

THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE  
SYSTEM OF THE SOURCES OF INTERNATIONAL LAW

with an APPENDIX on THE CONCEPT OF INTERNATIONAL LAW AND THE  
THEORY OF INTERNATIONAL ORGANISATION

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**ABSTRACT**

This is an almost complete version of the 1979 book by the same title, the most important  
part of which is the Appendix on the Concept of International Law and the Theory of Inter-  
national Organization. The Appendix is presented here in its complete form.

## PREFATORY NOTE

This is a slightly revised edition of a Course held in 1972 at the Hague Academy of International Law.

Since then, our ideas have naturally evolved on a number of topics indirectly relevant to the theme. It is felt, however, that a moderate revision should suffice.

In the first place, while any real improvements on such a huge open problem as, for example, the nature of international customary law (Section 2 of Chapter I, Sections 2–5 of Chapter II and Section 7 of the *Appendix*), would inevitably have to await a more appropriate occasion, other general problems, such as the concept of the State in the sense of international law and the nature of international relations and international law, have been reconsidered by the author recently. These issues—to which the perception of the nature of international organisation is closely related—are indeed discussed anew in *L'Etat dans le Sens du Droit des Gens et la Notion du Droit international*, Bologna, 1975.

In the second place, any variations occurring in our views on any general issues of indirect—albeit great—relevance are without exception of such a kind as to increase the weight of the data upon which we based our conclusions of 1972 with respect to the nature of international organisation and the normative role of the United Nations. We think most particularly of the clearer vision that we rightly or wrongly believe to have achieved—through further efforts to define these issues in *L'Etat*—of the inter-*power* (rather than inter-*State* or *interindividual*) composition of the *milieu* of international relations and of the consequences deriving therefrom, with respect to the nature, the features and the “domain” of international law, and the very outlook for the international “system”. We can fully rely, therefore—in so far as our views of the general problems evoked in the present book are concerned—upon the developments contained in that booklet of 1975.

The Bibliography—in which the works cited in abbreviated form in the footnotes are indicated in full—has been enlarged.

We express our sincere gratitude to those concerned with the planning and authorizing of the present edition.

Rome—Leyden, summer of 1978.

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*Omissis...*



## INTRODUCTION

1. The present essay is devoted to the illustration of some of the juridical problems raised by the “Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations”. I refer to the rather widely known document unanimously adopted by the General Assembly of the United Nations as resolution 2625 (XXV) on 24 October 1970—the quarter-century Anniversary of the Organization—with the stated purpose of setting a “landmark” in the promotion of the rule of law in the relations among States.<sup>1</sup>

The declaration of principles contained in resolution 2625 (XXV) belongs to the *genus* of Assembly recommendations and to that species of Assembly “declarations” which has now come to constitute a very substantial and important *corpus* of prescriptions.<sup>2</sup> It is a common feature of all these resolutions, as of the instrument we are concerned with, that they formulate principles, rules of conduct or both. Resolution 2625 (XXV), however, embodies a declaration which is rather special in some respects.

The principles formulated in the declaration are nothing less than: (a) the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; (b) the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (c) the duty not to intervene in matters within the domestic jurisdiction of any State in accordance with the Charter; (d) the duty of States to co-operate with one another in accordance with the Charter; (e) the principle of equal rights and self-determination of peoples; (f) the principle of sovereign equality of States; and (g) the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter of the United Nations.

From such headings it would appear that the object of the declaration is far more vital than the controversial title of the document would indicate.<sup>3</sup> There is hardly an issue of inter-State relations which does not come under the purview of one or more of the principles just listed. These principles have to do with peace among States and at times with peace within States, with the formation of States, with the relationship between States and peoples, with

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<sup>1</sup> The text can be read in the Annex to the present volume.

<sup>2</sup> The family includes, *inter alia*, resolutions 95 (I) of 11 Dec. 1946, on Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, 96 (I) of 11 Dec. 1946, on the Crime of Genocide, 217 (III) of 10 Dec. 1948, on International Bill of Human Rights, 260 (III) of 9 Dec. 1948, on Prevention and Punishment of the Crime of Genocide, 375 (IV) of 6 Dec. 1949, on Draft Declaration on Rights and Duties of States, 1386 (XIV) of 20 Nov. 1959, on Declaration of the Rights of the Child, 1514 (XV) of 14 Dec. 1960, on Declaration on the Granting of Independence to Colonial Countries and Peoples, 1653 (XVI) of 24 Nov. 1961, on Declaration of the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons, 1803 (XVII) of 14 Dec. 1962, on Permanent Sovereignty over Natural Resources, 1904 (XVIII) of 20 Nov. 1963, on United Nations Declaration on the Elimination of All Forms of Racial Discrimination, 1962 (XVIII) of 13 Dec. 1963, on Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 1963 (XVIII) of 13 Dec. 1963, on International Co-operation in the Peaceful Uses of Outer Space, 2131 (XX) of 21 Dec. 1965, on Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 2750 (XXV) of 17 Dec. 1970, on Reservation Exclusively for Peaceful Purposes of the Sea-bed and the Ocean floor, and the Subsoil thereof, Underlying the High Seas beyond the Limits of present National Jurisdiction and Use of their Resources in the Interests of Mankind, and convening of a Conference on the Law of the Sea, 3016 (XXVII) of 18 December 1972, on Permanent Sovereignty over Natural Resources of Developing Countries, 3201 (S-VI) of 1 May 1974, containing the Declaration on the Establishment of a New International Economic Order, 3281 (XXIX) of 12 December 1974, containing the Charter of Economic Rights and Duties of States, 31/91, of 14 December 1976, on Non-interference in the Internal Affairs of States.

<sup>3</sup> *Infra*, para. 91.

the continuity of a State's identity, with the equality, the independence and the territorial integrity of States, with the settlement of disputes, with colonialism old and new, and with such other fundamental questions as co-operation among States in any field and the compliance by them with the prescriptions of the Charter and international law in general.

From the point of view of the political importance of the subject-matter our declaration ranks in particular with the draft declaration of rights and duties of States, the declaration on the Granting of Independence to Colonial Countries and Peoples, the declaration on the Elimination of all Forms of Racial Discrimination and the declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. With regard to those instruments the Friendly Relations declaration covers partly common ground. However, it is more complex and problematical in view of the number and variety of the principles and rules it embodies in a single instrument.<sup>4</sup> Moreover the importance of our declaration has been greatly stressed within and without the United Nations Assembly. Prior to and during the elaboration of resolution 2625 (XXV), the "codification" of the principles which were to be embodied in the declaration had been emphatically advocated not only by States but also by scholars and scholarly associations. Some of the governments which sponsored the preparation and adoption of the declaration—seconded by a number of scholars—referred to the declaration as an instrument intended to ensure the peaceful co-existence among States characterised by different political, economic, social and cultural systems, or the co-ordination between "rival" or "competing" international "systems". The General Assembly has repeatedly referred to the declaration as intended to set a "landmark" in the progressive development and codification of international law, and as an important step towards making the application of the relevant principles "more effective". The adoption of the declaration was deliberately included among the events celebrating the Twenty-fifth Anniversary of the United Nations.

2. Title notwithstanding, the present essay is devoted not to a complete illustration of the declaration, let alone of all the chapters or parts of international law to which the declared principles relate. More than just a book to deal adequately with such matters would require one monograph for each principle.

We shall confine ourselves instead to considering briefly the declaration's seven sections—containing the formulation of one principle each—with a view to determining their approximate impact on the international law rules respectively relevant. After that we may try, by way of *tentative* conclusions, to evaluate the impact of the declaration as a whole, *de lege lata* and *de lege ferenda*. In so doing we would keep in mind, together with our own views on the matter,<sup>5</sup> the objectives pursued by the Assembly as a whole and by the main sponsors of the declaration.

The advantage of which any reader of the present essay will benefit thanks to the indicated limits of our task is regrettably balanced by the existence of problems that would not arise if we were dealing with a piece of the United Nations Charter, with the provisions of any other treaty or with any part of international customary law.

Were such the case, there would be no doubt that we were considering rules of international law to be set, as part of *lex lata*, at the side of other relevant rules, customary or conventional, and to be understood and assessed in derogation therefrom or in conjunction

<sup>4</sup> See, however, *infra*, paras. 50–51.

<sup>5</sup> These views, incidentally, are not to be related in any manner with the views of the Government that the present writer had the honour to represent in the "Special Committee on the Principles of International Law of Friendly Relations and Co-operation Among States in Accordance with the Charter" from 1964 to 1970 or in the Sixth Committee of the General Assembly. Any coincidence between the views expressed here and those expressed by the representative of that Government is merely casual; and any views expressed here contrasting with views expressed by that representative should be regarded as our own personal views.

therewith. But a resolution of the General Assembly of the United Nations is another matter. There arises the question of the legal effects of Assembly recommendations in general. There is the question, in particular, of the legal effects of declaratory resolutions. It would be hardly any use to deal with the formulation of any one of the seven principles, let alone the significance and effects of the declaration as a whole (*de lege lata* or *ferenda*), without first determining the place occupied, within the international system, by the legal instrument in which the declaration is embodied. Considering in particular the above-mentioned features of the declaration—not to mention its size—it seems that if there is a declaratory resolution of which it is imperative to determine the legal nature it is resolution 2625 (XXV).

3. Until we really set to the task of writing the present book, we had little doubt what the legal effects of a General Assembly resolution *grosso modo* would be. From the initial *ad hoc* readings we actually drew the impression that the prevalent view of principle was very close to the notion we had learnt at Law School, namely, that unqualified General Assembly resolutions are endowed, legally speaking, with a merely hortatory value. We soon realised, however, that the situation was less simple than that, and not just because of the variety of views. Indeed, the doctrinal views range between two extremes. At one pole of the continuum, to put it with Gross, is “the proposition that the General Assembly has a legislative or quasi-legislative function” and at the opposite pole the “proposition that resolutions of the Assembly are legally not binding”.<sup>6</sup> But this is a perfectly normal occurrence with regard to any issue of international law.

The trouble is that if one took Leo Gross’ continuum to be so arranged that the extreme assertors of the Assembly’s (*de lege lata*) legislative powers sat in A while the irreducible deniers were placed in B, too few among the authors of the proposed “theories” would be easy to situate in a single spot along the segment. In most cases an author seems to be with one foot in one spot and the other foot or a hand in another; and *not* with regard to different issues or different kinds of resolutions.

Of course it is easy to situate Leo Gross in B and McWhinney in A.<sup>7</sup> But Parry, for example, would have to be offered one seat close to A and another close to B. He maintains, if we understand correctly,<sup>8</sup> on one hand that the instruments in question are “binding enactments” of nothing less than an “agent of the international community” so that they could not be “related to the traditional sources of international law”;<sup>9</sup> on the other hand that they

<sup>6</sup> Leo Gross, “The United Nations and the Role of Law”, *International Organization*, 1965 (Summer), pp. 537–561, at p. 556.

<sup>7</sup> Gross clearly places himself, in the quoted article, among those who believe that the Assembly resolutions in question are not binding. According to McWhinney (*International Law and World Revolution*, at p. 80); “Though there may be some rather formalistic international lawyers who may still deny the effect of law to a United Nations General Assembly Resolution even where it rests . . . on the consensus of the main competing political and social systems . . . for most of the World Community the non-orbiting of nuclear weapons has been accepted as being binding international law from the moment of its adoption in the United Nations” (“it” being, presumably, the “principle” or the relevant Assembly resolution).

<sup>8</sup> *The Sources and Evidences of International Law*, Manchester, 1965.

<sup>9</sup> This in the chapter entitled “The new institutions of the international community and the sources of law”, pp. 19 ff. The author states here (p. 19) that it is not possible, or at any rate not easy, to relate the changes which have come about (as a result of the activity of the United Nations) to the traditional sources of the law. That Parry refers also to Assembly resolutions seems confirmed by what follows (pp. 20 ff.) in criticism of theories denying “the possibility of the United Nations having any direct influence upon international law”.

The point about the “accepted categories of the sources of international law” is reiterated one page further (21 f.); and in the same chapter Parry endorses Sloan’s presentation of the Assembly, in the enactment of binding resolutions, as “acting as an agent of the international community”, such agent asserting “the right to enter the legal vacuum and take a binding decision” in certain areas (at p. 20). After rejecting the—seemingly “conservative”—idea that resolutions are binding only for States voting in favour (*ibidem*), Parry formulates, *inter alia*, the following questions with regard to the impact of resolution 1514: “Can even the nine abstaining

are “just part of the practice of States”.<sup>10</sup> Similarly, when one reads Friedmann’s statement that resolutions are “an important link in the continuing process of development and formulation of new principles of international law”,<sup>11</sup> one would be tempted to place him next to, although not quite on, B. One hesitates, though, when one reads the other statement of the same author according to which it would be “futile” to discuss whether Assembly resolutions are sources of international law.<sup>12</sup> One would consider moving this theory towards A. However, that the discussion is not “futile” and that Friedmann’s position is a full B, seems to appear from that distinguished writer’s last contribution to the *American Journal*<sup>13</sup> where he writes—*à propos* of a quasi-unanimous Assembly declaration<sup>14</sup>—that “a declaration of principles is fine as far as it goes but it does not commit anybody to any specific action”. This sounds more like a demonstration of “futility” of Assembly declaratory resolutions. Technically speaking Friedmann was probably consistent. He presumably understood the term sources as material sources, namely, in his own words, as “the sum of the substantive rules, principles or other materials from which a particular legal norm is nourished”.<sup>15</sup> The difference is none the less striking between such “material” sources as custom and treaty and material sources like an Assembly resolution—adopted by 108 votes against none!—which “does not commit anybody to any specific action”.

We find similar difficulties with other authors. In his separate opinion on the *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa* case, 1955, Lauterpacht states: “It is one thing to affirm the somewhat obvious principle that the recommendations . . . addressed to the Members . . . are not legally binding upon them in the sense that full effect must be given to them. It is another thing to give currency to the view that they have no force at all whether legal or other and that they cannot be regarded as forming in any sense part of a legal system of supervision”.<sup>16-17</sup> Conceded that no phenomenon in the social field can be absolutely asserted or absolutely denied, conceded also that an Assembly resolution undoubtedly has a political or moral value, we wonder what is “force . . . legal or other . . . forming in any sense part of a legal system of supervision” in a resolution otherwise subject to the “somewhat obvious principle” that United Nations

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members deny that the law of territorial sovereignty has been, or must be, re-written as a result of that resolution? And must not even the 89 States which voted in favour of it concede that its disguise as an interpretation of the Charter, and therefore as existing law, is an exceedingly thin one?” (p. 22).

