit humanitaire constitue un élément intégral du système international pour le maintien et le rétablissement de la paix, notamment dans les conflits armés auxquels prennent part des entités non étatiques.

4. Le droit applicable dans les conflits armés auxquels prennent part des entités non étatiques comprend :

- l'article 3 commun aux Conventions de Genève de 1949 ;
- le Protocole II et toutes autres conventions applicables aux conflits armés non internationaux, pour autant que l'Etat en cause y soit partie et que les conditions de leur application soient remplies ;
- les règles et principes coutumiers du droit humanitaire sur la conduite des hostilités et la protection des victimes dans les conflits armés non internationaux ;
- les principes et les règles des droits de l'homme garantissant à toute personne une protection fondamentale ;
- les principes et les règles du droit international relatifs aux crimes de guerre, aux crimes contre l'humanité et au génocide ;
- les principes du droit international "tels qu'ils résultent des usages établis, des principes d'humanité et des exigences de la conscience publique".

5. Tout Etat est juridiquement tenu à l'égard de tous les autres membres de la communauté internationale de respecter le droit humanitaire en toutes circonstances, et tout autre Etat a le droit et l'obligation de demander le respect de ce droit. Aucun Etat et aucune entité non étatique ne peuvent se soustraire à leurs obligations en niant l'existence d'un conflit armé. Si l'Etat concerné fait valoir qu'aucun conflit armé interne n'a éclaté sur son territoire, les Nations Unies et les organisations régionales compétentes devraient être autorisées à déterminer de manière impartiale si le droit humanitaire est applicable.

6. En cas de violations graves du droit humanitaire, les Etats, les Nations Unies et les organisations régionales compétentes ont le droit d'adopter des mesures appropriées conformément au droit international. En particulier en cas de violations systématiques et massives du droit humanitaire, les Etats et les organisations régionales compétentes sont habilitées à prendre des contre-mesures n'impliquant pas l'usage de la force conformément au droit international pour amener la partie défaillante à mettre un terme à ces violations.

7. Toute violation grave du droit humanitaire dans les conflits armés auxquels prennent part des entités non étatiques engage la responsabilité individuelle des personnes responsables, quels que soient leur statut ou leur position officielle, en accord avec les instruments internationaux qui confient la répression de ces actes aux juridictions nationales ou internationales.

8. Lorsque les auteurs présumés de violations graves du droit humanitaire se trouvent sur le territoire d'un Etat, les autorités compétentes de ce dernier doivent les poursuivre et les déférer à leurs tribunaux. Toutefois, s'il apparaît que des charges suffisantes ont été retenues par une cour pénale internationale, par un autre Etat ou par l'Etat sur le territoire duquel le conflit a éclaté, ces personnes devraient être transférées à, ou extradées vers, la cour internationale ou les autorités de l'Etat concerné.

9. Pour arriver à une protection plus efficace des victimes des conflits armés auxquels prennent part des entités non étatiques, et tenant compte des récents conflits armés à caractère non international, les mesures suivantes devraient être envisagées :

- la conclusion par les parties à ces conflits, conformément à l'article 3, paragraphe 2, commun aux Conventions de Genève de 1949, d'accords spéciaux sur l'application des dispositions de ces Conventions, dans leur ensemble ou en partie ;

- le concours des Etats, des Nations Unies, du CICR et d'autres organismes internationaux à caractère humanitaire à des mesures de vérification et de contrôle de l'application du droit humanitaire, dans l'esprit des articles 89 (coopération) et 90 (Commission internationale humanitaire d'établissement des faits) du Protocole de 1977 additionnel aux Conventions de Genève relatif à la protection des victimes des conflits armés internationaux (Protocole I) ;

- la considération de la possibilité d'amender le Protocole II en vue de compléter ses règles et notamment :

  (a) de le rendre applicable à tous les conflits armés non internationaux ; et

  (b) d'établir un organisme international impartial et indépendant habilité à enquêter sur le respect du droit humanitaire (*cf.* article 90 du Protocole I).

10. Le droit des droits de l'homme est applicable dans la mesure où la protection des victimes de troubles et tensions internes n'est pas assurée par le droit humanitaire. Toutes les parties concernées sont tenues de respecter les droits de l'homme auxquels il ne peut être dérogé, sous la supervision de la communauté internationale agissant par le biais des organismes appropriés, universels ou régionaux.

11. Le principe selon lequel chacun a droit au même traitement dans tous les conflits armés, quelle qu'en soit la nature - principe de plus en plus confirmé par la pratique, la jurisprudence et la doctrine -, impose une adaptation progressive des principes et des règles relatifs aux conflits armés internes aux principes et règles applicables dans les conflits armés internationaux. Par conséquent, les Etats, les Nations Unies, les organisations régionales compétentes et le CICR devraient accorder une attention particulière au fait qu'il est nécessaire d'élaborer et d'adopter une convention générale tendant à réglementer tous les conflits armés et à protéger toutes les victimes, que ces conflits aient un caractère international, non international ou mixte".

English translation :

"*The Institute of International Law,*

Recalling its Resolutions "*Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*" (Neuchâtel Session, 1900), "*The Principle of Non-Intervention in Civil Wars*" (Wiesbaden Session, 1975) and "*The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*" (Santiago de Compostela Session, 1989) ;

Recalling further its Resolutions on the "*Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*" (Zagreb Session, 1971) and on the "*Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*" (Wiesbaden Session, 1975) ;

Considering that armed conflicts in which non-State entities participate have become more and more numerous and increasingly motivated by ethnic, religious or racial hatred ;

Noting that, as a consequence, the civilian population is increasingly affected by internal armed conflicts and ultimately bears the brunt of such violence, resulting in great suffering, death and deprivation ;

Noting that armed conflicts in which non-State entities are parties do not only concern those States in which they take place, but also affect the interests of the international community as a whole ;

Bearing in mind that, in the last fifty years, the principles of the United Nations Charter and human rights law have had a substantial impact on the development and application of humanitarian law ;

Recalling the ruling of the International Court of Justice that the obligation laid down in Article 1 common to the Geneva Conventions "to respect" the Conventions and to "ensure respect" for them "in all circumstances" derives from general principles of humanitarian law, with the consequence that it has acquired the status of an obligation of customary international law ;

Emphasizing the ruling of the International Court of Justice that Article 3 common to the Geneva Conventions of 1949 reflects "elementary considerations of humanity" and that the fundamental rules of humanitarian law applicable in armed conflicts "are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" ;

Considering the pronouncements of the International Criminal Tribunal for the Former Yugoslavia whereby many principles and rules previously applicable only in international armed conflicts are now applicable in internal armed conflicts and serious violations of humanitarian law committed within the context of the latter category of conflicts are regarded as war crimes;

Supporting the prosecution and punishment of those responsible for war crimes, crimes against humanity, genocide or other serious violations of humanitarian law, as well as the establishment of both national and international tribunals ascribed with this duty ;

Noting that the Security Council has affirmed, through its action based on Chapter VII of the United Nations Charter in armed conflicts in which non-State entities are parties, that the respect for humanitarian law is an integral element of the security system set up for the World organization ;

Welcoming the United Nations Secretary General's regulation of 6 August 1999 on the Observance by United Nations Forces of international humanitarian law which reaffirms their obligation to comply strictly with humanitarian law, in particular as to the protection of the civilian population, and provides for the prosecution of members of the military personnel of such a force in case of violations of humanitarian law, including in situations of internal armed conflicts ;

Drawing attention to the important role played by the International Committee of the Red Cross (ICRC) in recent conflicts in which non-State entities have participated in seeking to ensure humanitarian protection for all victims and in urging the parties to such conflicts to abide by elementary principles of humanity and notably to spare the civilian population the effects of violence and devastation ;

Considering that it is desirable that humanitarian law be reconsidered and adapted to new international circumstances, so as to reinforce its respect and the protection of victims in armed conflicts in which non-State entities are parties,

Adopts the following Resolution :

1. For the purposes of this Resolution :

   - The expression "armed conflicts in which non-State entities are parties" means internal armed conflicts on the territory of a State between the Government's armed forces and those of one or several non-State entities, or, in the event of the collapse of the State, between several non-State entities. Also included are internal armed conflicts in which peacekeeping forces intervene ;

- The expression "non-State entities" means the parties to internal armed conflicts that, on the territory of a State, oppose the Government's armed forces or are fighting entities of a similar nature, as per the conditions set forth in Article 3 common to the Geneva Conventions on the Protection of Victims of War or in Article 1 of the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

2. All parties to armed conflicts in which non-State entities are parties, notwithstanding their legal capacity, as well as the United Nations and competent regional organizations have the imperative duty to respect humanitarian law as well as fundamental human rights. The application of such principles and rules does not affect the juridical status of the parties to the conflict and is not subject to their recognition as belligerents or insurgents.

3. Respect for humanitarian law constitutes an integral part of international order for the maintenance and reestablishment of peace, particularly in armed conflicts in which non-State entities are parties.

4. The law applicable to armed conflicts in which non-State entities are parties includes:

- Article 3 common to the Geneva Conventions of 1949 ;

- Protocol II as well as any other conventions applicable to armed conflicts of a non-international character, provided the State involved is a party to these instruments and the conditions for their application are fulfilled ;
- Customary principles and rules of humanitarian law on the conduct of hostilities and the protection of victims applicable to internal armed conflicts ;

- The principles and rules of human rights law guaranteeing fundamental protection for individuals ;

- The principles and rules of international law relating to war crimes, crimes against humanity and genocide ;

- The principles of international law "derived from established custom, from the principles of humanity and from dictates of public conscience."

5. Every State is legally bound *vis-à-vis* all other members of the international community to respect humanitarian law in all circumstances, and any other State is legally entitled and duty bound to demand respect for this body of law. No State or non-State entity can escape its obligations by denying the existence of an armed conflict. Should the State concerned claim that no internal armed conflict has broken out on its territory, the United Nations and competent regional organizations should be allowed to establish impartially whether humanitarian law is applicable.

6. In cases of serious violations of humanitarian law, States, the United Nations and competent regional organizations have the right to adopt appropriate measures in accordance with international law. In particular, in case of systematic and massive violations of humanitarian law, States and competent regional organizations are entitled to take countermeasures not implying the use of force in accordance with international law designed to impel the delinquent party to put a stop to those violations.

7. Any serious violation of humanitarian law in armed conflicts in which non-State entities are parties entails the individual responsibility of the persons involved, regardless of their status or official position, in accordance with international instruments that entrust the repression of these acts to national or international jurisdictions.

8. If the alleged perpetrators of serious violations of humanitarian law are on the territory of a State, the relevant authorities of this State are bound to prosecute and try such persons before their courts. However, if a *prima facie* case is made out against those persons by

either an international criminal court, by another State or by the State in which territory the conflict had broken out, those persons should be surrendered or extradited to the international court or to the State authorities concerned.

9. In order to achieve a better protection for the victims in armed conflicts in which non-State entities are parties, and taking into account recent armed conflicts of a non-international character, the following measures should be considered :

- The conclusion by the parties to such conflicts of special agreements, in accordance with Article 3 paragraph 2 common to the Geneva Conventions of 1949, which apply all or part of the provisions of these Conventions ;

- The support of States, the United Nations, the ICRC as well as other international bodies of a humanitarian character for measures to verify and oversee the application of humanitarian law, in the spirit of Articles 89 (Cooperation) and 90 (International Humanitarian Fact-Finding Commission) of the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I) ;

- The study of an eventual amendment of Protocol II, with a view to complementing its rules and in particular so as :

(a) to make it applicable to all non-international armed conflicts ;

(b) to establish an impartial and independent international body equipped to investigate respect for humanitarian law (see Article 90 of Protocol I).

10. In so far as the protection of victims of internal disturbances and tensions is not regulated by humanitarian law, the matter remains within the purview of human rights law. All parties concerned are bound to respect non-derogable human rights under the scrutiny of

the international community acting through the appropriate universal or regional bodies.

11. The principle according to which every person has the right to the same treatment in all armed conflicts, whatever their nature - a principle confirmed by practice, case-law and publicists - requires an increasing alignment of the principles and rules relating to internal armed conflicts with the principles and rules applicable in international armed conflicts. Consequently, States, the United Nations, competent regional organizations and the ICRC should give serious consideration to the need to draft and adopt a general convention designed to regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character."

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A titre de remarque liminaire, *le Rapporteur* indique qu'il se bornera à présenter de manière générale l'approche de la Commission dans l'élaboration du projet de résolution révisé no 1. Il souligne que le texte du projet de résolution a été approuvé dans son ensemble par tous les membres de la Commission qui ont participé à ses travaux au cours de la présente session et profite de l'occasion qui lui est donnée pour les remercier pour les efforts déployés en vue d'arriver à un projet qui peut être considéré comme le résultat final des travaux de la Commission. Il insiste sur le fait que les membres de la Commission se sont dits convaincus que le moment est venu pour l'Institut d'exprimer son opinion sur les problèmes relatifs à l'application du droit international aux conflits armés auxquels prennent part des entités non étatiques, sur la base juridique de leurs solutions, ainsi que sur les comportements des parties et de la communauté internationale dans son ensemble, en prenant en considération les tendances actuelles.

Le Rapporteur rappelle que le sujet traité par la commission avait été décidé lors de la Session de Milan en 1993 de même que celui relatif à l'assistance humanitaire (20e Commission) et regrette que les travaux de ces deux commissions n'aient pu être coordonnés. Une lecture rapide du projet de résolution révisé n° 1 permet de constater que ce texte vise principalement

les problèmes relatifs à l'application du droit humanitaire bien que le titre soit plus large et qu'il y soit fait mention du droit international en général. La question de savoir quelle place devait être réservée au droit international général et aux règles relatives à la conduite des hostilités a du reste été soulevée. Ayant mentionné cette question dans son exposé préliminaire, le Rapporteur souligne que les membres de la Commission ont tous insisté pour que le droit humanitaire soit traité en priorité. Cette position est tout à fait compréhensible au regard de la triste expérience des conflits armés internes auxquels prennent part des entités non étatiques et auxquels est confrontée la communauté internationale. Le Rapporteur se demande dès lors s'il ne serait pas opportun de modifier le titre de la Résolution pour tenir compte de l'orientation générale des travaux de la Commission et d'incorporer dans les travaux futurs de l'Institut un nouveau sujet complétant les travaux de la Commission à cet égard.

S'agissant du contenu même du projet de résolution révisé n° 1, le Rapporteur insiste sur le fait qu'il a le mérite de tenir compte et d'insister sur les acquis de la pratique la plus récente relative aux conflits armés auxquels prennent part des entités non étatiques. Pour ce qui est du préambule, le Rapporteur indique qu'il permet de saisir le cadre général dans lequel s'est posé le problème de l'application du droit international, notamment humanitaire, aux situations étudiées et dans le contexte de l'après guerre froide. Le préambule peut être divisé en quatre parties. Dans une première partie, le projet de résolution a été replacé dans le contexte du travail déjà réalisé en la matière par l'Institut. La deuxième partie du préambule donne une indication du cadre général de la situation dans laquelle la Commission a dû analyser l'application des règles du droit international, y compris du droit humanitaire, dans les conflits armés contemporains. Le Rapporteur observe que les Etats ne sont plus les seules entités intéressées par ces conflits ; au contraire, la communauté internationale dans son ensemble a un intérêt direct, concret et tout particulier à voir les parties au conflit respecter le droit international, notamment le droit humanitaire et elle doit également, en cas d'intervention dans de tels conflits, le respecter. En outre, le droit humanitaire a subi une influence substantielle de la Charte des Nations Unies et des règles relatives à la protection des droits de l'homme ; il n'est plus possible désormais de les séparer. Dans sa troisième partie, le préambule rappelle les prononcés de la Cour internationale de Justice qui a clairement

posé que nombre de dispositions des Conventions de Genève peuvent être considérées comme faisant partie du droit coutumier applicable dans tous les conflits armés, quelle que soit leur nature. A ces prononcés s'ajoutent les décisions du Tribunal pénal international pour l'ex-Yougoslavie selon lesquelles certaines règles applicables aux conflits armés internationaux sont désormais applicables aux conflits armés non internationaux, y compris, dans certains cas, la perpétration de crimes de guerre dans des conflits internes. Enfin, dans une quatrième partie, le préambule met en exergue le rôle des Nations Unies et les décisions de ses organes, notamment du Conseil de sécurité et du Secrétaire général, qui permettent de conclure que le droit humanitaire fait désormais partie intégrante du système de sécurité de l'organisation mondiale. A cet égard, il rappelle la décision très importante du Secrétaire général en date du 6 août 1999 qui affirme clairement l'application du droit humanitaire aux Forces des Nations Unies et prévoit la poursuite des membres du personnel de ces forces en cas de violations du droit humanitaire, y compris en cas de conflits armés internes. Il estime que cette question, qui a été controversée pendant de nombreuses années, est dès lors désormais réglée.

S'attardant à l'article I du dispositif du projet de résolution révisé, le Rapporteur précise qu'il s'agit d'une disposition qui contient les définitions relatives aux entités non étatiques et aux conflits armés auxquels elles prennent part. L'article IV précise le droit applicable. En outre, d'autres articles disposent que parties, Etats, Nations Unies et organisations régionales compétentes qui interviennent dans le type de conflit visé par la Résolution doivent respecter et faire respecter le droit humanitaire, alors que d'autres projets de dispositions encore suggèrent certaines propositions *de lege ferenda.* Enfin, tenant compte de la pratique récente, l'article X se réfère aux victimes des troubles et tensions internes, matière qui n'est pas traitée par le droit humanitaire mais qui est toutefois fondamentale et ne peut être ignorée. Le Rapporteur exprime le souhait que cette disposition soit en mesure d'initier la réflexion et l'action directe en la matière. Pour sa part, l'article XI a un caractère général et traite des perspectives visant à uniformiser le traitement des civils dans les conflits armés, quelle que soit leur nature. Le Rapporteur est conscient que la doctrine de la nécessité militaire et les points de vue des Etats ne pourront être changés de manière draconienne dans un proche avenir. Il s'agit plutôt d'une approche patiente, par petits pas, afin

d'arriver à une plus grande uniformité du traitement des victimes dans les conflits armés.

A titre de conclusion, le Rapporteur rappelle l'importance de l'année 1999 qui marque le centième anniversaire des Conventions de La Haye et le cinquantième des Conventions de Genève. L'Institut a pris part à toutes les activités qui ont mené à ces résultats et le Rapporteur estime important que l'Institut confirme le rôle crucial qu'il joue dans le développement de ce domaine du droit international.

The *President* invited the Assembly to present its considerations, concentrating on the substantive text.

Mr *McWhinney* wished to address a point to Article VIII, but which was one of general application. He wondered why established wording from a number of contemporary treaties, such as that combatting terrorism, or from various rulings of the International Criminal Tribunal for former Yugoslavia, had not been adopted with respect to the prosecution of violations of humanitarian law. He suggested that the approach indicated in those treaties be included in this Article, that is, that primacy, in terms of the assumption of jurisdiction, be recognised as that of the state of nationality The right to prosecute on the part of other entities would then only arise in the event of inactivity or where there was a deliberate dragging of feet by the State of nationality so allowing for action to be taken by other States having appropriate contact with the issues in question. He suggested that it could be proposed in the text that the ICJ might rule on the order of priority for other entities to be involved, or even that it have over-arching jurisdiction in such cases.

M. *Degan*, précisant qu'il prend la parole en sa qualité de membre de la Commission, mais qu'il souhaite par ailleurs également développer son opinion particulière ainsi que le prévoit le paragraphe 3 de l'article 26 du Règlement de l'Institut, rappelle le mandat qui a été donné à la Commission en se référant au titre de la Résolution qui vise "[l]'application du droit international, notamment humanitaire, dans les conflits armés auxquels prennent part des entités non étatiques". Il est tout à fait opportun pour l'Institut de traiter de cette question, d'autant que les conflits internes

constituent aujourd'hui, plus encore que les conflits internationaux, une menace croissante à la paix et la sécurité internationales. Dans ce contexte, des efforts doivent être déployés en vue de prévenir de tels conflits et de leur trouver des solutions politiques. M. Degan insiste sur le fait que ce qui est le plus important est d'empêcher un Etat qui, alléguant la préservation de son intégrité territoriale, utilise ses forces armées et de police de telle manière que sont inévitablement perpétrés des crimes de droit international. Une telle action est le début d'un cercle vicieux dans lequel toutes les parties impliquées commettent des crimes et qui peut mener, en bout de course, à l'éclatement de l'Etat. A cet égard, il rappelle les tristes exemples récents de la Bosnie-Herzégovine, du Kosovo, du Dagestan et de la Tchétchénie. Le respect des principes de non-ingérence dans les affaires intérieures d'un Etat devrait reculer devant la menace de la perpétration de crimes de droit international. A cet égard, la Commission a précisément pour mandat de définir dans quelle mesure et de quelle manière s'appliquent les chapitres VI, VII et VIII de la Charte des Nations Unies dans le cadre des conflits internes. Toutefois, M. Degan reconnaît que la majorité des membres de la Commission a souhaité limiter son mandat aux règles et principes du droit humanitaire. Il s'est du reste personnellement rallié à cette volonté et a participé à l'élaboration du projet de Résolution révisé qui trouve son accord de manière générale.

M. *Morin* félicite le Rapporteur et la Commission pour le travail réalisé, la résolution représentant une contribution significative au développement du droit international. D'entrée, il attire l'attention sur l'importance de l'article IV du projet, qui décrit le droit applicable dans les conflits armés internes. C'est en quelque sorte le coeur de la résolution. Or, certains passages de cette disposition demandent à être précisés. M. Morin se demande en particulier s'il n'est pas possible de préciser la portée de l'expression "les règles et principes des droits de l'homme", qui se trouve au quatrième sous-paragraphe, de sorte que le lecteur éventuel puisse se faire une idée claire de ce qui est entendu par là. Cette expression recouvre en effet non seulement les normes conventionnelles, mais également les actes concertés non conventionnels élaborés par l'ensemble des institutions de l'ONU. Ces normes sont nombreuses : on peut en fait en dénombrer quelque 550, dont certaines se chevauchent, mais également se complètent.

S'agissant des conflits armés internes auxquels prennent part des entités non étatiques, M. Morin souligne que certains principes et règles sont particulièrement pertinents. Il existe en effet une analogie et même une similitude frappante entre les conflits auxquels sont mêlées de telles entités et les situations d'urgence entraînant la suspension des garanties fondamentales, souvent consacrées par la constitution du pays concerné.

C'est justement dans les conflits internes (guerres civiles ou troubles chroniques) que l'État est amené à proclamer l'état d'urgence et à vider ses obligations constitutionnelles et internationales de tout contenu. C'est pourquoi les organes de l'ONU et les institutions régionales ont voulu préciser quels principes et règles des droits de l'homme doivent continuer à s'appliquer même lorsque la protection constitutionnelle est suspendue. M. Morin renvoie avant tout aux principes concertés non conventionnels, auxquels il serait utile de se référer ici.

Les organes des Nations Unies, la Commission des droits de l'homme et le Conseil économique et social et l'Assemblée générale, se sont penchés sur ces situations de danger public exceptionnel invoquées par certains États pour justifier des dérogations, parfois dévastatrices, aux libertés.

Dans sa Déclaration de 1975 sur la torture et autres traitements cruels, inhumains ou dégradants, l'Assemblée générale affirme que les circonstances exceptionnelles, telles que l'état de guerre, l'instabilité politique ou toute autre situation d'urgence ne peuvent être invoquées pour justifier de tels actes. Puis elle étend le même principe, quelques années plus tard, à d'autres actes, comme les exécutions extrajudiciaires et les disparitions forcées. Dans les Principes adoptés en 1989 et 1992, l'Assemblée affirme que les situations d'exception ne peuvent en aucune circonstance justifier de pareils comportements de la part des États.

M. Morin suggère qu'il soit pris acte de ces développements dans le projet de Résolution et propose de compléter l'article IV en apportant les précisions suivantes, ou encore d'ajouter au projet une disposition distincte au même effet :

"IV. Le droit applicable dans les conflits armés auxquels prennent part des entités non étatiques comprend :

[...]

- les règles et principes des droits de l'homme garantissant à toute personne une protection fondamentale, tels que ceux élaborés par l'Assemblée générale et les organes des Nations Unies exerçant leur compétence dans ce domaine et tout particulièrement les normes visant les situations d'exception, les mesures d'urgence ou la suspension des garanties des droits et libertés, selon lesquelles un État n'est autorisé en aucune circonstance à déroger à certaines règles fondamentales comme l'interdiction de la torture ou autres traitements cruels, inhumains ou dégradants, la prévention des exécutions extrajudiciaires, arbitraires ou sommaires et des disparitions forcées, de même que l'État a l'obligation de maintenir en toute circonstance les principes du droit à un recours, du procès équitable et des droits de la défense."

Alternativement, on pourrait insérer la même idée dans une disposition figurant parmi les définitions de l'article 1er du projet, comme suit :

"Aux fins de la présente Résolution :

[...]

- l'expression "principes et règles des droits de l'homme" comprend les normes conventionnelles applicables aux Parties ainsi que les normes concertées non conventionnelles élaborées par l'Assemblée générale et les organes des Nations Unies compétents en la matière, et tout particulièrement les principes et règles visant les situations d'exception, les mesures d'urgence ou la suspension des garanties, selon lesquels un État n'est autorisé en aucune circonstance à déroger à certains droits et libertés."

Mr *Meron* expressed his satisfaction that the Institute had taken up the study of issues such as those covered by the Resolution. This was a very important area and a review of the position of non-State entities in this field was to be welcomed. Serious questions of human rights and humanitarian law arose in situations of grave conflicts, such as those seen recently in Central Africa. It was proper, too, to ask what answers international law could provide to transboundary activities of non-State entities in this area. The difficulties encountered in this field of study could be seen from the work of the United Nations Human Rights Commission. Whilst he felt the draft Resolution left some issues untouched and various questions unanswered, it should be recognised that it covered a great deal. He warmly congratulated the Rapporteur on the success of his work.

He wished, however, to raise a specific problem. The Resolution was, in a way, too rich a menu. Some of the issues covered were unnecessary for inclusion, whilst others included may not have been essential. For example, he considered that any reference to *erga omnes* obligations could be left to the work of the 5th Commission addressing that very area. Whilst he would have points of details to address to particular provisions later in the debate, the draft text touched on the trend to blur the distinction between different types of conflicts. This tendency had been apparent in the Rome Conference on the Statute of the International Criminal Court. The title of the Resolution itself supported it in that it went beyond non-international armed conflicts, notwithstanding that the body of the Resolution suggested otherwise. He proposed that the title be amended to reconcile with the text.

He had two proposals for amending the Preamble: the first was that specific reference be made to the Statute of the International Criminal Court and its recognition that crimes against humanity, genocide, and certain other crimes were applicable to non-international armed conflicts ; and secondly, that the definition of crimes against humanity expressly stated that such crimes could also be committed by entities other than States.

Mr *Pinto* expressed his congratulations to the Rapporteur and the Commission for their work. He was in general agreement with the scope and content of the Resolution, and was also of the view that the Resolution was a very rich menu of subjects. He wished to raise one small matter for the

consideration of the Rapporteur, and one further matter of particular importance to himself.

Article VI indicated that "In case of systematic and massive violations of humanitarian law, States and competent regional organizations are entitled to take counter-measures not implying the use of force in accordance with international law", and wondered why, if the proposal was that counter-measures be permitted "in accordance with international law", there was the apparent prohibition against the use of force.

His main comment was addressed to a matter not included in the Resolution but was one of which he was particularly aware given the situation in his own country, Sri Lanka, which had been torn by armed conflict in which non-State entities were involved. Article X, second sentence, stated that "All parties concerned are bound to respect non-derogable human rights under the scrutiny of the international community acting through the appropriate universal or regional bodies". In his mind, the real question was how to achieve this goal. It was clear that States could be directly bound by conventions and so forth, but how were other entities to be reached in the same way ? In fact, how might this question of broader application be addressed ? He suggested that the Resolution include a non-legal matter which touched the whole body of work of the Commission and this area in general, that is, the need to educate and disseminate relevant information. These activities should, he suggested, be undertaken by all States and "all parties concerned".

In Sri Lanka, for example, the authorities had tried to engage in such a process of education and dissemination of information, as well as trying to find other ways of reaching the minds of those in the armed forces so as to inform them of the limits on their activities in armed conflicts. The authorities had even attempted to reach minds at an earlier stage, that is, in primary and secondary schools. This was part of its process to reach out to governmental and non-governmental entities at an early stage, rather than waiting until conflict broke out. He suggested that requirements to educate and disseminate relevant information on the obligations to be respected in the event of armed conflicts, including information on the consequences that could follow from breaches of such obligations, be imposed on States

through international Conventions. He supported Mr Degan's point, that it was an important task to attempt to stop some of these conflicts arising in the first place.

M. *Frowein* félicite le Rapporteur et les membres de la Commission de leurs travaux et se dit de manière générale en accord avec le texte du projet de résolution révisé. Afin d'éviter une interprétation trop restrictive du champ d'application de la Résolution, il propose toutefois de supprimer du premier paragraphe de l'article I l'expression "dans le cas de l'effondrement de l'Etat". La Résolution ne vise pas que ce type de situation.

S'agissant du premier paragraphe de l'article I, M. *Barberis* demande un éclaircissement en ce qui concerne la nature proprement dite des entités non étatiques visées et s'interroge sur le point de savoir si y sont incluses les entités qui, tout en menant des activités militaires, poursuivent des buts commerciaux ou économiques.

M. *Torres Bernárdez* félicite le Rapporteur et les membres de la Commission pour les travaux réalisés. Il partage l'avis que tous les civils doivent avoir droit au même traitement, indépendamment de la nature du conflit armé dans lequel ils se trouvent, développement confirmé par la pratique, la jurisprudence et la doctrine. Pour ce qui est de la Commission internationale humanitaire d'établissement des faits, il indique que cet organe a lui-même estimé être compétent dans le cadre de conflits armés internes et se demande si le libellé de l'article IX est vraiment en conformité avec cette prise de position.

M. *Waelbroeck* adresse lui aussi ses félicitations au Rapporteur et aux membres de la Commission pour le travail remarquable réalisé. Il se félicite notamment de la mention qui est faite des travaux du Tribunal pénal international pour l'ex-Yougoslavie. Il souligne toutefois l'importance d'affirmer clairement la nécessité de protéger les droits de l'homme dans le contexte des conflits auxquels participent des entitiés non étatiques. A cet égard, il relève que des expressions différentes ont été employées notamment aux articles II, IV et X du projet de Résolution et qu'il serait approprié de procéder à une certaine uniformisation dans la mesure où la même réalité est visée. Enfin, M. Waelbroeck se demande s'il ne serait pas approprié

d'inclure dans le projet de Résolution une définition des droits de l'homme fondamentaux ou auxquels aucune dérogation n'est possible.