<sup>10</sup> In the conclusive stage of his brilliant essay, Parry’s language becomes suddenly guarded. At page 113 it is stated that “when it comes to assessing” (the Assembly’s) “proceedings as a source of international law there is no need to attempt to force the whole operation into the shape of a function of a treaty, or even to ponder particularly upon the “binding force” of resolutions of the General Assembly or of any other international body. All falls very adequately into place as part of the practice of States. Sometimes *that practice* results in . . . *treaties* . . . Sometimes, *more often indeed, it does not*, but produces political agreements, *still intended to be binding but lacking any strict legal content, or simply expressions of view.*” (italics added).

<sup>11</sup> *The Changing Structure of International law*, 1964, p. 139. The “important link” notion is in fact quoted approvingly by Leo Gross, *The United Nations and the Role of Law*, at p. 557.

<sup>12</sup> Friedmann, “General Course”, *Hague Rec.* 127 (1969-III), pp. 39 ff., at p. 143.

<sup>13</sup> “Selden Redivivus: Towards a Partition of the Seas”, *American Journal of International Law*, 65 (1971), pp. 757–770. This article is very dear to us not only because we had the privilege of admiring Friedmann’s energetic stand on the current problems of the law of the sea at one of the Malta Convocations but also because we had received an advance copy of “Selden Redivivus” from the author’s hands in one of the United Nations Conference Rooms. Friedmann seemed distressed, that day, about the Sixth Committee debates.

<sup>14</sup> Res. 2750 (XXV) of 17 Dec. 1970 on the “Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea”. This resolution was adopted almost unanimously (108, none against and 14 abstentions).

<sup>15</sup> Friedmann, “The Uses of ‘General Principles’ in the Development of International Law”, *American Journal of International Law*, 57 (1963), pp. 279–299, at p. 279.

<sup>16-17</sup> *ICJ Reports 1955*, at p. 118.

Assembly recommendations “are not legally binding”. Sørensen himself—an authority on the sources—while believing that the Assembly is deprived of a legislative power “dans les matières qui ne relèvent pas du droit interne de l’organisation”<sup>18</sup> seems to think that it has the power not only to contribute to the crystallisation of customary rules—which seems, subject to specification of the crystallising effect, very plausible—but also to give expression to existing law by an *authoritative*, albeit *declaratory* (not constitutive) statement.<sup>19</sup> Assuming that the lack of a legislative power is perfectly compatible with an Assembly’s contribution to custom, it seems not quite certain that the General Assembly has an *authoritative* power to declare existing law. Does Sørensen mean that an Assembly resolution is as binding as, for instance, a law-declaring arbitral award or a law-declaring judgment of the International Court of Justice as contrasted with a law-creating award or judgment? However relative the distinction may be, there is a difference, and Sørensen’s opinion is too important for the question to be overlooked.<sup>20</sup> Does “authoritative” mean what Castañeda refers to as a presumption *juris et de jure* of the existence of the declared rule?<sup>21</sup> Or does it mean that the General Assembly exercises a law-determining function on the strength of the maxim *eius est interpretari cuius est condere*?<sup>22</sup> And would Sørensen’s relatively cautious step towards pole A be of any comfort to Bin Cheng’s notion of Assembly resolutions—in given cases and circumstances—as “instant custom”?<sup>23</sup> Rosalyn Higgins seemed to be in principle very close to Sørensen’s belief—essentially a “B”—when she wrote that the General Assembly of the United Nations has “no right to legislate in the commonly understood sense of the term”.<sup>24</sup> However, in a further contribution that same author goes far towards the opposite pole of the continuum:<sup>25</sup> and in 1970 she stated that Assembly resolutions are “sources” both *formelles* and *matérielles* of international law, thus placing herself decidedly also in A.<sup>26</sup>

4. At the root of the various theories concerning the international legal value of Assembly resolutions, there are discernible, as is usually the case for any legal question, direct or specific conditioning factors and indirect or general factors, substantive or terminological.

Direct factors are the material features of Assembly resolutions and the relevant Articles of the United Nations Charter together with all the data which may be of use in the interpretation of those Articles as originally conceived or possibly developed through practice.<sup>27</sup>

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<sup>18</sup> Sørensen, “Principes de Droit International Public”, in *Hague Rec.* 111 (1960-III), at p. 100.

<sup>19</sup> *Ibidem*. In Sørensen’s words, the Assembly “par ses résolutions peut *affirmer le droit existant* et lui donner une *expression qui fait autorité*. Elle peut également contribuer à la *crystallisation d’une norme coutumière* qui se dessine déjà vaguement dans la pratique, mais *elle ne peut pas modifier le droit existant ou créer des nouvelles règles*; “l’effet d’une résolution dans ce domaine est plutôt *déclaratoire* que *constitutif*” (italics added).

<sup>20</sup> Crystallisation of a customary rule “qui se dessine déjà dans la pratique” may be too much or too little, according to the case. The term “crystallisation” was used by Loder, it seems, in connection with the drafting of the Statute of the Permanent Court of International Justice, in a passage quoted by Barile, *La rilevazione*, etc., p. 32 of separate print. It should be noted that one thing is the role of the Court and another thing is the role of a political body in the “crystallisation” of a customary rule. Cf. Leo Gross, quoted article, at p. 557.

<sup>21</sup> *Infra*, paras. 26 and 40.

<sup>22</sup> *Infra*, para. 46.

<sup>23</sup> *Para.* 29.

<sup>24</sup> Higgins, *The Development of International Law Through the Political Organs of the United Nations*, 1963, at p. 5: “Resolutions of the Assembly are not *per se* binding though those rules of general international law which they may embody are binding on member States, with or without the help of the resolution. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence.”

<sup>25</sup> “The Development”, etc., in *Proceedings*, American Society of International Law, 1965, pp. 116–124.

<sup>26</sup> “The United Nations and Law-making: the Political Organs”, same *Proceedings*, 1970, pp. 37–38.

<sup>27</sup> Among the elements of this kind is the fact that Assembly resolutions, while *not* possessing *all* the features of

Interacting with these specific factors are the indirect factors represented by the various possible solutions of preliminary (general) issues. Foremost among these are the issues concerning the definition of the conventional law-making and law-determining processes,<sup>28</sup> the distinction between “material” sources and “formal” sources, *et similia*. Examples of the impact of such variables are the concept of law sources as *material* sources presumably assumed by Friedmann, Parry’s concept of the law-making processes, Sørensen’s well-known theory of the sources and Higgins’ concepts of sources *matérielles* and *formelles*.<sup>29</sup> The presence of the variable in question renders it difficult to relate certain views regarding the legal effect of Assembly declarations to a system of the sources of international law sufficiently clear for one to be able to see which “legal” or “normative role” Assembly resolutions play, according to any given writer, with regard to the conduct of States.

5. But there is even more than that. Further variables are, in a mounting order of generality and complexity (after the identification of the conventional “sources”), the concept of the United Nations, the general theory of international organisation, the concept of international law and the notion of law in general.

It is manifest that the concept of the United Nations and international organisation in general—with the underlying concepts of international law and society—conditions the doctrines on the subject in a very considerable measure. Such is obviously the case, for example, of Sloan’s and Parry’s idea that the instruments in question are binding in that they emanate from the General Assembly as “an agent of the international community”.<sup>30</sup> Rosalyn

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any one of the “conventional” law-making and law-determining processes (custom, agreement, arbitral awards, judgments and political decisions), evidently possess one or more of the features of each one of those processes. The combined presence in an Assembly resolution of *some* feature of custom *and* some feature or features of treaty or agreement makes it apparently hard, for a number of writers, to resist the thought that the instrument is, in given circumstances or *ipso facto*, law-making or law-determining *either* as custom or treaty, or as a political decision (in spite of its “formal” qualification as a mere recommendation). This is probably the case of both the idea that unanimous declarations are binding and of the notion that non-unanimous ones are binding for the States which voted in favour. If the express consent of all does not constitute a treaty or agreement does it not reveal at least such an intense *opinio iuris* as to crystallise custom? If strict law-creating appears to be too daring a proposition, is the compound effect of the features present not sufficient to justify at least the assumption of the resolution as a law-determining instrument?

<sup>28</sup> Mentioned in the preceding footnote.

<sup>29</sup> Higgins, “The United Nations”, etc., 1970, *Proceedings*, American Society of International Law, at p. 42, raises further general and terminological issues. After mentioning the plethora of General Assembly “recommendations which are, for internal purposes of the Organisation, decisions, and which entail legal consequences for Members”, that author continues: “often, in respect of these internal matters, the consent of the plenary is not specifically asked. Ingrid Detter, in her book on *Law Making by International Organizations*, has given many such examples. Other recommendations, for example those to establish subsidiary bodies, entail financial consequences which are legally incumbent upon all the Members, whether they voted for the recommendation or not. In other words—and I think this now commands a fairly wide support among international lawyers—the passing of “binding decisions” is not the only way in which law development occurs. Legal consequences also can flow from acts which are not, in the formal sense, “binding”. And, further, law is developed by a variety of non-legislative acts which do not seek to secure, in any direct sense, “compliance” from Assembly members: I refer here to the “law-declaring activities of the Assembly”. In this passage there seem to be set aside, under wide concepts of “law development” and “legal consequences”, distinctions that lawyers usually make not little use of. *Inter alia*, one seems not to distinguish: (i) law development or legal consequences in the sense of formation or steps toward the formation of a rule of customary international law or of treaty law; from (ii) legal consequences (or, less plausibly, legal development) in the sense of legally binding effect; and from (iii) legal consequences (or, again less plausibly, legal development) in the sense of that legal relevance of an occurrence (fact or act) by which, for example, one says that a *wrongful act* entails the consequence of liability or of the duty to make reparation, or that a sale entails the consequence consisting in the transfer of title and the credit of the seller against the buyer.

<sup>30</sup> *Supra*, footnote 9.

Higgins makes use of similar concepts.<sup>31</sup> Notions such as the “will” of the international community or of the “organised international community” or of “the legal community of mankind” recur with great frequency and clearly play an increasingly important role in any theory of Assembly resolutions.<sup>32</sup>

These “ultimate” issues acquire perhaps the greatest weight and widest scope in the theories of those scholars who place the issue of the legal effects of Assembly resolutions within a revisionist theory of law and international law in general and of the law-making processes in particular. Falk, for example, who seems to be very close to McDougal and Lasswell’s concept of law as an “authoritative decision-making process”,<sup>33</sup> writes that international lawyers fail to “clearly understand” the processes of law creation.<sup>34–35</sup> According to the distinguished scholar from Princeton, “the formally persuasive denial of legislative status is not nearly so relevant to patterns of practice and expectation” as one might be inclined to suppose. Increasingly in other legal contexts “the characterisation of a norm as formally binding is not very significantly connected with its functional operation as law<sup>36</sup> . . .”. “Thus the formal limitations of status, often stressed by international lawyers, may not prevent resolutions of the General Assembly, or certain of them, from acquiring a normative status in international life”.<sup>37</sup> This would be, according to Falk, “a middle position between a formally difficult affirmation of true legislative status and a formalistic denial of law-creating role and impact”.<sup>38</sup> Assembly enactments, in other words (or some of them), function as law while being formally non-binding.<sup>39</sup> It is apparent that in this case Gross’ continuum would simply not work, unless one understood Falk to mean that the rules declared in Assembly resolutions may just become law through custom, through agreement or through decisions of judicial or other bodies.<sup>40</sup> According to Oscar Schachter, the “traditional sign-posts of legal obligation have limited utility” in all the cases of problems of “indeterminacy of obligation”, the prominent among these problems being “the much-discussed ‘quasi-legislative’ activity by the General Assembly and other United Nations bodies purporting to lay down, expressly or by implication, requirements of State conduct or to terminate or modify existing requirements”.<sup>41</sup> According to Schachter,<sup>42</sup> in cases such as these the traditional signposts “at the very least call for further analysis and possibly . . . for a more adequate theory of the basis of legal obligation in international society”.<sup>43</sup> The most pertinent framework for the search of such a theory—a search in the course of which, according to Schachter, if we are “to snare so elusive a quarry as international obligation we may need several nets and to spread them all wide”—would be the general theory developed by Harold Lasswell and Myres McDougal for inquiry into the “global process of authoritative

<sup>31</sup> Writings cited *supra*, footnotes 24–26.

<sup>32</sup> *Infra*, paras. 17–19 and 21; and *Appendix, passim*.

<sup>33</sup> *Infra*, paras. 17ff., especially 19.

<sup>34–35</sup> “On the Quasi-Legislative Competence of the General Assembly”, *American Journal of International Law*, 60 (1966), at p. 782 (reprinted in Falk (ed.), *The Status of Law in International Society*, Princeton University Press, 1970, pp. 174–184). A sharp evaluation of the author’s theses is in Onuf, “Professor Falk on the Quasi-Legislative Competence of the General Assembly”, same *Journal*, 64 (1970), pp. 349–355.

<sup>36</sup> Falk, “On the Quasi-Legislative Competence”, *ibid.*, at p. 783.

<sup>37</sup> Falk, quoted article, at p. 784.

<sup>38</sup> *Ibidem* at p. 782.

<sup>39</sup> The functionality binding character of Assembly resolutions seems to be explained by Falk also in terms of a contemporary trend to substitute consensus for consent in international law-making (*infra*, para. 28).

<sup>40</sup> *Infra*, Chap. II.

<sup>41</sup> Schachter, Oscar, “Towards a Theory of International Obligation”, in Schwebel, S., editor, *The Effectiveness of International Decisions*, 1971, at pp. 9–31, esp. 11–16.

<sup>42</sup> Schachter’s view on the value of Assembly resolutions seems to be close to Falk’s and Castañeda’s (*supra*, footnote 34–35 and *infra*, paras. 26 and 40). At page 14 of *Towards a Theory*, he refers to certain exigencies as being “expressed in declarations of the General Assembly and in other supposedly ‘non-binding assertions’”.

<sup>43</sup> Schachter, *Towards a Theory*, etc., at pp. 14–15.

decision”.<sup>44</sup> Here again we would find it difficult to place the author within the continuum.

6. Considering the importance and the difficulty of the question of the legal effects of Assembly declarations, it appears indispensable to organise our *exposé* in such a manner as to have the discussion of that question precede the proposed (first) reading of the Friendly Relations Declaration. Our outline would thus be as follows.

Chapter I is devoted to a critical analysis of the view that Assembly declarations are a special, new law-making process, contemplated as such by a conventional or customary rule (Sections 1–2) and of the views otherwise implying a special law-making force of the declarations (Section 3).<sup>45</sup> The latter Section includes, in particular (paragraphs 17 ff.), a discussion of the theories of Assembly resolutions as manifestations of a legislative or quasi-legislative function (competence) of the General Assembly as the “agent” of the “Organised International Community” or as a spokesman of the “will” of such a community, regardless of the absence of a conventional or customary rule enabling the Assembly to perform such a function. Considering the very great measure in which the concept of an organised international community (of States or mankind) affects any theory of the legal value of Assembly resolutions *de lege ferenda* as well as *de lege lata* we felt it to be incumbent upon us to proceed to a critical analysis of that concept and of the assumptions underlying it (on the basis, *inter alia*, of some past studies of ours on the social basis of international law). However, in order not to encumber the discussion of our topic unduly, the doctrine of an “Organised International Community” and of the “will” thereof, which involves not only the theory of international organisation but the very concept of international law in its entirety, is treated (as explained in paras. 18 and 21), in an *Appendix*. For the pompous title of the latter and for the many references it will contain to our own work we apologize in advance.

Chapter II discusses the material role of Assembly resolutions within the framework of the main conventional “sources” (custom and treaty) or alleged “sources” (general principles); and the role of Assembly resolutions in legal determination.

Chapter III discusses, in the light of any results achieved that far, the status of the resolution (2625-XXV) embodying the principles of “Friendly Relations”.

Chapter IV, devoted to the contents of the declaration, consists of the proposed first reading and commentary of the formulations of the seven principles.

Chapter V—preceding a few Conclusive Remarks—discusses the function of the declaration in the light of the objectives assigned to it by the General Assembly and by some member States and in the light of some of the scholarly assessments of that function. In particular, that Chapter considers the doctrine of Peaceful Co-existence and of a Law thereof.

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<sup>44</sup> Schachter, *Towards a Theory*, at pp. 15–16. According to Schachter “No other scheme” . . . “provides as complete a set of tools for examining the interplay of law and the other social processes. It can enable us to discern with sharpened awareness the connections between rules and behaviour and—equally important—can give us strong solvents to dissolve *long standing intellectual obstructions to understanding*” (emphasis added). We do not have the impression, however, that the five criteria enumerated by Schachter for the establishment of obligatory norms (at pp. 16–17) give one any really new insight into the identification of legal norms and their origin. To us they sound very much like excellent and imaginative descriptions of as many factors, or elements, of legal rules as rather commonly understood (*infra*, paras. 19–21).

<sup>45</sup> The law-determining function is dealt with, in order to simplify our discourse, only in Chapter II (Section 5, paras. 40–47).



## CHAPTER I

### THE THEORY OF ASSEMBLY RESOLUTIONS (DECLARATIONS) AS SPECIAL LAW-MAKING ACTS

#### *Section 1. The Alleged Legitimation by a Charter or Other Contractual Rule*

7. One can agree with the best advised commentators of the United Nations Charter that the matters with regard to which the General Assembly takes binding decisions are not merely *interna corporis*.

Obvious examples of Charter provisions envisaging Assembly decisions in a narrow sense are Articles 4.2 (admission), 5 and 6 (suspension and expulsion), 17 (budget and apportionment of burdens), 21 (adoption of rules of procedure), 22 (setting up of subsidiary bodies), 23, 61, 86 (election of member States to the elective seats in the Security Council, the Ecosoc or the Trusteeship Council), 63 (approval of Ecosoc agreements with the Agencies referred to in Article 57), 85 (approval of trusteeship agreements for non-strategic areas), 93 (determination of the conditions under which a non-member of the United Nations may become a party to the Statute of the Court, 96 (request of Court opinions and authorising other organs to request such opinions), 97 (appointment of the Secretary-General).<sup>1</sup>

It is plain that not all these matters are just *interna corporis*,—such as the Assembly's rules of procedure or the composition of a subsidiary body—with regard to which an Assembly decision affects United Nations Members only indirectly. In a number of matters the Assembly decision affects States directly.<sup>2</sup> For example, the decision under Article 17, which determines the *quantum* of the member States' obligation to pay contributions, creates, or at least "quantifies", obligations of member States. It follows that the fact that a matter affects the member States directly does not necessarily exclude it from those with regard to which the Assembly can take binding decisions.

It is also clear, however, that in so far as the Assembly is enabled to take binding decisions with regard to any matter, as a provision of the Charter, express or implied, enables it to do so. In any cases other than those in which—expressly or implicitly—the Assembly is endowed with a power of binding enactment it can only deliberate without binding effect. Such is the case, it seems, of the resolutions adopted by the General Assembly under the general competence conferred upon that body under Articles 10–14 of the Charter, such resolutions including Assembly declarations.<sup>3</sup> This is based on the literal, logical-systematic, historical and comparative interpretation of the Charter.

8. The language of the relevant Articles of Chapter IV of the Charter (Articles 10–14) is far clearer than some international lawyers seem ready to admit, in the sense that the *general* powers granted to the Assembly under those Articles do not involve binding decision-making except where it is specially so provided expressly or by implication.

The General Assembly "may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter and . . . may make recommendations to the Members . . . or to the Security Council or to both" (Article 10); "may consider the general principles of co-operation in the

<sup>1</sup> See especially, on these and other examples, Sloan, *The Binding Force*, pp. 4 ff.; and Asamoah, *The Legal Significance*, etc., pp. 3 ff.

<sup>2</sup> On internal developments in the United Nations, summary of issues and conclusions, see Bowett, "The Impact", etc., *Proceedings*, American Society of International Law, 1970, pp. 48–51.

<sup>3</sup> Very pertinent remarks in Sir Kenneth Bailey's, "Making International Law", etc., *Proceedings*, American Society of International Law, 1967, pp. 233–239; and also in *Effectiveness of International Decisions* (Schwebel, ed.), 1971, pp. 499–502, 388–389 and 390.

maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may *make recommendations with regard to such principles* to the Members or to the Security Council or to both" (Article 11.1); "may discuss any questions relating to the maintenance of international peace and security brought before it . . . in accordance with Article 35, paragraph 2, and, . . . may *make recommendations . . .* to the State or States concerned or to the Security Council or to both" (Article 11.2); "may call the attention of the Security Council to situations which are likely to endanger international peace and security" (Article 11.3); "*shall initiate studies and make recommendations for the purpose of . . . promoting* international co-operation in the political field and encouraging the progressive development of international law and its codification" (Article 13.1.a), and for the purpose of "promoting international co-operation in the economic, social, cultural, educational and health fields", etc. (Article 13.1.b); "*may recommend measures for the peaceful adjustment* of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations" (Article 14). "Recommend" and "recommendations" clearly carry, in themselves and within the phraseologies of the quoted provisions, a strictly hortatory significance. Notwithstanding the doubts expressed by some commentators, the Charter meaning seems to conform to the general meaning of the term.<sup>4</sup>

Admittedly, none of the Articles in question makes the negative point expressly and it is easy to see why the fathers of the Charter did not adopt such a course. It is sound "legislative technique" to confine oneself to spell out duties, obligations and/or correlative rights. To state expressly the lack of obligation in given instances is quite unusual and might be—except in special circumstances—very misleading from the viewpoint of interpretation. In the specific case of Assembly recommendations, to stress their non-binding character would also run counter to the most elementary psychological considerations.

It seems reasonable to conclude, in so far as the letter of the Charter is concerned, that while it would be simply naive to look for a provision spelling out the non-binding character of unqualified General Assembly resolutions, the relevant Articles do all that is necessary—short of spelling it out in as many words—to exclude the binding character of such resolutions.

#### 9. This plain interpretation is confirmed by *travaux préparatoires*.

Although no express definition or interpretation was given at the San Francisco Conference of the words "recommendation" and "recommend" as used in Articles 10 to 14, there were statements from which the non-imperative character must be inferred.<sup>5-6</sup> It was natural, on the other hand, that the San Francisco delegates deem an express statement to that effect not only technically and psychologically inopportune (for the reasons indicated above) but utterly superfluous, Committee 2 of Commission II (10th meeting) had rejected by 26 votes to 1 the proposal of the Philippines that the Assembly be vested with legislative authority to enact rules of international law.<sup>7</sup>

The argument that "legislation is not the only way in which binding decisions are made"<sup>8</sup>

<sup>4</sup> Sloan, *The Binding Force*, etc., especially page 6. This author's reference to private law is perhaps not quite relevant. The testator's recommendation is considered imperative by the law in the cases referred to by Sloan, page 13, within the framework of a situation in which the testator possesses a power of "imperative disposition" anyway. The question, therefore, is only one of interpretation of the testator's intent, such intent being in any case a sufficient basis for the law to give imperative effect to the recommendation.

<sup>5-6</sup> Sloan, *The Binding Force*, pp. 6-7.

<sup>7</sup> For *travaux préparatoires* see Russell, *A History of the United Nations Charter*, pp. 154, 754-776, and especially 759.

<sup>8</sup> Sloan, *The Binding Force*, at p. 7.

means too much or too little. We fail to see what binding decision power could be vested in the General Assembly *other* than: (i) the specific powers covered by the Charter rules of the kind mentioned at the outset of the present Section; and (ii) the law-making power clearly refused by the Conference when it rejected the Philippine proposal and adopted Articles 10–14 as they stand.

10. The Charter situation with regard to the Assembly's normative powers in question is even clearer than the similar situation which had existed within the League of Nations Covenant.

Indeed, the conferring upon an international body of functions of very wide scope from the point of view of the subject-matter was not new in 1945. The third paragraph of Article 3 of the League Covenant provided—in wording identical to paragraph 5 of Article 4 which defined the functions of the League Council—that “The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world”. This rule, which was the Covenant equivalent of Article 10 of the Charter, was unanimously understood as not to imply any “legislative power” of the League Assembly. It only sanctioned a power of recommendation. Binding decisions—as well as non-binding recommendations on matters of specific competence of the Assembly—were the object of separate Covenant provisions.

Now, the conclusion which for the Covenant might have been considered a matter of *logical* or *systematic interpretation* of the terms “deal” and “action” of Article 3.3 of the Covenant, is based for the Charter, in addition to logic and system, upon the repeated express emphasis which is put, throughout Chapter IV (Articles 10–14), upon the recommendatory nature of the resolutions taken by the Assembly on the strength of those provisions.

One would hardly compare the United Nations with the three Communities of European “integration”. Even there, however, recommendations are non-binding.

11. The merely hortatory effect of Assembly declarations has been clearly confirmed by practice.

The United Nations membership's belief in such merely hortatory effect is quite plain whenever a “two-stage” (or more) approach is adopted. This is the case not only of the Universal Declaration on Human Rights and of the Declaration on the Elimination of All Forms of Racial Discrimination,<sup>9</sup> but, in a measure, also of the Declaration on Outer Space and of the Declaration on the Sea-bed. Let it be added *ad abundantiam* that the fact that the Assembly has never felt that it might be useful or necessary to use a different denomination for the declaratory resolutions with regard to which no second (or third) stage was envisaged, is not without significance.

But that Assembly declarations are not binding results also from the spoken word of States. In the first place it has been stated repeatedly in the plenary and in the Assembly's Committees. Some of the most significant statements to that effect have been made *à propos* of resolution 2131 on “The Inadmissibility of Intervention”. Even more significant statements have been made in the course of the elaboration of the Friendly Relations Declaration, particularly at the last (Geneva) meeting of the Committee on 30 April–1 May 1970 and during the session of the Assembly (XXV) at which resolution 2625 was adopted. It must be noted, however, that within the framework of the Charter statements such as these were not indispensable.

“Spoken” word of the member States is also—albeit indirectly—the Memorandum prepared by the Office of Legal Affairs<sup>10–11</sup> in which it was stated, *inter alia*, that in the

<sup>9</sup> Gross, Leo, *The United Nations and the Role of Law*, at pp. 555–556.

<sup>10–11</sup> UN Doc. E/CN.4/L.610 of 2 April 1962.

practice of the Organisation “a declaration is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights. A recommendation is less formal”. “Apart from the distinction just indicated, there is probably no difference between a ‘recommendation’ or a ‘declaration’ in United Nations practice as far as strict legal principle is concerned. A ‘declaration’ or a ‘recommendation’ is adopted by resolution of a United Nations organ. As such it cannot be made binding upon member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a ‘declaration’ rather than a ‘recommendation’”. “However, in view of the greater solemnity and significance of a ‘declaration’, it may be considered to impart, on behalf of the organ adopting it, a strong *expectation* that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognised as laying down rules binding upon States”. “In conclusion, it may be said that in United Nations practice, a ‘declaration’ is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected”. As no objection has been raised by Members, to our knowledge, to this statement—according to which Assembly Declarations have, *per se*, no more binding force, “as far as strict legal principle is concerned”, than a “recommendation”—the matter would seem to be settled.

Indeed, the statement does contain some elements of ambiguity that it would be incorrect to overlook. Not only the equivalence of declarations and (non-binding) recommendations is qualified as the “probable” conclusion to be reached as a matter of *strict legal principle*—thus seeming to imply that a less strict-minded interpreter (strict being mostly understood as deaf to the exigency of progress) might reach a different conclusion—but the equivalence itself seems to be cast into doubt by the idea that in view of the greater solemnity and significance of a “declaration”, such an instrument “may be considered to impart, on behalf of the organ adopting it, a *strong expectation* that Members of the international community will abide by it” . . . and that in the case of declarations “*maximum compliance is expected*”. It is likely that these ambiguities did not slip into the text inadvertently.

However, it seems to us that the drafters were too good lawyers, and too conscientious professionals, to do more than just show some sympathy for the claim of law-making powers that any current or future General Assembly majority might try to make. If the expression “*strict legal principle*” is understood only for what it objectively means and is not confused with the idea of “narrow” or “restrictive” interpretation; if one also considers that it is unambiguously stated in the document that a declaration “cannot be made *binding* upon Member States, *in the sense that a treaty or convention is binding* upon the parties to it, *purely by the device* of terming it a ‘declaration’ rather than a ‘recommendation’”; if one further considers the sentence “*in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognised* as laying down rules binding upon States”, the ambiguities appear to remain at the surface.