Mr *Brownlie* expressed his firm view that the content of the Resolution presented a balanced approach and a useful overview of the law applicable in this area. This in itself was a worthwhile exercise and the Resolution was to be considered as making an important contribution here. To his mind, however, there were still serious problems that had to be recognised in this field, and which he did not think could be addressed in the Resolution by improved wording. For example, there were clearly problems of efficacy and implementation to be faced, even with "rule of law" States, and all the more with non-State entities. The latter encompassed a wide spectrum of entities, some on the verge of becoming States or lawful governments. In the case of some non-State entities the absence of legitimacy and the level of political influence on whether to grant them recognition even as insurgents, posed the problem of leverage with the application of international human rights. This leverage was normally very weak. In fact, a crude paradox might be identified from the problem of the "relative legitimacy" of such groups. If they were denied status as insurgents or belligerents, they had little encouragement to obtain the approval of the international community. However, he recognised that that, of course, presented a problem other than might be addressed in the current Resolution.

He had a particular point to make in relation to Article IV, which point still remained notwithstanding the Rapporteur's earlier comments. That Article set out a general statement of the law applicable, and, in such general terms, was very helpful. However, it seemed to him that there existed some inconsistency between Article IV and Article X. Article X, first sentence, read "Insofar as the protection of victims of internal disturbances and tensions is not regulated by humanitarian law, the matter remains within the purview of human rights law". This text presented a problem in that, in Article IV, there was no attempt to indicate the principles of humanitarian law in armed conflict or to indicate that human rights were part of a hierarchy, particularly in view of the fact that human rights were considered to apply to internal armed conflicts. A grey area that resulted could be seen with the situation of belligerent occupation. Belligerent occupation, as a legal status, granted the occupant various powers which, he considered, were not

too consistent with human rights law. All too often it seemed to him that human rights standards were bundled together with international humanitarian rights. The ambiguity in the text arising from the inconsistency he had addressed earlier might be resolved, he suggested, by aligning Article IV more closely with the content of Article X.

Mr *Orrego Vicuña* expressed his warm congratulations to the Rapporteur and the Commission for its most interesting work, and for its attempt to reach a balanced position, the success of which was to be seen in the evolving drafts of the Resolution. There were still, however, two aspects of general consideration which he wished to raise and place in a wider perspective.

The first concerned the question of the "applicable law". The Institute was, of course, in favour of progress in international law in the area covered by the Resolution as in other fields. One way of achieving a broad success in terms of the application of international law was by the transparent operation of everyone indicating consent to the substance of the area of international law in question. One trusted that in such cases international law would be firm, applicable and properly implemented. An alternative way was more indirect, that is, through a process of individual interpretation perhaps leading to results at variance with what lay in the minds of an original Drafting Committee. That sort of outcome risked reversing what progress might already have been achieved in a particular area, and was able to put a whole subject in dispute. The reason for this was that such a process of interpretation did not accord with the principle of consent indicated by relevant participants. He considered that Article IV reflected this approach and problem. Whilst he had no difficulty with the first three indents, the latter part of the Article, and especially the last indent, were, he considered, reflective rather of the above-mentioned process of interpretation. He considered it was not necessary to include the last indent in the Resolution, and, further, that it did not reflect the principle of international law being established by the consent of relevant participants. He would prefer that Article IV not be stated in too broad a manner, but be restricted to a statement of the principles of customary international law and other principles and rules related thereto. In his opinion, this would avoid the pitfalls of the alternative approach which could be seen in the discussions regarding the International Criminal Court.

The second main item was the need to attempt to make the Resolution compatible with generally accepted principles relating to jurisdiction. He had noted that the Resolution, with some nuances, in Article VIII, introduced the concept of universal jurisdiction, with nationality and other principles for the assumption of jurisdiction cast in a secondary position. As had already been expressed by others, the text should highlight the principle of nationality as the basis for assuming jurisdiction and then, only in the event of non application of its jurisdiction by the State of nationality, would other principles of jurisdiction enter into play. In this way, the Resolution would be compatible with current approaches to the assumption of jurisdiction, which had been widely consented to, and would not provide any "independent interpretation" such as he had spoken about earlier.

With this point in mind, he wished to highlight a particular problem that might arise in the special case of many developing countries, following on from the approach suggested by Mr McWhinney - that is, that one apply first the principle of jurisdiction based on nationality, but in the face of foot dragging one might turn to other bases for assuming jurisdiction. The risk that he had in mind here was that the courts or other bodies exercising jurisdiction in developing countries would be ignored and that recourse be made to alternative tribunals. If the tribunal in question were an international tribunal, that alternative might be considered acceptable. If recourse was made to a non-international tribunal, he considered that this result was not acceptable. Hence, for the above reasons, he suggested that Article VIII set out first the nationality principle, followed by the other bases for the assumption of jurisdiction, and that the role of national courts always be borne in mind in this context.

M. *Ranjeva* souhaite lui aussi rendre hommage au Rapporteur pour la qualité du travail réalisé. Il désire toutefois faire quatre observations. La première porte sur les articles IV et X. M. Ranjeva y décèle une certaine contradiction puisque, dans le cas de l'article X, l'application des droits de l'homme paraît résiduelle. Il souhaite qu'une distinction très nette soit opérée entre droits de l'homme et droit humanitaire et que soit accepté le caractère équipollent de la nature contraignante de ces deux branches du droit. Pour appuyer ses propos, il donne l'exemple du règlement général des armées de

Madagascar qui prévoit que tant les droits de l'homme que le droit humanitaire sont applicables aux forces armées en campagne. Deuxièmement, M. Ranjeva suggère que soit inclus, dans le septième alinéa du préambule, le terme "intransgressible" puisque le texte met clairement en exergue que ces obligations s'appliquent tant aux Etats et sujets de droit international qu'aux autres entités qui pourraient être concernées ou affectées par l'application de ces règles et principes du droit humanitaire. Troisièmement, M Ranjeva suggère que le troisième alinéa du préambule soit modifié en éliminant les termes "ethniques, raciales ou religieux" ou, alternativement, en introduisant avant cette énumération le mot "notamment." Enfin, M. Ranjeva appuie la suppression de l'expression "effondrement de l'Etat" au deuxième paragraphe de l'article I et souligne qu'il votera en faveur de cette importante Résolution.

Sir Kenneth Keith acknowledged the great importance of the topic of the Resolution and its potential to fill gaps in existing law. He commented that the Resolution could make up for inadequacies in the law and strike a balance between existing and developing law. He nevertheless feared that a number of States would be reluctant to acknowledge the principles contained in the Resolution, as was the case in the drafting of the two Protocols to the Geneva Conventions in 1977 and the discussion of new Conventions at the 1999 Hague Centennial Conference. He hoped that the Resolution might influence the imminent discussions of the General Assembly regarding the Hague Centennial Conference and the discussions of the International Red Cross and Red Crescent societies on the 50th Anniversary of the Geneva Conventions. He agreed with Mr Pinto that the dissemination of human rights information was crucial for the implementation of humanitarian law and human rights obligations. Nevertheless, he believed that existing law already provided adequately for human rights education, and so he believed that the Resolution should simply recall such obligations.

Sir Kenneth also wished to point out a problem in relation to his work with the International Humanitarian Fact-Finding Commission. Article 90 of Protocol I to the Geneva Conventions allowed the Commission to investigate any related matters it saw fit, an interpretation of its mandate which had never been questioned. Article IX of the Resolution might limit the function of the Commission. He therefore suggested that the Article of the Resolution be reworded to take this into account.

Mr *Henkin* extended his congratulations to the Rapporteur emphasizing that these congratulations were not just a formality, but a sincere recognition of the Rapporteur's achievements. He wished to draw attention to the relationship between human rights law and humanitarian law, which bodies of rules, in his view, complemented each other and had a cumulative effect. He therefore believed that the term "international law" in the Resolution's title referred to human rights law. With regard to Article V, he pointed out that States should have not only the obligation to respect, but also to ensure respect for humanitarian law.

With regard to Article VI, he pointed out that the first sentence mentioned States, the United Nations, and competent regional organizations, while the second sentence only referred to States and organizations. He therefore asked for clarification as to which entities it was intended would be bound under this Article. Furthermore, he believed that such entities as the United Nations peacekeeping forces should be bound by obligations to respect and to ensure respect for humanitarian law. He felt that this was important in light of a number of peacekeeping operations in which humanitarian law was enforced during the mandate of the operation, but allowed to disintegrate once the mandate ended. He hoped that such an obligation would encourage the deployment of United Nations peacekeeping forces in areas of conflict until peace had been permanently restored. Finally, he also supported the motion that Article VI be amended so as to allow for the use of force to put a stop to violations of humanitarian law.

M. *Degan* appuie la suggestion de M. Henkin, relative à l'article VI, qui tend à la suppression des mots "conformément au droit international" après les mots "contre-mesures n'impliquant pas l'usage de la force". Au surplus, il observe que l'intervention humanitaire peut être légitime dans des cas tout à fait exceptionnels et qu'il appartient au procureur du Tribunal pénal international pour l'ex-Yougoslavie de poursuivre ceux qui ont commis des crimes durant une telle intervention.

The *President* recalled that the term "countermeasures", as employed in the International Law Commission's Report on State Responsibility, was limited to the non-use of force. Therefore, if the word "countermeasures" were to be employed in the Resolution, it would necessarily imply the non-use of force.

Mr *Shahabuddeen* congratulated the Rapporteur and indicated his agreement with the comments of Mr Frowein. In Article I, he was not sure whether the phrase "in the event of the collapse of the State" was appropriate. He asked whether it was not possible for a State to exist even during a conflict involving non-State entities. He suggested the phrase be deleted. With regard to Article X, he pointed out that according to its current formulation, human rights law was only to apply residually.

M. *Abi-Saab* félicite le Rapporteur et exprime son accord avec le projet de résolution. Il a en effet la conviction que l'Assemblée est saisie d'un bon texte. Dans le cadre du présent débat, il aimerait formuler trois observations.

En premier lieu, et comme l'a dit M. Degan, il relève que le mandat de la 14e Commission était particulièrement large, car il devait couvrir toutes les questions de droit international soulevées par les conflits internes, et pas seulement les aspects de droit humanitaire. Toutefois, la Commission ne pouvait pas remplir un tel mandat. C'est donc à juste titre qu'elle s'est concentrée, dans un premier temps, sur le plus pressant, à savoir la dimension humanitaire des conflits armés et qu'elle a, pour le surplus, laissé à l'Institut le soin de la charger de poursuivre ses travaux ou de nommer un nouveau rapporteur. Le projet de résolution ramène l'intervenant à la première mouture du projet de Protocole II additionnel aux Conventions de Genève, élaboré par le Comité international de la Croix-Rouge. Ce texte couvrait toutes les situations entrant dans le champ d'application de l'article 3 commun aux Conventions de Genève. Comme on le sait, le Protocole II a finalement reçu un champ d'application plus réduit, étant limité aux conflits que définit l'Article premier de cet instrument. La pratique internationale a démontré que l'on a eu d'avantage d'audace que la majorité des participants à la Conférence diplomatique de 1974 - 1977. Dès lors, la nouveauté du projet réside avant tout dans l'inclusion de la composante de droit pénal. Dans cet esprit, l'intervenant est d'accord avec M. Frowein: l'un des éléments les plus faibles de l'article I du projet réside dans le fait qu'il définit les conflits armés comme des hostilités qui opposent un gouvernement à des rebelles et exclut les conflits entre rebelles. Les mots "dans le cadre de l'effondrement de l'Etat" peuvent apparaître comme une restriction alors qu'ils étaient conçus comme un exemple. M. Abi-Saab n'aurait aucune objection à leur suppression.

Sa deuxième observation concerne l'article VIII du projet, mentionné par M. Mc Whinney. La formulation du projet est surprenante et compliquée. On pourrait recourir à une formulation plus simple si l'on veut maintenir cette disposition. L'article VIII pourrait tout simplement consacrer le fait que le système des infractions graves aux Conventions de Genève s'applique ici.

Finalement, l'intervenant aborde la mise en oeuvre du droit humanitaire qui demeure toujours imparfaite. On a tendance à croire, aujourd'hui, que tous les problèmes peuvent être réglés par le biais du droit pénal, par la répression. Or tel n'est pas le cas. Il faut aussi rechercher d'autres approches, et notamment étudier la cause des conflits et le moyen de les prévenir.

Mr *Skubiszewski* also congratulated the Rapporteur for his work under extremely difficult circumstances. He agreed with Messrs. Degan and Abi-Saab that the Resolution should limit itself to the conduct of hostilities in internal conflicts. He supported the idea that Article 3 common to the Geneva Conventions and Protocol II to the Geneva Conventions should fill the gaps in the event of a derogation of human rights law. He also drew attention to the usefulness of the *Tadic* case and of the contributions of Professor Christopher Greenwood to the Centennial of The Hague Conference to the work of the Commission.

Le *Secrétaire général* juge utile, compte tenu des observations formulées au sujet du titre du projet de résolution et du mandat de la Commission, d'apporter la précision suivante. Jusqu'à l'adoption d'une résolution, l'Institut est libre de modifier l'intitulé du projet. La Commission ne peut pas le faire de sa propre autorité, mais son Rapporteur et ses membres peuvent soumettre des suggestions à cet égard. La préoccupation majeure doit être de faire en sorte qu'il y ait correspondance entre le titre d'une résolution et son contenu. En l'espèce, la quatorzième Commission pourrait, par exemple, proposer de supprimer l'adverbe "notamment" dans le titre du projet. L'étude de certains aspects du thème suggéré à la quatorzième Commission pourrait être proposée à la Commission des travaux.

The *President* closed the general discussion and opened the debate on specific Articles starting with Article I.

Mr *Gaja* noted that the reference to the involvement of intervening peacekeeping forces in an internal conflict, as provided for by Article I(a), could give rise to an *a contrario* interpretation of the Resolution. Specifically, he wondered whether the Resolution could not also cover the situation in which an intervening State supported governmental forces or a non-State entity.

Mr *Dinstein* was of the opinion that if another State intervened directly in an internal conflict, the conflict would thereby become international. This did not, however, apply to cases of intervention by peacekeeping forces.

Mr *Gaja* believed that there was a variety of opinion on the consequences of State intervention. He pointed to the view expressed in the *Nicaragua* case by the International Court of Justice, which clearly implied that a conflict between governmental forces and a non-State entity would remain governed by the rules concerning international conflicts.

Mr *McWhinney* indicated that the Resolution appeared to apply to situations such as that of Germany in 1945, but did not apply to such cases as the disintegration of the former Yugoslavia.

Le *Rapporteur* peut admettre la suppression des mots "dans le cas de l'effondrement de l'Etat". Quant à la suggestion de M. Gaja, elle sera examinée par la Commission.

Mr *Shahabuddeen* proposed that in Article I(b) the phrase "as per the conditions set forth in" be replaced with "within the contemplation of".

Mr *Meron* supported the suggestion to delete the reference to the "collapse of the State" from Article I (a). He, too, did not believe that the intervention of peacekeeping forces would change the character of an internal conflict.

Mr *Brownlie* also voiced his support for the deletion of the reference to "the collapse of the State". He recalled the situation in Poland in 1939 and in France in 1940, where the government had collapsed but armed forces still operated in the field. As a result, he suggested that the phrase "in the event of the collapse of the State" be replaced with "where the circumstances make it appropriate".

M. *Barberis* rappelle sa précédente intervention et demande au Rapporteur s'il pourrait apporter les éclaircissements sollicités quant au cercle des entités non étatiques couvertes par le projet de résolution.

Le *Rapporteur* indique que la notion d'entités non étatiques incluse dans le projet est souvent utilisée en droit international général sans qu'elle constitue une notion bien définie. Il s'agit d'entités qui ne sont pas des Etats, mais des entités de fait pouvant devenir des Etats à un certain moment ou demeurer des mouvements insurrectionnels. En réponse au questionnaire du Rapporteur, M. Dinstein a indiqué que l'Institut devrait parler de conflits armés internes plutôt que de conflits armés auxquels prennent part des entités non étatiques[1]. Compte tenu du titre retenu par l'Institut, le Rapporteur a estimé qu'il devait conserver la notion de conflits armés auxquels prennent part des entités non étatiques. En fait, l'article I du projet donne à cette notion le sens de parties à un conflit armé interne. Cette définition ne vaut qu'aux fins de la résolution.

Sir Ian Sinclair also agreed with the motion to delete the reference to the collapse of the State. He considered that the amendment proposed by Mr Shahabuddeen could be addressed through a better co-ordination between the French and English versions of the text.

Mr *Henkin* suggested that the title of the Resolution make specific reference to human rights law and humanitarian law. He also asked why the Article was restricted to armed conflicts "on the territory of the State" and suggested this phrase be deleted.

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[1] Cf. Institut de droit international, *Annuaire*, Volume 68, Tome I, Session de Berlin, 1999 - Première partie, p. 285.

Mr *Sohn* suggested that the phrase "collapse of the State" be replaced by "collapse of the central government".

Mr *Dinstein* said that the Commission had not had in mind the situation of Poland and France during World War II, but rather the more recent cases of Somalia and Sierra Leone. In each of these countries, the central government had ceased to exist and entities striving for power in the State were all non-governmental. Some refer to the situation as a "collapsed" State.

Mr *Feliciano* expressed his reservations about the term "non-State entities". He recalled that this term was defined with reference to Protocols I and II to the Geneva Conventions, which, in his view, did not apply to some non-State parties which operated, for example, in Asia. He pointed out that in that part of the world, a number of non-State entities were engaged in purely commercial, non-political activities, such as piracy, banditry, and drug dealing. The reference to armed conflict in Article 1 of Protocol II would not encompass the activities of such non-political non-State entities.

M. *Torres Bernárdez* tient à préciser la manière dont il interprète la notion d'entités non étatiques : il s'agit d'entités non étatiques relevant de l'ordre interne de l'Etat où se déroule le conflit. En sont exclus les mouvements internationaux et les entités qui proviennent d'un autre Etat.

Mr *Meron* suggested that the last sentence of Article I(a) be deleted.

The *President* then opened the discussion of Article I(b).

Mr *Lowenfeld* asked for clarification on the provisions of Protocols I and II to the Geneva Conventions.

Mr *Dinstein* recalled that Protocol I applied to international armed conflicts, which were excluded from the scope of the Resolution, whereas only Protocol II, as well as Article 3 common to the Geneva Conventions, addressed non-international armed conflicts. He furthermore pointed out that Article 1(4) of Protocol I provided that wars of national liberation be regarded as international armed conflicts. Protocol II, the subject of the

present Resolution, consequently was not applicable to wars of national liberation. He also recalled that the International Court of Justice had declared that Article 3 common to the Geneva Conventions constitutes an integral part of customary international law.

Le *Rapporteur* rappelle que la rédaction du premier tiret de l'article I a connu une certaine évolution. Le sort de la dernière phrase de cette disposition dépend de la décision que prendront les membres de la Commission. Dans son exposé préliminaire, le Rapporteur a insisté sur le changement de caractère des conflits armés en cas d'intervention des forces des Nations Unies[2]. Personnellement, il serait enclin à insister sur ce point.

The *President* proceeded to discussion of Article II.

Mr *McWhinney* asked whether the reference to "competent regional organizations" meant regional organisations as defined by the United Nations Charter.

Mr *Bernhardt* voiced his concern that reference in the text to non-derogable rights was too restrictive. He believed that the Resolution should consistently make reference to general human rights.

Mr *Shahabuddeen* proposed that the phrase "notwithstanding their legal capacity" be replaced with "irrespective of their character". He also recalled that the Commission had studiously avoided drawing *jus cogens* into the Resolution. He therefore asked whether the word "imperative" was advisable in Article II.

The *President* indicated his agreement with Mr Shahabuddeen's first suggestion.

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2 Cf. *op. cit.*, p. 301.

Mr *Tomuschat* expressed his agreement with Mr Waelbroeck that the reference to non-derogable human rights was too limited. He asserted that the most important rights to protect during armed conflict were the rights to life, liberty, and freedom of the person, which were not necessarily non-derogable.

Sir Kenneth Keith believed that the reference to "regional organizations" was too restrictive and might lead to the exclusion of other relevant organizations. He indicated his preference for some of the more general language used in Articles IX and X of the Resolution.

Mr *Sohn* recalled that human rights were enumerated by two fundamental documents. The Charter of the United Nations provided for human rights and fundamental freedoms, and the Universal Declaration on Human Rights provided for general human rights principles. He suggested, therefore, that reference be made to rights recognised in the Universal Declaration.

Mr *Meron* signaled his agreement with the suggestion to drop the word "imperative" and to make reference to fundamental human rights as opposed to non-derogable rights. He pointed out that different human rights conventions contained varying lists of non-derogable rights. He furthermore proposed to substitute the phrase "is not subject to their recognition" with "is not dependent on their recognition".

La séance est levée à 13 h 00.

Huitième séance plénière

Lundi 23 août 1999 (après-midi)

La séance est ouverte à 15 h 05 sous la présidence de M. *Zemanek*.

The *President* opened the debate on Article III.

M. *Torres Bernárdez* se demande si le mot "notamment" ne pourrait pas être à la source de certaines confusions, dans la mesure où l'on pourrait raisonner *a contrario*. Il suggère de le biffer ou de le remplacer par "y compris".

Mr *Henkin* noted that Article II refers to human rights, whereas these are not mentioned in Article III. He suggested that the Rapporteur and Commission might want to look at that inconsistency.

M. *Ranjeva* relève que le respect des droits de l'homme constitue aussi un fondement essentiel du système de la Charte des Nations Unies relatif au maintien de la paix et de la sécurité internationales. A cet égard, il suggère d'adapter la terminologie de l'article III à celle de la Charte, en évoquant non pas "la paix" mais "la paix et la sécurité internationales".

Mr *Feliciano*, in referring to Articles II and III, reflected that the thrust of the Articles was to foster respect for international law at large, and that the specific reference to international humanitarian law should not be taken to exclude international human rights. He noted that paragraph 12 of the Preamble mentions the regulation of 6 August 1999 by the United Nations' Secretary-General which does not refer to human rights but only to humanitarian law. That being said, he felt that Article II embodies an imperative duty to respect both international humanitarian law and human rights.

The *President* observed that the Commission would have to amend the terminology throughout the Resolution to make it more consistent. He then opened the debate on paragraph 1 of Article IV.

M. *Ranjeva* propose d'ajouter "notamment" à la fin de la phrase introductive. Il s'agit en effet ici d'une énumération des règles existantes qui ne doit pas s'entendre comme excluant la possibilité d'interprétations régionales du droit humanitaire.

Concernant le premier sous-paragraphe de l'article III, M. *Frowein* préférerait que l'on relie l'article 3 commun aux "règles générales du droit humanitaire", de manière à en reconnaître l'applicabilité à tous les Etats, qu'ils soient parties aux Conventions de Genève ou non. Par ailleurs, il suggère que le sous-paragraphe 2 soit placé à la fin, car il renvoie à des règles plus spécifiques, qui devraient être précédées des principes généraux tels qu'énoncés dans les autres sous-paragraphes.

Mr *Shahabuddeen* observed that the rule in paragraph 1 of Article IV straddles the international and the municipal spheres. The rule, being of a residual nature, should come at the very end of Article IV.

Mr *Feliciano* thought that the word "international" should be inserted before the word "law" in Article IV *in limine*. He added that paragraph 6 refers to situations where there is a gap or lacuna in the law, so that the reference to the Martens clause was warranted.

The *President* opened the debate on paragraph 2 of Article IV.

Mr *Skubiszewski* referred to an amendment he circulated modifying paragraph 2 in the following way: the words "provided the State involved is a party to these instruments and the conditions for their application are fulfilled" should be deleted , so that the paragraph ends with the word "character".

The *President* opened the debate on paragraph 3 of Article IV. There being no comments, he invited observations on paragraph 4 of Article IV.

Mr *Bernhardt* suggested that the paragraph should be modified to refer to "principles and rules guaranteeing fundamental human rights", in order to make the provision more consistent with Articles II and X.

Mr *Orrego Vicuña* proposed the following formulation for paragraph 4 : "Such generally accepted principles and rules guaranteeing fundamental protection of human rights".

M. *Morin* tient à revenir sur trois points qu'il a brièvement évoqués lors de la discussion générale sur le projet de résolution. Premièrement, la formule énoncée au 4ème paragraphe soulève un débat de fond : s'agit-il d'un ensemble de droits et libertés qui ont leur source dans des régimes conventionnels mais aussi dans des actes concertés de nature non conventionnelle, ou doit-on comprendre que l'on renvoie aux principes indérogeables qui sont énumérés dans les instruments conventionnels pertinents ? La mention de l'"ensemble des droits fondamentaux, en particulier ceux auxquels il ne peut être dérogé", constituerait peut-être une solution de compromis susceptible de recueillir l'approbation de la majorité de l'Assemblée. Deuxièmement, M. Morin souhaiterait que l'on aligne les solutions contenues aux articles IV (qui régit les conflits armés) et X (qui régit les situations de troubles qui ne peuvent être qualifiées de conflits armés). L'uniformisation se justifie par le fait que la distinction entre les deux situations est trop délicate pour donner lieu à des différences significatives de régimes juridiques. Troisièmement, M. Morin insiste pour que l'on s'efforce d'indiquer systématiquement la source des règles et principes évoqués, particulièrement lorsqu'on se trouve dans le domaine non conventionnel. Il attire l'attention de l'Assemblée sur la dimension pédagogique de cette résolution, qui a vocation à être lue non seulement par des juristes, mais aussi par toutes les personnes intéressées. Dans ce contexte, la terminologie finale du texte revêt une importance toute particulière.

M. *Waelbroeck* revient sur le problème de la mention des "droits fondamentaux", formule qu'il estime trop large et exagérément vague. Il relève que certaines confusions pourraient se développer sur le plan linguistique, dans la mesure où certaines langues comme l'allemand tendent à assimiler l'expression de "droits fondamentaux" de l'homme aux droits de l'homme, qu'ils soient ou non susceptibles de faire l'objet d'une dérogation.

En ce qui le concerne, il reste partisan, sur le fond, de limiter la catégorie concernée aux droits indérogeables. M. Waelbroeck serait toutefois prêt à admettre une formule de compromis, par exemple celle qui a été avancée par M. Orrego Vicuña.

M. *Torres Bernárdez* se demande si les "principes et les règles des droits de l'homme" doivent s'entendre comme des principes et règles qui relèvent du droit international. Il demande au Rapporteur un éclaircissement à ce sujet.

The *President* opened the debate on paragraph 5 of Article IV.

M. *Degan* propose une formule plus ouverte, qui ne se limite pas aux crimes internationaux dont peuvent connaître les tribunaux pénaux internationaux existants, mais qui soit susceptible de s'étendre à d'autres types de crimes, présents, comme par exemple le terrorisme, ou futurs, qui résulteront de l'évolution du droit international.

M. *Torres Bernárdez* appuie la suggestion de M. Degan. Il importe d'ouvrir au maximum la formulation, même si celle-ci pourrait, à défaut, être acceptée telle quelle.

The *President* opened the debate on paragraph 6 of Article IV.

Mr *McWhinney* noted that there was an inconsistency between the French and English versions of paragraph 6. He questioned the soundness of the English text of the Martens clause and wondered whether the reference to the "dictates of public conscience" was really necessary.

Mr *Dinstein* retorted that the quoted passage in paragraph 6 was taken from the Martens clause which had been included in the Hague Conventions as well as the 1949 Geneva Conventions and the 1977 Additional Protocols, and that it was essential to cover any gaps or lacunae in the law. It followed, according to him, that paragraph 6 ought to remain at the end of Article IV. He commented that international human rights law plays a different role in international and internal armed conflicts; while it is perfectly acceptable to refer purely to humanitarian law with respect to

international armed conflicts, as that body of law is fully developed, a specific reference to both humanitarian law and human rights law is needed in internal armed conflicts. States, he noted, very often declare a state of emergency in times of armed conflicts, to leave only non-derogable human rights in force, thus underscoring the significance of paragraph 6.

Mr *Meron* agreed that the current language of the Martens clause should be retained, as it comes from the 1977 Additional Protocol I. Moreover this modernised version of the clause had been referred to with approval by the International Court of Justice in its *Advisory Opinion on the Legality of the Use Or Threat of Use of Nuclear Weapons*.

Mr *Sohn* also underlined the significance of the Martens clause and the fact that it had been used on many occasions in international instruments.

The *President* opened the debate on Article V.

Mr *Gaja* queried as to why the first sentence of Article V refers only to States, whereas the intention revealed in the remainder of the provision was that non-State entities were meant to be covered as well. He thought that the last sentence could give the unfortunate impression that States could deny the existence of an armed conflict and thereby successfully ignore international humanitarian law before the United Nations or a regional organization had proceeded to characterize the conflict. Finally, he thought that the reference to "the United Nations and competent regional organizations" was extremely vague as to which body should act and on what legal basis.

M. *Schindler* s'associe à la proposition avancée par M. Gaja, tendant à reformuler la disposition de façon à ce qu'elle couvre tout Etat mais aussi toute entité non étatique.

Mr *Pinto* referred to the need to disseminate information and educate populations as an important part of implementation. He submitted a text for a new paragraph 2 to Article V :

"2. "States shall undertake broad and early dissemination among their nationals, especially through their educational systems, of the specific obligations imposed by customary international law and treaties in force concerning humanitarian law in armed conflict, as well as of the specific remedies available in the event of breach of those obligations".

"2. Les Etats doivent entreprendre une large diffusion auprès de leurs ressortissants, tout spécialement dans le cadre de leur système d'éducation, d'informations sur les obligations précises imposées par le droit international coutumier et les traités en vigueur en matière de droit humanitaire dans le cadre de conflits armés, ainsi que de recours particuliers en cas de violation de ces obligations".

Mr *Shahabuddeen* admitted he was attracted by the proposition put forward by Mr Gaja, but wondered whether the answer to the difficulty in the first sentence could be found in a broad interpretation of the duty to respect humanitarian law "in all circumstances". He thought that adding the word "merely" after "escape its obligations by" would more clearly express the principle that a State could not successfully bar the application of humanitarian law to an armed conflict. He suggested that the third sentence should refer to both States and non State entities, as the latter could also be in a position to deny the existence of an armed conflict.