Compared with such unequivocal denials, the statements that a declaration “may be considered to impart a *strong expectation* on the part of the organ that the Members of the international Community will abide by it” and that “*maximum compliance*” is expected, must be understood in the sense that both the “strong expectation” and the “maximum compliance” simply mean that *in so far as* such non-binding instruments as *recommendations are concerned*, declarations *may deserve, de facto, more compliance*.<sup>12</sup>

Considering the care which the drafters of the document seem to have deployed, it is not

<sup>12</sup> It is our belief, on the contrary, that, *subject to exceptions*, Assembly declarations of abstract rules or principles, however solemn, are less, not more, significant than resolutions concerning concrete issues (*infra*, paras. 15(iii) and 16).

insignificant that the most important of the sentences representing the “positive” (and allegedly “progressive”) view refrains from identifying the General Assembly with the “international community” or with an “agent” thereof. On the contrary, it is stated that “the organ” holds the “expectation that the members of the international community—namely, *States or Governments*—abide”.<sup>13</sup>

12. It goes without saying that the Assembly’s power to resolve with binding effect can be extended to further matters—in addition to those of the kind mentioned earlier—by Charter amendment. However, no amendments of relevance having in practice been adopted, this hypothesis can be set aside. No evidence seems to be available of an informal or *de facto* amendment of the Charter bringing about any general “legislative” power of the Assembly.<sup>14–15</sup>

There is of course the further possibility of agreements other than the Charter envisaging Assembly determinations as binding. The examples are numerous.<sup>16</sup> It is necessary to keep in mind, however—in discussing the Assembly’s powers—that the agreements in question are far from the equivalent of Charter rules.

Indeed, the relevant clauses of such agreements appear to be too occasional and circumstantial, so to speak, to be conceivable as additional *constitutive elements* of a “permanent” instrument such as the Charter. They are hardly conceivable as constitutional rules adding to the powers of the main organ created by that instrument.

One must also consider the nature of the legal situations brought about by the agreements or clauses of the kind now in question. Those situations—obligation-right situations—only affect the parties to the agreement, whether Members or non-members of the United Nations, to the exclusion not only of other States (notably United Nations Members) but also of the United Nations as a whole or the Assembly *qua* organ. For all such other parties, the agreement or clause remains *res inter alios acta*. There is thus no empowering of the United Nations in a legal sense. The *parties* are bound *inter sese* to abide by the Assembly’s deliberation, but not towards the General Assembly or the United Nations membership. Indeed, as shown in the *Appendix*, most phenomena of international organisation correspond precisely to such a pattern, namely to *inter sese* obligations (and rights) of the member States.<sup>17</sup> In the instances in question, however, the Assembly’s role is envisaged even more clearly as a matter of *private* concern and convenience of a number of States, the Assembly having no title to deal with the matter except the clause of the external agreement.<sup>18</sup>

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<sup>13</sup> The Secretariat sounds in this respect more demanding, perhaps, than some of the commentators.

<sup>14–15</sup> On the so-called informal amendment of the Charter, see especially Lachs, M., “Le Problème de la Révision”, etc., *Revue générale de Droit International Public*, 1957, pp. 51 ff.; Zacklin, Ralph, *The Amendment of the Constitutive Instruments of the United Nations and Specialized Agencies*, Leyden, 1968; and Engel, Salo, “Procedures for the De Facto Revision of the Charter”, 1965 *Proceedings*, American Society of International Law, pp. 108–116.

On the question of evolutive interpretation (implied powers and subsequent practice), *Appendix*, Section 6, paras. 153–159.

<sup>16</sup> Asamoah, *The Legal Significance* at pp. 4–5.

<sup>17</sup> Such a pattern is similar to the phenomenon of *private* arbitration in municipal legal systems; and even more to the phenomenon by which the parties in a sale entrust a third person with the task of determining the price. But see also the *Appendix*, Section 4, especially para. 135.

<sup>18</sup> The Italian Colonies Annex to the Peace Treaty of 1947 is a case in point. Italy, not a member of the United Nations at the time, was extraneous to the Charter system. But even if Italy had been a member of the organisation, it is decidedly an overstatement to say that in a case like that of the disposal of Italian colonies “with respect to States parties to (the) agreement (namely the Peace Treaty), such recommendations will be as effective as if they were laws enacted by an international legislature *with powers similar* to a national legislative body”. The passage is from Sohn, L., *American Bar Association Journal*, 34 (1948), p. 315 (quoted by Sloan, *The Binding Force*, at p. 16).

Legally, the General Assembly is no more under an obligation to look into the matter or resolve it than it has a title to claim compliance.

### *Section 2. The Alleged Legitimation by a Customary Rule*

13. A rule of customary international law on the strength of which the General Assembly of the United Nations enact binding rules of conduct is logically conceivable as part either of *lex lata* or *lex ferenda*. As a matter of logic the rule is conceivable either as a universal (or general) rule of customary law, making General Assembly declarations binding on any State or international person, or as a customary rule binding United Nations Members only. One could maintain that although the Charter did not provide for a legislative power of the General Assembly such a power has “developed”—so to speak—through the practice of States acting in, or through the medium of, the General Assembly.

In itself, the mere repetition by the Assembly of the practice of adopting declaratory resolutions is of course, however frequent or constant, insufficient.<sup>19</sup> The positive theory of an Assembly law-making or law-declaring competence would perhaps find a better support—*prima facie*—in the combination of the frequency of the Assembly’s normative urges with other elements which the assertors of that competence seem to draw from the general state of international society. We refer to the assumptions which the adherents of the positive doctrine draw from the institutionalisation process which the international society seems to be undergoing, from the inadequacy of custom and treaty in meeting the peaceful change exigencies of interdependent nations, from the position occupied by the United Nations against such a background, and from the role that the Assembly would be naturally called upon to play as the most representative, quasi-universal, body of an “organised” international community. The exercise by the Assembly of a law-making function (or of an authoritatively interpretative function) seems to be envisaged, in other words, as a natural consequence of the increasingly pressing exigencies of peaceful change in a world society which is not endowed with adequate “peaceful change” machineries. In view of the gap, in view of the exigency, the General Assembly started doing what of necessity, a social necessity, should be done. Repeated recourse by the Assembly to the instrument of normative or declaratory resolutions has become an habitual, uniform practice. Involving as it does in each instance the participation of the totality or quasi-totality of the member States’ delegations—a far more generalised and intense consensus, it would seem, than the general acquiescence often deemed sufficient for the formation of customary rules—such a practice has determined the formation, and would represent in any case adequate evidence of the existence of a corresponding customary rule. Under such rule the Assembly would be generally legitimised to adopt law-making (or law-declaring) resolutions within the wide scope of its competence. Thanks to the presence of such a rule the General Assembly now does as *a matter of law* what at the outset it did, as a matter of mere necessity, *de facto*.

14. Although this line of reasoning would seem to stress, together with the *raison d’être* of the legitimising customary rule, that element of *opinio* which should accompany the uniform conduct in order to complete, so to speak, the factors of customary law, it does not seem really to prove the point as a matter of *lex lata*. Such generic elements would not suffice to demonstrate the existence of a substantive or procedural rule of customary law in any field. Far less would such elements demonstrate the point with regard to the existence of a *constitutional* rule of international law of such sweeping importance as a rule attributing a

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<sup>19</sup> One would actually be inclined to think that the frequency of declarations, combined with their relatively “facile” drafting, is a negative rather than a positive sign with regard to the possession by the Assembly of a power to make or declare law.

normative function to an international body. To demonstrate the existence of such a rule, one would need data and arguments of a far more substantial weight.

It is undeniable that the international society is in great, urgent need of less inadequate peaceful change machineries than treaty, custom and the not very substantial tertiary law-making processes at present available.

One could not deny, in particular, that that lack of adequate law-making processes has become even more dramatic, in the last five decades, than it has always been in the past. First there was the disappearance, with the First World War, of the remnants of the relatively effective authority which the Powers of the “Concert” of Europe had managed to exercise in the restricted international society of the XIXth Century. Then there has been, in the last quarter century, the massive emergence on the international scene of so many new States that the membership of the so-called “society” of States<sup>20</sup> (together with the almost equal membership of the United Nations) has more than doubled and the majority of the present membership is made up of States which question, not without some reason, a part of the existing law. Developments such as these have undoubtedly determined a degree of tension between existing law and social exigencies which is perhaps without precedent.<sup>21</sup> That that tension has not been without consequence in the law-making processes is clearly demonstrated by the quantity and quality of the codification and progressive development of important parts of the law of nations which has been achieved with the signal contribution of ways and means created within the framework of the United Nations and particularly within the framework of the Assembly.<sup>22</sup> Secondly it cannot be contested either that the only collective body in which, in the present time, delegates of most existing States regularly meet is the General Assembly of the United Nations.

But it is much too easy to say that as a matter of law, of existing international law, the general exigency of more adequate peaceful change procedures has been sufficient—in combination with the presence of a permanent, “universal” body—to turn into binding instruments some of the resolutions of such a body: and this in spite of the fact that the said body is plainly *not* endowed by its Charter with a binding decision-making function beyond limits that would clearly be crossed if the alleged normative power were really in existence.

Necessity is a very important factor among those which contribute to the coming into being of customary rules. The belief that a given rule—or the conduct that the rule (if existing) would prescribe—is necessary to ensure the peace, the well-being or the progress of society, is identified by many, perhaps rightly, as the correct understanding of *opinio iuris*. This may be the reason (or one of the reasons) why this element of custom is described as *opinio iuris seu necessitatis*.

It should not be overlooked, however, that one thing is the belief in that necessity on the part of men of good will, or of some members of the academic community—one thing is even the obvious, objective necessity for an international legislative body—and another thing is the “belief in necessity” that is required to bring about, and prove, the existence of the corresponding international customary rule.<sup>23</sup> The belief that would matter is a *belief of States*

<sup>20</sup> *Infra*, Section 3, especially para. 128, of the Appendix.

<sup>21</sup> *Infra*, paras. 86 (end) and 98–99.

<sup>22</sup> Ago, *La codificazione del diritto internazionale, La Comunità internazionale*, 1968; Rosenne, “The Role of the International Law Commission”, *Proceedings*, American Society of International Law, 1970, pp. 24–37.

<sup>23</sup> That “on ne saurait présumer qu’un droit existe simplement parce que son existence peut paraître souhaitable” was stated by the International Court of Justice in the *South West Africa* case, 1966, *ICJ Reports* 1966 at p. 48.

A similar denial is to be found in Judge Gros’ dissident opinion in the *Legal Consequences (Namibia)* case of 1971 (*ICJ Reports* 1971, at p. 339). Judge Gros, who also quotes Koretsky (*ICJ Reports* 1962, p. 268), states: “Dire qu’un pouvoir est nécessaire, qu’il découle logiquement d’une certaine situation, est l’admission de l’inexistence d’une justification juridique. Nécessité n’a pas de loi, dit-on; c’est en effet qu’on sort du droit

*or Governments*—namely a belief entertained by the *real actors* on the scene of international law.<sup>24</sup> No such belief seems to emerge from a dispassionate analysis of the practice of States within and without the General Assembly. If anything, there appears constantly the serious concern to avoid the emergence of a situation in which such a belief could be assumed as existing. Naturally, in so far can this be perceived as one is willing to look beyond the surface—beyond the fact that all the members of the Assembly participate more or less enthusiastically in the elaboration of declaratory resolutions—in order to explore the matter in sufficient depth to ascertain the intent or conviction by which governments and their delegates are inspired in the exercise.

The relevant practice actually shows, as we understand it, that States believe neither in the specific necessity that the General Assembly perform a legislative function nor in the necessity that such a function be performed at all by any body within their “society”.

15. The belief of the United Nations membership in the merely hortatory value of Assembly declarations—a belief some expressions of which have been noted in the previous Section—is fully confirmed by the general attitude of governments towards such declarations or in connection with their elaboration and adoption.

We do not refer now to actual compliance or non-compliance with any resolutions’ prescriptions on the part of the addressees. To be sure, effective compliance or non-compliance is among the essential tests of the value of the rules embodied in a resolution (effectiveness). We shall consider the relevance of that test—as distinguished from others—for the solution of the question whether any rule embodied in a declaration has “become”, so to speak, a tacitly or otherwise agreed rule, or a customary rule.<sup>25</sup> We are now concerned instead with those attitudes of member States which may constitute positive or negative evidence with regard to the existence of a customary rule legitimizing Assembly resolutions or given Assembly resolutions *per se* as law-making acts. For this issue, compliance or non-compliance with the allegedly law-making acts is *directly* not more decisive, however relevant, than the actual compliance or non-compliance with treaties or given classes of treaties may be decisive for the demonstration of the existence of *pacta sunt servanda*.<sup>26</sup> For the present issue—existence or inexistence of a customary rule of legitimization of an Assembly’s law-making function—such general attitudes are rather of interest as they are expressly manifested by, or otherwise discernible in, member States when they initiate, sponsor, support or discuss a resolution, when they vote for or against it or abstain, or when they cite or discuss a resolution as a possible support of some claim or cause.

From the observation of such attitudes there emerge at least three data excluding that the Members of the United Nations believe in the existence—or even the necessity—of a *legal* obligation to comply with Assembly declarations, comparable to the obligation to comply with treaties.

(i) First, it is abundantly clear that every State participating in the sponsoring, the discussion and/or the voting of Assembly resolutions in matters other than those susceptible of Assembly decision, feels legally entitled to consider each resolution as a non-binding recommendation. Conversely, no members seem to feel legally entitled to consider any such resolution as a binding instrument. It is not exclusively so where (as in instances discussed in

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lorsqu’on invoque la nécessité”. These *dicta*, which related to the question whether necessity could justify “compétence unilatérale de révocation du mandat par l’Assemblée générale” are recalled here because in the situation discussed in the text they apply *a fortiori*.

<sup>24</sup> Appendix, paras. 121 ff., especially 126–129.

<sup>25</sup> *Infra*, para. 27.