M. *Torres Bernárdez* s'interroge sur la pertinence de la troisième phrase de l'article V, qui semble aller à la fois au-delà (dans la mesure où une détermination exclusive semble être conférée à des organes internationaux) et demeurer en deçà (puisque les Nations Unies disposent déjà d'un certain pouvoir de qualification en vertu de la Charte) du droit existant. Par ailleurs, cette phrase semble plus liée à l'article VI qu'à l'article V. M. Torres Bernárdez ne s'opposerait donc pas à sa suppression.

Mr *Skubiszewski* shared Mr Gaja's concern and suggested that the words "notwithstanding that obligation" be added at the end of the first leg of the last sentence of paragraph 5.

M. *Abi-Saab* relève que la première phrase ne fait qu'exprimer l'obligation de "respecter et faire respecter" le droit humanitaire contenue aux articles 1er communs aux Conventions de Genève. Par ailleurs, concernant la deuxième phrase, il relève que, historiquement, ce ne sont jamais les entités non étatiques qui nient l'existence d'un conflit, mais bien l'Etat qui souhaite minimiser la gravité de la situation. Le parallélisme énoncé théoriquement ne correspond pas ici à la réalité. Quant à la troisième phrase de l'article V, elle est sans doute assez vague, mais M. Abi-Saab estime qu'elle devrait être maintenue en vue de fournir des indices permettant de résoudre ce problème classique du droit humanitaire. Sans doute une nouvelle formulation devrait-elle être élaborée en vue de persuader la majorité des membres de l'Assemblée.

Mr *McWhinney* commented that it would be advisable to limit the reference to "competent regional organizations" to those acting pursuant to Chapter VIII of the United Nations Charter.

M. *Ranjeva* soutient la suggestion de M. Gaja de prévoir un régime indifférencié entre les Etats et les entités non étatiques dans la première phrase. Il craint par ailleurs que la deuxième phrase ne soit pas un modèle de clarté, en particulier l'expression "en niant l'existence". Enfin, M. Ranjeva émet les plus sérieuses réserves sur la troisième phrase de l'article V. Même si c'est de façon détournée, on semble ici ouvrir la voie à une consécration d'un "droit d'ingérence" en faveur des organisations internationales, y compris régionales. La référence à l'impartialité n'est nullement de nature à rassurer ceux qui connaissent le fonctionnement des organisations. En l'absence d'une définition des critères propres à réaliser cette impartialité, il s'agit moins d'une garantie que d'une sorte de voile de pudeur destiné à masquer les risques générés par semblable dérive. M. Ranjeva propose donc la suppression de la dernière phrase.

Mr *Dinstein* observed that the third sentence of paragraph 5 dealt with the *lex ferenda* whereas the entire provision meant to be an expression of *lex lata*. He therefore suggested that the sentence be moved to Article IX.

The *President* opened the debate on Article VI.

Mr *Meron* reminded the Assembly that he generally favoured robust measures against States violating human rights and humanitarian law, but nevertheless wondered whether Article VI belonged in the draft Resolution. The focus of the Resolution is on armed conflicts in which non-State entities are involved, and not on counter-measures. He observed that there was a risk in adopting a text which, in striving to be too broad, would end up being diluted. He thought that Article VI as a whole should be deleted and the matter referred to the Fifth Commission concerned with obligations *erga omnes*.

Le *Secrétaire général* rappelle que, lors de la Session de Saint-Jacques de Compostelle, en 1989, l'Institut de droit international a adopté une résolution sur la protection des droits de l'homme. Son article 2 paragraphe 2 se lit comme suit :

> "Sans préjudice des fonctions et pouvoirs que la Charte attribue aux organes des Nations Unies en cas de violation des obligations assumées par les membres de l'Organisation, les Etats, agissant individuellement ou collectivement, sont en droit d'adopter, à l'égard de tout autre Etat ayant enfreint l'article premier (qui énonce l'obligation pour les Etats de respecter les droits de l'homme), des mesures diplomatiques, économiques et autres, admises par le droit international et ne comportant pas l'emploi de la force armée en violation de la Charte des Nations Unies ".

Il attire l'attention de l'Assemblée sur la nécessité de maintenir une certaine cohérence entre les travaux poursuivis par l'Institut sur des sujets similaires.

Mr *Feliciano* saw an inconsistency between the first and the second sentence of Article VI, and wished that the Rapporteur would clarify the text.

The *President* opened the debate on Article VII.

Mr *Orrego Vicuña* observed that the reference to "status or official position" in Article VII seemed to refer only to States, whereas it should cover both States and non-State actors. Further, he thought that the reference

to "international instruments" was too vague and that the expression should be narrowed.

The *President* noted that similar provisions could be found in the Statutes of the International Criminal Tribunals for former Yugoslavia and Rwanda. He then proceeded to open the debate on Article VIII.

Mr *Meron* objected that the formulation of the principle of universal jurisdiction found in Article VIII was both incorrect and unnecessary, and should be deleted. The interplay of the duty to prosecute in the first sentence and the duty to extradite in the second sentence was unclear.

Mr *Gaja* found fault with both the drafting and the substance of Article VIII. He wondered what a non-State entity should do if it found an alleged perpetrator of grave breaches of humanitarian law on the territory it controlled. This was a vital problem because the 1977 Additional Protocol II was silent on the issue.

Mr *Feliciano* thought that the arguments put forward by Mr Meron were not convincing and on the whole his suggestion too radical, as it was perfectly appropriate to make *de lege ferenda* proposals. Further, he thought that the objections laid out by Mr Orrego Vicuña did not adequately reflect established practice which clearly recognised the jurisdiction of the State of nationality of the offender.

M. *Abi-Saab* considère que si l'objectif de cet article est d'étendre la procédure des infractions graves applicable aux situations de conflits internationaux à celles qui prévalent dans les conflits internes, il faudrait l'énoncer plus clairement. En ce qui le concerne, s'il peut admettre cette extension au profit des juridictions internationales, il craint de ne pouvoir souscrire à une obligation de transfert ou d'extradition à un Etats tiers, qui ne se justifie pas dans le cas d'un conflit interne. M. Abi-Saab souscrit donc à la proposition de M. Meron de supprimer cette disposition.

M. *Ranjeva* abonde en ce sens. Il estime que, même *de lege ferenda*, le texte actuel va trop loin.

Mr *Meron* begged to differ with Mr Feliciano and reiterated that Article VIII did not represent *lex lata*. He thought it most unfortunate to suggest that States are bound to prosecute or extradite without making any distinctions, when only grave breaches called for such a duty. He further reflected that the reference to "an international criminal court" ought to be clarified, as there was a need to differentiate between a court or tribunal created pursuant to Chapter VII of the United Nations Charter and a court established by treaty, to which the other State might not be a party. As it was not possible to answer such complicated questions here, he suggested the deletion of the entire Article.

Mr *Shahabuddeen* commented that the text of the English version of the second sentence should be revised to say "the State in the territory of which the conflict".

Mr *Orrego Vicuña* agreed with Mr Meron that Article VIII attempts to introduce as a general rule the concept of universal jurisdiction which is now an exception. The Institute cannot suggest such a fundamental change in the space of one paragraph. He thought that the Article should be deleted or, failing that, that it should refer to specific treaty provisions.

Sir Ian Sinclair admitted that the arguments put forward by his *confrères* had convinced him that Article VIII posed too many problems. He noted that these issues would require a great deal of time to be considered and that the best solution for now was to delete the Article, as suggested by Messrs Meron and Abi-Saab.

Mr *McWhinney* joined earlier speakers in calling for the deletion of Article VIII. Failing that, he thought that the provision should indicate that disputes as to jurisdiction should be referred to the International Court of Justice.

M. *Frowein* pense que, au lieu de supprimer l'article VIII, on pourrait dégager une nouvelle formulation. Le remplacement, dans le texte anglais, de "serious violations" par "graves breaches", serait selon lui de nature à constituer une solution.

Mr *Henkin* found several problems in Article VIII. He wondered what the source of the duty to prosecute was, as universal jurisdiction did not imply that States were under an obligation to act. He thought that the Article should spell out at what conditions another State could request extradition and wondered why the State in the territory of which the conflict had broken out should be given priority.

Mr *Ress* countered that he could not support the outright deletion of the Article and suggested that it could be made more permissive by the use of wording such as "the State may prosecute". If Article VIII were to be deleted, then it should be switched to Article IX and its content included as a rule *de lege ferenda* so as to contribute to a development of the law.

Mr *Dinstein* agreed that Article VIII should be deleted and moved to Article IX, in the form of a suggestion to introduce the concept of grave breaches into Protocol II.

M. *Torres Bernárdez* se prononce en faveur du maintien de cette disposition, quitte à ce qu'elle soit déplacée dans l'article IX. Il relève néanmoins que la règle qu'elle exprime n'est pas à proprement parler *de lege ferenda* dans la mesure où elle reflète en partie le droit existant.

The *President* then moved to Article IX of the Resolution.

Mr *Sohn* stated that Article IX reflected the law as it stood, whereas Article XI had a *de lege ferenda* character. It would be better if Articles X and XI were inserted before Article IX, so as to indicate that some positive results had already been achieved.

M. *Ranjeva* observe que les idées formulées dans ce paragraphe sont généreuses mais toutefois irréalistes.

Sir Kenneth Keith recalled that he made an additional suggestion in relation to fact finding. He suggested that the Commission should consider it at its next meeting.

The *President* opened the debate on subsection 2 of Article IX. As there were no observations, he moved to subsection 3.

Mr *Meron* stated that he was in favour of amending Protocol II, but that the prospects in this respect were not very good. The Institute should therefore adopt a more flexible approach, and call upon States to "apply Protocol II even in the absence of an amendment", or in other words, on a voluntary basis. This was in line with the instruction given several years ago by the Joint Chiefs of Staff of the United States Army to apply the same body of principles of international humanitarian law in all conflicts whatsoever.

Mr *Skubiszewski* recalled that he circulated an amendment to Articles IV, second paragraph. He realised that the radical changes he suggested in respect of the status of Protocol II were unlikely to be accepted, and therefore joined Mr Meron's proposal. He further proposed to redraft the third Section of Article IX, point (a), as follows:

> "(a) to make it applicable to all non-international armed conflicts *on the same conditions and in the same circumstances as those stated in common Article 3 of the Geneva Conventions of 1949;* and"
>
> "(a) de le rendre applicable à tous les conflits armés non internationaux *dans les mêmes conditions et dans les mêmes circonstances que celles indiquées à l'article 3 commun aux Conventions de Genève de 1949* ; et"

Mr *Feliciano* stated that he understood the reference to all non-international armed conflicts as including the hypothesis where the conflict was taking place in a State which was not a party to Protocol II. From this perspective, he agreed with Mr Skubiszewski's proposal. He drew the attention to the work of the ICRC as to the extent to which Protocol II could be regarded as part of customary international law.

M. *Morin* suggère de remplacer l'expression placée au début de l'article IX "Pour arriver à une protection plus efficace" par "En vue d'une protection plus efficace".

The *President* then moved to Article X.

Mr *Meron* insisted on the importance of Article X. He recalled that Mr Sahovic had mentioned the Proposal on Fundamental Standards of Humanity which was before the Human Rights Commission. The Institute had to avoid adopting a retrogressive formula as compared to that proposal. Likewise, the Rome Statute of the International Criminal Court provided that crimes against humanity could be committed in all situations. Further, the Institute should not lose sight of the fact that weapons conventions were also part of international humanitarian law. In that respect, it could be noted that the Ottawa Treaty on Anti-Personal Landmines, the Convention on Bacteriological and Biological Weapons and the 1993 Chemical Weapons Convention applied in all circumstances. Finally, the second sentence of Article X should refer to "fundamental human rights" instead of non-derogable human rights, because the various relevant conventions contained different lists of non-derogable rights. Mr Meron therefore proposed to redraft Article X as follows:

> "To the extent that certain aspects of internal disturbances and tensions may not be covered by International Humanitarian Law, the victims remain under the protection of human rights law. All parties are bound to respect fundamental human rights under the scrutiny of the international community acting through appropriate universal or regional bodies."
>
> "Dans la mesure où certains aspects des troubles et tensions internes peuvent n'être pas régis par le droit international humanitaire, les victimes demeurent protégées par les règles des droits de l'homme. Toutes les parties ont l'obligation de respecter les droits fondamentaux de l'homme, sous la supervision de la communauté internationale agissant par le biais des organismes universels ou régionaux appropriés."

Mr Meron also recalled that he proposed amending the title of the Resolution to read as follows :

"The application of humanitarian law *and human rights law* in non-international armed conflicts in which non State entities are parties.

"L'application du droit humanitaire *et des droits de l'homme* dans les conflits armés non internationaux auxquels prennent part des entités non étatiques."

Finally, Mr Meron drew attention to his proposed amendment of the Preamble of the Resolution, which consisted in adding the following paragraphs between the second and third paragraph of the Draft Resolution :

"*Recognizing* that the Rome Statute of the International Criminal Court states that the crime of genocide, crimes against humanity and certain war crimes can be committed in non-international armed conflicts and, in the case of genocide and crimes against humanity, in all situations ;

Recognizing further that Article 7 of the Rome Statute of the International Criminal Court states that crimes against humanity can be committed not only by States, but by non-State entities as well ;"

"*Reconnaissant* que le Statut de Rome de la Cour pénale internationale affirme que le génocide, les crimes contre l'humanité et certains crimes de guerre peuvent être commis lors de conflits armés non internationaux, et que des génocides et des crimes contre l'humanité peuvent être commis en toutes circonstances ;

Reconnaissant de plus que l'article 7 du Statut de Rome de la Cour pénale internationale affirme que les crimes contre l'humanité peuvent être commis non seulement par des Etats, mais aussi par des entités non étatiques ;"

Mr *Bernhardt* supported Mr Meron's proposal to replace "non-derogable human rights" by "fundamental human rights". The former formula could mean that personal freedom could be restricted without any jurisdictional supervision, and further, that property rights should not be respected in the hypothesis under consideration. The Institute should avoid creating this impression.

Mr *Ress* supported Mr Meron's proposal.

Mr *Skubiszewski* agreed with Mr Meron, but indicated that the second section of Article IV already referred to "any other conventions". This also included the 1954 Convention on the Protection of Cultural Property, in particular its Article 19, as well as the Geneva Protocol on Chemical and Biological Warfare of 1925.

Mr *Tomuschat* stated that the first sentence of Article X was too restrictive. It did not add anything substantial and could be read as qualifying the first part of the second sentence.

M. *Morin* considère qu'il n'est pas inutile de rappeler nommément les droits auxquels les Etats ne peuvent déroger. Il ne faut toutefois pas donner l'impression que la protection est limitée à ces seuls droits.

M. *Torres Bernárdez* fait part de ses préoccupations relatives à la dernière phrase de l'article. Il propose de supprimer la référence aux "organisations universelles ou régionales".

M. *Jean-Flavien Lalive* considère tout d'abord que le mode d'expression est trop diplomatique. Le choix du conditionnel ne reflète qu'un voeu de l'Institut. Il préférait une phraséologie plus affirmative et souhaiterait que l'action du Comité international de la Croix-Rouge en matière de promotion d'une nouvelle convention fasse l'objet d'un paragraphe distinct.

M. *Frowein* indique qu'afin d'éviter un malentendu, il serait utile de préciser que l'égalité de traitement ne bénéficie qu'à ceux qui prennent part à la lutte armée.

Mr *Meron* entirely agreed with the point made by Mr Frowein. It was important to distinguish between combatants and non-combatants. The increasing alignment of the principles and rules relating to internal armed conflicts with the principles and rules applicable in international armed conflicts should be encouraged.

Mr *Pierre Lalive* was not very optimistic in respect of the drafting of a general convention designed to regulate all armed conflicts and protect all victims. However, as had been stated before, the Institute could recommend to States acting individually to apply the rules relating to international armed conflicts in all armed conflicts whatsoever. This did not imply that the appeal to draft a general convention should be dropped.

Mr *Sohn* proposed that the words "the ICRC should give serious consideration to the need to draft and adopt a general convention" be replaced by "the ICRC should draft a general convention".

M. *Torres Bernárdez* voudrait que la Résolution ne donne pas l'impression d'être vide de sens. Il souhaite donc que l'idée contenue dans le paragraphe XI soit renforcée.

La séance est levée à 18 h 55.

Dizième séance plénière

Mardi 24 août 1999 (après-midi)

La séance est ouverte à 15 h 10 sous la présidence de M. *Zemanek*.

The *President* opened the discussion on revised Draft Resolution n° 2. He proposed that discussion on the Preamble be held over until the conclusion of the debate on the substantive text, and that the procedure agreed for earlier Resolutions be followed, that is, that the Articles of the Resolution be adopted by consensus save where a specific vote was requested. He then invited the Rapporteur to speak to the new draft version of his Resolution.

Le *Rapporteur* introduit le projet de résolution révisé n° 2, qui a la teneur suivante :

L'Institut de Droit international,

Rappelant ses résolutions sur les "*Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*" (Session de Neuchâtel, 1900), "*Le principe de non-intervention dans les guerres civiles*" (Session de Wiesbaden, 1975) et "*La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats*" (Session de Saint-Jacques-de-Compostelle, 1989) ;

Rappelant aussi ses résolutions sur "*Les conditions d'application des règles humanitaires relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*" (Session de Zagreb, 1971) et "*Les conditions d'application des règles, autres que les*

règles humanitaires, relatives aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées" (Session de Wiesbaden, 1975) ;

Considérant que les conflits armés auxquels prennent part des entités non étatiques sont de plus en plus nombreux et qu'ils sont de plus en plus souvent motivés, en particulier, par des causes ethniques, religieuses ou raciales ;

Notant que, dès lors, la population civile est affectée de manière croissante par les conflits armés internes et qu'elle supporte en fin de compte la plus grande part de cette violence, ce qui cause de grandes souffrances, la mort et la privation ;

Constatant que les conflits armés auxquels prennent part des entités non étatiques ne concernent pas seulement les Etats dans lesquels ils ont lieu mais qu'ils touchent les intérêts de la communauté internationale dans son ensemble ;

Ayant à l'esprit que pendant les cinquante dernières années les principes de la Charte des Nations Unies et les droits de l'homme ont substantiellement influencé le développement et l'application du droit humanitaire ;

Rappelant le prononcé de la Cour internationale de Justice selon lequel l'obligation consacrée à l'article 1 commun aux Conventions de Genève de "respecter et faire respecter" les Conventions "en toutes circonstances" découle de principes généraux du droit humanitaire, de sorte qu'elle a acquis le statut d'une obligation de droit international coutumier ;

Soulignant les conclusions de la Cour internationale de Justice selon lesquelles l'article 3 commun aux Conventions de Genève de 1949 reflète des "considérations élémentaires d'humanité" et selon lesquelles les règles fondamentales du droit humanitaire applicables dans les conflits armés "s'imposent ... parce qu'elles constituent des principes intransgressibles du droit international coutumier" ;

Considérant les prononcés du Tribunal pénal international pour l'ex-Yougoslavie, selon lesquels un grand nombre de principes et de règles précédemment applicables aux seuls conflits armés internationaux s'appliquent désormais aux conflits armés internes, et selon lesquels des violations graves du droit humanitaire commises durant des conflits de ce dernier type constituent des crimes de guerre ;

Appuyant la poursuite et la condamnation, par des juridictions nationales, des responsables de crimes de guerre, de crimes contre l'humanité, de génocide et d'autres violations graves du droit humanitaire, ainsi que l'établissement de juridictions internationales affectées à cette tâche ;

Reconnaissant que, selon l'article 7 du Statut de Rome de la Cour pénale internationale, les crimes contre l'humanité peuvent être commis par des individus agissant non seulement pour le compte d'un Etat, mais aussi pour celui d'entités non étatiques ;

Notant que le Conseil de sécurité a affirmé, par les actions entreprises sur la base du Chapitre VII de la Charte des Nations Unies dans les conflits armés auxquels prennent part des entités non étatiques, que le respect du droit humanitaire est un élément intégral du système de sécurité de l'Organisation mondiale ;

Se félicitant de la décision du Secrétaire général des Nations Unies du 6 août 1999 sur le respect du droit international humanitaire par les Forces des Nations Unies qui réitère l'obligation de ces dernières de respecter strictement ce droit, en vue notamment de protéger la population civile, et prévoit la poursuite des membres du personnel militaire de ces Forces en cas de violations du droit humanitaire, également dans des situations de conflits armés internes ;

Se félicitant également de l'importante action déployée par le Comité international de la Croix-Rouge (CICR) dans des conflits récents auxquels prenaient part des entités non étatiques, action qui tendait à assurer la protection humanitaire de toutes les victimes et à inviter les parties aux conflits à respecter les principes élémentaires d'humanité, et notamment à protéger la population civile contre les effets de la violence et de la dévastation ;

Considérant qu'il est souhaitable de procéder à un réexamen et à l'adaptation du droit humanitaire aux nouvelles situations internationales en vue de renforcer son respect et la protection des victimes des conflits armés auxquels prennent part des entités non étatiques ;

Adopte la Résolution suivante :

1. Aux fins de la présente Résolution :

   - l'expression "*conflits armés auxquels prennent part des entités non étatiques*" vise les conflits armés internes entre les forces armées d'un gouvernement et celles d'une ou plusieurs entités non étatiques, ou entre plusieurs entités non étatiques. Y sont aussi inclus les conflits armés internes dans lesquels interviennent des forces de maintien de la paix ;

   - l'expression "*entités non étatiques*" désigne les parties aux conflits armés internes qui s'opposent aux forces armées gouvernementales ou luttent contre des entités de même nature et qui remplissent les conditions prévues à l'article 3 commun aux Conventions de Genève de 1949 pour la protection des victimes de la guerre ou à l'article premier du Protocole de 1977 additionnel aux Conventions de Genève relatif à la protection des victimes des conflits armés non internationaux (Protocole II).

2. Toutes les parties aux conflits armés auxquels prennent part des entités non étatiques, indépendamment de leur statut juridique, de même que les Nations Unies et les organisations régionales compétentes, ont l'obligation de respecter le droit humanitaire de même que les droits de l'homme fondamentaux. L'application des principes et des règles pertinents n'affecte pas le statut juridique des parties au conflit et ne dépend pas de la reconnaissance de belligérance ou du statut d'insurgés.

3. Le respect du droit humanitaire et des droits de l'homme fondamentaux constitue un élément intégral de l'ordre international pour le maintien et le rétablissement de la paix et de la sécurité, y compris dans les conflits armés auxquels prennent part des entités non étatiques.

4. Le droit international applicable dans les conflits armés auxquels prennent part des entités non étatiques comprend :

- l'article 3 commun aux Conventions de Genève de 1949 ;

- le Protocole II et toutes autres conventions applicables aux conflits armés à caractère non international ;

- les règles et principes coutumiers du droit humanitaire sur la conduite des hostilités et la protection des victimes dans les conflits armés non internationaux ;

- les principes et les règles garantissant les droits de l'homme fondamentaux ;

- les principes et les règles du droit international applicables dans les conflits armés internes relatifs aux crimes de guerre, aux crimes contre l'humanité, au génocide et à d'autres crimes internationaux ;

- les principes du droit international "tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique".

5. Tout Etat et toute entité non étatique prenant part à un conflit armé sont juridiquement tenus l'un envers l'autre et à l'égard de tous les autres membres de la communauté internationale de respecter le droit humanitaire en toutes circonstances, et tout autre Etat a le droit de demander le respect de ce droit. Aucun Etat et aucune entité non étatique ne peuvent se soustraire à leurs obligations en niant l'existence d'un conflit armé.

6. En cas de violations graves du droit humanitaire, les Etats, les Nations Unies et les organisations régionales compétentes ont le droit d'adopter des mesures appropriées conformément au droit international.

7. Sans préjudice des fonctions et pouvoirs que la Charte attribue aux organes des Nations Unies en cas de violations systématiques et massives du droit humanitaire ou des droits de l'homme fondamentaux, les Etats, agissant individuellement ou collectivement, sont en droit d'adopter, à l'égard de toute partie au conflit armé qui enfreint ses obligations, des mesures diplomatiques, économiques et autres, admises par le droit international, et ne comportant pas l'emploi de la force armée en violation de la Charte des Nations Unies.

8. (a) Toute violation grave du droit humanitaire dans les conflits armés auxquels prennent part des entités non étatiques engage la responsabilité individuelle des personnes responsables, quels que soient leur statut ou leur position officielle, en accord avec les instruments internationaux qui confient la répression de ces actes aux juridictions nationales ou internationales.

(b) Lorsque les auteurs présumés de violations graves du droit humanitaire commises dans un conflit armé non international se trouvent sur le territoire d'un Etat, les autorités compétentes de ce dernier sont en droit de les poursuivre et de les déférer à leurs tribunaux.

9. Pour arriver à une protection plus efficace des victimes des conflits armés auxquels prennent part des entités non étatiques, et tenant compte des récents conflits armés à caractère non international, les mesures suivantes devraient être envisagées :

- la conclusion par les parties à ces conflits, conformément à l'article 3, paragraphe 2, commun aux Conventions de Genève de 1949, d'accords spéciaux sur l'application des dispositions de ces Conventions, dans leur ensemble ou en partie ;

- le concours des Etats, des Nations Unies, du CICR et d'autres organismes internationaux à caractère humanitaire à des mesures de vérification et de contrôle de l'application du droit humanitaire dans les conflits armés internes ; de plus, les Nations Unies et les organisations régionales compétentes devraient être autorisées à déterminer de manière impartiale si le droit humanitaire est applicable au cas où l'Etat concerné fait valoir qu'aucun conflit armé interne n'a éclaté ;

- l'application du Protocole II à tous les conflits armés non internationaux sans attendre une révision formelle de ce Protocole ;

- l'amendement du Protocole II en vue de compléter ses règles et notamment :

  (a) d'établir un organisme international impartial et indépendant habilité à enquêter sur le respect du droit humanitaire (*cf.* article 90 du Protocole I) ;

  (b) d'ajouter une disposition sur les infractions graves traitant, entre autres, de questions de compétence, d'extradition, et de transfert à une juridiction internationale.

10. Dans la mesure où certains aspects des troubles et tensions internes peuvent ne pas être régis par le droit humanitaire, les victimes demeurent protégées par les règles des droits de l'homme fondamentaux. Toutes les parties ont l'obligation de respecter les droits de l'homme fondamentaux, sous la supervision de la communauté internationale.

11. L'Institut salue et encourage une adaptation progressive des principes et règles relatifs aux conflits armés internes aux principes et règles applicables dans les conflits armés internationaux. Il est donc souhaitable et nécessaire que les Etats, les Nations Unies et les organisations régionales compétentes, s'inspirant notamment des

importants travaux du Comité international de la Croix-Rouge dans ce domaine, élaborent et adoptent une convention visant à réglementer tous les conflits armés et à protéger toutes les victimes, que ces conflits aient un caractère international, non international ou mixte.

12. Tous les Etats et toutes les entités non étatiques sont tenus de diffuser les principes et règles du droit humanitaire et des droits de l'homme fondamentaux applicables dans les conflits armés internes.

English translation :

The Institute of International Law,

Recalling its Resolutions "*Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*" (Neuchâtel Session, 1900), "*The Principle of Non-Intervention in Civil Wars*" (Wiesbaden Session, 1975) and "*The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*" (Santiago de Compostela Session, 1989) ;

Recalling further its Resolutions on the "*Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*" (Zagreb Session, 1971) and on the "*Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflicts to Hostilities in which United Nations Forces May Be Engaged*" (Wiesbaden Session, 1975) ;

Considering that armed conflicts in which non-State entities participate have become more and more numerous and increasingly motivated in particular by ethnic, religious or racial hatred ;

Noting that, as a consequence, the civilian population is increasingly affected by internal armed conflicts and ultimately bears the brunt of such violence, resulting in great suffering, death and deprivation ;

Noting that armed conflicts in which non-State entities are parties do not only concern those States in which they take place, but also affect the interests of the international community as a whole ;

Bearing in mind that, in the last fifty years, the principles of the United Nations Charter and human rights law have had a substantial impact on the development and application of humanitarian law ;

Recalling the ruling of the International Court of Justice that the obligation laid down in Article 1 common to the Geneva Conventions "to respect" the Conventions and to "ensure respect" for them "in all circumstances" derives from general principles of humanitarian law, with the consequence that it has acquired the status of an obligation of customary international law ;

Emphasising the ruling of the International Court of Justice that Article 3 common to the Geneva Conventions of 1949 reflects "elementary considerations of humanity" and that the fundamental rules of humanitarian law applicable in armed conflicts "are to be observed ... because they constitute intransgressible principles of international customary law" ;

Considering the pronouncements of the International Criminal Tribunal for the Former Yugoslavia whereby many principles and rules previously applicable only in international armed conflicts are now applicable in internal armed conflicts and serious violations of humanitarian law committed within the context of the latter category of conflicts constitute war crimes ;

Supporting the prosecution and punishment by national jurisdictions of those responsible for war crimes, crimes against humanity, genocide or other serious violations of humanitarian law, as well as the establishment of international tribunals entrusted with this task ;

Recognising that, under Article 7 of the Rome Statute of the International Criminal Court, crimes against humanity can be committed by persons acting not only for States, but for non-State entities as well ;

Noting that the Security Council has affirmed, through its action based on Chapter VII of the United Nations Charter in armed conflicts in which non-State entities are parties, that respect for humanitarian law is an integral element of the security system set up for the World organization ;

Welcoming the United Nations Secretary General's regulation of 6 August 1999 on the Observance by United Nations Forces of international humanitarian law which reaffirms their obligation to comply strictly with humanitarian law, in particular as to the protection of the civilian population, and provides for the prosecution of members of the military personnel of such Forces in case of violations of humanitarian law, including in situations of internal armed conflicts ;

Welcoming the important role played by the International Committee of the Red Cross (ICRC) in recent conflicts in which non-State entities have participated in seeking to ensure humanitarian protection for all victims and in inviting the parties to such conflicts to abide by elementary principles of humanity and notably to spare the civilian population the effects of violence and devastation ;

Considering that it is desirable that humanitarian law be reconsidered and adapted to new international circumstances, so as to reinforce its respect and the protection of victims in armed conflicts in which non-State entities are parties,

Adopts this Resolution :

1. For the purposes of this Resolution :

   - The expression "armed conflicts in which non-State entities are parties" means internal armed conflicts between a government's armed forces and those of one or several non-State entities, or between several non-State entities. Also included are internal armed conflicts in which peacekeeping forces intervene ;

- The expression "non-State entities" means the parties to internal armed conflicts who oppose the government's armed forces or are fighting entities of a similar nature and who fulfill the conditions set forth in Article 3 common to the Geneva Conventions on the Protection of Victims of War or in Article 1 of the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

2. All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, as well as the United Nations and competent regional organizations have the obligation to respect humanitarian law as well as fundamental human rights. The application of such principles and rules does not affect the juridical status of the parties to the conflict and is not dependent on their recognition as belligerents or insurgents.

3. Respect for humanitarian law and fundamental human rights constitutes an integral part of international order for the maintenance and reestablishment of peace and security, including in armed conflicts in which non-State entities are parties.

4. The international law applicable to armed conflicts in which non-State entities are parties includes :

- Article 3 common to the Geneva Conventions of 1949 ;

- Protocol II as well as any other conventions applicable to armed conflicts of a non-international character ;

- Customary principles and rules of humanitarian law on the conduct of hostilities and the protection of victims applicable to internal armed conflicts ;

- The principles and rules guaranteeing fundamental human rights ;

- The principles and rules of international law, applicable in internal armed conflicts, relating to war crimes, crimes against humanity, genocide and other international crimes ;

- The principles of international law "derived from established custom, from the principles of humanity and from dictates of public conscience."

5. Every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect humanitarian law in all circumstances, and any other State is legally entitled to demand respect for this body of law. No State or non-State entity can escape its obligations by denying the existence of an armed conflict.

6. In cases of serious violations of humanitarian law, States, the United Nations and competent regional organizations have the right to adopt appropriate measures in accordance with international law.

7. Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations, in case of systematic and massive violations of humanitarian law or fundamental human rights, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other party to the armed conflict which has violated its obligations, provided such measures are permitted under international law and do not involve the use of armed force in violation of the United Nations Charter.

8. (a) Any serious violation of humanitarian law in armed conflicts in which non-State entities are parties entails the individual responsibility of the persons involved, regardless of their status or official position, in accordance with international instruments that entrust the repression of these acts to national or international jurisdictions.

(b) If the alleged perpetrators of serious violations of humanitarian law committed in a non-international armed conflict are on the territory of a State, the relevant authorities of this State are entitled to prosecute and try such persons before their courts.

9. In order to achieve a better protection for the victims in armed conflicts in which non-State entities are parties, and taking into account recent armed conflicts of a non-international character, the following measures should be considered :

- The conclusion by the parties to such conflicts of special agreements, in accordance with Article 3 paragraph 2 common to the Geneva Conventions of 1949, which apply all or part of the provisions of these Conventions ;

- The support of States, the United Nations, the ICRC as well as other international bodies of a humanitarian character for measures to verify and oversee the application of humanitarian law in internal armed conflicts. Furthermore, the United Nations and competent regional organizations should be allowed to establish impartially whether humanitarian law is applicable, should the State concerned claim that no internal armed conflict has broken out ;

- The application of Protocol II in all non-international armed conflicts, without waiting for its formal revision ;

- The amendment of Protocol II, with a view to complementing its rules and in particular so as :

  (a) to establish an impartial and independent international body designed to investigate respect for humanitarian law (see Art. 90 of Protocol I) ;

  (b) to add a grave breaches provision addressing *inter alia* issues of jurisdiction, extradition and surrender to an international jurisdiction ;

10. To the extent that certain aspects of internal disturbances and tensions may not be covered by humanitarian law, the victims remain under the protection of fundamental human rights law. All parties are bound to respect fundamental human rights under the scrutiny of the international community.

11. The Institute welcomes and encourages an increasing alignment of the principles and rules relating to internal armed conflicts with the principles and rules applicable in international armed conflicts. It would be desirable and necessary for States, the United Nations and regional competent organizations, drawing inspiration from the important work done by the ICRC in this field, to draft and adopt a convention designed to regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character.

12. All States and non-State entities are required to disseminate the principles and rules of humanitarian law and fundamental human rights applicable in internal armed conflicts.

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The *President* invited comments on Article I, first indent. There being no comments, the text was adopted by consensus. He then invited comments on Article I, second indent, which, there being no comments, was adopted by consensus.

M. *Waelbroeck* propose d'insérer dans l'article I un paragraphe définissant l'expression "droits de l'homme fondamentaux". En effet, cette notion lui paraît vague et susceptible de créer des malentendus. L'orateur se demande si elle désigne les droits auxquels il ne peut pas être dérogé selon les systèmes régionaux de protection des droits de l'homme. Une définition s'impose pour éviter que l'on assimile les droits de l'homme fondamentaux à tous les droits de l'homme - ce qui, de l'avis de tous, irait trop loin. Pour sa part, l'intervenant estime que les droits de l'homme fondamentaux sont des droits auxquels aucune dérogation ne peut être apportée d'après les systèmes de protection collective.

Le *Rapporteur* comprend la préoccupation de M. Waelbroeck. Lors de sa récente réunion, la Commission a revu la terminologie utilisée dans les dispositions du précédent projet concernant les droits de l'homme. Elle a décidé de recourir à une seule notion, celle de droits de l'homme fondamentaux. Elle a renoncé à en proposer une définition dans l'article I parce qu'elle jugeait nécessaire et suffisant d'y inclure une définition des deux notions essentielles du projet (les entités non étatiques et les conflits armés auxquels celles-ci prennent part), compte tenu des objectifs de ce dernier. Il va de soi que le Rapporteur étudiera volontiers la définition des droits de l'homme fondamentaux que M. Waelbroeck proposera, le cas échéant.

Mr *Shahabuddeen* considered that a certain inelegance might arise were Article I to be expanded in the manner suggested by Mr Waelbroeck. However, in his view, that particular point did need to be addressed in the Resolution specifically, particularly in the light of Article IV. In its current wording, that Article appeared to indicate that the entirety of fundamental human rights was a part of general international law, which, to his mind, did not seem to be the case. He proposed, to address such a defect presented by the current text of Article IV, that the *chapeau* read "The international law applicable to armed conflicts in which non-State entities are parties derives from", thereby deleting the word "includes" after the word "parties". Further, he proposed that there be inserted at the beginning of the fourth indent of Article IV the words "insofar as relevant,", so that that indent would read "Insofar as relevant, the principles and rules guaranteeing fundamental human rights".

Mr *Feliciano* pointed out that, as he had attended the Commission's drafting meeting earlier, it might be helpful to the debate to indicate why a proposal such as that made by Mr Shahabuddeen had not been adopted in the new draft version of the Resolution. The Commission had been of the view that wording to the effect of "derives from" international law might indicate that the items enumerated in Article IV were considered to be "sources of" international law, rather than, as the current text of Article IV suggested, were "part of" international law.

The *President* put to the vote whether to insert in Article I a third indent which would provide for some sort of definition of the term "fundamental human rights". The proposal was rejected by 19 votes against, 2 in favour, with 9 abstentions.

The President then moved the discussion on to Article II.

Sir Kenneth Keith queried the restriction presented by the use of the word "regional" in the phrase "competent regional organizations". To his mind, that might suggest that, for example, NATO did not constitute a "regional organization" within the meaning of the United Nations Charter, while he considered that NATO was a body that should be included within the scope of Article II. His considerations in this regard were not restricted to Article II, as the same point could be seen in Article IX, second indent, where there was, once again, a reference to "competent regional organizations". He considered that other bodies, like the ICRC, an international tribunal, or even a national tribunal, should be included within the intent of the phrase "competent regional organizations", but these would, on the current wording, be excluded.

Le *Rapporteur* expose que la Commission a examiné cette question lors de sa dernière réunion. Elle a estimé que le projet vise les organisations et arrangements régionaux dans le cadre du chapitre VIII de la Charte des Nations Unies et a renoncé à modifier la terminologie du projet de résolution.

M. *Waelbroeck* comprend que l'Assemblée n'ait pas voulu ajouter une nouvelle définition à l'article I. Mais il suggérerait de préciser à l'article II ce que l'on entend par les droits de l'homme fondamentaux, car c'est la première fois que ces termes apparaissent dans la partie opérationnelle du projet de résolution.

M. *Frowein* expose que la notion de droits fondamentaux de l'homme doit être interprétée compte tenu des règles permettant de déroger à ces droits en certaines circonstances. Il n'est donc pas nécessaire de parler, dans le texte, de droits auxquels on ne peut pas déroger. De plus, comme on l'a déjà indiqué, cette dernière notion pourrait aussi susciter des malentendus.

M. *Waelbroeck* n'insiste pas pour que sa proposition soit mise au vote, compte tenu des explications fournies par M. Frowein.

Mr *Philip* supported Sir Kenneth Keith's proposal, but suggested, to meet the intent of the latter, adding words such as "and other competent organizations", so that the relevant phrase would read "regional and other competent organizations".

Le *Rapporteur* rappelle que les organisations régionales ont un rôle spécifique et que, comme telles, elles se distinguent des autres organisations internationales. Dans le domaine concerné, les Nations Unies ont, en tant qu'organisation universelle, leur propre rôle ; pour leur part, les organisations régionales ont reçu un certain nombre de mandats concernant le droit humanitaire et elles peuvent intervenir ou prendre part au règlement de conflits armés auxquels prennent part des entités non étatiques. L'adjectif "compétentes" doit, en premier lieu, souligner qu'il s'agit d'organisations régionales visées par le Chapitre VIII de la Charte ; il vise aussi la faculté, pour les organisations concernées, d'intervenir. Quant à l'adjectif "régionales", le Rapporteur n'a pas le souvenir que cette qualification ait été mise en cause jusqu'à présent. Il lui paraît donc nécessaire de parler d'organisations régionales.

Sir Kenneth Keith welcomed the Rapporteur's careful explanation, including his reference to Chapter VIII of the United Nations Charter. However, his point remained that there were other organizations which might properly be considered to be "competent" within the intended scope of Article II, such as, in fact, a multi-national force, whose own rules of engagement say that they are subject to the rules set out under Article II of the Resolution. Hence, he wished to propose a wider wording than "competent regional organizations" such as "competent regional and other organizations", thereby recognising the point the Rapporteur had made, but which wording did not exclude from the scope of Article II other relevant entities.

Mr *Philip* supported the latest proposal of Sir Kenneth Keith.

The *President* proposed a revised wording for Article II, line 2, which would read "competent regional and other international organizations", which proposal was adopted by 25 votes in favour, 3 against, and 4 abstentions.

Mr *Tomuschat* suggested that the introductory words of Article II be amended to read along the lines of "All parties to armed conflicts in which non-State entities participate", thereby replacing the words "are parties" with the word "participate".

The *President* invited the Assembly to adopt by consensus Article II as amended by Sir Kenneth Keith's suggestion and subject to Mr Tomuschat's proposal. The Assembly adopted Article II by consensus.

The *President* moved the discussion on to Article III.

Mr *Feliciano* suggested, following on from Mr Tomuschat's proposal, that the last phrase of Article III be likewise amended.

On the invitation of the *President*, the Assembly then adopted Article III by consensus subject to Mr Feliciano's suggestion. The President then moved the discussion on to Article IV, indent 1.

M. *Frowein* souhaite clarifier la portée de ce passage. Il suggère l'insertion des mots "comme principe général du droit humanitaire" pour souligner que l'article 3 commun aux Conventions de Genève n'a pas seulement une portée conventionnelle, au contraire du Protocole II, qui ne reflète sans doute pas le droit coutumier.

Le *Rapporteur* partage l'appréciation de M. Frowein. Pour lui aussi, l'article 3 commun aux Conventions de Genève doit être considéré comme du droit coutumier. Le Rapporteur serait donc disposé à admettre la proposition de M. Frowein. Il souhaiterait toutefois la soumettre à la Commission. En effet, celle-ci a jugé inutile d'inclure une précision identique dans le projet parce que, comme le rappelle le préambule du projet de résolution, la Cour internationale de Justice s'est déjà prononcée sur ce point.

Mr *Sohn* proposed inserting the word "general" rather than the word "basic".

Mr *Meron* said that he would have supported Mr Frowein's suggestion. However, he pointed out that it was already encompassed within the Preamble.

Mr *Frowein* replied that, when he made his suggestion, he did have the Preamble in mind, but considered that the substantive Articles had a different status from the Preamble, hence his proposal. The intent behind his proposal was to clarify that "Article 3 common to the Geneva Conventions of 1949" had the wider status in international law that he suggested.

The *President* proposed a text for Article IV, first indent, to read as follows : "Article 3 of the Geneva Conventions, as basic principles of humanitarian law". This proposal was adopted by 22 votes in favour, 5 against, with 9 abstentions.

Mr *Feliciano* wished to indicate that while he did not disagree with the idea that Article 3 common to the Geneva Conventions of 1949 represented a basic part of humanitarian law, he thought that the vote just taken might lead to some distortion in the balance of Article IV. The reason for this was that the latter reflected a certain order in that it dealt first with provisions of Conventions, then with rules of customary international law, and finally with the general principles and rules. He therefore wondered whether the wording for Article IV, first indent, referring as it did to "basic principles of humanitarian law" might cross over this order in Article IV generally.

The *President*, in reply, pointed out that, whilst it was true that the reference to Article 3 in Article IV, first indent, was clearly to a provision in Conventions that had not prevented it from becoming a general principle. In any event, Article IV contained a wide reference already to "principles of international law".

The President moved the discussion on to Article IV, second indent, which, in the absence of comments from the Assembly, was adopted by consensus. He then moved the discussion on to Article IV, third indent, which, in the absence of comments, was adopted by consensus. He then moved the discussion on to Article IV, fourth indent.

Mr *Feliciano* suggested that this should read "principles and rules of international law guaranteeing fundamental human rights", so as to emphasize, with the addition of the words "of international law" that the text spoke of such principles and rules as of international law and not of domestic law.

The *President* proposed a vote on this suggested amendment of Article IV, fourth indent, which was adopted by 34 votes in favour, none against, with 1 abstention.

The President moved the discussion on to Article IV, fifth indent, which, there being no comments from the Assembly, was adopted by consensus. The President moved the discussion on to Article IV, sixth indent, which, there being no comments from the Assembly, was adopted by consensus. The President then moved the discussion on to the *chapeau* to Article IV.

Mr *Shahabuddeen* indicated that, in the light of the intervention from Mr Feliciano relating to the *chapeau*, he no longer wished to maintain his proposed amendment.

The *President* invited the Assembly to adopt Article IV in its entirety, which it did by consensus. The President moved the discussion on to Article V, which, there being no comments from the Assembly, was adopted by consensus. The President then moved the discussion on to Article VI.

Le *Rapporteur* demande à l'Assemblée si elle souhaite ajouter dans l'article VI les mots "et autres organisations internationales" dans le prolongement de la décision prise dans le cadre de l'examen de l'article II.

The *President* supported the Rapporteur's suggestion that Article VI include the words "competent regional and other international organizations" rather than simply "competent regional organizations".

Mr *von Mehren* suggested the insertion of the word "international" before the words "humanitarian law" in line 1 of Article VI.

Sir Ian Sinclair confessed some confusion in the light of the last proposed amendment. Throughout the text, the relevant references were to "humanitarian law", and nowhere was there a reference to "international humanitarian law".

Mr *Meron* considered that the point made by Sir Ian Sinclair reflected a drafting omission and suggested that the Drafting Committee be authorised to insert the word "international" before every reference to "humanitarian law" in the Resolution.

Mr *Bernhardt* wished to signal that he considered that no difficulty arose from the absence of the word "international" in relation to "humanitarian law".

The *President* proposed that it be left to the Drafting Committee to decide whether to take up Mr Meron's suggestion.

Mr *Gaja* suggested that the wording appearing in Article VII, "humanitarian law or fundamental human rights", should, also logically, be included in Article VI.

Mr *Philip* considered that the same point applied equally in relation to Article V.

The *President* was of the view that the current text of Article VI reflected a statement of an obligation *erga omnes*, as the Geneva Conventions expressly so stated. However, if one were to include in the same phrase "international human rights" which, in his opinion, would itself reflect an obligation *erga omnes*, a view he was aware was not necessarily held by all, this might intrude upon the work of the 5th Commission studying *erga omnes* obligations more generally.

Mr *Gaja* noted that Article V addressed the question of respect for "humanitarian law", and when and how it should be applied. The basis for the application of humanitarian law was not the same as for the application of international human rights.

Mr *Feliciano* considered that, in the light of the recent interventions, there would now be a substantial overlap between Articles VI and VII which he did not think could adequately be addressed by the Drafting Committee alone, and he invited input on this point from the Rapporteur.

The *President* wished to indicate his disagreement with the last intervention, being of the view that Articles VI and VII were addressed to different issues, the former being addressed to the United Nations and competent regional and other international organizations, and the latter to States. In order to highlight this difference, he suggested that the word "States" be deleted from Article VI.

M. *Ranjeva* attire l'attention de l'Assemblée sur la terminologie à utiliser dans le projet de résolution pour décrire le droit humanitaire (droit international humanitaire ou droit humanitaire). Le Comité de rédaction devrait avoir un esprit pédagogique quand il étudiera le projet. Il s'impose d'avoir une approche unitaire du droit humanitaire et de ne pas suggérer qu'il y ait un droit humanitaire interne et un droit international humanitaire.

Mr *Sohn* highlighted a further difference in Articles VI and VII, the former referring to "serious violations" and the latter to "systematic and massive violations".

M. *Jean-Flavien Lalive* revient à l'article V pour formuler une observation qui se reflète sur l'article VI. La première phrase de l'article V traite du droit humanitaire et la seconde phrase de cette disposition paraît consacrer des obligations d'une manière générale. Peut-être le Comité de rédaction souhaitera-t-il remplacer "à leurs obligations" par "à de telles obligations" ?

Mr *Dinstein* wished to respond to Mr Sohn's intervention by making two points: the first, procedural, that Article VII, following upon the suggestion made by the Secretary General, drew upon wording of the Resolution adopted by the Institute at Santiago de Compostela; the second, substantive, that Article VI dealt also with the "United Nations and competent regional and other international organizations", while Article VII was confined to "States" alone. It was clear that the latter had different rights of intervention from those of the United Nations, as the Security Council was vested with special powers under the Charter.

Le *Rapporteur* désire apporter une précision à la suite de l'intervention de M. Dinstein. La précédente version du projet de résolution abordait plusieurs thèmes dans une seule disposition, l'article VI. La Commission a voulu tenir compte de la résolution adoptée par l'Institut à Saint-Jacques-de-Compostelle sur la protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats. La dissociation de la précédente disposition en deux articles distincts a paru être la meilleure des solutions. L'article VII a donc pour origine la seconde phrase de l'article VI du précédent projet.

The *President* proposed the adoption of the amendment suggested by Mr Gaja, that is, that the opening words of Article VI read "In cases of serious violations of humanitarian law or fundamental human rights", which proposal was adopted by 33 votes in favour, none against, with 5 abstentions. He invited the Assembly to express its opinion on the proposed deletion of the word "States" from Article VI, which was adopted by consensus. The President then asked the Assembly to express its opinion on Article VI as a whole. It was adopted by consensus. The President then moved the discussion on to Article VII.

Mr *Waelbroeck* asked for clarification on what actions by States were intended to be covered by the wording in Article VII of "States, acting individually or collectively", as compared with the reference in Article VI to "competent regional and other international organizations". In his view, these two phrases implied an overlap between actions by States.

The *President* considered that the reference to States "acting collectively" did not necessarily imply action by international organizations.

Mr *Waelbroeck* was in agreement, but considered that the reference to States "acting collectively" could be taken to refer to actions of international organizations.

Mr *Dinstein* agreed with the Rapporteur that the intention of Article VII was to refer to States acting outside the framework of international organizations, whether they acted alone or in conjunction with other States. He hoped that the *travaux préparatoires* to this Resolution indicated that intention clearly.

Mr *Pinto* asked whether the word "systematic" in the phrase "systematic and massive violations of humanitarian law and fundamental human rights" was really necessary, as he considered that "massive violations" should be a sufficient basis for intervention of the kinds suggested in Article VII. He also queried why violations had to be both "systematic *and* massive" before intervention would be permitted.

Mr *Sohn* reiterated his suggestion that, to maintain consistency in the overall text, the words "systematic and massive violations" be replaced by "serious violations".

Mr *Abi-Saab* wished to return, in the light of the recent interventions, to the text of Article VI, as adopted, from which the word "States" had been deleted. He recalled that during the work of the Commission, it had been highlighted that there were two thresholds for intervention intended to be addressed in the Resolution: one would permit States to intervene, the other concerned when the taking of countermeasures might arise. The current text now put "regional and other international organizations"on the same level as the United Nations, contrary to what had been suggested in the original text of the Resolution. This was a very important point as it implied that such "regional and other international organizations" might do what the UN was entitled to do. He proposed the re-insertion of the word "States" in Article VI, thus leaving clearly the second type of intervention - countermeasures - to be dealt with in Article VII.

The *President* put to the vote the reinsertion of the word "States" in Article VI, which proposal was rejected by 20 votes against, 6 in favour, with 12 abstentions.

Mr *Schachter* suggested the deletion of the words "systematic and" from the phrase "systematic and massive violations".

The *President* recalled that Mr Sohn had suggested that all references to "violations" be to "serious violations". Mr Schachter's proposal would still leave Article VII at variance in this regard with other Articles in the Resolution.

Mr *Tomuschat* wished to draw attention to a complication in the wording of the text which he considered arose when one bore in mind the work of the International Law Commission when adopting its draft Articles on international State responsibility and the issue of countermeasures. Those Articles declined to state that countermeasures were permitted, but simply recognised that they might be taken. Hence, in order to make Article VII consistent with the work of the International Law Commission, he proposed that it should rather reflect the view that "countermeasures are not prohibited by international law".

The *President* suggested that, whilst the International Law Commission must, understandably, be careful and cautious, there was no reason why the Institute should not make a bolder statement in relation to this matter.

Mr *Shahabuddeen* recalled that in an earlier version of Article VI, the text had referred to the "prohibition against the use of armed force" in connection with the taking of countermeasures. He noted that in the current Article VII there was also a prohibition against the use of armed force, not in relation to the taking of countermeasures, but rather in relation to the taking of "diplomatic, economic and other measures". He wondered whether this reflected a deliberate change of context. He wished to make a further point on the final words of Article VII "do not involve the use of armed force in violation in the United Nations Charter". He wondered whether that wording was intended also to state a prohibition against the use of armed

force, or whether it was intended to state a prohibition against certain action provided that the action adopted did not imply the violation of the United Nations Charter. He therefore asked the Rapporteur for clarification.

Le *Rapporteur* estime que M. Shahabuddeen a clairement expliqué le sens du nouvel article VII. Cette disposition ne comporte aucune ambiguïté ; elle développe la deuxième phrase de l'article VI de la version antérieure du projet de résolution et reprend presque littéralement l'article 2, paragraphe 2, de la résolution précitée de Saint-Jacques-de-Compostelle. Par ailleurs, le précédent intervenant a bien exposé que la question du recours à la force est liée à la violation de la Charte des Nations Unies. On ne peut donc pas interpréter l'article VII du projet comme ouvrant la voie à l'emploi de la force en dehors de la Charte.

M. *Ranjeva* remercie le Rapporteur pour la réponse donnée à M. Shahabuddeen. Le nouvel article VII est une reformulation de la seconde phrase de l'article VI de la précédente version du projet de résolution. Il comporte plusieurs idées dont la première est celle de la hiérarchie des violations. Personnellement, l'orateur se méfie des hiérarchies qualitatives dans la mesure où l'on n'est pas en mesure de donner les critères qui caractérisent les différents stades de ces violations. Dès lors, on court le risque d'avoir à régler le problème de l'interprétation subjective de ces hiérarchies. Le deuxième point résulte de l'utilisation des mots "sans préjudice des fonctions et pouvoirs que la Charte attribue aux organes des Nations Unies". Cela équivaut à une reconnaissance de la possibilité d'un cumul des interventions : celle des Nations Unies et celle des Etats. *Quid* s'il y a une collision entre les deux interventions ? Laquelle prévaudra sur l'autre ? Tout en reconnaissant la primauté théorique de la Charte, l'orateur ne pense pas que cette question puisse être résolue de manière très pratique. L'équipollence des compétences mériterait des précisions. Le troisième point que l'orateur souhaite soulever concerne la mention des contre-mesures: le Rapporteur a fait état de la résolution de Saint-Jacques-de-Compostelle. M. Ranjeva serait intéressé à connaître les suites données à cette résolution. En conclusion, l'orateur observe que l'article VII pose des problèmes très pratiques et concrets et qu'il convient de les résoudre.

Le *Rapporteur* rappelle que l'on vient de voter la suppression de toute mention des Etats dans l'article VI. Sans aucunement remettre en cause le résultat de ce vote, il concevait plutôt la différence entre l'article VI et l'article VII en termes de degré croissant de gravité. Dans la mesure où l'Assemblée semble avoir plutôt considéré que l'article VI concerne les organisations internationales et l'article VII les Etats, le Rapporteur admet que la mention de violations "graves" dans le premier et de "systématiques et massives" dans le second, devient problématique. Il répète néanmoins que la rédaction de l'article VII s'inspire de celle qui avait été choisie lors de la Session de Saint-Jacques de Compostelle.

Mr *Frowein* requested a clarification from the Rapporteur as to the inclusion of the words "do not involve the use of armed force in violation in the United Nations Charter" in Article VII. He suggested, rather, that this Article end after the words "provided such measures are permitted under international law". He recognised that the words that he suggested be deleted were drawn from the Resolution adopted by the Institute in Santiago de Compostela, but since then the United Nations Security Council had rejected by 12 votes to 3 a proposal to condemn the intervention of NATO in Kosovo. As a result, he considered that the restriction suggested by the words "do not involve the use of armed force in violation in the United Nations Charter" no longer needed to be retained.

M. *Torres Bernárdez* considère que l'expression "systématiques et massives" prend place dans une disposition équilibrée et prudente qu'il serait hasardeux de remettre en cause, fût-ce dans une seule de ses composantes.

Sir Ian Sinclair wished to explain his vote in favour of re-inserting the word "States" in Article VI, as suggested by Mr Abi-Saab. He had considered that such inclusion would have highlighted the distinction between Articles VI and VII and the threshold required for intervention. As a result of the most recent interventions, he was left in some confusion as to what the Assembly really intended the Resolution as a whole to state.

Mr *Meron* requested the President to clarify the proposal put forward by Mr Sohn.

The *President* said that the proposal was to replace the words "systematic and massive" by the word "serious".

Mr *Meron* observed that the Resolution attempted to combine human rights and humanitarian law while each system had traditionally used a different terminology and imposed different requirements. Human rights law usually required violations to be "massive and systematic" before calling for an international reaction, whereas humanitarian law merely requires "serious" violations. He thought that the Institute should accept these distinctions as existing, otherwise there was a risk of creating confusion.

Mr *von Mehren* reflected on the importance of the distinction between Articles VI and VII as explained by Mr Dinstein, that a State should not act unless more serious violations occurred than those which warranted action by international organizations. In principle, he objected to States seeking to take over from international organizations the primary responsibility for dealing with violations of humanitarian law, although he considered that this could be appropriate in some circumstances. He wondered why States could not be permitted, under the Resolution, to take at least diplomatic measures against a State committing serious violations of humanitarian law. He suggested deleting the word "diplomatic" in the fourth line of Article VII. Finally, he thought that the Institute should shy away from giving the least appearance that States could use armed force outside the framework of the United Nations Charter.

M. *Rigaux* tient à préciser que la différence entre les articles VII et VIII lui paraît justifiée. L'article VIII concerne le droit d'engager des poursuites, qui est envisagé assez largement. Par contre, l'article VII traite de mesures plus coercitives, ce qui justifie une rédaction beaucoup plus restrictive. Par ailleurs, M. Rigaux n'apprécie pas l'expression "sans préjudice de", qui prête le plus souvent à confusion. En l'occurrence, il suppose que seule est visée la situation où les Nations Unies n'ont pas elles-mêmes adopté de mesures.

Mr *Dinstein* appealed to Mr von Mehren to withdraw his amendment as the matter had been fully discussed during the Session of the Institute at Santiago de Compostela. The Resolution adopted in Santiago made it clear

that States could always issue protests and diplomatic *démarches.* The question, however, was when States had the right to take more serious mesures, such as a severance of diplomatic relations. Here a higher threshold was required. He observed that the work on the Santiago Resolution should be seen as an integral part of the *travaux préparatoires* of the present Resolution.

Le *Secrétaire général* rappelle que, lors de la Session de Saint-Jacques de Compostelle, on n'avait pas entendu exclure l'hypothèse où des Etats adopteraient des mesures parallèlement aux Nations Unies. Il rappelle à ce sujet le précédent de l'Afrique du Sud, où certains Etats avaient été au-delà des mesures d'embargo édictées par les organes compétents de l'ONU.

The *President* called for a vote on the amendment proposed by Mr Sohn to replace the words "systematic and massive" by the word "serious". The amendment was rejected by a vote of 30 against, 6 in favour, with 3 abstentions.

He then called for a vote on the amendment proposed by Mr Schachter to drop the words "systematic and". The amendment was rejected by a vote of 29 against, 6 in favour, with 5 abstentions.

The President also called for a vote on the amendment proposed by Mr Frowein to delete the last part of the Article, starting with the words "and do not involve the use of force ...". The amendment was carried by a vote of 21 in favour, 15 against, with 5 abstentions.

Finally, Article VII as a whole was put to the vote and adopted by 38 votes in favour, 1 against, with 4 abstentions.

The President then opened the debate on Article VIII, paragraph (a). There being no remarks, he asked if there were any observations on paragraph (b).

M. *Pocar* suggère que le Comité de rédaction écarte, dans le texte français, la mention d'auteurs "présumés", qui lui semble heurter le principe de la présomption d'innocence.

M. *Ranjeva* suggère que, dans l'alinéa b), on précise que les autorités compétentes ont non seulement le droit, mais aussi l'obligation d'engager des poursuites.

Mr *Meron* reminded the Assembly that this point had been dealt with on a number of occasions the previous day. He noted that the concept of universal jurisdiction gave States a *right* to prosecute but that only with respect to grave breaches was there a *duty* to do so. Given that the Resolution addressed situations of non-international armed conflict to which the concept of grave breaches might not apply, he urged Mr Ranjeva to desist from his proposed amendment.

The *President* called for a vote on the amendment proposed by Mr Ranjeva to insert the words "and obliged" after "entitled". The amendment was carried by a vote of 16 in favour, 15 against, with 7 abstentions.

He then put Article VIII as a whole to the vote, which was adopted by 34 votes in favour, none against, with 6 abstentions.

The President then opened the debate on Article IX.

Mr *Shahabuddeen* pointed out that the words "of or part of" on the last line of paragraph 1 were not clear.