<sup>26</sup> As shown by Schwebel’s (ed.) volume on *The Effectiveness of International Decisions*, such a test would be interesting for both resolutions and treaties.

the preceding Section) the non-binding character of the instrument is indicated expressly or clearly implied.<sup>27</sup>

(ii) Second, no one witnessing the actual working of the United Nations escapes the perception that the activities of the Assembly are pervaded to an extreme by the urge of individual governments or groups of governments to get away from every session with as good an “image” as possible. This “image” factor is a very considerable driving force towards the proliferation of proposals, counter proposals and eventually resolutions. As everybody in the United Nations is convinced that recommendations are *per se* not mandatory, States tend to embellish their image by putting forward draft resolutions. Other States tend naturally to support such drafts. And potential or natural opponents are often reluctant to face the risk of tarnishing or spoiling their own image by opposing the proposal openly or by casting a negative vote.<sup>28</sup>

It would be not decisive to retort that national legislatures are equally or even more so conditioned. Of course, exigencies of party image and personal image are often paramount in the adoption of national legislation. The *differentia specifca* between a national parliament and the United Nations Assembly is that the national legislature *is*, by law and by definition, a legislature while the Assembly, *au départ*, is *not*. Whether a Bill gets voted under the urge of considerate reasons or sheer demagogic matters little. It is legislation. On the contrary, Assembly recommendations are not *per se* legislation. Whether members of the General Assembly really “mean it” or not, matters so much as to make *all* the difference.

The indication of the “political” or “propaganda” concerns of states as a major factor of the easy adoption of Assembly resolutions—especially of abstract declarations of principles—is not refuted either by the consideration that similar concerns often condition ordinary diplomacy.<sup>29</sup> True: but diplomacy does not claim to be law-making or law-declaring, except when it is a matter of concluding a treaty: and even then the conclusion proper is *beyond* the diplomatic phase.

It is obvious that our remark only relates to a tendency frequently revealed in the Assembly, but susceptible of *démenti*. The realisation that it exists, however, enhances in proportion not only the significance and the impact of negative votes, reservations and abstentions but also the inexistence of a law-making power of the Assembly.<sup>30</sup>

(iii) The above attitudes appear to be particularly obvious with regard to the abstract formulation of rules or principles.

Whenever concrete, specific issues are discussed, every State is cautious to the extreme. It will do its utmost—in spite of the non-binding character of recommendations—in order either to prevent the adoption of a recommendation it deems detrimental to its material or moral interest or to turn it into generalities by the process known in United Nations circles as “defusing”.<sup>31</sup>

When, on the contrary, declarations of general rules or principles are involved from the outset, States are relatively liberal in supporting or acquiescing. Firstly, the rule or principle will always be general enough to allow for argument against its application in any concrete instance. Were not such the case, an exception, an incidental phrase, an additional paragraph

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<sup>27</sup> *Supra*, para. 11.

<sup>28</sup> Compare Higgins, “The Development”, etc., in 1965 *Proceedings*, American Society of International Law, pp. 123–124.

<sup>29</sup> If we understand correctly, this is the point made by Higgins, *The United Nations*, etc., at pp. 39–40.

<sup>30</sup> On reservations as indications weakening the evidence of *opinion iuris* see Higgins, *The United Nations*, etc., at p. 40.

<sup>31</sup> It consists in subjecting the language of a draft resolution aimed at condemning the conduct of a given State or group of States to such a process of generalisation as to make the original intent of the draft disappear altogether. The resulting text will contain abstract statements of principle and generalised exhortations to comply.

can always be negotiated as a matter of barter for a vote or an abstention, so that the adoption of the principle will only represent a small nuisance or no nuisance at all. Furthermore, the principle can always be drafted in such terms for it to be, in perspective, of equal nuisance and equal advantage to every State.

In view of the factors in question the *regulatory impact* of Assembly resolutions seems inversely proportional to the degree of abstraction of the rules or principles they formulate.<sup>32</sup> The classification, however, would be in terms of *regulatory impact* (obviously conceivable also for *hortatory* enactments), not in terms of degree of *binding force* or “softness” of “hardness”.<sup>33</sup>

16. Another significant element is the overwhelming predominance, in all the declarations, of the normative over the institutional.

To the negative consequence of this state of affairs with regard to the effectiveness of the principles embodied in the Friendly Relations Declaration we shall revert in due course. It must be stressed here that the systematic rejection, in the Special Committee, of any constructive—however moderate—proposal with regard to the institutional framework of the duty of peaceful settlement, or of the prohibition of the threat or use of force, is the most blatant piece of evidence of the very determined resistance of the average XXth-century sovereign State to the idea of submitting to an international institution on any concrete issue. Such being the case, it is hard to conceive that the sovereign State can be at the same time so ready to submit to the resolutions of one such institution as to justify the doctrine that there exists a rule of customary international law—come into being as an effect of the actual submission of States to Assembly resolutions as a matter of practice—under which Assembly declaratory resolutions qualified as legally binding instruments.

To be sure, law-making is not the only function of the international community that should be removed from the exclusive hands of States—viewed as the *elementary units* or as the decentralised *organs* of international society<sup>34</sup>—and placed in the hands of a more centralised machinery. There is also law-determining and law-enforcing. Conceded that enforcing is the most problematic of all, is it credible that States became suddenly so eager to organise law-making through the agency of the General Assembly while remaining so obdurately attached to their “prerogatives” with regard to law-determining as they prove to

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<sup>32</sup> Among the resolutions formulating rules *in abstracto*, we would include, *inter alia*, together with the declaration we are dealing with, the Declaration on Human Rights, the Declaration on Non-intervention, the Declaration on the Rights and Duties of States, the Declaration on Asylum, the resolution on the Strict Observance of the Prohibition of the Threat or Use of Force and of the Right of Peoples to Self-Determination. The most abstract of all are precisely the declarations adopted by the Assembly not so much on the strength of any one of its given substantive competences but within the framework of Article 13.1 (a). At the opposite extreme we would situate resolutions dealing with specific issues and particularly with an actual, concrete crisis: Congo, creation of a new State, Middle East conflict, Namibia, Rhodesia, Apartheid, Hungary. Concrete resolutions may be, in spite of the heat or tension at the moment of adoption, legally more significant than general enactments.

Somewhere in between we would place resolutions characterised, as compared with the identified categories, by a *mixed* nature in that they present the features of both. These are *general-concrete* resolutions which formulate general or abstract rules or principles but do so within a concrete context, namely in view of an actual, relatively immediate need. In this category we would include such resolutions as the Declaration on the Independence of Colonial Countries and Peoples, the resolutions that preceded the Outer Space Treaties, the National Wealth and Resources Resolution. Resolutions such as these present a different kind of generality or abstraction. They deal with a general problem but in connection with concrete exigencies to be satisfied in given areas, or with regard to given concrete situations.

<sup>33</sup> The concept of “soft law” is, in our opinion, of highly questionable usefulness (*infra*, para. 112 (ii)). The question was discussed at the Hague Academy Colloquium on The Protection of the Environment and International Law (Kiss, editor), Sijthoff, Leyden, 1975, esp. at pp. 540–544 and 623–627.

<sup>34</sup> On that alternative, *Appendix*, paras. 123 ff. and 114–116, respectively.

be, for example, in the part of the Friendly Relations Declaration which relates to the peaceful settlement of disputes?

Indeed it might be contended that the preference for abstract law-declaring is but a manifestation of the physiological gradualness of an institutional *growth* of international society, in which the development of less encumbering abstract rules or principles naturally precedes the establishment of effective rule-determining machineries. But the contrast between the reluctance to accept commitments in the field of peaceful settlement and the enthusiasm for law-declaring finds perhaps a better explanation in the fact that abstract rule-declaring is assumed to leave things much as they are—adding at most to the weaponry of multilateral diplomacy or propaganda—while any serious commitment towards binding third-party settlement would bring about more *effective* and less easily escapable—legal determination.

If such is the case, that contrast would be a sign, equally physiological perhaps but less encouraging (for the doctrine of the Assembly's normative role), that the functional development of international organisation, so far, at least, as concerns international *law*, is really at a standstill in the field of law-making as well as in the field of legal determination.

### *Section 3. The Doctrine of Assembly Declarations as the Expression of the “Will” of the “Organised International Community” (and Other Doctrines)*

17. It would seem, however, that the question of the normative role of the General Assembly cannot be discussed conclusively—whatever one's beliefs—only in terms of a legitimising rule, contractual or customary. The discussion in terms of a legitimising rule is looked upon by many contemporary lawyers as “formalistic”. Underlying the widespread idea of a quasi-legislative competence of the Assembly there are in fact theories which draw upon the notion that in any society the ultimate sources of law are social facts and structures not always —especially at the inception—translated into formal rules. This would be particularly true in a society in transition like the international society, moving as it is from a state of so-called “decentralisation” of the law-making and law-determining (and law-enforcing) functions to a state of progressive “centralisation”.

According to this trend of thought, the label for which could be the doctrine of the “Organised International Community”, the General Assembly constitutes, as the main organ of the existing universal organisation of general competence, the most representative body of such an Organised International Community. To maintain that the “Will” of the Assembly is not law, or quasi-law, and to maintain that the law-making function remains exclusively in the hands of States, would mean, according to the doctrine in question, to close one's eyes to the new realities and in particular to the “revolution” that the international community is undergoing.<sup>35</sup>

This alleged revolution would consist not just in the accession to statehood by many new nations. In the expressed or implied intimation of an increasing number of scholars, the international community, once if ever composed exclusively of a limited number of sovereign States, is not only enlarged to more than twice that number of States and to an even more considerable number of other entities—foremost among which would be billions of individuals—but radically modified in structure by the presence of international organisations, which numbered about a dozen a century ago but are now hundreds.

Within such a mutation it would seem perfectly natural that the law-making function, together with other functions, once monopolised by States, is now being transferred to

<sup>35</sup> Even a sharp and prudent scholar like Shabtai Rosenne, *The Role*, etc., at p. 25 refers to “the constantly changing needs of an expanding international community itself going through a *deep revolutionary process*” (emphasis added).

international organs and particularly to the General Assembly.

Considerations such as these do not, in our view, alter the terms of the question. They are no substitute for the demonstration—on the basis, by all means, of the relevant historical and sociological facts—of the existence of a *juridical* competence of the Assembly to create law: namely, of a rule so empowering the Assembly. However, the nature of the doctrine is such and the degree to which it seems to bear upon the contemporary literature is so high (even the requirement of a “rule” being questioned as formalistic), that it cannot be summarily set aside.

One cannot contest, for example, such an *adage* as *ex facto ius*.<sup>36</sup> It would also be hard to deny some basic analogies between the United Nations Assembly and a parliament or a constituent body. In the presence of such analogies one cannot deny that it is conceivable that the Assembly would get to acquire some normative power by a gradual evolution of its own practice, namely as a matter of natural building-up of that Assembly’s authority, without Charter amendment or revision. If a legislative power of the General Assembly is not—as we have seen—*du droit accompli*, it cannot be excluded that it is more or less *facile à accomplir*. Of importance in that respect is also the fact that it is within the General Assembly, *inter alia*, that significant debates have been carried out aimed at the promotion of some of the most worthy among the *belles causes de l’humanité*.

Indeed, the States assembled in the United Nations seem to us to be looking at the organisation of the international society with little or no sympathy. Except perhaps in the presence of very special circumstances, and notably when it is a matter of asserting a law-making role of the Assembly as presently constituted, the member States are actually *opposed*, if one must tell the truth, to any further step in the organisation of their relations, let alone the organisation of the world or even of the so-called “society of States”. This is proved beyond any doubt not only by the record of the United Nations during the first quarter-century but particularly by the purely normative content of the Friendly Relations Declaration.<sup>37</sup>

18. A *la rigueur*, this might encourage one to proceed to a summary dismissal of the theory of the “Organised International Community”. There remains the fact, on the other hand, that the notion of the existence of an Organised International Community or Community of Mankind, and the related notion of the United Nations as the institutional framework of such a community, recurs in the literature of international law and organisation with such insistence, and in such terms, that one feels confronted with a problem. That concept is invoked, by the *doctrine*, not only in support of the theory of the legislative or quasi-legislative powers of the Assembly but also with regard to related matters of vital importance. It is invoked, for instance, in support of the unqualified application to international organisations of the “federal analogy” and of the theory of “divided sovereignty”. And it is on that same basis that the evolutive interpretation of the constituent instruments of international organisations—through doctrines such as “implied powers”, “effectiveness”, “subsequent practice of the organs *qua* organs”—is equalled with the evolutive interpretation of national, especially federal, constitutions. These doctrines have played an important role, for example, in the International Court’s proceedings concerning *Admission, Injuries Suffered in the Service of the United Nations, Certain Expenses*, and in

<sup>36</sup> Not to the point, however, of accepting as a legal argument a statement that “it would be meaningless to maintain that action taken with the active.”

<sup>37</sup> The organisational or institutional *motif*, very fashionable at the inception of the United Nations (suffice it to recall the language of the Draft Declaration on Rights and Duties of States) is less in honour at present. Nationalism and preservation of sovereignty are the main concern, except when vague statements about “common heritage” are made with regard to Outer Space or the Sea-floor and Subsoil. On the institutional element, *infra*, paras. 82, 97, 99, 104, 106–107, 109 (and mainly the *Appendix*).

the *South West Africa* cases. In some instances those doctrines may seem to have had some impact—however ambiguous—on the Court itself.<sup>38</sup> The doctrine of the “Organised International Community” has also been invoked, more or less explicitly, as the foundation of an automatic, *ope iuris* succession of the United Nations to the League of Nations in certain important functions.<sup>39</sup>

The doctrine must, therefore, be looked into. We do so—with reluctance—in the announced *Appendix*.

19. Separate mention and a partly separate treatment should also be made—in the limited measure afforded by the circumstances—of another doctrine to which some contemporary writers have recourse in the alternative or in conjunction with the doctrine of the “Organised International Community”. We refer to those doctrines of international obligation which within the framework of the conception of law as a “decision-making process” or as an “authoritative” decision-making process maintain that obligation is not necessarily conditioned to the presence of a rule, because while there may be rules without obligation there may be obligations without rules.

According to this doctrine there are subject-matters, times or occasions when such a concept as “rules” appears to be an incomplete description of the essence of international law and must be substituted or integrated by concepts, such as consensus, obligation, expectation.<sup>40</sup> In such circumstances an Assembly declaratory resolution—or any resolution, for that matter—could be binding regardless of whether it is a rules-creating instrument enabled to do so by a (secondary) rule<sup>41</sup> raising it to the rank of a “formal” source.

To begin with the “area of agreement”, in so far as these doctrines emphasise the importance of socio-psychological and other elements—such as claims and counterclaims, and acquiescence, or expectation, or consensus—in the development of international law, they contribute valuable elements to the analysis of the ingredients of law in general and international law in particular.<sup>42</sup> McDougal’s contributions, for example, and those of Falk and Schachter, have great merit in widening and deepening the knowledge of the processes through which international customary law develops and in particular those processes of legal determination, interpretation and application which in turn concur to the adaptation and development of existing law. Because of this very reason, however, we do not believe that the doctrines in question imply any significant alteration, either in the concept of law, or in the system of the sources of the law of nations, or, in particular, in the theory of the legal effects of international resolutions.

20. The unpopularity of the notion of law as “rules” or “norms” is a recurrent phenomenon explainable partly as a reaction against narrow-minded, formalistic and conservative notions of the legal system and the legal system’s operation—within or without the Courts—partly as the understandable “satiété” of any lawyer with the law he continuously

<sup>38</sup> See, *inter alia*, the *South West Africa* cases (*Ethiopia and Liberia v. South Africa*, 1960–1966), recalled by Fitzmaurice, dissenting opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding Security Council Resolution 276 (1970), *ICJ Reports 1971*, at p. 241. Cf. also Read in 1950 (*South-West Africa*) case’ *ICJ Reports 1950*, at p. 172.

<sup>39</sup> *Infra, Appendix*, para. 139.

<sup>40</sup> *Supra*, para. 5 and references thereunder. An admirably clear condensation of the doctrine in question is offered by Lissitzyn, O. J. *International Law To-day and To-morrow*, 1965, at pp. 39–40.

<sup>41</sup> In the sense indicated, for example, by Hart, *The Concept of Law*, Oxford, 1961, at pp. 77 ff.

<sup>42</sup> McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order*, 1967; and McDougal, *International Law, Power and Policy*, etc., Hague Rec. 82 (1953-I). See also, in addition to Falk’s works listed in the Bibliography, Lissitzyn, *International Law To-day and To-morrow*, esp. at pp. 39–40; Higgins, “Policy Considerations and the International Judicial Process”, *International and Comparative Law Quarterly*, XVII (1968), *passim*., esp. at pp. 58 and 61; and Schachter, *Towards a Theory*, etc., at pp. 15 ff.

lives with. The truth remains that law is essentially made of rules.<sup>43</sup> Of course, in addition to rules, there are principles, general principles and legal policies. But who denied that?

Naturally, the practitioner of the law is likely to get impatient at rules in general when he feels uncomfortable with rules that do not suit him. Even more justified is the reformer's impatience at rules which he deems to be not in conformity with given values or exigencies, old or new. Scholars, in their turn, may either feel the same way spontaneously or simply try to meet the exigencies of practitioner or reformer. The lawyers, however, should avoid the error of not realising that some, if not all, the things they consider to be law but not rules are either *not* law at all or law *and* rules at the same time.

Be that as it may, we fail to see any advantage—technical or political—in contending that law is not made of rules and of the other known normative elements. The problem is to press either for a better understanding and application of existing rules or for their alteration in order to meet given exigencies. There is nothing to gain in either direction by substituting the concept of law as a process for the concept of law as a body of rules. Surely one wants to assert the cherished value or interest as a matter of rights and duties, not as a matter of contingent expediencies. Rules are the only answer, however difficult it may be to get them.

We also fail to see what are the elements that the doctrine in question proposes to substitute for rules of conduct—namely consensus, obligation, expectation—except factors of rules, as is the case of consensus, or effects or aspects of rules, as is the case of obligation. Isn't expectation another rule-making or rule-evidencing factor? Are not the expectation of compliance, and the fact of compliance on the whole, with a behaviour prescription two of the signs, if not the main signs, that one is in the presence of a legal rule, created either by a formal process such as legislation or contract, or by a less formal process such as tacit agreement or custom? If, on the other hand, there is no expectation, or the expectation proves *on the whole* to be vain, does it not simply mean that there is, precisely, no legal rule or norm? Isn't expectation in such a case the hope, the wish for a rule? As such, it is of course part of the process that may lead to law. But what is the advantage of assuming that it is law already?

The doctrines in question resemble considerably, from the point of view of the relationship between legal norms and bare facts—facts from which the existence of the norms depends and facts constituting the realisation of the norms' prescriptions—the so-called "institutionalist" theories of national law, according to which a legal system consists not only of rules but also of the institutional elements "supporting" the rules. Acceptable in so far as they simply indicate another example of the obvious truth that *ex facto ius*, the institutional theories are not acceptable if and in the measure in which they imply—as they seem to imply—that the institutional element is not, as any other fact which is of relevance for the lawyer, a law-creating fact *or* a fact to which the law applies, according to whether one considers it *de lege ferenda* or *de lege lata*.

Be that as it may of the doctrine in question as a general theory of law, we would certainly agree that under given circumstances Assembly resolutions create expectations and other situations that may substantiate, *together with other factors*, a customary rule or an "informal" contractual rule. This will be discussed in the next chapter with regard to custom and agreement, with regard to law-making and law-determining, and with regard to general principles. It should appear there that the resolutions of international bodies are certainly among the elements of States' practice that may contribute to the creation of rules of customary law or of contractual rules. This does not mean, however, that resolutions are law-making or law-determining in the sense in which custom, agreement, arbitral awards, judgments and decisions of political bodies are *per se* law-creating or law-determining.

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<sup>43</sup> In the literature of English language suffice it to recall Hart, *The Concept of Law*, p. 78 f. and *passim*. Without the idea of rule, according to Hart, "we cannot hope to elucidate even the most elementary forms of law".

21. Leaving aside “policies”, with which we may deal briefly at a later stage, another important aspect of the doctrine under consideration—in its general import as well as in its impact on the problem of Assembly resolutions—is the notion of “authority”. This is an essential element, it seems, of the concept of international law as “an authoritative decision making-process” or as a “global process of authoritative decision”, the actors in the process being both State authorities and international organs.<sup>44</sup>

White reiterating acceptance of the concept of process as an excellent illustration of the manner in which in fact the rules of customary and conventional law come into being and are determined, interpreted and applied by States and, far less frequently, by international organs—and while agreeing that not just “much” but even *all* international law . . . rests not on abstract formulations of “the general interests” but “on the congruence or reasonable accommodation of the interests of many nations producing a consensus which can be translated into legal terms”<sup>45</sup>—we are troubled by the term authoritative.

In the measure in which that term serves the purpose of distinguishing people at large (scholars included) from the ultimate actors, conceived as the whole national and international “officialdom”, we have no difficulty in accepting it. Such distinction suits us perfectly to discriminate those who directly participate in the international *rule-making* and *rule-determining*, interpreting and applying processes from those who do not. If, however, one referred to authority in the sense in which States and their organs, and particularly national courts, operate as *authorities* with regard to creation, determination, interpretation and application of municipal law, we would be unable to concur. Whether the process theory is compatible with rules or not, one thing is the situation in municipal law and another thing the situation in international law. In the international “arena” States are not authorities in any legal sense *vis-à-vis* each other, except in the theories of *dédoublement fonctionnel*.<sup>46</sup> Given States at given times prevail *de facto* and exert a greater *de facto* influence on law-making and law-determining: but not as international “authorities”.<sup>47</sup> As regards international organs, they do exercise something comparable to limited “authoritative” functions. But this happens only when they are *legally* empowered to make binding *decisions*, political or judicial. Otherwise they are not authoritative in a legal sense.

At this stage, however, the doctrine in question merges into the theory of the “Organised International Community” recalled in the preceding paragraph and discussed in the *Appendix*.<sup>48</sup>

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<sup>44</sup> In Lissitzyn’s words, for example, the actors are “authoritative decision-makers, national and international” (quoted work, at p. 39) and “The task is performed not only by ‘international decision-makers’ such as the judges of international courts, but also, and more frequently, . . . national governments as they appraise each other’s actions and responses in the international arena” (same work, at p. 40).

<sup>45</sup> Lissitzyn, quoted work, at p. 40. On the “general interest” (and on States’ and human values) see, however, *infra*, para. 106 and *Appendix*, para. 126.

<sup>46</sup> *Appendix*, paras. 115–116, 131 and 161.

<sup>47</sup> *Appendix*, paras. 123 ff. and 131.

<sup>48</sup> On the aspects of the “process” theory of international law which relate to legal policies, *infra*, para. 106.



## CHAPTER II

### ASSEMBLY DECLARATIONS WITHIN THE FRAMEWORK OF EXISTING LAW-MAKING AND LAW-DETERMINING PROCESSES

#### *Section 1. Assembly Declarations as Part of the Practice of States*

22. The inexistence of any contractual or customary rule qualifying Assembly declarations as law-making instruments does not mean that Assembly declarations have no effects of international legal *interest*. It is hardly conceivable that a text enacted by an international organ operating under a treaty and concerning the relations of States *inter sese* or with other entities, or in any other way the conduct of States at home or abroad could be without value for, or from the point of view of, international law. Some precisions, however, are indispensable.

In the first place there is of course the *hortatory effect* which is typical of international recommendations whenever no other effect is expressly or implicitly envisaged by a contractual or customary rule. From this point of view recommendations (and declarations among them) are opposed to international decisions and other binding deliberations such as the regulations, the decisions and the directives of the European Communities.

In the second place General Assembly declarations “produce”—*as well* as decisions or any other enactments of international organs—all the effects which any piece of joint or several practice of States in their external or internal affairs can produce with regard to any aspect of the international legal intercourse among those States. The people who assemble, make statements, submit oral or written proposals, and eventually participate in the vote by which a resolution is adopted, are envoys of States. They operate as elements of the organisations of their respective States. It is therefore only normal that their statements, attitudes and acts count, subject to exception or specification deriving from special circumstances and/or from acts of the governments concerned, as governmental statements, attitudes and acts, *susceptible* of evaluation—and in that sense of *legal* effects in a proper sense—under international law, or otherwise susceptible of having some factual effect upon international law.<sup>1</sup>

23. In particular, it is natural that the text of a non-binding Assembly resolution as well as the attitudes manifested by States in the vote or in the debate concerning such a resolution merge—at some stage—into one or the other of the processes universally accepted as the law-making processes of international law. We refer to treaties or conventions—agreement in general—and custom. It is equally natural that the same resolutions, and the attitudes manifested by States in the votes and debates should have a bearing on legal determination, a field where the role of political bodies is likely to be of greater importance, in spite of the emphasis generally put on the so-called “legislative” or “quasi-legislative” function, than in the field of law-making.<sup>2</sup>

It must be stressed again, however, that one thing is to be aware of the possible *factual* impact of Assembly resolutions on law-making or law-determining, and another thing is to accept the idea that Assembly action is either—

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<sup>1</sup> On the organisation of States for international legal purposes, *Appendix*, paras. 116, 121–122, and footnote 23.

<sup>2</sup> The general emphasis upon law-making is probably due, *inter alia*: (i) to the fact that the United Nations organs involved being “political”, one is led to envisage them more as law-makers than law-appliers; and (ii) to the fact that States are perhaps more reluctant to accept concrete legal determination than the formulation of general, abstract rules (*supra*, para. 16).

- (i) a new source of law at the side of, or in any manner additional to, treaty and custom;<sup>3</sup> or
- (ii) a new or additional set of law-determining or law-applying acts, comparable to the awards of arbitral tribunals or the judgments of the International Court of Justice.<sup>4</sup>

It is not our purpose to survey now the great variety of factual “effects” that Assembly resolutions or declarations may bring about, or may concretely have brought about, with regard to the creation, modification or extinction of a rule of international law or of an international legal situation deriving from any such rule’s determination or application. Considering, however, our problem: and considering the normative although not necessarily law-making or law-determining purpose ostensibly pursued by Assembly declarations, it may be of interest to try to determine in less general terms the kinds of impact that Assembly declarations may have upon the creation, modification or extinction of rules of international law or in the determination-application of any such rules to concrete situations. This may help qualify the negative conclusion reached in the previous chapter with regard to the Assembly’s law-making role and make our position more clear with regard to the prevailing doctrines concerning the difficult matter.<sup>5</sup>

It will be convenient to deal separately with law-making and law-determining; and with custom and treaty (and general principles).

### *Section 2. Assembly Declarations and Customary Law*

24. There can be no question as to the impact that Assembly resolutions may have on customary law at any one of the latter’s conceivable stages. This applies both to the inception, the progress and the perfectioning of the *iter* through which a customary rule comes into being (namely to the phase of the rule which precedes its being law) *and* to the determination or application of the rule or to the evidence of the rule’s existence (namely to a phase subsequent to the coming into being of the rule). The coming into being of a rule having a negative incidence upon existing rules, a resolution may obviously have an impact also in the process leading to *desuetudo* of a rule.

Lest one considers in extent and depth all the customary rules of international law on which one or more Assembly resolutions may have had an impact, it is not possible to go beyond mention of a few examples. As such one may recall: the possible impact of the Declaration on Permanent Sovereignty over National Resources on the international legal rules relating to nationalisation and protection of foreign investment; the possible impact of various resolutions, starting from the Declaration on Human Rights, on the international rules which may be relevant with regard to racial discrimination; or the impact of the Declaration on Independence of Colonial Countries and Peoples and of the resolution on the implementation of the latter on the development of the law with regard to the self-determination of individuals or peoples.<sup>6</sup>

While it is easy to indicate examples—or to discuss each one of them on its merits<sup>6a</sup>—it is

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<sup>3</sup> As maintained, *inter alios*, if we understand correctly, by Asamoah, *The Legal Significance*, etc. A similar position seems to be held by Castañeda, *Legal Effects of UN Resolutions*, Chapter 7. Other doctrinal positions of relevance were mentioned in the Introduction.

<sup>4</sup> *Infra*, para. 42.

<sup>5</sup> There is no doubt whatsoever, to put it with Secretary-General U Thant, (1970, *Proceedings*, American Society of International Law, at p. 276)—that “the United Nations contributes to the growth of international law in multiple ways, just as international law contributes to the functioning of the United Nations in multiple ways”. The question is to see exactly how decisively and intensively, or in what sense.