Sir Ian Sinclair suggested redrafting the English version of paragraph 1 so that it would read "on the application of the provisions of these Conventions in whole or in part".

The *President* observed that the words "other international organizations" should be inserted after the word "regional".

Sir Kenneth Keith noted that paragraph 4 (a) did not reflect the fact that the International Fact-Finding Commission now considered itself competent to look at these matters, with the agreement of the parties to the conflict.

Mr *Dinstein* answered that the Commission had taken note of the comment made by Sir Kenneth Keith and others on the previous day as to the practice of the International Fact-Finding Commission pursuant to the 1977 Additional Protocol I, but it felt that a formal amendment to Additional Protocol II should still validly be suggested by the Resolution.

Mr *Feliciano* suggested adding the word "criminal" after the word "international" in paragraph 4 (b).

The *President* then invited comments on Article X.

Mr *Pocar* suggested that the reference to "victims" should be replaced by "individuals" to cover those who had not yet become victims.

Le *Rapporteur* rappelle que, dès le début des travaux, le terme "victime" a été choisi comme référence. Il comprend fort bien la position de M. Pocar, mais signale que le mot "victime" a l'avantage de couvrir à la fois des individus et des groupes.

The *President* noted that the term "victims" was appropriate in the context of the application of humanitarian law, but that with respect to human rights law, which is preventive in nature, it was preferable to avoid using that term.

M. *Jean-Flavien Lalive* attire l'attention du Comité de rédaction sur le terme anglais "scrutiny", qui a été traduit par "supervision", mais qui serait sans doute mieux rendu par le terme "contrôle", qu'il estime plus fort.

Mr *Meron* stated that he would be willing to accept the proposal made by Mr Pocar. He further suggested removing the word "law" after the words "human rights".

Following a short discussion, it was agreed that, as a drafting change, the Article should refer to "the principles and rules of international law guaranteeing fundamental human rights".

The *President* called a vote on the amendment proposed by Mr Pocar to replace the word "victims" by the word "individuals". The amendment was carried by 37 votes in favour, 2 against, with 3 abstentions.

The President then invited observations on Articles XI and XII. There being no comments, he asked whether anyone wished to make remarks on the Preamble.

M. *Degan* fait part à l'Assemblée de sa ferme opposition au sujet du neuvième considérant du Préambule. Il estime en effet que, contrairement au Tribunal pénal international pour le Rwanda ou à la Cour pénale internationale, le Tribunal pénal international pour l'ex-Yougoslavie n'a pas la compétence pour poursuivre des personnes accusées de crimes de guerre s'ils sont commis dans des conflits internes. L'article II du Statut du Tribunal est très clairement lacunaire sur ce point particulier. M. Degan propose donc la suppression du neuvième considérant.

The *President* called for a vote on whether to retain paragraph 9 of the Preamble. The motion was adopted by 26 votes in favour, 6 against, with 8 abstentions.

Finally, the Assembly approved the Resolution as a whole by a vote of 41 in favour, 3 against, with no abstention.

La séance est levée à 17 h 45.

Onzième séance plénière

Mercredi 25 août 1999 (matin)

La séance est ouverte à 10 h 10 sous la présidence de M. *Zemanek*.

The *President* introduced Draft Resolution No. 3 of the Fourteenth Commission on "The application of international law, in particular humanitarian law, in armed conflicts in which non-State entities are parties", which reads as follows:

"L'Institut de Droit international,

Rappelant ses résolutions sur les "*Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*" (Session de Neuchâtel, 1900), "*Le principe de non-intervention dans les guerres civiles*" (Session de Wiesbaden, 1975) et "*La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats*" (Session de Saint-Jacques-de-Compostelle, 1989) ;

Rappelant aussi ses résolutions sur "*Les conditions d'application des règles humanitaires relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*" (Session de Zagreb, 1971) et "*Les conditions d'application des règles, autres que les règles humanitaires, relatives aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*" (Session de Wiesbaden, 1975) ;

Considérant que les conflits armés auxquels prennent part des entités non étatiques sont de plus en plus nombreux et qu'ils sont de plus en plus souvent motivés, en particulier, par des causes ethniques, religieuses ou raciales ;

Notant que, dès lors, la population civile est affectée de manière croissante par les conflits armés internes et qu'elle supporte en fin de compte la plus grande part des violences en résultant, ce qui cause de grandes souffrances, des morts et des privations ;

Constatant que les conflits armés auxquels prennent part des entités non étatiques ne concernent pas seulement les Etats dans lesquels ils ont lieu, mais qu'ils touchent les intérêts de la communauté internationale dans son ensemble ;

Ayant à l'esprit que pendant les cinquante dernières années les principes de la Charte des Nations Unies et des droits de l'homme ont substantiellement influencé le développement et l'application du droit international humanitaire ;

Rappelant le prononcé de la Cour internationale de Justice selon lequel l'obligation consacrée à l'article 1 commun aux Conventions de Genève de "respecter et faire respecter" les Conventions "en toutes circonstances" découle de principes généraux du droit international humanitaire, de sorte qu'elle a acquis le statut d'une obligation de droit international coutumier ;

Soulignant le prononcé de la Cour internationale de Justice selon lequel l'article 3 commun aux Conventions de Genève de 1949 reflète des "considérations élémentaires d'humanité" et selon lequel les règles fondamentales du droit humanitaire applicables dans les conflits armés "s'imposent ... parce qu'elles constituent des principes intransgressibles du droit international coutumier" ;

Considérant le prononcé du Tribunal pénal international pour l'ex-Yougoslavie selon lequel un grand nombre de principes et de règles précédemment applicables aux seuls conflits armés internationaux s'appliquent désormais aux conflits armés internes et selon lequel des violations graves du droit international humanitaire commises durant des conflits de ce dernier type constituent des crimes de guerre ;

Appuyant la poursuite et la condamnation, par des juridictions nationales, des responsables de crimes de guerre, de crimes contre l'humanité, de génocide et d'autres violations graves du droit international humanitaire, ainsi que l'établissement de juridictions internationales chargées de cette tâche ;

Reconnaissant que, selon l'article 7 du Statut de Rome de la Cour pénale internationale, les crimes contre l'humanité peuvent être commis par des individus agissant pour le compte d'un Etat ou au nom d'entités non étatiques ;

Notant que les actions entreprises par le Conseil de sécurité sur la base du Chapitre VII de la Charte dans des conflits armés auxquels prenaient part des entités non étatiques démontrent que le respect du droit international humanitaire est un élément intégral du système de sécurité de l'Organisation mondiale ;

Se félicitant de la décision du Secrétaire général des Nations Unies du 6 août 1999 sur le respect du droit international humanitaire par les Forces des Nations Unies qui réitère l'obligation de ces dernières de respecter strictement ce droit en vue notamment de protéger la population civile et qui prévoit la possibilité de poursuivre pénalement les membres du personnel militaire de ces Forces qui se seraient rendus coupables de violations du droit humanitaire, également dans des situations de conflits armés internes ;

Se félicitant également du rôle important joué par le Comité international de la Croix-Rouge (ci-après : CICR) dans des conflits récents auxquels prenaient part des entités non étatiques, aux fins d'assurer la protection humanitaire de toutes les victimes et en invitant les parties aux conflits à respecter les principes élémentaires d'humanité, notamment à protéger la population civile contre les effets de la violence et des dévastations ;

Considérant qu'il est souhaitable de procéder à un réexamen et à l'adaptation du droit international humanitaire aux nouvelles situations en vue de renforcer le respect de ce droit et de mieux protéger les victimes des conflits armés auxquels prennent part des entités non étatiques,

Adopte la Résolution suivante :

1. Aux fins de la présente Résolution :

   - l'expression "*conflits armés auxquels prennent part des entités non étatiques*" vise les conflits armés internes entre les forces armées d'un gouvernement et celles d'une ou plusieurs entités non étatiques, ou entre plusieurs entités non étatiques ; y sont aussi inclus les conflits armés internes dans lesquels interviennent des forces de maintien de la paix ;

   - l'expression "*entités non étatiques*" désigne les parties aux conflits armés internes qui s'opposent aux forces armées gouvernementales ou luttent contre des entités de même nature et qui remplissent les conditions prévues à l'article 3 commun aux Conventions de Genève de 1949 pour la protection des victimes de la guerre ou à l'article premier du Protocole de 1977 additionnel aux Conventions de Genève relatif à la protection des victimes des conflits armés non internationaux (Protocole II).

2. Toutes les parties aux conflits armés auxquels prennent part des entités non étatiques, indépendamment de leur statut juridique, de même que les Nations Unies et les organisations régionales et autres organisations internationales compétentes, ont l'obligation de respecter le droit international humanitaire de même que les droits fondamentaux de l'homme. L'application des principes et des règles pertinents n'affecte pas le statut juridique des parties au conflit et ne dépend pas de la reconnaissance de belligérance ou du statut d'insurgés.

3. Le respect du droit international humanitaire et des droits fondamentaux de l'homme constitue un élément intégral de l'ordre international pour le maintien et le rétablissement de la paix et de la sécurité, y compris dans les conflits armés auxquels prennent part des entités non étatiques.

4. Le droit international applicable dans les conflits armés auxquels prennent part des entités non étatiques comprend :

   - l'article 3 commun aux Conventions de Genève de 1949 en tant que principes fondamentaux du droit international humanitaire ;

   - le Protocole II et toutes autres conventions applicables aux conflits armés non internationaux ;

   - les règles et principes coutumiers du droit international humanitaire sur la conduite des hostilités et la protection des victimes dans les conflits armés internes ;

   - les principes et les règles du droit international garantissant les droits fondamentaux de l'homme ;

   - les principes et les règles du droit international applicable dans les conflits armés internes relatifs aux crimes de guerre, aux crimes contre l'humanité, au génocide et à d'autres crimes internationaux ;

   - les principes du droit international "tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique".

5. Tout Etat et toute entité non étatique prenant part à un conflit armé sont juridiquement tenus l'un envers l'autre et à l'égard de tous les autres membres de la communauté internationale de respecter le droit international humanitaire en toutes circonstances. Tout autre Etat a le droit de demander le respect de ce droit. Aucun Etat et aucune entité non étatique ne peut se soustraire à de telles obligations en niant l'existence d'un conflit armé.

6. En cas de violations graves du droit international humanitaire ou des droits fondamentaux de l'homme, les Nations Unies et les organisations régionales et autres organisations internationales compétentes ont le droit d'adopter des mesures appropriées conformément au droit international.

7. Sans préjudice des fonctions et pouvoirs que la Charte attribue aux organes des Nations Unies en cas de violations systématiques et massives du droit humanitaire ou des droits fondamentaux de l'homme, les Etats, agissant individuellement ou collectivement, sont en droit d'adopter, à l'égard de toute partie au conflit armé qui enfreint ses obligations, des mesures diplomatiques, économiques et autres, admises par le droit international.

8. Toute violation grave du droit international humanitaire dans les conflits armés auxquels prennent part des entités non étatiques engage la responsabilité individuelle des personnes responsables, quels que soient leur statut ou leur position officielle, en accord avec les instruments internationaux qui confient la répression de ces actes aux juridictions nationales ou internationales.

   Les autorités compétentes de l'Etat sur le territoire duquel se trouve une personne contre laquelle est alléguée une violation grave du droit international humanitaire commise dans un conflit armé non international sont en droit de la poursuivre et de la déférer aux tribunaux de celui-ci ; elles sont priées de le faire.

9. Pour arriver à une protection plus efficace des victimes des conflits armés auxquels prennent part des entités non étatiques et tenant compte des enseignements des récents conflits armés à caractère non international, les mesures suivantes devraient être envisagées :

   - la conclusion par les parties à ces conflits, conformément à l'article 3, paragraphe 2, commun aux Conventions de Genève de 1949, d'accords spéciaux sur l'application de tout ou partie des dispositions de celles-ci ;

   - le concours des Etats, des Nations Unies, du CICR et d'autres organismes internationaux à caractère humanitaire à des mesures de vérification et de contrôle de l'application du droit international humanitaire dans les conflits armés internes ; en outre, au cas où l'Etat concerné fait valoir qu'aucun conflit armé interne n'a éclaté, l'autorisation donnée aux Nations Unies

ou à toute organisation régionale ou autre organisation internationale compétente de déterminer de manière impartiale si le droit international humanitaire est applicable ;

- l'application du Protocole II à tous les conflits armés non internationaux sans attendre une révision formelle de ce Protocole ;

- l'amendement du Protocole II en vue de compléter ses règles et notamment :

  (a) d'établir un organisme international impartial et indépendant habilité à enquêter sur le respect du droit international humanitaire (*cf.* article 90 du Protocole I) ;

  (b) d'ajouter une disposition sur les infractions graves traitant notamment de questions de compétence, d'extradition vers un autre Etat et de transfert à une juridiction pénale internationale.

10. Dans la mesure où certains aspects des troubles et tensions internes peuvent ne pas être régis par le droit international humanitaire, les individus demeurent protégés par le droit international garantissant les droits fondamentaux de l'homme. Toutes les parties ont l'obligation de respecter les droits fondamentaux de l'homme, sous le contrôle de la communauté internationale.

11. L'Institut salue et encourage une adaptation progressive des principes et règles relatifs aux conflits armés internes aux principes et règles applicables dans les conflits armés internationaux. Il est donc souhaitable et nécessaire que les Etats, les Nations Unies et les organisations régionales et autres organisations internationales compétentes, s'inspirant notamment des importants travaux du CICR dans ce domaine, élaborent et adoptent une convention visant à réglementer tous les conflits armés et à protéger toutes les victimes, que ces conflits aient un caractère international, non international ou mixte.

12. Tous les Etats et toutes les entités non étatiques sont tenus de diffuser les principes et règles du droit international humanitaire et des droits fondamentaux de l'homme qui sont applicables dans les conflits armés internes.

English translation :

"*The Institute of International Law,*

Recalling its Resolutions "*Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*" (Neuchâtel Session, 1900), "*The Principle of Non-Intervention in Civil Wars*" (Wiesbaden Session, 1975) and "*The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*" (Santiago de Compostela Session, 1989) ;

Recalling further its Resolutions on the "*Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*" (Zagreb Session, 1971) and on the "*Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*" (Wiesbaden Session, 1975) ;

Considering that armed conflicts in which non-State entities are parties have become more and more numerous and increasingly motivated in particular by ethnic, religious or racial causes ;

Noting that, as a consequence, the civilian population is increasingly affected by internal armed conflicts and ultimately bears the brunt of the resulting violence, causing great suffering, death and privation ;

Noting that armed conflicts in which non-State entities are parties do not only concern those States in which they take place, but also affect the interests of the international community as a whole ;

Bearing in mind that, in the last fifty years, the principles of the United Nations Charter and of human rights law have had a substantial impact on the development and application of international humanitarian law ;

Recalling the ruling of the International Court of Justice that the obligation laid down in Article 1 common to the Geneva Conventions "to respect" the Conventions and to "ensure respect" for them "in all circumstances" derives from general principles of international humanitarian law, with the consequence that it has acquired the status of an obligation of customary international law ;

Emphasizing the ruling of the International Court of Justice that Article 3 common to the Geneva Conventions of 1949 reflects "elementary considerations of humanity" and that the fundamental rules of humanitarian law applicable in armed conflicts "are to be observed ... because they constitute intransgressible principles of international customary law" ;

Considering the ruling of the International Criminal Tribunal for the Former Yugoslavia whereby many principles and rules previously applicable only in international armed conflicts are now applicable in internal armed conflicts and serious violations of international humanitarian law committed within the context of the latter category of conflicts constitute war crimes ;

Supporting the prosecution and punishment by national jurisdictions of those responsible for war crimes, crimes against humanity, genocide or other serious violations of international humanitarian law, as well as the establishment of international tribunals entrusted with this task ;

Recognizing that, under Article 7 of the Rome Statute of the International Criminal Court, crimes against humanity can be committed by persons acting for States or non-State entities ;

Noting that the actions undertaken by the Security Council under Chapter VII of the Charter in armed conflicts in which non-State entities were parties confirm that respect for international humanitarian law is an integral element of the security system of the world organization ;

Welcoming the United Nations Secretary General's regulation of 6 August 1999 on the Observance by United Nations Forces of international humanitarian law which reaffirms their obligation to comply strictly with humanitarian law, in particular as to the protection of the civilian population, and provides for the possibility of prosecuting members of the military personnel of such Forces in case of violations of humanitarian law, in particular in situations of internal armed conflicts ;

Welcoming also the important role played by the International Committee of the Red Cross (ICRC) in recent conflicts to which non-State entities were parties in seeking to ensure humanitarian protection for all victims and in inviting the parties to such conflicts to abide by elementary principles of humanity, notably to spare the civilian population the effects of violence and devastation ;

Considering that it is desirable that international humanitarian law be reconsidered and adapted to new circumstances, so as to reinforce respect for this law and the protection of victims in armed conflicts in which non-State entities are parties ,

Adopts this Resolution :

1. For the purposes of this Resolution :

- the expression "armed conflicts in which non-State entities are parties" means internal armed conflicts between a government's armed forces and those of one or several non-State entities, or between several non-State entities ; also included are internal armed conflicts in which peacekeeping forces intervene ;

- the expression "non-State entities" means the parties to internal armed conflicts who oppose the government's armed forces or are fighting entities of a similar nature and who fulfill the conditions set forth in Article 3 common to the Geneva Conventions of 1949 on the Protection of Victims of War or in Article 1 of the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

2. All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, as well as the United Nations, and competent regional and other international organizations have the obligation to respect international humanitarian law as well as fundamental human rights. The application of such principles and rules does not affect the legal status of the parties to the conflict and is not dependent on their recognition as belligerents or insurgents.

3. Respect for international humanitarian law and fundamental human rights constitutes an integral part of international order for the maintenance and reestablishment of peace and security, in particular in armed conflicts in which non-State entities are parties.

4. International law applicable to armed conflicts in which non-State entities are parties includes:

- Article 3 common to the Geneva Conventions of 1949 as basic principles of international humanitarian law ;

- Protocol II and all other conventions applicable to non-international armed conflicts ;

- customary principles and rules of international humanitarian law on the conduct of hostilities and the protection of victims applicable to internal armed conflicts ;

- the principles and rules of international law guaranteeing fundamental human rights;

- the principles and rules of international law applicable in internal armed conflicts, relating to war crimes, crimes against humanity, genocide and other international crimes ;

- the principles of international law "derived from established custom, from the principles of humanity and from dictates of public conscience."

5. Every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect international humanitarian law in all circumstances, and any other State is legally entitled to demand respect for this body of law. No State or non-State entity can escape its obligations by denying the existence of an armed conflict.

6. In cases of serious violations of international humanitarian law or fundamental human rights, the United Nations and competent regional and other international organizations have the right to adopt appropriate measures in accordance with international law.

7. Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations, in case of systematic and massive violations of humanitarian law or fundamental human rights, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any party to the armed conflict which has violated its obligations, provided such measures are permitted under international law.

8. Any serious violation of international humanitarian law in armed conflicts in which non-State entities are parties entails the individual responsibility of the persons involved, regardless of their status or official position, in accordance with international instruments that entrust the repression of these acts to national or international jurisdictions.

The competent authorities of a State on the territory of which is found a person against whom is alleged a serious violation of international humanitarian law committed in a non-international armed conflict are entitled to prosecute and try such a person before their courts; they are urged to do so.

9. In order to achieve a better protection for the victims in armed conflicts in which non-State entities are parties and taking into account the experience of recent armed conflicts of a non-international character the following measures should be considered :

- the conclusion by the parties to such conflicts of special agreements, in accordance with Article 3 paragraph 2 common to the Geneva Conventions of 1949, on the application of all or part of the provisions of the Convention ;

- the support of States, the United Nations, the ICRC as well as other international bodies of a humanitarian character for measures to verify and oversee the application of international humanitarian law in internal armed conflicts ; furthermore, should the State concerned claim that no internal armed conflict has broken out, the authorisation given to the United Nations or any other competent regional or international organization to establish impartially whether international humanitarian law is applicable ;

- the application of Protocol II in all non-international armed conflicts, without waiting for its formal revision ;

- the amendment of Protocol II, with a view to complementing its rules and in particular so as :

  (a) to establish an impartial and independent international body designed to investigate respect for international humanitarian law (*cf.* Article 90 of Protocol I) ;

  (b) to add a grave breaches provision addressing, in particular, issues of jurisdiction, extradition and surrender to an international criminal jurisdiction.

10. To the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights. All parties are bound to respect fundamental human rights under the scrutiny of the international community.

11. The Institute welcomes and encourages the progressive adaptation of the principles and rules relating to internal armed conflicts to the principles and rules applicable in international armed conflicts. Therefore it is desirable and necessary that States, the United Nations and competent regional and other international organizations, drawing special inspiration from the important work done by the ICRC in this field, draft and adopt a convention designed to regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character.

12. All States and non-State entities must disseminate the principles and rules of humanitarian law and fundamental human rights which are applicable in internal armed conflicts."

Le *Secrétaire général* précise que le titre de la résolution a été légèrement modifié pour mieux refléter le contenu de la résolution. Il procède ensuite au vote nominal. La résolution est adoptée par 33 voix, aucune voix contre et une abstention.

Ont voté en faveur du projet : M. Bernhardt, Mme Bindschedler-Robert, MM. Broms, Degan, Díez de Velasco Vallejo, Dinstein, Doehring, Dominicé, El-Kosheri, Gaja, Gannagé, Jayme, McWhinney, von Mehren, Philip, Pinto, Ress, Rigaux, Rudolf, Sahovic, Schindler, Sohn, Torres Bernárdez, Vignes, Waelbroeck, Zemanek, Mme Burdeau, Sir Kenneth Keith, MM. Pocar, Ranjeva, Tomuschat, Treves, Vinuesa.

S'est abstenu : M. Shahabuddeen.

The *President* thanked the Members for their co-operation and congratulated the Rapporteur on the adoption of the Resolution.

La Résolution adoptée par l'Institut se trouve à la page 386 de *l'Annuaire.*

La séance est levée à 10 h 30.

Textes adoptés lors de la 69ème Session

17 - 25 août 1999

A. Résolutions adoptées par l'Institut lors de sa Session de Berlin

I. La prise en compte du droit international privé étranger
(Quatrième Commission, Rapporteur : M. Kurt Lipstein)

Taking Foreign Private International Law to Account
(Fourth Commission, Rapporteur: Mr Kurt Lipstein)

II. Le règlement judiciaire et arbitral des différends internationaux impliquant plus de deux Etats
(Onzième Commission, Rapporteur : M. Rudolf Bernhardt)

Jucidial and Arbitral Settlement of International Disputes Involving More Than Two States
(Eleventh Commission, Rapporteur : Mr Rudolf Bernhardt)

III. L'application du droit international humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquels prennent part des entités non étatiques
(Quatorzième Commission, Rapporteur : M. Milan Sahovic)

The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties
(Fourtheenth Commission, Rapporteur : Mr Milan Sahovic)

I. La prise en compte du droit international privé étranger

(Quatrième Commission, Rapporteur : M. Kurt Lipstein)

L'Institut de Droit international,

Considérant que la fonction du droit international privé est de déterminer les règles juridiques dont l'application est la plus appropriée dans un cas donné ;

Considérant que les règles juridiques dont l'application est la plus appropriée dans un cas donné sont celles qui favorisent la justice, la sécurité juridique, l'efficacité, l'uniformité ou le respect des intentions communes ou des attentes justifiées des parties ;

Considérant que la sécurité juridique de ces règles est favorisée par le recours aux mêmes règles de droit en ce qui a trait aux situations créées et aux actes conclus ;

Considérant que l'efficacité peut être favorisée en portant une attention particulière au droit qui exerce de fait le contrôle ;

Considérant que l'on ne peut parvenir à une uniformité de décision que lorsqu'on retrouve, dans les règles de conflit de lois pertinentes des pays concernés, des règles de conflits de lois identiques et interprétées de façon uniforme, ou encore lorsqu'un des critères de rattachement reçoit priorité ;

Le texte anglais fait foi, le texte français est une traduction.

I. Taking Foreign Private International Law to Account

(Fourth Commission, Rapporteur : Mr Kurt Lipstein)

The Institute of International Law,

Considering that the task of private international law is the search for the legal rules most appropriate to be applied in the individual case ;

Considering that the legal rules most appropriate to be applied in the individual case are those which promote justice, legal certainty, effectiveness, uniformity or compliance with the common intention or justified expectations of the parties ;

Considering that legal certainty may be advanced by reliance on the same law in respect of situations created and transactions concluded ;

Considering that effectiveness may be advanced by paying special regard to the law which exercises factual control ;

Considering that uniformity of decision is only achieved if the relevant choice of law rules of the countries concerned either contain identical choice of law rules interpreted uniformly or if one of different connecting factors is accorded precedence ;

The English text is authoritative. The French text appearing opposite is a translation.

Considérant que, même lorsqu'on ne peut parvenir à une uniformité totale de décision, un certain degré d'uniformisation peut cependant, dans un cas donné, être atteint si le tribunal tient compte du droit international privé étranger ;

Considérant que l'intérêt de la justice peut être favorisé par la prise en compte du droit international privé étranger ;

Considérant que, en certaines circonstances, ces objectifs seront poursuivis plus efficacement lorsque non seulement les règles du droit interne étranger, mais aussi celles du droit international privé étranger, seront prises en compte ;

Adopte la Résolution suivante :

La prise en compte du droit international privé étranger

1. ne devrait pas être exclue d'emblée, qu'elle implique ou non un renvoi au premier ou au second degré ;

2. ne devrait pas se voir limitée aux situations dans lesquelles l'uniformité est souhaitable ;

Considering that even if total uniformity of decision cannot be achieved, a degree of uniformity may be achieved in the individual case if the referring court takes foreign private international law into consideration ;

Considering that the interest of justice may be advanced by taking foreign private international law into account ;

Considering that these aims can be furthered best if in some situations not only foreign domestic law but also foreign private international law is taken into account ;

Adopts the following Resolution :

Taking foreign private international law to account

1. Should not be excluded altogether, irrespective of whether it involves a reference back or on ;

2. Should not be restricted to situations where uniformity is desired ;

3. devrait être envisagée :

(a) si la validité ou l'efficacité d'un acte ou d'un contrat est tenue pour souhaitable et est ainsi assurée ; ou

(b) si l'uniformité de traitement d'un acte ou d'un contrat est souhaitable et peut être atteinte ; ou

(c) si les parties ont le choix du droit applicable et, l'ayant exercé, ont inclus dans ce droit le droit international privé ; ou

(d) si la validité d'un acte ou d'un contrat établi conformément aux règles de conflit de lois prévues par le droit applicable au moment où l'acte ou le contrat a été établi, est ultérieurement remise en question ; ou

(e) si, pour la décision d'une question préalable, la validité d'un acte peut être maintenue soit par application des règles de conflit de lois de la loi régissant la question principale, soit par application des règles de conflit de lois de la loi régissant la question préalable ;

4. ne devrait pas être envisagée :

(a) si la loi du for comporte des règles alternatives de conflit de lois opérant sur un pied d'égalité ;

(b) si les parties ont le choix du droit applicable et, l'ayant exercé, n'ont pas inclus dans celui-ci le droit international privé.

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(23 août 1999)

3. Should be considered :

(a) if the validity or the effectiveness of an act or a transaction is regarded as desirable and assured thereby ; or

(b) if a uniform treatment of an act or a transaction is desirable and can be achieved; or

(c) if the parties enjoy a choice of law, have exercised it, and have included private international law ; or

(d) if the validity of an act or transaction concluded according to the choice of law rules of the law applicable at the time when the act or transaction was concluded is questioned in later proceedings ; and or

(e) if, when deciding an incidental question, the validity of an act would be ensured either by application of the conflict rules of the law governing the main question or of the conflict rules of the law governing the incidental question;

4. ought not to be considered :

(a) if the law of the forum contains alternative choice of law rules operating on an equal footing;

(b) if the parties enjoy a choice of law, have exercised it, and have not included private international law.

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(23 August 1999)

II. Le règlement judiciaire et arbitral des différends internationaux impliquant plus de deux Etats

(Onzième Commission, Rapporteur : M. Rudolf Bernhardt)

L'Institut de Droit international,

Réaffirmant que le règlement judiciaire et arbitral est un des modes importants par lequel les différends entre Etats sont réglés conformément à la Charte des Nations Unies ;

Observant que le règlement judiciaire et arbitral international est en général entendu comme un processus bilatéral, et que le caractère de plus en plus multilatéral des relations internationales rend nécessaire une adaptation des règles traditionnelles du règlement des différends ;

Considérant que les éventuels effets de normes impératives de droit international et d'obligations *erga omnes* ne sont pas traités par la présente résolution ;

Adopte la Résolution suivante :

I. Principes

1. Le consentement des Etats est le fondement de la compétence des cours et tribunaux internationaux ; il en résulte qu'on ne peut pas se prononcer sur un litige impliquant plus de deux Etats sans le consentement de tous les Etats concernés. L'absence d'un tel consentement interdit d'aboutir à un règlement, ou ne permet qu'un règlement partiel du différend.

Le texte anglais fait foi, le texte français est une traduction.

II. Judicial and Arbitral Settlement of International Disputes Involving More Than Two States

(Eleventh Commission, Rapporteur : Mr Rudolf Bernhardt)

The Institute of International Law,

Reaffirming that judicial and arbitral settlement is one important means to settle disputes between States in accordance with the Charter of the United Nations;

Noting that international judicial and arbitral dispute settlement is, in general, bilaterally conceived, and that the increasing multilateral character of international relations requires an adaptation of the traditional dispute settlement rules;

Considering that possible consequences of peremptory norms of international law and of *erga omnes* obligations are not addressed in this Resolution;

Adopts the following Resolution :

I. Principles

1. The consent of States is the basis of the jurisdiction of international courts and tribunals, and consequently a dispute between more than two States cannot be decided without the consent of all States concerned. Without such consent either no settlement or only partial settlement of the dispute is possible.

The English text is authoritative. The French text appearing opposite is a translation.

2. Les dispositions portant sur la compétence et sur la procédure figurant dans les statuts et règlements des cours et tribunaux internationaux présentent souvent des caractéristiques particulières et uniques. C'est pourquoi l'interprétation des textes pertinents constitue le point de départ de l'examen de toute affaire, y compris celles qui impliquent plus de deux Etats. Néanmoins il est possible de dégager quelques principes généraux et des dispositions similaires concernant l'intervention et les autres modes de participation d'Etats tiers.

3. Les principes généraux et les règles relatifs à la participation d'Etats tiers valables devant la Cour internationale de Justice peuvent aussi être appliqués, s'ils sont appropriés dans les circonstances de l'espèce, devant d'autres cours ou tribunaux internationaux.