<sup>6</sup> On these and other instances see Asamoah, *The Legal Significance, passim*.

<sup>6a</sup> See, for instance, *infra*, paras. 76, 81, 106.

difficult to make order in the issues raised by the precise determination of the role of Assembly declarations on the development of customary law.

Two general points must, however, be made. The first point, which follows from the previous Chapter, is that Assembly recommendations only provide *material* custom-making stuff.<sup>7</sup> Unlike binding decisions, Assembly recommendations are sources in a *material* sense only.

This point, however, calls for qualification in view of the controversial nature of custom in general and international custom in particular. While many scholars consider custom to be a *formal* source, not a few believe custom to be a source in a merely *material* sense. If the latter view were correct, Assembly recommendations and custom would be sources in the same sense.

To discuss the nature of custom thoroughly would lead us too far astray. We can only state briefly for the present purposes that in our opinion custom as a source is neither purely *formal* nor merely *material*.

A reasonable compromise, in our view, is probably to admit that international custom really occupies a position which makes it *neither* fully formal (as treaty, contract or act of parliament) *nor merely material* (as, for example, the needs of the society which prompt the “creation” of the rule, or the general historical *factors* of such needs, and the other indirect factors of formation of a customary rule). Custom would thus appear to be in an intermediate area between formal and material, but closer to the formal sources than to mere historical factors.

When it comes to declarations of principles, however, they undoubtedly qualify as *material* sources in the same *narrow*, proper sense in which the needs calling for a rule, or the general historical factors of a rule—let’s say the *indirect*, as distinct from the *direct* factors of a customary rule—are merely *material* sources.<sup>7a</sup>

The second point is that in the measure in which the United Nations contribute to custom, they do nothing really new, either in comparison to the pre-United Nations times or *par rapport* with the situation obtaining in the United Nations until a certain time.<sup>8</sup>

Some clarification can now be sought with regard to single controversial aspects of the problem.

25. An essential point, in most direct contrast with the theory of the quasi-legislative competence of the General Assembly, is the relationship between “United Nations resolutions” and “United Nations practice” as a whole, and the relationship of the latter with the “practice of States” as a whole.

To begin with the relationship between declaratory resolutions and United Nations practice, one must always distinguish, within the scope of this necessarily broad discussion, between the resolution as a formal act or instrument and the resolution as part of the materials or facts—historical and social facts—constituting States’ practice. While it is natural and inevitable that emblematic reference be made in both meanings to an “Assembly resolution”, the difference is a capital one. The *resolution* as such is the *hortatory act-instrument*, with its

<sup>7</sup> *Contra*, it seems, Higgins, *The United Nations*, etc., at p. 38 f. According to that author, as indicated earlier, Assembly resolutions are sources *formelles* and *matérielles*.

<sup>7a</sup> Our position with regard to the matter thus differs not only from those for whom custom is a *formal* source but also from Ago’s well-known position (*Scienza giuridica*, pp. 78 ff.). Of Ago’s *critique*, however, we share the essence, especially with regard to the rejection of the *Grundnorm* theory.

The position we are inclined to favour also differs from Friedmann’s view quoted in the Introduction.

<sup>8</sup> Compare Higgins, last cited work, at pp. 37–38. For reasons given in the *Appendix*, paras. 157 ff., we are unable to see what is meant exactly by the distinction between “the practice of States *qua* States, and the practice of States *qua* organs” (Higgins, *ibidem*, at p. 38). States, for us, do not normally act in a capacity of “organs” of international law. See *Appendix*, paras. 121 ff.

problems—legal and political—of validity, meaning, impact. The resolution in its material essence is really the *text as one element in a congeries of facts* connected with, or related to, the adoption of the resolution and including such adoption.

Among the facts of the latter kind are general and *ad hoc* debates, statements, proposals, comments, counter-proposals, amendments, formal and informal negotiations, votes, declarations of vote. It must be emphasised that from such a *material* point of view, a non-adopted resolution, or an amendment adopted or rejected, may well possess in given circumstances, for the solution of a given question (existence, inexistence or meaning of a customary rule), a greater significance than an adopted resolution.

26. A distinguished student of the role of the United Nations in the development of international law raises the interesting question “How does one weigh, juridically speaking, the evidence of practice in the United Nations as compared with contrary evidence which may be made available elsewhere”.<sup>9</sup> This question extends to Assembly resolutions.

United Nations practice as a whole, inclusive of Assembly recommendations, is an integral part of the practice of States. It is only for reasons of practical convenience or scientific analysis that one distinguishes between the practice of States in the United Nations and States’ *practice at large*; and it is only for such reasons that one may want to isolate either United Nations practice as a whole or United Nations resolutions from States’ practice at large. In so far as United Nations practice, and notably United Nations declarations are concerned, the ascertained inexistence of any contractual or customary rule qualifying Assembly declaratory resolutions as binding legal instruments<sup>10</sup> and the obvious inexistence of any rule qualifying United Nations practice in a wide sense as of special legal value, exclude the existence of any legal distinction either of United Nations practice as a whole or of Assembly recommendations from States’ practice at large. “Juridically speaking”, therefore, there is no distinction, in the sense of a distinction based on a legal qualification.

The only conceivable distinctions are *material* distinctions, namely distinctions of fact between the value of each piece of practice as compared to all the others, whether the practice is United Nations practice or States’ practice at large, and in the former case whether it is a matter of an adopted recommendation or of a different piece of United Nations practice. It is a matter of appreciation—*objective* appreciation—on the part of the observer, be this the International Court of Justice, an arbitral tribunal, another international organ, a scholar or, as is mostly the case, a State’s legal adviser. The only criteria of appreciation of the comparative value of “in” and “extra-United Nations” practice are the general criteria on the basis of which one determines the coming into being, or the evidence of the existence, of a rule of customary international law. It is perhaps reasonable to assume that under such criteria United Nations practice—or perhaps United Nations recommendations—would in principle be considered as *in fact*, particularly significant, subject however to any different indication emerging in the given case.

In his dissenting opinion on the *South West Africa* cases, Judge Tanaka seems to hold a different view. He seems to think either that the availability of evidence of United Nations practice was sufficient to exclude the necessity of further probing into what we call States’ practice at large, or that in any case United Nations practice was decisive.<sup>11</sup> It is not clear to

<sup>9</sup> Higgins, last quoted work, at p. 46.

<sup>10</sup> A conceivable—but in our view nonexistent—qualification of the United Nations practice on recommendations would be the *juris et de iure* presumption asserted by Castañeda, passage quoted *infra*, footnote 80 to Chapter II.

<sup>11</sup> I’m not sure whether “Judge Tanaka thought that there was something positivistic in the view that customary law, developed through the collective processes of the United Nations, could be denied by the failure of some or even many nations to conform” (Higgins, last quoted work (1970), at p. 47). If he did so he simply begged the question. If the United Nations developed norm was customary law, it could obviously *not* be “denied” by anything (except an agreed derogation by the parties). If it could be “denied”, it was not customary law.

us, from the discussion following her question, what exactly is Doctor Higgins' answer.<sup>12</sup> Until her last paragraph she seems inclined to give in to sympathy for what she calls "the collective processes of the international community". In the end, however, she thinks "that a strong advocacy of the law-creating role of the United Nations . . . does not necessarily entail going along with (Judge Tanaka's) view that practice within the United Nations is paramount in the face of conflicting evidence". We would concur.<sup>13</sup>

This conclusion, in our opinion, is more correct, although less enthusing. It conforms first with our conception of the relationship between United Nations practice and States' practice at large (as two manifestations of international practice as practice of States); second, with our understanding of the nature of international organisation.<sup>14</sup> The above conclusion is also the most convincing in view of the "customary" nature of the rule that was being sought. It was a matter of existence of a customary rule, not of a rule "positivistically" conceived as the emanation of the problematic "will" of the international community. The States' *practice at large* was the most appropriate area to explore.

27. The simple repetition of a rule in the Assembly does not by itself "create"—in spite of overwhelming majorities, similarity (or identity) of content, frequency of reiteration or citation, or length of the period covered by the repetitions—a corresponding customary norm.<sup>15</sup> It would be too easy if the "shouting out" of rules through General Assembly resolutions were to be law-making simply as a matter of "times" shouted and size of the choir. By all means, we would urge that one let the General Assembly shout as often and as loud as it is able and willing to shout. However, for the shouted rule to be customary law there still remains to consider the conduct and the attitudes of States with regard to the actual behaviour, positive or negative, contemplated as due by the rule.

This does not mean, on the other hand, that the rule would exist only on the condition that absolute, general or universal, compliance were ascertained.<sup>16–17</sup> Where, however, compliance (together with *opinio*) is not "regular" or "habitual", much will depend, in addition to all the circumstances which may justify given cases of non-compliance, on the *attitudes of other States* and on the reaction to such attitudes on the part of the non-complying parties.

Going back to reiteration, it is our impression that in the *South West Africa* cases the choice of legal counsel for the applicants (and of Judge Tanaka) to rely so much on Assembly resolutions was a non-felicitous short-cut. The possibility, afforded by the proliferousness of the Assembly's normative activity and by the vagueness and generality of the rules produced, of relying upon an Assembly resolution in support of virtually any legal contention should not be a sufficient excuse to save the trouble of giving an adequate demonstration of the existence of a rule of customary international law.<sup>18</sup>

<sup>12</sup> Last quoted work (1970), at pp. 46–48.

<sup>13</sup> We concur also with regard to the quoted author's dissatisfaction (*ibidem*) about the 1966 judgment of the International Court of Justice in the *South West Africa* cases.

<sup>14</sup> Appendix.

<sup>15</sup> That a deeper probing is necessary is recognised by Virally, in the chapter on the Sources in the *Manual of International Law* edited by Sørensen.

<sup>16–17</sup> We agree here with Higgins, *The United Nations*, etc., pp. 40–41.

<sup>18</sup> According to Higgins (who is rightly critical of Jessup and Van Wijk) the question, in the *South West Africa* cases, whether there existed a rule condemning racial discrimination, would seem to coincide with the question "whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general *opinio iuris*, have created the norm in question" (*The United Nations*, etc., at p. 43). (As we see it, incidentally, *opinio iuris* being under certain conditions decisive *in itself* for the existence of a customary rule (*infra*, para. 29), the sentence where that *opinio* is mentioned as having been given rise to would beg the question altogether.)

But what we find most relevant and not acceptable in Judge Van Wijk's position is not his denial of the

It is clear, in any case, that the doctrine of repeated shouting<sup>19</sup> has no foundation. Its only presumable justification could be the idea that shouting by the Assembly is an equivalent of the alleged “will” of the alleged “organised international community”.

Judge Tanaka’s conception of a kind of institutionalised custom-making function of intergovernmental bodies is rather wide-spread. As noted by Rousseau, some writers look at Assembly recommendations as “le commencement de l’élaboration d’un droit coutumier par les membres de la communauté internationale agissant *in corpore*”.<sup>20</sup> One of the justifications of Rousseau’s remark seems to be the statement of that scholar who asks, in connection with the identification and scope of the “*law-making practices of United Nations political organs*”, and in particular with the paramount problem of *opinio iuris*, “If a law-declaring resolution of the General Assembly is adopted by a very substantial majority, what guidance do we have as to whether *they believed themselves legally bound so to do?*”<sup>21</sup>

One seems to lose, in this statement of the question—in which the very expression “law-making practices of the United Nations” is misleading—the conception of recommendations as part of States’ practice in the United Nations, in its turn a part of States’ practice at large.

According to our understanding of Assembly activities, declaratory resolutions included, United Nations practice is not envisaged by any rule attributing to it a custom-making function.<sup>22</sup> It follows that recommendations, together with any other elements of United Nations practice, contribute directly or indirectly to one or the other of the elements of custom (or to the sole element for those who believe there is only one), according to the case. The contribution may consist, for example, in the successful exhortation of some conduct of States. It may also consist in a demonstration—or, more precisely, in contributing to the demonstration—of *opinio iuris*. It is in *this* sense that recommendations, together with the many other components of United Nations practice, are part of that practice of States which brings about the formation of customary rules. As such, the declarations are neither “law-making” *tout court* nor specimens of *law-making practices* of the United Nations Assembly. Terms such as these would be appropriate, we think, only if recommendations were thought to be *per se* law-making or *per se* that “instant custom” that the quoted scholar seems not ready ‘to admit them to be.<sup>23</sup>

Only within such a notion of the law-making role of recommendations could there be a

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existence of an Assembly’s legislative power. It is his curt denial of the existence of a general rule or principle of the law of nations condemning racial discrimination. We would not embark here on a discussion of this important matter. But it is quite possible that the existence of a norm on non-discrimination in the “society” of States of our time could be asserted not only on the basis of such elements as may be drawn from United Nations practice (including of course the resolutions referred to by Higgins) but also on the basis of “outside” elements, starting from the results of the Nuremberg trials with regard to crimes against humanity.

From such a perspective, to say that a rule owes its existence as custom merely to the fact that it was repeatedly asserted by overwhelming majorities in the United Nations Assembly (or other United Nations bodies, or Agencies of the United Nations family) is to diminish the value of the rule as a primary rule of international law. It would mean—from our point of view—to make that rule as doubtful—as a *customary* rule—as that other rule—the most reiterated of all in the United Nations and elsewhere—according to which the use or threat of force is prohibited. Indeed, although the rule of conduct corresponding to the content of Article 2.4 of the Charter is embodied in the Charter and has been certainly reiterated in the United Nations at least as often as the duty to refrain from racial discrimination, we do not believe it has become a rule of customary law (*infra*, para. 58).

<sup>19</sup> This doctrine seems to be shared by Jennings, “General Course”, in *Hague Rec.* 121 (1967-II), at p. 335. The shouting of the rule by the Assembly would seem to be the equivalent of “conduct showing *opinion iuris*”.

<sup>20</sup> *Droit international public*, I, 1970, at p. 433.

<sup>21</sup> Italics are added. The passage is from Higgins, *The United Nations*, etc., at p. 39. But compare, for the notion of customary law, Higgins, *The Development* (1965), at pp. 1–2.

<sup>22</sup> *Supra*, paras. 7–16.