II. Différends impliquant plus de deux Etats parties

4. Lorsque deux ou plus de deux Etats ont des intérêts juridiques identiques ou similaires dans un différend, ces Etats devraient examiner la possibilité d'agir conjointement ou en commun devant la cour ou le tribunal international compétent.

5. Une requête unilatérale devant une cour ou un tribunal émanant d'un ou de plusieurs Etats et dirigée contre plus d'un Etat défendeur requiert, en principe, l'introduction d'instances parallèles et distinctes, à moins qu'un accord préalable en sens contraire n'intervienne entre les Etats impliqués.

6. Sous réserve des instruments juridiques pertinents, la cour ou le tribunal peut, au vu de toutes les circonstances, ordonner la jonction d'instances ou l'organisation de procédures communes. La cour ou le tribunal devra, dans le respect des exigences du caractère équitable de la procédure, déterminer quels effets produira sur celle-ci la jonction d'instances, ou, sans jonction formelle, l'organisation de procédures communes.

2. Provisions concerning jurisdiction and procedure in statutes and rules of international courts and tribunals often present specific and unique features. Therefore the interpretation of the relevant texts is the starting point in all cases including those involving more than two States. Nevertheless, some general principles and similar provisions concerning intervention and other forms of third-State participation can be identified.

3. The general principles and rules concerning third-State participation applicable to the International Court of Justice may also be applied, if appropriate in the particular circumstances, to proceedings before other international courts and tribunals.

II. Disputes involving more than two States as Parties

4. Where two or more States have identical or similar interests of a legal nature in a dispute they should consider taking joint or common action before the competent international court or tribunal.

5. Unilateral application to a court or tribunal by one or more States directed against more than one State as respondents requires, in principle, parallel and separate proceedings if no previous agreement between the States involved can be reached.

6. Subject to the relevant legal instruments, the court or tribunal may join pending cases or order common proceedings taking into account all the circumstances. The procedural consequences of a joinder of cases or of common proceedings without a formal joinder should be determined by the court or tribunal with due respect for the requirements of a fair procedure.

III. Intervention

7. Sous réserve des dispositions des instruments régissant le fonctionnement de la cour ou du tribunal, les deux principaux types d'intervention sont les suivants :

(a) intervention par un Etat tiers qui estime que, dans un différend, un intérêt juridique est pour lui en cause ;

(b) intervention par des Etats tiers à un différend mettant en jeu l'interprétation d'un traité multilatéral auquel ils sont également parties.

8. L'intervention d'un Etat tiers ne le rend pas pour autant partie principale à l'instance. Les parties et les intervenants ont des positions et des rôles distincts qui ne peuvent être joints sans un accord à cet effet.

9. Les conséquences de l'intervention dans des affaires qui soulèvent une question d'interprétation d'un traité multilatéral (article 63 du Statut de la Cour internationale de Justice et textes similaires d'autres statuts) sont expressément énoncées dans les textes pertinents. Si l'Etat tiers est partie au traité, il a le droit d'intervenir dans l'instance et d'y participer à titre d'intervenant. Tant les parties au différend que l'Etat intervenant sont liés par l'interprétation donnée par la cour ou le tribunal aux dispositions du traité en cause.

10. L'intervention en vertu de l'article 62 du Statut de la Cour internationale de Justice ou de textes similaires d'autres statuts exige que l'Etat intervenant ait un intérêt juridique à ce faire. Cela signifie que des droits ou obligations dudit Etat, relevant du droit international public, sont susceptibles d'être affectés par la décision. La cour ou le tribunal devra décider, selon les circonstances de l'espèce, si ledit Etat peut se prévaloir d'un tel intérêt, et si la décision rendue affectera ou non cet intérêt. Si la Cour ou le tribunal constate l'existence d'un intérêt juridique, l'Etat sollicitant l'intervention devrait être admis à l'instance à titre d'intervenant.

III. Intervention

7. Subject to the provisions of the instruments governing the functioning of the court or tribunal, two principal types of intervention are:

(a) intervention by a third State in cases where it considers that it has an interest of a legal nature which may be affected by the decision in the case; and

(b) intervention by third States Parties to a multilateral treaty the construction of which is in question.

8. Intervention by a third State does not mean that this State becomes a full party to the proceedings. Parties and interveners have different positions and functions which cannot be combined without special agreements.

9. The consequences of intervention in cases raising a question of the construction of a multilateral treaty (Article 63 of the Statute of the International Court of Justice and similar texts in other statutes) are explicitly set out in the relevant texts. If the third State is a party to the treaty, it has a right to intervene and to participate as an intervener. The parties to the case as well as the intervening State are bound by the construction given to the relevant treaty provisions by the court or tribunal.

10. Intervention under Article 62 of the Statute of the International Court of Justice and similar texts in other statutes requires the existence of an interest of a legal nature on the part of the intervening State. That means that rights or obligations of this State under public international law can be affected by the decision. Whether the State can claim such an interest and whether it may be affected by the decision of the court or tribunal has to be determined by the court or tribunal according to the specific features of each case. When the court or tribunal has found a legal interest to exist, the State applying for intervention should be admitted as intervener.

11. L'intervention ne nécessite pas l'existence d'un lien juridictionnel entre les parties au différend et l'Etat tiers autre que les dispositions du Statut de la Cour Internationale de Justice et des dispositions similaires figurant dans d'autres textes pertinents permettant l'intervention.

12. Un Etat peut présenter une intervention au fond, tout comme au stade de l'examen de la compétence et de la recevabilité ; dans des cas exceptionnels, il peut également présenter une intervention lors d'autres procédures incidentes.

13. Un Etat qui envisage de se porter intervenant peut demander à la cour ou au tribunal de lui faire tenir copie des mémoires. La cour ou le tribunal décide après consultation des parties.

14. Lorsque l'instrument pertinent prévoit la possibilité de nommer un juge *ad hoc*, l'Etat intervenant n'en bénéficie pas.

15. La décision relative à la recevabilité de l'intervention lie les parties et l'Etat intervenant.

16. L'Etat intervenant a le droit de prendre part à la procédure écrite et orale. L'ampleur de sa participation dépendra des règles pertinentes de la cour ou du tribunal ainsi que du besoin de mener les procédures de manière efficace et équitable.

17. La décision de la cour ou du tribunal lie l'Etat intervenant dans les limites dans lesquelles l'intervention a été accueillie. Dans les mêmes limites, la décision est obligatoire pour les parties principales dans leurs relations avec l'Etat intervenant.

18. L'Etat intervenant peut, moyennant l'accord de toutes les parties à l'affaire, devenir partie principale à l'instance avec les droits et obligations correspondants.

11. Intervention does not require the existence of a jurisdictional link between the parties to the dispute and the third State beyond the provisions of the Statute of the International Court of Justice and similar provisions in other relevant texts allowing intervention.

12. A State may apply to intervene on the merits as well as in proceedings confined to matters of jurisdiction and admissibility; in exceptional cases, it may also apply to intervene in other incidental proceedings.

13. When a State considers intervening, it may request the court or tribunal to provide it with copies of the pleadings. The court or tribunal shall decide after consulting the parties.

14. Should the relevant instrument provide for the appointment of a judge *ad hoc*, this does not apply to an intervening State.

15. The decision concerning the admissibility of the intervention is binding on the parties and the intervening State.

16. The intervening State has the right to take part in the written and oral proceedings. The extent of such participation depends on the relevant rules of the court or tribunal and on the need to conduct the proceedings in an effective and equitable manner.

17. The decision of the court or tribunal is binding on the intervening State to the extent of the admitted intervention. To the same extent, the decision is binding on the principal parties in their relations with the intervening State.

18. With the consent of all parties to the case, an intervening State may become a full party to the proceedings with the corresponding rights and obligations.

IV. Parties indispensables

19. Si les droits ou obligations d'un Etat tiers constituent l'objet même d'un différend porté par d'autres Etats devant une cour ou un tribunal et s'il ne s'avère pas possible d'en arriver à une décision sans prendre parti sur les droits ou obligations de l'Etat tiers, la cour ou le tribunal ne peut procéder que si ledit Etat devient partie principale au litige. Cet Etat tiers est une "partie indispensable" à l'instance.

20. Si les droits ou obligations des parties dans l'affaire peuvent être distingués de ceux d'un Etat tiers, la cour ou le tribunal peut se prononcer sur la partie du litige concernant lesdits droits ou obligations.

21. Un accord peut intervenir entre les Etats impliqués pour que la "partie indispensable" devienne partie principale à l'instance, avec les droits et obligations correspondants, afin de permettre à la cour ou au tribunal d'arrêter une décision sur l'ensemble du litige.

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(24 août 1999)

IV. Indispensable Parties

19. If the rights or obligations of a third State are the very subject-matter of a dispute submitted by other States to a court or tribunal and if a decision on that dispute is not possible without deciding on the rights or obligations of the third State, the court or tribunal cannot take such a decision unless that third State becomes a party to the proceedings. This third State is an "indispensable party" to the proceedings.

20. If the rights or obligations of the parties to the proceedings can be separated from those of a third State, the court or tribunal may decide on that part of the dispute relating to these rights or obligations.

21. All the States involved may agree that the "indispensable party" becomes a full party to the proceedings with the corresponding rights and obligations, in order to enable the court or tribunal to decide the entire dispute.

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(24 August 1999)

III. L'application du droit international humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquels prennent part des entités non étatiques

(Quatorzième Commission, Rapporteur: M. Milan Sahovic)

L'Institut de Droit international,

Rappelant ses résolutions sur les "*Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*" (Session de Neuchâtel, 1900), "*Le principe de non-intervention dans les guerres civiles*" (Session de Wiesbaden, 1975) et "*La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats*" (Session de Saint-Jacques-de-Compostelle, 1989) ;

Rappelant aussi ses résolutions sur "*Les conditions d'application des règles humanitaires relatives aux conflits armés aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*" (Session de Zagreb, 1971) et "*Les conditions d'application des règles, autres que les règles humanitaires, relatives aux hostilités dans lesquelles les Forces des Nations Unies peuvent être engagées*" (Session de Wiesbaden, 1975) ;

Considérant que les conflits armés auxquels prennent part des entités non étatiques sont de plus en plus nombreux et qu'ils sont de plus en plus souvent motivés, en particulier, par des causes ethniques, religieuses ou raciales ;

Le texte français fait foi. Le texte anglais est une traduction.

III. The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties

(Fourteenth Commission, Rapporteur : Mr Milan Sahovic)

The Institute of International Law,

Recalling its Resolutions "*Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*" (Neuchâtel Session, 1900), "*The Principle of Non-Intervention in Civil Wars*" (Wiesbaden Session, 1975) and "*The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*" (Santiago de Compostela Session, 1989) ;

Recalling further its Resolutions on the "*Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*" (Zagreb Session, 1971) and on the "*Conditions of Application of Rules, Other than Humanitarian Rules, of Armed Conflict to Hostilities in which United Nations Forces May Be Engaged*" (Wiesbaden Session, 1975) ;

Considering that armed conflicts in which non-State entities are parties have become more and more numerous and increasingly motivated in particular by ethnic, religious or racial causes ;

The Fench text is authoritative. The English text appearing opposite is a translation.

Notant que, dès lors, la population civile est affectée de manière croissante par les conflits armés internes et qu'elle supporte en fin de compte la plus grande part des violences en résultant, ce qui cause de grandes souffrances, des morts et des privations ;

Constatant que les conflits armés auxquels prennent part des entités non étatiques ne concernent pas seulement les Etats dans lesquels ils ont lieu, mais qu'ils touchent les intérêts de la communauté internationale dans son ensemble ;

Ayant à l'esprit que pendant les cinquante dernières années les principes de la Charte des Nations Unies et des droits de l'homme ont substantiellement influencé le développement et l'application du droit international humanitaire ;

Rappelant le prononcé de la Cour internationale de Justice selon lequel l'obligation consacrée à l'article 1 commun aux Conventions de Genève de "respecter et faire respecter" les Conventions "en toutes circonstances" découle de principes généraux du droit international humanitaire, de sorte qu'elle a acquis le statut d'une obligation de droit international coutumier ;

Soulignant le prononcé de la Cour internationale de Justice selon lequel l'article 3 commun aux Conventions de Genève de 1949 reflète des "considérations élémentaires d'humanité" et selon lequel les règles fondamentales du droit humanitaire applicables dans les conflits armés "s'imposent ... parce qu'elles constituent des principes intransgressibles du droit international coutumier" ;

Considérant le prononcé du Tribunal pénal international pour l'ex-Yougoslavie selon lequel un grand nombre de principes et de règles précédemment applicables aux seuls conflits armés internationaux s'appliquent désormais aux conflits armés internes et selon lequel des violations graves du droit international humanitaire commises durant des conflits de ce dernier type constituent des crimes de guerre ;

Noting that, as a consequence, the civilian population is increasingly affected by internal armed conflicts and ultimately bears the brunt of the resulting violence, causing great suffering, death and privation ;

Noting that armed conflicts in which non-State entities are parties do not only concern those States in which they take place, but also affect the interests of the international community as a whole ;

Bearing in mind that, in the last fifty years, the principles of the United Nations Charter and of human rights law have had a substantial impact on the development and application of international humanitarian law ;

Recalling the ruling of the International Court of Justice that the obligation laid down in Article 1 common to the Geneva Conventions "to respect" the Conventions and to "ensure respect" for them "in all circumstances" derives from general principles of international humanitarian law, with the consequence that it has acquired the status of an obligation of customary international law ;

Emphasizing the ruling of the International Court of Justice that Article 3 common to the Geneva Conventions of 1949 reflects "elementary considerations of humanity" and that the fundamental rules of humanitarian law applicable in armed conflicts "are to be observed ... because they constitute intransgressible principles of international customary law" ;

Considering the ruling of the International Criminal Tribunal for the Former Yugoslavia whereby many principles and rules previously applicable only in international armed conflicts are now applicable in internal armed conflicts and serious violations of international humanitarian law committed within the context of the latter category of conflicts constitute war crimes ;

Appuyant la poursuite et la condamnation, par des juridictions nationales, des responsables de crimes de guerre, de crimes contre l'humanité, de génocide et d'autres violations graves du droit international humanitaire, ainsi que l'établissement de juridictions internationales chargées de cette tâche ;

Reconnaissant que, selon l'article 7 du Statut de Rome de la Cour pénale internationale, les crimes contre l'humanité peuvent être commis par des individus agissant pour le compte d'un Etat ou au nom d'entités non étatiques ;

Notant que les actions entreprises par le Conseil de sécurité sur la base du Chapitre VII de la Charte dans des conflits armés auxquels prenaient part des entités non étatiques démontrent que le respect du droit international humanitaire est un élément intégral du système de sécurité de l'Organisation mondiale ;

Se félicitant de la Décision du Secrétaire général des Nations Unies du 6 août 1999 sur le respect du droit international humanitaire par les Forces des Nations Unies qui réitère l'obligation de ces dernières de respecter strictement ce droit en vue notamment de protéger la population civile et qui prévoit la possibilité de poursuivre pénalement les membres du personnel militaire de ces Forces qui se seraient rendus coupables de violations du droit humanitaire, également dans des situations de conflits armés internes ;

Se félicitant également du rôle important joué par le Comité international de la Croix-Rouge dans des conflits récents auxquels prenaient part des entités non étatiques, aux fins d'assurer la protection humanitaire de toutes les victimes et en invitant les parties aux conflits à respecter les principes élémentaires d'humanité, notamment à protéger la population civile contre les effets de la violence et des dévastations ;

Considérant qu'il est souhaitable de procéder à un réexamen et à l'adaptation du droit international humanitaire aux nouvelles situations en vue de renforcer le respect de ce droit et de mieux protéger les victimes des conflits armés auxquels prennent part des entités non étatiques ;

Supporting the prosecution and punishment by national jurisdictions of those responsible for war crimes, crimes against humanity, genocide or other serious violations of international humanitarian law, as well as the establishment of international tribunals entrusted with this task ;

Recognizing that, under Article 7 of the Rome Statute of the International Criminal Court, crimes against humanity can be committed by persons acting for States or non-State entities ;

Noting that the actions undertaken by the Security Council under Chapter VII of the Charter in armed conflicts in which non-State entities were parties confirm that respect for international humanitarian law is an integral element of the security system of the World Organization ;

Welcoming the United Nations Secretary General's regulation of 6 August 1999 on the Observance by United Nations Forces of international humanitarian law which reaffirms their obligation to comply strictly with humanitarian law, in particular as to the protection of the civilian population, and provides for the possibility of prosecuting members of the military personnel of such Forces in case of violations of humanitarian law, in particular in situations of internal armed conflicts ;

Welcoming also the important role played by the International Committee of the Red Cross (ICRC) in recent conflicts to which non-State entities were parties in seeking to ensure humanitarian protection for all victims and in inviting the parties to such conflicts to abide by elementary principles of humanity, notably to spare the civilian population the effects of violence and devastation ;

Considering that it is desirable that international humanitarian law be reconsidered and adapted to new circumstances, so as to reinforce respect for this law and the protection of victims in armed conflicts in which non-State entities are parties ;

Adopte la Résolution suivante :

I. Aux fins de la présente Résolution :

- l'expression "*conflits armés auxquels prennent part des entités non étatiques*" vise les conflits armés internes entre les forces armées d'un gouvernement et celles d'une ou plusieurs entités non étatiques, ou entre plusieurs entités non étatiques ; y sont aussi inclus les conflits armés internes dans lesquels interviennent des forces de maintien de la paix ;

- l'expression "*entités non étatiques*" désigne les parties aux conflits armés internes qui s'opposent aux forces armées gouvernementales ou luttent contre des entités de même nature et qui remplissent les conditions prévues à l'article 3 commun aux Conventions de Genève de 1949 pour la protection des victimes de la guerre ou à l'article premier du Protocole de 1977 additionnel aux Conventions de Genève relatif à la protection des victimes des conflits armés non internationaux (Protocole II).

II. Toutes les parties aux conflits armés auxquels prennent part des entités non étatiques, indépendamment de leur statut juridique, de même que les Nations Unies et les organisations régionales et autres organisations internationales compétentes, ont l'obligation de respecter le droit international humanitaire de même que les droits fondamentaux de l'homme. L'application des principes et des règles pertinents n'affecte pas le statut juridique des parties au conflit et ne dépend pas de la reconnaissance de belligérance ou du statut d'insurgés.

III. Le respect du droit international humanitaire et des droits fondamentaux de l'homme constitue un élément intégral de l'ordre international pour le maintien et le rétablissement de la paix et de la sécurité, y compris dans les conflits armés auxquels prennent part des entités non étatiques.

IV. Le droit international applicable dans les conflits armés auxquels prennent part des entités non étatiques comprend :

- l'article 3 commun aux Conventions de Genève de 1949 en tant que principes fondamentaux du droit international humanitaire ;

Adopts this Resolution :

I. For the purposes of this Resolution :

- the expression "armed conflicts in which non-State entities are parties" means internal armed conflicts between a government's armed forces and those of one or several non-State entities, or between several non-State entities ; also included are internal armed conflicts in which peacekeeping forces intervene ;

- the expression "non-State entities" means the parties to internal armed conflicts who oppose the government's armed forces or are fighting entities of a similar nature and who fulfill the conditions set forth in Article 3 common to the Geneva Conventions of 1949 on the Protection of Victims of War or in Article 1 of the 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

II. All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, as well as the United Nations, and competent regional and other international organizations have the obligation to respect international humanitarian law as well as fundamental human rights. The application of such principles and rules does not affect the legal status of the parties to the conflict and is not dependent on their recognition as belligerents or insurgents.

III. Respect for international humanitarian law and fundamental human rights constitutes an integral part of international order for the maintenance and reestablishment of peace and security, in particular in armed conflicts in which non-State entities are parties.

IV. International law applicable to armed conflicts in which non-State entities are parties includes :

- Article 3 common to the Geneva Conventions of 1949 as basic principles of international humanitarian law ;

- le Protocole II et toutes autres conventions applicables aux conflits armés non internationaux ;

- les règles et principes coutumiers du droit international humanitaire sur la conduite des hostilités et la protection des victimes dans les conflits armés internes ;

- les principes et les règles du droit international garantissant les droits fondamentaux de l'homme ;

- les principes et les règles du droit international applicable dans les conflits armés internes relatifs aux crimes de guerre, aux crimes contre l'humanité, au génocide et à d'autres crimes internationaux ;

- les principes du droit international "tels qu'ils résultent des usages établis, des principes de l'humanité et des exigences de la conscience publique".

V. Tout Etat et toute entité non étatique prenant part à un conflit armé sont juridiquement tenus l'un envers l'autre et à l'égard de tous les autres membres de la communauté internationale de respecter le droit international humanitaire en toutes circonstances, tout autre Etat a le droit de demander le respect de ce droit. Aucun Etat et aucune entité non étatique ne peut se soustraire à de telles obligations en niant l'existence d'un conflit armé.

VI. En cas de violations graves du droit international humanitaire ou des droits fondamentaux de l'homme, les Nations Unies et les organisations régionales et autres organisations internationales compétentes ont le droit d'adopter des mesures appropriées conformément au droit international.

VII. Sans préjudice des fonctions et pouvoirs que la Charte attribue aux organes des Nations Unies en cas de violations systématiques et massives du droit humanitaire ou des droits fondamentaux de l'homme, les Etats, agissant individuellement ou collectivement, sont en droit d'adopter, à l'égard de toute partie au conflit armé qui enfreint ses obligations, des mesures diplomatiques, économiques et autres, admises par le droit international.

- Protocol II and all other conventions applicable to non-international armed conflicts ;

- customary principles and rules of international humanitarian law on the conduct of hostilities and the protection of victims applicable to internal armed conflicts ;

- the principles and rules of international law guaranteeing fundamental human rights ;

- the principles and rules of international law applicable in internal armed conflicts, relating to war crimes, crimes against humanity, genocide and other international crimes ;

- the principles of international law "derived from established custom, from the principles of humanity and from dictates of public conscience."

V. Every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect international humanitarian law in all circumstances, and any other State is legally entitled to demand respect for this body of law. No State or non-State entity can escape its obligations by denying the existence of an armed conflict.

VI. In cases of serious violations of international humanitarian law or fundamental human rights, the United Nations and competent regional and other international organizations have the right to adopt appropriate measures in accordance with international law.

VII. Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations, in case of systematic and massive violations of humanitarian law or fundamental human rights, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any party to the armed conflict which has violated its obligations, provided such measures are permitted under international law.

VIII. Toute violation grave du droit international humanitaire dans les conflits armés auxquels prennent part des entités non étatiques engage la responsabilité individuelle des personnes responsables, quels que soient leur statut ou leur position officielle, en accord avec les instruments internationaux qui confient la répression de ces actes aux juridictions nationales ou internationales.

Les autorités compétentes de l'Etat sur le territoire duquel se trouve une personne contre laquelle est alléguée une violation grave du droit international humanitaire commise dans un conflit armé non international sont en droit de la poursuivre et de la déférer aux tribunaux de celui-ci ; elles sont priées de le faire.

IX. Pour arriver à une protection plus efficace des victimes des conflits armés auxquels prennent part des entités non étatiques et tenant compte des enseignements des récents conflits armés à caractère non international, les mesures suivantes devraient être envisagées :

- la conclusion par les parties à ces conflits, conformément à l'article 3, paragraphe 2, commun aux Conventions de Genève de 1949, d'accords spéciaux sur l'application de tout ou partie des dispositions de celles-ci ;

- le concours des Etats, des Nations Unies, du Comité International de la Croix Rouge et d'autres organismes internationaux à caractère humanitaire à des mesures de vérification et de contrôle de l'application du droit international humanitaire dans les conflits armés internes ; en outre, au cas où l'Etat concerné fait valoir qu'aucun conflit armé interne n'a éclaté, l'autorisation donnée aux Nations Unies ou à toute organisation régionale ou autre organisation internationale compétente de déterminer de manière impartiale si le droit international humanitaire est applicable ;

- l'application du Protocole II à tous les conflits armés non internationaux sans attendre une révision formelle de ce Protocole ;

- l'amendement du Protocole II en vue de compléter ses règles et notamment :

VIII. Any serious violation of international humanitarian law in armed conflicts in which non-State entities are parties entails the individual responsibility of the persons involved, regardless of their status or official position, in accordance with international instruments that entrust the repression of these acts to national or international jurisdictions.

The competent authorities of a State on the territory of which is found a person against whom is alleged a serious violation of international humanitarian law committed in a non-international armed conflict are entitled to prosecute and try such a person before their courts; they are urged to do so.

IX. In order to achieve a better protection for the victims in armed conflicts in which non-State entities are parties and taking into account the experience of recent armed conflicts of a non-international character the following measures should be considered :

- the conclusion by the parties to such conflicts of special agreements, in accordance with Article 3 paragraph 2 common to the Geneva Conventions of 1949, on the application of all or part of the provisions of the Conventions ;

- the support of States, the United Nations, the ICRC as well as other international bodies of a humanitarian character for measures to verify and oversee the application of international humanitarian law in internal armed conflicts ; furthermore, should the State concerned claim that no internal armed conflict has broken out, the authorisation given to the United Nations or any other competent regional or international organisation to establish impartially whether international humanitarian law is applicable ;

- the application of Protocol II in all non-international armed conflicts, without waiting for its formal revision ;

- the amendment of Protocol II, with a view to complementing its rules and in particular so as :

(a) d'établir un organisme international impartial et indépendant habilité à enquêter sur le respect du droit international humanitaire (*cf.* article 90 du Protocole I) ;

(b) d'ajouter une disposition sur les infractions graves traitant notamment de questions de compétence, d'extradition vers un autre Etat et de transfert à une juridiction pénale internationale.

X. Dans la mesure où certains aspects des troubles et tensions internes peuvent ne pas être régis par le droit international humanitaire, les individus demeurent protégés par le droit international garantissant les droits fondamentaux de l'homme. Toutes les parties ont l'obligation de respecter les droits fondamentaux de l'homme, sous le contrôle de la communauté internationale.

XI. L'Institut salue et encourage une adaptation progressive des principes et règles relatifs aux conflits armés internes aux principes et règles applicables dans les conflits armés internationaux. Il est donc souhaitable et nécessaire que les Etats, les Nations Unies et les organisations régionales et autres organisations internationales compétentes, s'inspirant notamment des importants travaux du Comité International de la Croix Rouge dans ce domaine, élaborent et adoptent une convention visant à réglementer tous les conflits armés et à protéger toutes les victimes, que ces conflits aient un caractère international, non international ou mixte.

XII. Tous les Etats et toutes les entités non étatiques sont tenus de diffuser les principes et règles du droit international humanitaire et des droits fondamentaux de l'homme qui sont applicables dans les conflits armés internes.

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(25 août 1999)

(a) to establish an impartial and independent international body designed to investigate respect for international humanitarian law (*cf.* Article 90 of Protocol I) ;

(b) to add a grave breaches provision addressing, in particular, issues of jurisdiction, extradition and surrender to an international criminal jurisdiction.

X. To the extent that certain aspects of internal disturbances and tensions may not be covered by international humanitarian law, individuals remain under the protection of international law guaranteeing fundamental human rights. All parties are bound to respect fundamental human rights under the scrutiny of the international community.

XI. The Institute welcomes and encourages the progressive adaptation of the principles and rules relating to internal armed conflicts to the principles and rules applicable in international armed conflicts. Therefore it is desirable and necessary that States, the United Nations and competent regional and other international organizations, drawing special inspiration from the important work done by the ICRC in this field, draft and adopt a convention designed to regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character.

XII. All States and non-State entities must disseminate the principles and rules of humanitarian law and fundamental human rights which are applicable in internal armed conflicts.

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(25 August 1999)

B. Statuts et Règlement

I. Nouvel article 13 des Statuts

II. Nouvel article 1bis du Règlement

I. Statuts

L'Institut a adopté un nouvel article 13 et a, ce faisant, remanié les articles 11 et 12, sans modifier les textes.

Article 11

1. Le Secrétaire général est élu par l'Institut pour trois sessions. Il est immédiatement rééligible.

2. Il est chargé de la rédaction des procès-verbaux de chaque séance qui sont soumis à l'approbation de l'Institut dans une séance suivante ; les procès-verbaux qui n'ont pas pu être adoptés par l'Institut sont soumis à l'approbation du Président.

3. Le Secrétaire général est chargé, en outre, de toutes les publications de l'Institut, de la gestion courante, de la correspondance pour le service ordinaire de l'Institut et de l'exécution de ses décisions, sauf dans le cas où l'Institut lui-même y aura pourvu autrement. Il a la garde du sceau et des archives. Son domicile est considéré comme le siège de l'Institut. Dans chaque session ordinaire, il présente un résumé des derniers travaux de l'Institut.

4. *Actuel article 12 sans modification de texte :*

L'Institut peut, sur la proposition du Secrétaire général, nommer un ou plusieurs secrétaires ou secrétaires adjoints, chargés d'aider celui-ci dans l'exercice de ses fonctions, ou de le remplacer en cas d'empêchement momentané.

1. Statutes

The Institute has adopted a new Article 13 and has renumbered Articles 11 and 12 without change in the texts.

Article 11

1. The Secretary-General shall be elected by the Institute for three sessions ; he may be re-elected without interval.

2. He shall be responsible for the preparation of the minutes of each meeting, which shall be submitted to the Institute for approval at a subsequent meeting ; minutes which it has not been possible for the Institute to adopt shall be submitted to the President for approval.

3. The Secretary-General is further responsible for all publications of the Institute, the day-to-day management, correspondence for the ordinary work of the Institute, and the carrying out of its decisions, except in such cases as the Institute itself shall make other arrangements. He shall have custody of the seal and archives. His domicile shall be regarded as the seat of the Institute. At each ordinary session, he shall submit a summary of the recent work of the Institute.

4. *Existing Article 12 without changing the text :*

The Institute may, on the proposal of the Secretary-General, appoint one or more secretaries or deputy-secretaries, to assist him in the performance of his duties, or to deputize for him if he is temporarily unable to act.

Article 12

Actuel article 13 sans modification de texte :

1. L'Institut nomme, parmi ses Membres, pour trois sessions, un Trésorier chargé de la gestion financière et de la tenue des comptes.

2. Le Trésorier présente, dans chaque session ordinaire, un rapport financier.

3. Deux Membres sont désignés, à l'ouverture de chaque session, en qualité de Commissaires Vérificateurs, pour examiner le rapport du Trésorier. Ils sont eux-mêmes rapport dans le cours de la session.

4. S'il y a lieu, l'Institut nomme également, pour le terme de trois sessions, un Bibliothécaire.

Article 13

L'Institut nomme, parmi ses Membres et Associés, une Commission de travaux chargée de faire des propositions sur le programme des travaux et sur la désignation des Rapporteurs, ainsi que de suivre l'avancement des travaux des diverses Commissions. La Commission des travaux est présidée par le Président de l'Institut.

Article 12

Existing Article 13, without change in the text :

1. The Institute shall appoint a Treasurer from among its Members, for three sessions, entrusted with financial management and the keeping of the accounts.

2. At each ordinary session, the Treasurer shall submit a financial report.

3. At the opening of each session, two Members shall be appointed Auditors to examine the Treasurer's report. They themselves shall report in the course of the session.

4. If necessary, the Institute shall also appoint a Librarian for a period of three sessions.

Article 13

The Institute shall appoint from its Members and Associates a Programme Committee with the function of advising on the programme of work and on the selection of Rapporteurs, as well as of following the progress of the work of the various Commissions. The Programme Committee is chaired by the President of the Institute.

II. Nouvel article 1bis du Règlement

Article 1bis

1. La Commission des travaux comprend le Président de l'Institut, ainsi que douze membres et six suppléants élus par l'Institut pour une période de six ans. Lors de la première élection après l'adoption du présent article, quatre membres et deux suppléants sont élus pour une période de deux ans et quatre membres et deux suppléants pour une période de quatre ans. Le Secrétaire général désigne par tirage au sort ceux qui sont élus pour deux ans ou pour quatre ans.

2. La Commission des travaux élit en son sein deux Vice-Présidents, l'un d'eux spécialiste du droit international public et l'autre du droit international privé.

3. En cas de vacance au sein de la Commission des travaux ou d'impossibilité pour l'un de ses membres à prendre part à une réunion, l'un des suppléants prendra sa place dans l'ordre d'ancienneté à l'Institut.

II. New Article 1bis of the Rules

Article 1bis

1. The Programme Committee shall consist of the President of the Institute, and of twelve members together with six deputy members. They shall be elected by the Institute and shall serve for a period of six years. At the first election to be held after the adoption of the present amendment, four members and two deputy members shall serve for a period of two years, and four members and two deputy members for a period of four years. The Secretary general shall draw by lot the name of those serving for two and four-year periods.

2. The Programme Committee shall elect from its members two Vice-Presidents, one from the field of public international law and one from the field of private international law.

3. In the event of a vacancy in the Committee, or the inability of a member of the Committee to attend a meeting, one of the deputy members, in order of seniority in the Institute, shall take his place.

C. Voeu concernant la Convention de Rome de 1998

Résolution

L'Institut de Droit international,

Rappelant l'article 1, paragraphe 2(d) de ses Statuts, en vertu duquel l'un des buts de l'Institut est de : "favoriser le progres du droit international ... en contribuant, dans les limites de sa compétence, soit au maintien de la paix, soit à l'observation des lois de la guerre" ;

Se réjouit de l'adoption, à Rome, le 17 juillet 1998 du Statut de la Cour criminelle internationale ;

Exprime l'espoir que les questions encore pendantes seront résolues au sein de la Commission préparatoire à la satisfaction générale ;

Espère que ce Statut sera ratifié largement ;

Demande au Secrétaire général de transmettre la présente Résolution à la Commission préparatoire pour l'établissement de la Cour criminelle internationale.

Resolution

The Institute of International Law,

Recalling Article 1, paragraph 2(d), of its Statutes, by which one of the purposes of the Institute is to "promote the progress of international law ... by contributing, within the limits of its competence, either to the maintenance of peace or to the observance of the laws of war";

Welcomes the adoption on 17 July 1998 at Rome of the Statute of the International Criminal Court ;

Expresses the hope that all outstanding issues will be successfully resolved in the Preparatory Commission to general satisfaction ;

Hopes that that Statute will be widely ratified ;

Requests the Secretary general to forward this Resolution to the Preparatory Commission for the establishment of the International Criminal Court.

L'Institut de Droit international

The Institute of International Law

In Memoriam
Origines et histoire de l'Institut, bibliographie sommaire
Statuts et Règlements de l'Institut
Les sessions de l'Institut
Prix Rolin-Jaequemyns
Membres honoraires, Membre titulaires et Associés
Membres émérites
Notices nécrologiques
Liste des Commissions

In Memoriam

Fondateurs de l'Institut de Droit international, réunis du 8 au 11 septembre 1873, dans la Salle de l'Arsenal, à l'Hôtel de Ville de Gand:

Pascal Mancini (de Rome), Président

Emile de Laveleye (de Liège)

Tobie Michel Charles Asser (d'Amsterdam)

James Lorimer (d'Edimbourg)

Wladimir Besobrassof (de Saint-Pétersbourg)

Gustave Moynier (de Genève)

Jean Gaspar Bluntschli (de Heidelberg)

Augusto Pierantoni (de Naples)

Charles Calvo (de Buenos-Aires)

Gustave Rolin-Jaequemyns (de Gand)

David Dudley Field (de New York)

Origines et histoire de l'Institut de Droit international

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- André Durand, "La participation de Gustave Moynier à la fondation de l'Institut de Droit international (1873)", *Revue internationale de la Croix-Rouge* (novembre-décembre 1994), pp. 585-606.
- Dr. iur. Fritz Münch, "Das Institut de Droit international". Dans : *Archiv des Völkerrechts.* 28. Band - 1./2. Heft, 1990 p. 76-105.

Les Résolutions de l'Institut sont publiées à l'issue de chaque session dans l'*Annuaire.*

Elles ont été réunies dans deux volumes: *Résolutions de l'Institut de Droit international, 1873-1956* et *Résolutions de l'Institut de Droit international 1957-1991.*

Statuts et Règlement de l'Institut

L'Institut est régi par des *Statuts* adoptés en 1873, modifiés plusieurs fois depuis lors, et par un *Règlement.*

En outre, il existe une *Fondation auxiliaire de l'Institut de Droit international,* qui apporte un soutien financier aux activités de l'Institut. Elle est régie par des *Statuts* et un *Règlement intérieur et financier*, adoptés en 1947.

Les Prix James Brown Scott sont régis par un Règlement.

Ces textes sont publiés dans une brochure éditée par le Secrétariat de l'Institut, où elle peut être obtenue.

Les sessions de l'Institut de Droit international

Les *Présidents* de chaque session sont mentionnés entre parenthèses. Tous les Présidents ont présidé une session, à l'exception des sept Présidents suivants : Henri Harburger (1914-1916), le Marquis d'Alhucemas (1932-1934, 1934-1936), Nicolas Politis (1937-1942), Jean Spiropoulos (1965-1967), Edouard Hambro (1975-1977), Constantin Eustathiadès (1977-1979), Erik Castrén (1983-1985), René-Jean Dupuy (1995-1997).

L'Institut connaît, en outre, le titre de *Président d'honneur*. Ont été élus Présidents d'honneur : Gustave Rolin-Jaequemyns (1892), Gustave Moynier (1894), John Westlake (1911), Albéric Rolin (1923) et Charles De Visscher (1954).

1. Genève 1874 (P. S. Mancini)
2. La Haye 1875 (J. C. Bluntschli)
3. Zurich 1877 (F. de Parieu)
4. Paris 1878 (F. de Parieu)
5. Bruxelles 1879 (G. Rolin-Jaequemyns)
6. Oxford 1880 (M. Bernard)
7. Turin 1882 (A. Pierantoni)
8. Munich 1883 (J. de Holtzendorff)
9. Bruxelles 1885 (G. Rolin-Jaequemyns)
10. Heidelberg 1887 (A. de Bulmerincq)
11. Lausanne 1888 (A. Rivier)
12. Hambourg 1891 (L. de Bar)
13. Genève 1892 (G. Moynier)
14. Paris 1894 (L. Renault)
15. Cambridge 1895 (J. Westlake)
16. Venise 1896 (E. Brusa)

17. Copenhague 1897 (Ch. Goos)
18. La Haye 1898 (T. M. C. Asser)
19. Neuchâtel 1900 (Ch. Lardy)
20. Bruxelles 1902 (Ed. Descamps)
21. Edimbourg 1904 (Lord Reay)
22. Gand 1906 (A. Rolin)
23. Florence 1908 (C. F. Gabba)
24. Paris 1910 (Ch. Lyon-Caen)
25. Madrid 1911 (Ed. Clunet)
26. Christiania 1912 (G.-F. Hagerup)
27. Oxford 1913 (T.E. Holland)
28. Paris 1919 (Sir Thomas Barclay)
29. Rome 1921 (A. Corsi)
30. Grenoble 1922 (A. Weiss)
31. Bruxelles 1923 (Ed. Rolin-Jaequemyns)
32. Vienne 1924 (L. Strisower)
33. La Haye 1925 (B.J.C. Loder)
34. Lausanne 1927 (J. Brown Scott)
35. Stockholm 1928 (K.H. Hammarskjöld)
36. New York 1929 (J. Brown Scott)
37. Cambridge 1931 (A.P. Higgins)
38. Oslo 1932 (F. Beichmann)
39. Paris 1934 (Ch. Lyon-Caen)
40. Bruxelles 1936 (Ed. Rolin-Jaequemyns)
41. Luxembourg 1937 (Sir Cecil Hurst)
42. Lausanne 1947 (B. Nolde)
43. Bruxelles 1948 (Ch. De Visscher)
44. Bath 1950 (Sir Arnold McNair)
45. Sienne 1952 (T. Perassi)
46. Aix-en-Provence 1954 (A. de La Pradelle)
47. Grenade 1956 (J. de Yanguas Messia)
48. Amsterdam 1957 (J. P. A. François)
49. Neuchâtel 1959 (G. Sauser-Hall)
50. Salzbourg 1961 (A. von Verdross)
51. Bruxelles 1963 (H. Rolin)
52. Varsovie 1965 (B. Winiarski)

53. Nice 1967 (H. Valladao)
54. Edimbourg 1969 (Sir Gerald Fitzmaurice)
55. Zagreb 1971 (J. Andrassy)
56. Rome 1973 (G. Morelli)
57. Wiesbaden 1975 (W. Wengler)
58. Oslo 1977 (M.K. Yasseen)
59. Athènes 1979 (A. Gros)
60. Dijon 1981 (Ch. Rousseau)
61. Cambridge 1983 (Sir Robert Jennings)
62. Helsinki 1985 (P. Reuter)
63. Le Caire 1987 (B. Boutros-Ghali)
64. Saint-Jacques-de-Compostelle 1989 (J.M. Castro-Rial y Canosa)
65. Bâle 1991 (P. Lalive)
66. Milan 1993 (R. Ago)
67. Lisbonne 1995 (A. Ferrer Correia)
68. Strasbourg 1997 (K. Skubiszewski)
69. Berlin 1999 (E. Jayme)

Le *siège officiel* de l'Institut - conformément à l'article 11 des Statuts - a été, de 1873 à 1878, à Gand (S.G. Gustave Rolin-Jaequemyns) ; de 1878 à 1892, à Bruxelles (S.G. Alphonse Rivier puis à partir de 1887 Gustave Rolin-Jaequemyns) ; de 1892 à 1900, à Lausanne (S.G. Ernest Lehr) ; de 1900 à 1906, à Louvain (S.G. Edouard Descamps) ; de 1906 à 1913, à Gand, de 1913 à 1919, à La Haye, de 1919 à 1923, à Bruxelles (S.G. Albéric Rolin, 1906-1923) ; de 1923 à 1927, à Louvain (S.G. Alfred Nerincx) ; de 1927 à 1931, à Gand, de 1931 à 1950, à Bruxelles (S.G. Charles De Visscher, 1927-1937 ; Fernand De Visscher, 1937-1950) ; de 1950 à 1963, à Genève (S.G. Hans Wehberg, 1950-1962 ; S.G. *p.i.* Paul Guggenheim, 1962-1963) ; de 1963 à 1969, à Paris (S.G. Mme Suzanne Bastid) ; de 1969 à 1981, à Bruxelles (S.G. Paul De Visscher) ; depuis 1981, à Genève (S.G. Nicolas Valticos, 1981-1991; Christian Dominicé depuis octobre 1991).

Prix institué par James Brown Scott
Prix Rolin-Jaequemyns

En 1931, James Brown Scott a institué un prix "dans un esprit de reconnaissance vis-à-vis de l'Institut et dans une pensée d'hommage ému à la mémoire de sa mère Jeannette Scott" (*Annuaire de l'Institut de Droit international*, 1931, vol. II, p. 229).

Aux termes de son Règlement, le prix est décerné tous les quatre ans (art. 4) et porte le nom d'un des treize internationalistes désignés (art. 2). Il est destiné à distinguer l'auteur d'un mémoire inédit consacré à une question de droit international public (art. 1 et 10). Le prochain prix portera le nom de *Rolin-Jaequemyns*. Il sera décerné en 2003, et sera doté d'un montant de CHF. 10'000.-

Le sujet suivant est mis au concours:

"Les mesures provisoires en droit international devant les juridictions internationales"

"Provisional Measures under International Law Before International Courts and Tribunals"

Les mémoires, conformes au Règlement, doivent être remis jusqu'au 31 décembre 2002 au Secrétariat de l'Institut de Droit international à l'attention de M. Christian Dominicé, p.a. IUHEI; 132, rue de Lausanne, Case postale 36, CH-1211 Genève 21.

Le texte du Règlement du Prix est publié dans la brochure mentionnée *supra* p. 414, qui peut être obtenue auprès du Secrétariat de l'Institut.

Membres honoraires, Membres et Associés de l'Institut[1]

A. Membres honoraires :

1. *Boutros-Ghali* (Boutros), Egypte, né 14-11-1922, professeur honoraire de l'Université du Caire ; ancien Vice-Premier Ministre chargé des Affaires étrangères ; ancien Secrétaire général des Nations Unies ; Président de la Société Internationale pour le Développement (Rome). Adresse professionnelle : UNESCO, 7 Place de Fontenoy, F-75352 Paris 07 SP. Tél. (+33 1) 4568 1249. Domicile : 28, rue de Bourgogne, F-75007 Paris, ou 2, av. El Nil, Giza - Le Caire, Egypte. Tél. (+20 2) 72 2033 ; Fax (+20 2) 354 2428. (1973, 1985, 1993 ; Pr. 1985-1987).

2. *Castro-Rial y Canosa* (Juan Manuel), Espagne, né 9-2-1915, ambassadeur ; professeur de droit international public et privé ; membre de la Cour permanente d'Arbitrage. Domicile : Calle Nuñez de Balboa 69, 28001 Madrid, Espagne. Tél. (+34 1) 715-13-34. (1967, 1979, 1991 ; Pr. 1987-1989).

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1 Le pays mentionné après les noms et prénoms est celui de la nationalité de l'intéressé. Les chiffres indiqués entre parenthèses, après chaque nom, désignent l'année dans laquelle il a été élu Associé, Membre titulaire, Membre honoraire. D'éventuelles fonctions dans le Bureau de l'Institut sont signalées par les abréviations suivantes: Pr. = Président; V.-Pr. = Vice-Président; S.G. = Secrétaire général; S.G.- adj. = Secrétaire général adjoint; Tr. = Trésorier; Tél. ou Tel. = numéro de téléphone. Cette liste a été établie le 10 mars 2000.

3. *Ferrer-Correia* (Antonio de Arruda), Portugal, né 15-8-1912, Recteur honoraire de l'Université de Coïmbra ; professeur de droit international privé à l'Université catholique (Lisbonne) ; professeur à la Faculté internationale de droit comparé (Strasbourg) ; membre de l'Académie internationale de droit comparé (Paris) et de l'Institut hispano-luso-américain de droit international (Madrid) ; Docteur h.c. de l'Université de Aveiro (Portugal) et de l'Université fédérale de Rio de Janeiro (Brésil) ; membre correspondant de l'Académie des sciences de Lisbonne ; Président de la Fondation Calouste Gulbenkian (Lisbonne). Bureau : Fondation Calouste Gulbenkian, 45 avenue de Berne, 1000 Lisbonne. Tél. (+351 1) 793 5131 ; Fax (+351 1) 797 4289. Domicile : 15, rue Teixeira de Calvalho, 3000 Coïmbra, Portugal. Tél. (+35 39) 71 6450. (1977, 1989, 1997 ; Pr. 1993-1995).

4. *van Hecke* (Georges, Chevalier), Belgique, né 10-5-1915, Avocat à la Cour de cassation ; Assesseur honoraire de la Section de législation du Conseil d'Etat ; Professeur émérite de la *Katholieke Universiteit Leuven* ; membre de la *Koniklyke Academie voor Wetenschappen* ; membre étranger de la *Koninklyke Nederlandse Akademie van Wetenschappen*. Bureau : De Bandt, Van Hecke & Lagae, rue Brederode 13, B-1000 Bruxelles. Tél. (+32 2) 517 9411 ; Fax (+32 2) 513 9713. Domicile : Sorghvliet, Bergstraat 16, B-1851 Grimbergen. Tél. et Fax. (+32 2) 251 3837. (1961, 1971, 1997 ; 2e V.-Pr. 1973-1975).

5. *Jennings* (Sir Robert Y.), UK, born 19-10-1913, Kt., Q.C., former President of the International Court of Justice ; sometime Whewell Professor of International Law, University of Cambridge ; Hon. Bencher, Lincoln's Inn ; Hon. LL.D. Universities of Hull, the Saarland and Rome. Home : 61 Bridle Way, Grantchester, Cambridge CB3 9NY, United Kingdom. Tel. (+44 1223) 84 1314. (1957, 1969, 1985 ; 3e V.-Pr. 1979-1981 ; Pr. 1981-1983).

6. *Mbaye* (Kéba), Sénégal, né 5-8-1924, ancien Vice-Président de la Cour internationale de Justice ; Premier Président honoraire de la Cour suprême du Sénégal. Rue "G" X Rue Léon Gontran Damas, Boîte postale 5865, Dakar-Fann, Sénégal. Tél. (+22 1) 824 5600 ; Fax (+22 1) 825 6077. (1983, 1987, 1995).

7. *Mosler* (Hermann), Allemagne, né 26-12-1912, ancien juge à la Cour internationale de Justice et à la Cour européenne des Droits de l'Homme ; professeur émérite à l'Université de Heidelberg ; directeur émérite de l'Institut Max-Planck de droit comparé et de droit international public ; Membre et ancien président de l'Académie des Sciences et Lettres de Heidelberg ; Membre correspondant de l'Académie autrichienne des Sciences et Lettres et de l'Accademia Nazionale dei Lincei. Bureau : Max-Planck-Institut für Völkerrecht, Im Neuenheimer Feld 535, D-6120 Heidelberg. Tél. (+49 6221) 4821 ; Fax (+49 6221) 482 288. Domicile : Mühltalstr. 117a, D-69121 Heidelberg, Allemagne. Tél. (+49 6221) 480 082. (1957, 1977, 1997).

8. *Nascimento e Silva* (Geraldo Eulalio do), Brésil, né 18-2-1917, K.C.M.G., Ambassadeur ; Président de la Société brésilienne de Droit international et du *Brazilian Branch of the International Law Association*. Domicile : Rua Mario Pederneiras 54, 22261-020 Rio de Janeiro, Brésil. Tél. (+55 21) 226 7668 ; Fax (+55 21) 226 8387. (1973, 1979, 1997).

9. *Pescatore* (Pierre), Luxembourg, né 20-11-1919, ancien juge à la Cour de Justice des Communautés Européennes ; membre de la Cour permanente d'Arbitrage ; ancien juge au Tribunal administratif de l'OIT ; professeur honoraire à l'Université de Liège. Domicile : 16, rue de la Fontaine, L-1532 Luxembourg, Grand-Duché de Luxembourg. Tel. (+352) 22 4044 ; Fax (+352) 46 6142. (1965, 1975, 1995).

10. *Schachter* (Oscar), USA, born 19-6-1915, Hamilton Fish Professor of International Law and Diplomacy, Emeritus Columbia University School of Law ; Honorary President of the American Society of International Law. Office : Columbia University, Law School, 435 West 116th Street, New York, N.Y. 10027. Tel. (+1 212) 854 2651 ; Fax (+1 212) 854 7946. Private address : 11 East 86th Street, Apt 9C, New York, N.Y. 10028. Tel. (+1 212) 831 0833. (1965, 1973, 1995 ; 2e V.-Pr. 1991-1993).

11. *Schwind* (Fritz), Autriche, né 1-6-1913, professeur émérite et ancien Recteur de l'Université de Vienne ; membre titulaire de l'Académie autrichienne des Sciences et Lettres. Bureau : Kommission für Europarecht der Österreichischen Akademie der Wissenschaften, Fleischmarkt 22, Stg. 2/III, A-1010 Vienne. Tel. (+43 1) 5297 60/92. Domicile : Franz Barwig-Weg 20, A-1180 Vienne, Autriche. Tél. (+43 1) 47 931 ; Fax (+43 1) 478 0743. (1967, 1979, 1999).

12. *Truyol y Serra* (Antonio), Espagne, né 4-11-1913, Docteur en droit ; professeur à l'*Universidad complutens*e de Madrid ; Docteur *honoris causa* de l'Université de Lisbonne ; Vice-Président de l'Académie royale des sciences morales et politiques d'Espagne ; Juge émérite du Tribunal constitutionnel d'Espagne. Domicile : Calle Juan Bravo 32, 28006 Madrid, Espagne. Tél. (+34 1) 435 0426. (1977, 1983, 1999).

B. Membres titulaires :

1. *Abi-Saab* (Georges Michel), Egypte, né 9-6-1933, professeur de droit international à l'Institut universitaire de hautes études internationales, Genève. Domicile : Chemin St-Georges 14, CH-1815 Clarens. Tél. (+41 21) 964 4223 ou (+41 22) 734 7152, Fax. (+41 21) 964 8222. Bureau : IUHEI, 132, rue de Lausanne, Case postale 36, CH-1211 Genève 21, Tél. (+41 22) 731 1730 ; Fax. (+41 22) 738 4306. (1981, 1985).

2. *Amerasinghe* (Chittharanjan Felix), Sri Lanka, born 2-3-1933. B.A., LL.B., Ph.D., LL.D. (Cambridge) ; LL.M. (Harvard) ; Ph.D. (Ceylon) ; Judge, UN Tribunal, New York ; Sometime Honorary Professor of Law, University of Colombo, Sri Lanka ; Second Professor of Law, University of Ceylon, Colombo ; Director, Secretariat, World Bank Tribunal ; Member, Arbitrator's Panel, Law of the Sea Convention. Professional address : c/o Secretariat, UN Tribunal, New York, NY 10017, USA. Home address : 6100 Robinwood Road, Bethesda, Maryland 20817, USA. Tel. (+1 301) 229 2766 ; Fax. (+1 301) 229 4151. (1981, 1987).

3. *Anand* (Ram Prakash), India, born 15-6-1933, B.A. (Delhi) ; LL.M. (Delhi) ; LL.M. (Yale) ; J.S.D. (Yale) ; Professor of International Law ; Home address : D-7/7058 Vasant Kunj, New Delhi 110070, India, e-mail : r.p.anand@usa.net. (1985, 1991).

4. *Arangio-Ruiz* (Gaetano), Italie, né 10-7-1919, professeur de droit international à la Faculté de droit de l'Université de Rome ; Membre de la Commission du droit international des Nations Unies et rapporteur spécial sur la responsabilité des Etats pour faits illicites. Bureau : Iran-United States Claims Tribunal, Parkweg 13, NL-2585 JH The Hague ; Tel. (+31 70) 355 1371 ou 352 0064. Domicile : Corso Trieste 51, I-00198 Rome, Italie. Tél. Rome (+39 6) 855 9720 ; campagne : (+39 564) 81 9200. (1981, 1985).

5. *Barberis* (Julio A.), Argentine, né 12-4-1936, représentant permanent de l'Argentine auprès de la Commission du fleuve Paraná ; Juge au Tribunal administratif de l'OIT, Genève. Domicile : Arenales 824 (2° piso), 1061 Buenos Aires, Argentine. Tél. (+54 1) 393 8282, Bureau : Tél. (+54 1) 383 0320 ; Fax (+54 1) 814 3689. (1987, 1997).

6. *Bardonnet* (Daniel), France, né 18-5-1931, professeur émérite à l'Université de droit, d'économie et de sciences sociales de Paris ; Membre du Curatorium de l'Académie de Droit international de La Haye. Domicile : 5 rue des Eaux, F-75016 Paris, France. Tél. (+33 1) 4520 9580 ; Fax (+33 1) 4050 1997. (1987, 1993).

7. *Bedjaoui* (Mohammed), Algérie, né 21-9-1929, Docteur en droit ; diplômé de sciences politiques ; Avocat ; ancien Ministre de la Justice ; ancien Ambassadeur ; Membre et ancien Président de la Cour internationale de Justice. Adresse professionnelle : Cour internationale de Justice, Palais de la Paix, 2517 KJ La Haye, Pays-Bas. Tél. (+31 70) 302 2447 ; Fax (+31 70) 362 1011. Domicile : Statenlaan 33A, 2582 GC La Haye, Pays-Bas. Tél. (+31 70) 352 2491 ; Fax. (+3170) 352 0694. (1977, 1985 ; 1er V.-Pr. 1997-1999).

8. *Bennouna* (Mohamed), Maroc, né 29-4-1943, Docteur en droit international ; Agrégé de droit public et science politique ; Juge au Tribunal pénal international pour l'ex-Yougoslavie. Adresse professionnelle : Tribunal pénal international pour l'ex-Yougoslavie, Churchillplein 1, NL-2517 JW La Haye. Tél. (+31 70) 416 54 11 ; Fax (+31 70) 416 5307. Domicile : 5 rue Henner, F-75009 Paris. (1985, 1995).

9. *Bernhardt* (Rudolf), Allemagne, né 29-4-1925, Ancien Président de la Cour européenne des Droits de l'Homme ; professeur de droit émérite de l'Université de Heidelberg ; directeur émérite de l'Institut Max-Planck de droit public comparé et de droit international. Bureau : Institut Max-Planck de droit public comparé et de droit international, Im Neuenheimer Feld 535, D-69120 Heidelberg, Allemagne. Tél. (+49 6221) 4821 ; Fax. (+49 6221) 48-22-88. Domicile : Gustav-Kirchhoff-Str. 2a, D-69120 Heidelberg. Tél. (+49 6221) 41 3699 ; Fax (+49 6221) 47 2079. (1987, 1993).

10. *Bindschedler-Robert* (Mme Denise), Suisse, née 10-7-1920, Avocate ; Dr. en droit ; Dr. h.c. de l'Université de Fribourg (Suisse) ; Prof. hon. de l'Institut universitaire de hautes études internationales de Genève ; ancien juge à la Cour européenne des Droits de l'Homme ; Membre hon. du Comité international de la Croix-Rouge ; ancienne présidente de l'Institut international des Droits de l'Homme (Institut Cassin) à Strasbourg. Domicile : Ringoltingenstrasse 21, CH-3006 Berne, Suisse. Tél. (+41 31) 352 6593 ; Fax (+41 31) 352 6571. (1975, 1981).

11. *Blix* (Hans), Suède, né 28-6-1928, jurisconsulte ; ambassadeur ; docteur en droit ; ancien directeur de l'Agence internationale de l'énergie atomique. P.O. Box 100, A-1400 Vienne, Autriche. Tél. (+43 1) 2360 1111. Domicile : Runebergsgatan 1, 11429 Stockholm. Tél. et Fax. (+46 8) 678 0139. (1975, 1983).

12. *Bos* (Maarten), Pays-Bas, né 22-12-1916, professeur émérite de droit international public de l'Université d'Utrecht ; vice-président de l'*International Law Association* ; rédacteur en chef honoraire de la *Netherlands International Law Review*. Domicile : 't Hooge Einde, Belvédèreweg 2, NL-8161 AW Epe (Gueldre), Pays-Bas. Tél. (+31 578) 616 603. (1973, 1979).

13. *Broms* (Bengt), Finlande, né 16-10-1929, professeur de droit international public et de droit constitutionnel à la Faculté de droit de l'Université de Helsinki ; membre du Curatorium de l'Académie finlandaise des Sciences ; président de la Société finlandaise de droit international ; membre de la Cour permanente d'Arbitrage. Adresse professionnelle : Iran-United States Claims Tribunal, Parkweg 13, NL-2586 JH The Hague. Domicile : Raatimiehenkatu 2 A9, 00140 Helsinki 14, Finlande. Tél. (+3580) 174 148. (1973. 1981 ; 2ème V.-Pr. 1997-1999).

14. *Brownlie* (Ian), UK, born 19-9-1932, Member of the English Bar (Queen's Counsel) ; Former Chichele Professor of Public International Law in the University of Oxford. Professional address : Blackstone Chambers, Temple, GB-London EC4Y 9BW. Tel. (+44 207) 583 1770 ; Fax : (+44 207) 822 7350. (1977, 1983).

15. *Caflisch* (Lucius), Suisse, 31-08-1936, Juge à la Cour européenne des droits de l'homme ; Professeur à l'Institut universitaire de hautes études internationales, Genève. Adresse professionnelle : Palais des droits de l'homme, F-67000 Strasbourg. Tél. (+33 3) 9021 4079 ; Fax. (+33 3) 8841 2792 ; e-mail : lucius.caflisch@court1.coe.fr. Domicile : 23 rue Goethe, F-67000 Strasbourg. Tél. (+ 33 3) 8845 3821 : Fax. (+ 33 3) 8845 3821 : e-mail : caflisch@cybercable.fr. (1979, 1985).

16. *Caminos* (Hugo), Argentine, né 16-3-1921, professeur émérite de droit international de l'Université de Buenos Aires ; Sous-secrétaire aux affaires juridiques et Conseiller juridique de l'Organisation des Etats américains. Domicile : Orlix de Ocampo 2820, Piso 10, C 1425 DSQ, Buenos Aires, Argentine. Tél. et fax (+5411) 4802 1684. (1979, 1987).

17. *Carrillo Salcedo* (Juan Antonio), Espagne, né 8-10-1934, professeur de droit international public. Bureau : Faculté de droit, Université de Séville, Avenida del Cid, 41004 Séville, Espagne. Tél. (+34 5) 455 1256 ; Fax (+34 5) 455 1598. Domicile : Avenida Republica Argentina 56, 41011 Séville, Espagne. Tél. : (+34 5) 445 6131. (1983, 1991).

18. *Cassese* (Antonio), Italie, né 1-01-1937, professeur de droit international ; Ancien Président du Tribunal pénal international pour l'ex-Yougoslavie. Bureau : Istituto universitario europeo, Badia Fiesolana, Via dei Roccettini 5, I-50016 San Domenico di Fiesole, Firenze. Tél. (+39 055) 468 5316 ; Fax. (+39 055) 243 943. Domicile : Via Laura 22, I-50121 Firenze. (1995, 1999).

19. *Collins* (Lawrence), U.K., born 7-5-1941, Fellow, Wolfson College, Cambridge ; visiting professor, Queen Mary & Westfield College, University of London ; partner, Herbert Smith (solicitors), London. Office : Royal Courts of Justice, Strand, GB-London WC2A 2LL. Tel. (+44 20) 7947 7466 ; Fax (+44 20) 7947 7298. Home : (+44 171) 435 1957. (1989, 1993).

20. *Conforti* (Benedetto), Italie, né 3-9-1930, professeur de droit international à l'Université de Naples ; Juge à la Cour européenne des droits de l'homme. Adresse professionnelle : Palais des droits de l'homme, F-67000 Strasbourg. Tél. (+33 3) 9021 4079 ; Fax. (+ 33 3) 8841 2792. Domicile : Via del Marzano 9 (Posillipo Alto), I-80123 Naples, Italie. Tél. (+39 81) 575 4125 ; Fax (+39 81) 575 4125. E-Mail : benconfo@unina.it (1989, 1993).

21. *Crawford* (James Richard), Australia, born 14-11-1948, Whewell Professor of International Law, Director Lauterpacht Research Centre for International Law. Office : Lauterpacht Research Centre for International Law, 5 Cranmer Road, Cambridge CB3 9BL, England. Tel. (+44 1223) 335 358 ; Fax. (+44 1223) 311 668. E-Mail : JRC1000@hermes.cam.ac.uk. Home : 7 Archway Court, Barton Rd, Cambridge CB3 9LW, England ; E-Mail : JRC3000@aol.com. (1985, 1991).

22. *Degan* (Vladimir-Djuro), Croatie, né 2-7-1935, professeur de droit international public à la Faculté de droit de Rijeka ; Directeur de l'Institut Adriatique de l'Académie croate des Sciences et des Beaux-Arts de Zagreb. Bureau : Jadranski zavod, Frane Petrica 4/I, 10 000 Zagreb, Croatie. Tél. (+3851) 425 123 ; Fax (+3851) 4569 383. Domicile : Frankopanska 5A, 10 000 Zagreb, Croatie. Tél. (+3851) 422 955. (1983, 1989).

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23. *Pocar* (Fausto), Italie, né 21.2.1939, Juge, Tribunal pénal international, professeur de droit international à la Faculté de droit de l'Université de Milan ; membre et ancien président du Comité des droits de l'homme (ONU). Adresse professionnelle : Tribunal pénal international, Churchillplein 1, P.O. Box 13888, NL-2501 EW La Haye. Domicile : Via Dell'Uomo 7, 20129 Milano. Tel. (+39 2) 713 243. (1997).

24. *Ranjeva* (Raymond), Madagascar, né 31-8-1942, Juge à la Cour internationale de Justice. Bureau : Cour internationale de Justice, Palais de la Paix, NL-2517 KJ La Haye. Tél. (+31 70) 302 2323 ; Fax. (+31 70) 364 9928. Domicile : Ary Schefferstrat 47, NL-2597 VN La Haye. Tél. (+31 70) 324 6246. (1995).

25. *Rao* (Sreenivasa Pemmaraju), India, born 28-04-1942, Joint Secretary and Legal Adviser, Ministry of External Affairs, Legal and Treaties Division. Professional address : ISIL Building, 9 Bhagwandass Road, New Delhi, India. Tel. (+91 11) 338 1839. Fax. (+91 11) 469 2316. (1999).

26. *Reisman* (Michael), USA, born 23-04-1939, Myres S. McDougal professor of law. Professional address : Yale Law School, 127 Wall Street, Room 322, P.O. Box 208215, New Hagen, CT 06520-8215. Tel. (+ 1 203) 432 4962 ; Fax (+ 1 203) 432 7247 ; E-mail : michael.reisman@yale.edu. Home : 275 Chestnut Lane, Hamden, CT 06518, USA. Tel. (+ 1 203) 288-6699 and 211 E. 53rd Street, Apt. 12G, New York, NY 10022. Tel. (+ 1 212) 935 8240. (1999).

27. *Sarcevic* (Petar), Croatia, né 26-4-1941, Ambassadeur, professeur de droit international privé à la Faculté de droit de Rijeka ; Président de l'Association internationale de droit de la Famille. Adresse professionnelle : Pravni Fakultet, Hah410 6, 51000 Rijeka. Tel. (+ 385 51) 675 121 ; Fax. (+ 385 51) 675 113. Domicile : Stossmaverov TR6 5/I, 10000 Zagreb. Tel. (+ 385 1) 481 9517 ; Fax (+ 385 1) 481 3517 ; E-mail : petar.sarcevic1@zg.tel.hr. (1997).

28. *Tomuschat* (Christian), Allemagne, né 23-07-1936, professeur à l'Université Humboldt de Berlin. Adresse professionnelle : Institut für Völker- und Europarecht, Unter den Linden 6, D-10099 Berlin. Tél. (+49 30) 2093 3335 ou 33305 ; Fax. (+49 30) 2093 3365. Domicile : Odilostrasse 25A, D-13467 Berlin. Tél. (+ 49 30) 405 414 86 ; Fax. (+ 49 30) 405 414 88 : E-mail : Chris.Tomuschat@t-online.de. (1997).

29. *Treves* (Tullio), Italie, né 20-09-1942, professeur de droit international à la faculté de droit, Université de Milan ; Juge au Tribunal international du droit de la Mer. Adresse professionnelle : Istituto di diritto internazionale, Facultà di Giurisprudenza, Via Festa del Perdono 7, I-20122 Milano. Fax (+ 39 02) 5830 6826 : E-mail : tullio.treves@unimi.it. Domicile : Via Cosimo del Fante, 8, I-20127 Milano. Tél. + Fax. (+ 39 02) 5830 3398. (1999).

30. *Vinuesa* (Raúl Emilio), Argentine, né 30-03-1943, Professor of Public International Law, University of Buenos Aires ; Member of the Panel of Arbitration MERCOSUR. Home address : Alsina 2360, San Isidro (1642), Buenos Aires, Argentina. Tel. (+ 54 11) 4723 6664 ; Fax. (+ 54 11) 4394 4412 ; E-mail : revinu@arnet.com.ar. (1999).

31. *Weeramantry* (Christopher G.), Sri Lanka, born: 17-11-1926, Emeritus Professor of Law, Monash University ; Honorary Life Member, Bar Association of Sri Lanka. Home : Apt. 5/1 Roland Towers, Dharmaraja Mawatha, Off Alfred House Avenue, Colombo 3, Sri Lanka. Tel/Fax. (+94 1) 555 028. (1999).

32. *Yusuf* (Abdulquawi) Somalie, né le 12-09-1948, Conseiller spécial et Sous-Directeur général pour les affaires africaines, Organisation des Nations Unies pour le Développement Industriel (ONUDI). Adresse professionnelle : ONUDI, P.O. Box 300, A-1400-Vienne. Tél. (+43 1) 2602 63108 ; Fax. (+ 43 1) 2134 6310 ; e-mail : ayusuf@unido.org. Domicile : Karl Bodingbauerstrasse 14, A-2100 Korneuburg. Tél. (+43 2262) 73718. (1999).

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Membres émérites de l'Institut
(Article 22 des Statuts)

M. Derek W. Bowett (Royaume Uni) 1997.

M. Finn Seyersted (Norvège), 1997.

M. Francisco Capotorti (Italie), 1998.

Sir Francis Vallat (Royaume Uni), 1999

M. Ronald Macdonald (Canada), 1999

M. Yuichi Takano (Japon), 1999

Nouveaux membres émérites

Francesco Capotorti

Né à Naples en 1925, Francesco Capotorti obtient le titre de docteur en droit *cum laude* à l'âge de vingt ans avec une thèse de licence sur l'*occupatio bellica* qui sera publiée après quatre ans par la maison d'édition Jovene de Naples et qui déjà à cette époque lui donnera la réputation d'un écrivain assez doué et brillant.

En 1951, ayant obtenu la "*libera docenza*" en droit international, sa carrière de professeur débuta à l'Université de Cagliari pour s'achever, après plus de quarante ans d'enseignement, dans la prestigieuse Université de Rome "La Sapienza".

Non moins remarquable reste son oeuvre scientifique, qui s'étend à tous les domaines des sciences juridiques internationalistes, du droit international public, et notamment du droit des traités et du droit des minorités, au droit international privé et au droit communautaire.

Très nombreuses ont été aussi les fonctions qu'il a exercées dans la pratique des relations internationales et surtout au sein des Nations Unies (telles que sa participation à l'Assemblée générale comme délégué de l'Italie, à la conférence sur le droit des traités, au Comité spécial pour la définition de l'agression, à la sous-commission pour la protection des minorités, etc.) et en tant qu'Avocat général à la Cour des Communautés européennes entre 1976 et 1982.

Tous ceux qui ont connu M. Capotorti, soit aux Nations Unies soit aux Communautés européennes, se souviennent de son éloquence toujours brillante, de sa remarquable manière de diriger des débats et de focaliser le point de synthèse des différentes opinions, son aigu sens de l'*humor*.

Elu Associé de l'Institut en 1983, il devint Membre titulaire en 1989. Son état de santé l'a contraint à donner sa démission en 1998, pour le plus grand regret de ses collègues.

Benedetto Conforti

Sir Francis Vallat

Our Confrère, Sir Francis Vallat, has recently indicated his wish to resign from the Institute. His advancing years (he was 87 earlier this year) have rendered it difficult for him to attend our biennial sessions, although he was able to come to our session in Strasbourg in 1997.

Sir Francis has had a distinguished career in the public service of his country and as an academic and practitioner. He studied international law at Cambridge under Lord McNair, and, after serving in the Royal Air Force during the Second World War between 1941 and 1945 joined the Foreign Office as an Assistant Legal Adviser in 1945. He served as Legal Adviser to the UK Mission to the United Nations in New York between 1950 and 1954, and was appointed as Legal Adviser to the Foreign Office in 1960 in succession to Sir Gerald Fitzmaurice, having served as the latter's deputy in London from 1954 to 1960.

Sir Francis retired early from the post of Legal Adviser to the Foreign Office in 1968 to take up the post of Director of International Law Studies at King's College, London, subsequently being appointed Professor of International Law from 1970 to 1976. He combined his academic work with acting as Director of Studies for the International Law Association between 1969 and 1973, and with practice before the International Court of Justice and other international tribunals. He was one of the counsel for Libya in the *Tunisia/Libya Continental Shelf* case and also in the *Libya/Malta Continental Shelf* case ; more recently, he is still active as one of the counsel for Qatar in the *Qatar v. Bahrain* case. He was elected a member of the International Law Commission in 1973 and served in that capacity until 1981, being Chairman of the Commission in 1978.

Our Confrère was elected an Associate Member of the Institute in 1965, a full member in 1977, and served as Second Vice-President of the Institute between 1989 and 1991. His contributions will be sadly missed in our deliberations.

Sir Ian Sinclair

Ronald Macdonald

Notre Confrère Ronald St. John Macdonald a connu une carrière universitaire et professionnelle des plus fructueuses. Après ses études de droit aux universités Dalhousie et Harvard (*Diploma in International Law*), ainsi qu'à Genève, il devint membre des Barreaux de la Nouvelle-Ecosse (1955) et de l'Ontario (1956).

Il ne devait pas tarder à être attiré par l'enseignement du droit et la recherche, dont il acquit une longue expérience, d'abord à Osgoode Hall (Toronto, de 1955 à 1959), puis à l'Université de Western Ontario (London, de 1959 à 1961). Il devient à cette époque le premier directeur (*Editor*) de la revue *Current Law and Social Problems*. C'est à la Faculté de droit de l'Université de Toronto, cependant, qu'il consacre le plus grand nombre d'années ; il en devient d'ailleurs doyen (1961-1972). Il y dirige, en outre, le *University of Toronto Law Journal*.

Son talent est tourné avant tout vers l'enseignement du droit international public. Il s'y fait remarquer au point d'être envoyé comme représentant du Canada dans plusieurs conférences internationales et à l'Assemblée générale de l'ONU. Il agit également comme conseiller du gouvernement canadien.

En 1972, il devient doyen de la Faculté de droit de l'Université Dalhousie, à Halifax, et accède au même moment à la présidence du Conseil canadien de droit international. C'est à cette époque qu'il entreprend d'écrire l'histoire de l'enseignement du droit international dans les universités canadiennes, qui fera l'objet de nombreux articles et demeure la meilleure source de renseignements sur ce sujet.

L'ampleur de ses connaissances et la sûreté de son jugement lui vaudront encore de prendre place parmi les juges de la Cour européenne des droits de l'homme, à Strasbourg.

Elu Associé de l'Institut à la session d'Athènes, en 1979, il devient Membre titulaire en 1985. On ne s'étonnera pas qu'il ait été nommé rapporteur de la Commission consacrée à l'enseignement du droit international à la session de Bâle (1991). Les conclusions des travaux de cette Commission ont fait l'objet d'une Résolution de l'Institut à sa dernière Session (Strasbourg, 1997).

Jacques-Yvan Morin

Yuichi Takano

Professor Yuichi Takano was elected as Associate Member of the Institute at the 1979 Session in Athens, and first participated in the 1981 Session in Dijon. Since then, he has been a very active Member of the Institute, attending all sessions until 1991, in Basel. Age has prevented him from participating in the last three sessions.

As the Professor holding the Chair of International Law in the University of Tokyo for more than 20 years, Professor Takano played a significant leading role in Japanese international law circles. He served as President of the Japanese Society of International Law from 1973-76.

Upon graduation from the Faculty of Law of the University of Tokyo in 1941, Professor Takano began his study of international law as an assistant to the late Professor Kisaburo Yukota, who was once an Honorary Member of the Institute.

Just before the end of World War II, Professor Takano began work at the Ministry of Foreign Affairs, where he dealt with the various legal issues that Japan was faced with just before, and after, its surrender to the Allied Powers.

In 1949, he was invited to return to the University of Tokyo and in 1956 was given a Chair of International Law as a full Professor. Thus, until his retirement from the University in 1977, he was engaged in the teaching and research of international law for nearly 30 years. Even after that he continued, for some ten years, to lecture on international law and organizations at Sofia University.

During the occupation period, Professor Takano was one of the editors of a new journal called *The Study of the Rules and Regulations of Occupation*, and he spent much energy and time studying the new legal problems which Japan was to experience for the first time during the post-War period. He published monographs on *Treaties and the Constitution* and *Japanese Territory.* He also published a number of articles on a wide range of subjects relating to international law. In the 1950's, he organized a study group on the jurisprudence of the International Court of Justice and edited a book on this subject, covering the Court until the 1970's.

His attitude was one of positivism and his research covered both the historical background and precedents on the relevant jurisprudence.

Professor Takano's two-volume treatise on international law, and another book on international organizations, were widely used by the scholars and the students of international law in Japan in the 1960's and 70's.

Shigeru Oda

Notices nécrologiques

Haopei Li (1906 - 1997)

It was a sorrowful day. On 6 November 1997, our Confrère Li Haopei suddenly passed away when he was about to finish his four-year term of office as Judge of the International Criminal Tribunal for the former Yugoslavia. It was unexpected because, in spite of his old age, he used to do his daily physical exercise and he always appeared quite healthy. He started with flu and later became involved in liver trouble. He died at the age of 91 in The Hague, The Netherlands.

Judge Li graduated from the former Soochow University Law School in Shanghai which was the only law school in China teaching "comparative law", mainly Anglo-American law. From 1936 to 1939, he studies in the London School of Economics and Political Science. After his return from Europe, he was successively engaged in teaching at various universities in China. He was appointed Dean of Law School of Zhejiang University. Since 1963, he served in the Chinese Ministry of Foreign Affairs in Beijing and subsequently became Legal Adviser of the Foreign Ministry.

In 1985, he was elected Associate of our Institute of International Law and later in 1991 became Titular Member of the Institute. In 1993, he became a member of the International Court of Arbitration. Later in the same year he was elected at the United Nations as Judge of the International Criminal Tribunal for the former Yugoslavia sitting at The Hague. He served as such until the end of his lifetime. He passed away only about a couple of months after his return from the Institute's Session at Strasbourg, France.

Judge Li had devoted most of his lifetime in working on international law. He had written several legal works, including a textbook in General Principles of Private International Law. A Precis on the Law of Treaties, A Comparative Study of the Law of Nationality, etc. Besides, he had translated several foreign legal works into the Chinese Language, notably Alfred Verdross "International Law", Martin Wolf's "Private International Law" and the French Civil Code. In the course of translating the latter two works, he was joined by several other Chinese colleagues.

Ni Zhengyu

Eero Manner (1912 - 1999)

Judge Eero Manner who was a leading legal authority in Finland on problems related to the law of land and waters and environment passed away on 16 February 1999 in Helsinki.

He obtained the Bachelor of Laws degree at the University of Helsinki in 1937 and the Master of Laws degree two years later. During the Second World War he served as Captain in the Finnish army. Later he continued his research work and presented his doctoral thesis on common uses of waters in 1953.

In 1956 he was appointed Assistant Chancellor of Justice. Nine years later he became Professor at the Helsinki Polytechnic. In 1967 he was appointed Judge of the Supreme Court. He held this post until 1983.

Throughout his career in the Supreme Court he served also as a Legal Adviser to the Ministry for Foreign Affairs. This post led him closer to international law and he represented Finland in many international diplomatic conferences including the Third United Nations Conference on the Law of the Sea where he worked for several years as the Head of the Finnish Delegation. Furthermore, he was during several years a member of the Finnish delegation to the General Assembly of the United Nations. In 1978 the Nordic countries nominated him their candidate for election to the International Court of Justice. He was also a Member of the International Court of Arbitration in 1984-1996.

All through his career Judge Manner was writing on problems of the law of international waters and environment. He was also very active in the International Law Association and presided over two committees related to the above mentioned fields.

Judge Eero Manner became an Associate Member of our Institute in 1985 and a Titular Member in 1989. He will be remembered as an excellent lawyer and a very good friend.

Bengt Broms

Stephan Verosta (1909 - 1998)

Stephan Verosta visait tout d'abord une carrière dans la magistrature. Un stage auprès des tribunaux mixtes en Egypte faisait naître en lui cet amour pour le droit international, auquel il restait fidèle toute sa vie. Il entrait donc en 1932 dans le Bureau de Droit international du Ministère Autrichien des Affaires étrangères. En même temps il devenait chargé de cours à la prestigieuse Académie consulaire de Vienne. Parmi ses auditeurs se trouvaient nos Confrères Manfred Lachs et Friedrich August Freiherr von der Heydte. Lors de l'attaque de putschistes nationaux-socialistes contre la Ballhausplatz le 25 juillet 1934 ceux-ci prenaient Verosta comme otage. Il en fut traumatisé pour toute sa vie. En 1938 il refusait son transfert dans le service diplomatique de l'Allemagne hitlérienne. Il devenait juge dans les tribunaux de première instance dans diverses petites villes de la Basse-Autriche jusqu'à sa mobilisation en 1942. Il servait ensuite comme simple soldat dans une compagnie d'interprètes. Après son retour à Vienne dans l'été de 1946 il se dévouait à la reconstruction du service diplomatique autrichien. De 1951-1953 il fut chargé d'affaires à Budapest. De 1953 à 1956 il participait, comme jurisconsulte du Ministère, aux négociations qui devaient aboutir à la conclusion du Traité d'Etat de 1955, qui mettait fin à l'occupation inter-alliée de l'Autriche. C'est sa grande connaissance de l'histoire du droit international qui lui avait permis de trouver des analogies à l'appui de thèses entérinées ensuite dans ce Traité. Dans sa thèse d'agrégation "*Die internationale Stellung Österreichs 1938 bis 1947*" Verosta soutenait qu'entre 1938 et 1945 l'Autriche n'était qu'occupée par

l'Allemagne. La prétendue annexion de l'Autriche par l'Allemagne était contraire au droit international et ne pouvait donc pas produire des effets. Déjà avant la conclusion du Traité d'Etat Verosta considérait une déclaration de neutralité de l'Autriche comme le meilleur moyen d'obtenir la fin de l'occupation quadripartite. Il devenait par la suite le grand théoricien de cette neutralité, dont il a exposé la nature juridique dans un grand rapport au *Österreichische Juristentag* en 1966.

En 1962 Verosta prenait la succession de son maître Alfred Verdross à la chaire de droit international et de philosophie du droit de l'Université de Vienne. Son intérêt le portait surtout vers l'histoire du droit international, dont il n'omettait jamais de souligner ses rapports avec l'actualité. Ainsi, son livre "Johannes Chrysostomos, Staatsphilosoph und Geschichtstheologe" ne traitait pas seulement des vues philosophiques de ce grand docteur de l'église byzantine, mais également de ses démêlés avec les autocrates byzantins. De même, son cours à l'Académie de Droit international de La Haye sur "International Law in Europe and Western Asia between 100 and 650 A.D." montrait les efforts visant à trouver une base juridique commune pour des relations entre Etats appartenant à des systèmes juridiques et idéologiques très différents. Ce cours traitait donc un problème qui nous était revenu pendant la période de la guerre froide. Le dernier grand ouvrage historique de Verosta est d'une actualité encore plus brûlante. Comme expert d'une commission du Conseil de l'Europe Verosta avait élaboré un schéma commun pour l'analyse des archives des ministères des affaires étrangères des divers pays-membres du Conseil de l'Europe. Comme président d'une Commission de l'Académie Autrichienne des Sciences Verosta s'efforçait de publier une telle analyse des archives du Ministère des Affaires étrangères de 1859 à 1918. Une équipe de collaborateurs bénévoles, pour la plupart des diplomates autrichiens à la retraite, examinaient donc les archives pour trouver des documents qui, selon eux, étaient importants. Verosta en faisait le tri et écrivait des introductions et commentaires aux documents choisis ("Digestes"). Les problèmes balkaniques n'ont guère changés depuis, ni les tentatives si souvent abortives de les résoudre, tel des conférences d'ambassadeurs, des sanctions économiques et la mise de certaines régions sous mandat administratif. Verosta anticipait l'aboutissement de ces recherches dans son livre sur le Concert européen (Kollektivaktionen der Mächte des Europäischen Konzerts, Vienne 1988). D'autres digestes

portaient sur la formation et le déclin de la Confédération germanique, de l'Alliance entre l'Autriche et l'Allemagne et de la Triplice. Verosta en avait développé déjà une théorie des problèmes sous-jacents dans son livre de 1970 sur la théorie et réalité des alliances ("Theorie und Realität von Bündnissen"). Verosta a vivement ressenti que ces "digestes" qui étaient conçus en six volumes ont dû être réduits à deux volumes. Pourtant, Verosta avait encore la satisfaction de les voir publiés ("Die völkerrechtliche Praxis der Donaumonarchie von 1859 bis 1918" Vienne 1996, Verlag der Österr. Akademie der Wissenschaften).

Verosta, dans ses recherches, n'était nullement eurocentrique. Ainsi, dans sa contribution sur l'histoire du droit international dans la dernière édition du traité de Verdross il traite à pied d'égalité le développement européen et non-européen. Sa participation active à l'Université des Nations Unies à Tokyo est une autre preuve de la largeur de son esprit.

Verosta devint Associé de notre Institut en 1961 et Membre en 1973. Depuis 1964 il était membre correspondant et depuis 1971 membre à part entière de l'Académie autrichienne des Sciences. Il fut membre de la Commission du Droit international de 1976 à 1981. En 1963 il présida la Conférence des Nations Unies pour la Codification du Droit consulaire. En 1980 ses amis et élèves lui dédiaient des Mélanges, où la liste des publications de Verosta couvre neuf pages.

Les graves soucis que lui causait l'infirmité d'un de ses fils expliquent qu'il lui était devenu difficile de participer à nos sessions. Il y participait pourtant par écrit et ne manquait jamais de m'interroger sur les progrès de nos travaux. Le groupe autrichien porte le deuil d'un grand savant et d'un des architectes de son indépendance après 1945.

Ignaz Seidl-Hohenveldern

Endre Ustor (1909 - 1998)

Notre Confrère Endre Ustor, Membre honoraire, est décédé à Budapest le 17 avril 1998. Né en 1909, Hongrois, il a été professeur et diplomate, montrant dans les activités qu'il a déployées et les responsabilités qu'il a assumées tout à la fois une évidente compétence et une grande urbanité.

Après avoir pratiqué le barreau au début de sa carrière, il a alterné, dès après la fin de la deuxième guerre mondiale, des fonctions au sein de l'administration de son pays - notamment en qualité de conseiller juridique au Ministère des affaires étrangères - et des enseignements universitaires.

Délégué hongrois à de nombreuses conférences internationales et au sein de divers organes des Nations Unies, il a également été membre de la Commission du droit international des Nations Unies, qu'il présida avec distinction.

Endre Ustor avait été élu Associé de l'Institut en 1967. Il devint Membre titulaire en 1979. En 1995, nous l'avons élu à l'Honorariat.

Christian Dominicé

Membres émérites décédés

John R. Stevenson (1921 - 1997)

John R. Stevenson, Member emeritus, died on October 27, 1997 at the age of 76 after a long illness. Jack, as he was known, had an illustrious career in the private practice of law, in high government positions and in cultural and philanthropic activities. He was elected as an Associate Member of the Institute in 1973 and a full Member in 1985. He served as Second Vice-President from 1987 to 1989.

A native of Chicago, he received his law degree in 1949 and a doctorate in law in 1952 both from Columbia Law School where he was editor-in-chief of the Law Review. He joined the prestigious firm of Sullivan and Cromwell in 1950 and remained associated with the firm as partner, chairman of the firm and special counsel until 1992. Much of his practice concerned international financial transactions in which he represented a number of foreign governments as well as private corporations. He was appointed the Legal Advisor of the State Department in 1969 and in 1973 the head of the U.S. delegation to the Law of the Sea Conference where he had an influential role. He also had a special interest in Latin-America and he served for some years on the Inter American Commission of Human Rights. At one time, he was an intermediary between the Peruvian Government and the Shining Path Rebels.

Throughout his career he took an active role in cultural and philanthropic organizations. He was a trustee of the National Gallery of Art and from 1978 to 1993, the President of its board of trustees. He also maintained an extensive role in international arbitration and in recent years was Chairman of the American Arbitration association. He participated actively in the Institute on both private and public law issues and attended all of its sessions prior to his last illness. The American Society of International Law elected him twice as its President (1965-1967) and Honorary President. In 1997 he was awarded the Manley Hudson Medal for pre-eminent scholarship and achievement in international law. His survivors included his wife, Ruth Carter and four children from his first marriage.

Oscar Schachter

Myres S. McDougal (1906 - 1998)

Myres S. McDougal, Member emeritus, died May 7, 1998 at the age of 92. Mac, as he was widely known, was a towering figure in the American legal community, esteemed for his contributions to many fields of law, especially the development (jointly with Harold Lasswell) of a policy-oriented, configurative jurisprudence which he and his younger collaborators applied to major areas of international law. Born and educated in Mississippi he taught Greek and Latin before entering law school. A post-graduate year at Oxford introduced him to international law taught by Brierly, but he then devoted twenty years to real property law and to urban planning issues. His interest in international law was stimulated by his government service during World War II which involved lend-lease and other areas of international cooperation. On his return to Yale he devoted a major part of his teaching to international law along with his law-policy science theories. Mac was an outspoken advocate of human rights in the United States and on the international level. While notably combative in his public style, he was invariably courteous, warm and helpful in his personal relations, especially supportive of his students. Several are Members of the Institute and three are judges on the International Court. He was elected twice as President of the American Society of International Law and subsequently, Honorary President. The Manley Hudson Medal was awarded to him in 1976. He was elected as an Associate Member of the Institute in 1967 and as a Member in 1979. Although unable to attend recent sessions for reason of health, he took an active part in the work of several commissions through personal correspondence with Members.

His survivors include his wife, Frances Lee McDougal and his son John. The Myres McDougal Professorship of International Law was recently established in his honour by Yale University.

Oscar Schachter

Commission des travaux (Article 13 des Statuts)

Président	:	M. Edward McWhinney
Membres	:	MM. Amerasinghe, Bedjaoui, Broms, Caflisch, Fadlallah, Ferrari-Bravo, Mme Higgins, MM. Jayme, Lagarde, Lowenfeld, Schermers, Torres Bernardez.
Suppléants	:	MM. Anand, Degan, El-Kosheri, Owada, Parra Aranguren, Roucounas.

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Commissions scientifiques

Première Commission

La substitution et le principe d'équivalence en droit international privé
Substitution and the Principle of Equivalence in Private International Law

Création	:	Strasbourg, 1997
Rapporteur	:	Mme Isabel de Magalhães Collaço
Membres	:	MM. Droz, El-Kosheri, Fadlallah, Gannagé, Jayme, Lagarde, Moura Ramos, Mme Pérez Vera, MM. Pocar, Sarcevic, Schwind, Vischer.

Deuxième Commission

Le recours à la doctrine du *forum non conveniens* et aux "anti-suit injunctions": principes directeurs
The Principles for Determining When the Use of the Doctrine of forum non conveniens *and Anti-suit Injunctions is Appropriate*

Création	:	Strasbourg, 1997
Rapporteur	:	M. Lawrence Collins
Co-rapporteur	:	M. Georges Droz
Membres	:	MM. Fadlallah, van Hecke, Lipstein, Lowenfeld, Matscher, von Mehren, Sir Peter North, von Overbeck, Sarcevic, Schwebel, Sucharitkul, Vischer, Waelbroeck.

Troisième Commission

Les droits fondamentaux de la personne face aux immunités de juridiction du droit international
The Fundamental Rights of the Person and the Immunity From Jurisdiction in International Law

Création	:	Lisbonne, 1995
Rapporteur	:	M. Peter H. Kooijmans
Membres	:	MM. Conforti, Doehring, Dugard, Lady Fox, MM. Gros Espiell, van Hecke, Henkin, Matscher, Mbaye, Morin, Ress, Salmon, Seidl-Hohenveldern, Sir Ian Sinclair, M. Vukas.

Cinquième Commission

Les droits et les obligations *erga omnes* en droit international
Rights and Duties erga omnes *in International Law*

Création	:	Strasbourg, 1997
Rapporteur	:	M. Giorgio Gaja
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Huitième Commission

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Dix-septième Commission

La compétence universelle en matère pénale à l'égard du crime de génocide, des crimes contre l'humanité et des crimes de guerre
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Dix-neuvième Commission

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