<sup>23</sup> *The United Nations*, etc., at p. 43. Our view with regard to “instant custom”, is briefly explained *infra*, para. 29.

sense in determining whether the adopting majority “believed themselves legally bound to do so”. Even in that case, perhaps, the requirement is rather obscure. What would matter—within the context of a conception we are unable to share anyway—is not whether Assembly members felt legally bound *to vote* for the declaratory resolution but, rather, whether they felt legally bound by the rules they proclaimed.<sup>24</sup>

This does not mean that according to our view of the role of Assembly recommendations in the development of international customary law, *opinio iuris* is irrelevant. It is, on the contrary, as relevant as that element can be for the coming into existence of any customary rule or for the evidence thereof. But *opinio* must not necessarily be related to the moment of adoption of the declaratory resolution. Of course, if the circumstances of the presentation, discussion and adoption of a recommendation are such as to satisfy the observer that the conduct declared to be due was considered to be due as a matter of legal obligation, or of necessity (an element more substantial than just the sentiment of an obligation to vote in favour) so much the better. There will be a pretty good—but not necessarily decisive—piece of evidence in United Nations practice itself, in support of the notion that the rule is considered to be an existing rule.

But the really decisive element will mostly come from elsewhere. It will come from the practice of States prior to, concomitant with or following the United Nations recommendatory process. And it will come not, or not so much, in the form of an expression of belief in the existence of a *general rule* (let alone the existence of the obligation to recognise it *in abstracto*) as in the form of the expression, or the implication, of the belief of States that the *conduct* which the rule aims at imposing is due or necessary.<sup>25</sup>

28. The full realisation that Assembly resolutions are only part of States’ practice in the United Nations and that the practice (of States) in the United Nations is but a part of States’ practice at large, reduces, in a way, the importance—from the viewpoint of custom-making or custom-proving—of majorities or unanimities behind Assembly resolutions.

Of course, the size of the vote—favourable and negative votes and abstentions—is *of relevance*. It is *indicative* of the degree to which the assertion by the Assembly of a rule, or of an interpretation, meets the favour of States. This is significant for the hortatory or moral value of a declaration, for the chances of compliance by States, and indirectly for the actual materialisation of a generalised conduct susceptible to bring about a customary rule or to prove its existence.

In so far, however, as the issue is not the formally binding character of the resolution or declaration as the *overall* attitude and conduct of States with regard to the declared rule (or interpretation)—within and without the United Nations—the vote *as such*, and its size, are not decisive. The vote size will be relevant from this viewpoint, within the congeries of other elements, namely, as a *material* element among any other elements that may matter. Its degree of importance will depend on the circumstances and on the nature of the other, United Nations and extra-United Nations, elements.

This consideration should also help redimension the rather puzzling insistence of not a few distinguished international lawyers—among those more inclined to recognise the existence of a law-making role of declaratory resolutions—upon the notion that somehow, *in connection with the “development” of an Assembly’s quasi-legislative competence* (namely as a factor or a consequence of such competence), international law has become so much less exigent, with regard to the requirement of consent, as to have substituted *consensus* for *consent*. It would thus seem to be “due”, *inter alia*, to that development of international organisation, notably to the development of the General Assembly as the most representative

<sup>24</sup> On this point *supra*, paras. 14–16.

<sup>25</sup> Doctor Higgins seems to think the same way (*The United Nations*, pp. 46–48).

body of the *organised international community*, if at last unanimity is no more *condicio sine qua non* of international law-making.<sup>26–27</sup>

No doubt, States have lately given up to a degree, in international conferences and in permanent collective bodies, the requirement of unanimity. This emerges clearly from the comparison of the United Nations with the League. The development is not without consequences on multilateral treaty-making. Here the full preservation of the rule of consent for the purposes of the decisive stage of ratification may be frustrated in a measure by the fact that—except for reservations—the text would be in principle untouchable by a ratifying State which felt its interests had suffered, in the phase of negotiation, from the majority rule prevailing within a conference or within a United Nations body.<sup>28</sup>

However, the novelties brought about by these developments—*du reste* limited—directly affect *treaties* and recommendations or decisions<sup>29</sup> of international bodies. They do not seem to affect international custom because the formation of customary rules was *not*, previously, except in the opinion of those who identified custom with “tacit agreement”, subject to the requirement of consent, in the sense of unanimity. Consensus as opposed to consent, in other words, was already deemed sufficient, according to the prevailing view, for the formation of customary rules.

Whether and in what sense the development of international organisation will have a bearing on this requirement of custom in the short or long run we do not feel quite ready to say.<sup>30</sup> It does seem, however, that the tendency of the United Nations Assembly to

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<sup>26–27</sup> It has been written that “The notion of contract was in time replaced by consent, express or implied. Wilfred Jenks, among others, has persuasively suggested that, so far as international organisation is concerned, consent has effectively been replaced by consensus” (Higgins, *The United Nations*, etc., at p. 41, quoting Jenks’ article referred to here below. The same idea is in Falk, *The Quasi-Legislative Competence*, etc., at pp. 784, 790; and in other works.

If we understand him correctly, in “Unanimity, The Veto, Weighted Voting, Special and Simple Majorities and Consensus: Modes of Decision in International Organisations”, *Cambridge Essays in International Law in honour of Lord McNair*, London, 1965, pp. 48 ff., Jenks is not concerned so much with unanimity being unnecessary or less necessary for a legally valid (namely *regular*) decision, let alone for a recommendation. Jenks seems to be mainly concerned with the problem of securing compliance by means other than just that legally binding character of the *decision*, which is already there. This is our understanding, for instance, of the following passage (at p. 48): “The problem now is primarily one of devising procedures and safeguards to ensure that decisions are taken with a degree of deliberation and sense of responsibility commensurate with their importance. We appear to be entering upon a new phase in which the keynote is no longer either unanimity or majority decision but consensus. The wheel has not come, and will not come, full circle, but there has been a marked shift of emphasis from the desire to ensure that decisions are no longer blocked by a requirement of unanimity or a veto to the desire to ensure that they reflect a sufficiently wide consensus to make them effective in practice.” What Jenks drives at here is to secure, behind a decision, as wide a consensus *as to make the decision*—namely a binding instrument—*effective in practice*. At page 55 f. Jenks makes it even clearer that he is seeking to promote consensus as opposed to *majority decision* (namely imposed decision) not to *consent* which is required for the conclusion of a contract or for the adoption of a unanimous resolution. Very valuable, in Jenks’ paper, are also the two pages (53–57) illustrating the meaning of *consensus*.

One notices with interest, for instance, that while consensus is being pointed out by some as one of the great achievements of contemporary international law and organisation, it is indicated by Jenks in this paper as a “*mode of decision as old as primitive law*” (p. 56) and fundamentally as a *device of diplomacy* (italics in the quoted sentence are added).

<sup>28</sup> The more liberal régime of reservations seems obviously conceived to reduce the effect of majority rule in the phase of negotiation.

<sup>29</sup> And other instruments.

<sup>30</sup> Quite incidentally it is perhaps worth noting that the contemporary practice shows actually signs of the opposite, namely that consent takes at times the place of consensus. One sign might be the requirement of *recognition* added in Vienna to the International Law Commission’s original formulation of Article 38 of the Vienna Convention on the Law of Treaties.

Another matter is of course “special custom”, for which, as rightly pointed out by Parry, *The Sources*, etc., pp. 58–59, the Court requires unanimity. But see Parry himself, pp. 59 ff., especially at 61–62.

“legifigate” by resolution or declaratory resolution has no merit in a *consensus versus consent* development in the formation of the customary rules to which Assembly resolutions may contribute in the various measures we are considering.<sup>31</sup>

This seems to be a felicitous development in view of the better guarantees which are offered by *custom*, as a law-making process, as compared to majority or even unanimous Assembly “rulings”. Were the resolutions binding as “voluntary” law, whether adopted by majority or unanimously, international society would have moved from an excess of “rigidity” to an excess of elasticity of the law that might facilitate the adoption of inconsiderate norms.

Just as most voluntary law is entrusted for its creation (within the United Nations framework) to the “considerate” process of codification and progressive development consisting of International Law Commission phases, followed by Sixth Committee and governments phases, followed by a Diplomatic Conference phase, it is right that resolutions should be channelled, when they do not flow directly into the same stream of treaty law, into a law-making process such a custom which still offers, thanks to its normally slow pace and spontaneity, the best assurance of conformity to the more fundamental and permanent interests of the generality of States.

#### 29. A few words may perhaps be useful about the time factor and reiteration.

We pointed out earlier incidentally that it is possible that *opinio iuris* acquire in certain cases a decisive value. In so doing, however, we did not intend ‘to “dispose” of *diuturnitas*. On the contrary, it is our understanding that ordinarily the formation of a rule of customary (international) law is the result of the concurring presence of both elements: *diuturnitas* being the uniform behaviour for some time and *opinio iuris* (as indicated by *seu necessitatis*) the conviction of the social necessity of the conduct in question. There is no reason, however, why the two elements should be present in the same “quantity”, or with the same “intensity”, in the “making” of every rule.

It seems reasonable to believe that while some rules will have been “made” by *diuturnitas* more than by *opinio*, other rules, vice versa, are due to *opinio* more than to *diuturnitas*, the greater weight of the more abundant or intense element compensating, so to speak, for the paucity of the scarcer one. In some (less frequent) cases, we would say, it may be reasonable to believe that a particularly substantial presence—in quantity or quality—of one of the two elements might remedy, in a sense, what *prima facie* could be or *appear* to be like a total absence of the other.

For instance, rules like *pacta sunt servanda* or *pacta tertiis non juvant nec nocent*, or that elementary notion of liability by which one shall make reparation for the unjust damage caused by one’s action, would hardly need *diuturnitas* for them to come into being. Based as they are on the most intuitive reasons, they have in practice always been there, the high intensity of *opinio iuris*—namely the conviction that they are so just and expedient as to meet the minimal necessities of coexistence among any members of any “society”—is quite sufficient for their “legitimation” as rules of law.<sup>32</sup>

This leads us to believe that there is nothing impossible in the notion of “instant custom” as such. In so far as custom in general is concerned, it is perfectly conceivable that a customary rule of international law come into being by virtue of the fact that with regard to

<sup>31</sup> There also remains to be seen to what extent the tendency to substitute majority for unanimity in international organisations is determined by a genuine “sense of discipline” developed by States and to what extent it is due to the limited substantive impact of the deliberations of international organisations for which the requirement of unanimity is being abandoned.

<sup>32</sup> We would not say that it is only a matter of “clearly” established *opinio juris*: as believed, it seems—with the framework of a similar notion—by Bin Cheng, “United Nations Resolutions on Outer Space, ‘Instant’ International Customary Law?” in *Indian Yearbook*, 5 (1965), at pp. 36 and 46 (under para. 6).

some question to which the general attention of States happens to be called at some stage of development of international society, an *opinio iuris* of such *intensity* has come into being, as to be by itself sufficient to consolidate into a binding precept.

Another matter altogether is the question whether an *Assembly declaratory resolution* makes instant custom. This question, in our view, must be answered in the negative as we do not see how the resolution alone—and in itself—could be conclusive with regard to *opinio iuris*.

We have the Impression that those who believe that this may have been the case with the second of the Outer Space resolutions tend either to envisage Assembly declaratory resolutions as endowed with special law-making potentialities of the kind already discussed in the preceding chapter, or entertain a questionable notion of custom, almost identical with tacit agreement.<sup>33-36</sup> For our part, we are persuaded that a rule on the non-appropriability of Outer-Space, in the form of an agreement—tacit or implicit—between the only two States significantly engaged in activities in those areas, was already in existence at the time of the resolutions. The resolutions, in their turn, while perhaps merely declaring *that* agreement between those two States, concurred in the manifestation of the accession of the whole membership of the United Nations, such accession to be later embodied in the formal treaty. The declaration, however, was *one* of the factors marking the accession by other States to the tacit agreement. It was not a “corporate” legislative act involving the United Nations membership as such. In other words the text of the relevant resolution and the *vote in favour* of its adoption represented *only* the formal recording, the registration, the documentation of both the bilateral agreement and the accession of the remaining membership.<sup>37</sup> Then came the Outer Space treaty, which in a way performed the function of “codifying” the general tacit agreement. A customary rule might be (or perhaps *have been*) a further development of the situation subsequent to the treaty.

30. A partly related question is whether it would be correct to believe that the existence and activity of international organisations, notably of the General Assembly’s, brings about an acceleration in the development of customary law and/or an improvement of the content thereof.<sup>38</sup> Both ideas seem to be present in Judge Tanaka’s opinion on the *South West Africa* cases, 1966.<sup>39</sup>

An adequate answer to this question would require a study, which had not been accomplished by those who had advanced that argument in the cases recalled. Subject to correction on the basis of the results of such a study, we would be inclined to agree with

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<sup>33-36</sup> Which seems to be the case with Bin Cheng, *United Nations Resolutions on Outer Space*, etc., pp. 23–48, especially at pp. 37 ff. and 46–47. The confusion is pretty obvious in paras. 15 and 16 on pp. 46–47.

Higgins overemphasises perhaps the role of the super-Powers in custom-making when she says, *à propos* of the Outer Space resolutions that “Resolutions seeking formally to make law in new areas and specifically in areas where the likely protagonists are very limited in number, present rather different problems. In such matters as prohibitions on atomic testing and co-operation in Outer Space the votes of the super-Powers are properly of paramount consideration, and they can be said to ‘weigh’ more than those of the world community. Notions of efficacy and continuity would dictate that their active support is essential for the resolutions concerned to enter into the stream of law-making” (*The United Nations*, etc., at. p. 42).

As rightly pointed out by Bin Cheng, quoted work, the role of the two “Space-Powers” in the United Nations practice regarding the law of Outer Space has been, in effect, a weighty one. That role is more easily explained, however, precisely (*infra*, para. 36) as a fundamental agreement between the main directly interested parties: an agreement to which many United Nations members—the exceptions resulting from statements such as that of the French representative quoted by Bin. Cheng—acceded by *concludentia*, revealed, *inter alia*, by the adoption of the resolutions and the statements accompanying it.

<sup>37</sup> *Infra*, para. 36.

<sup>38</sup> The improvement would be in the sense of a greater conformity to the needs of the international community.

<sup>39</sup> *ICJ Reports* 1966.

Judge Tanaka and Rosalyn Higgins in so far as they take notice of, and emphasise, the fact that the presence of international organisations—and of the United Nations in particular—has created new “opportunities” for every State to “declare its position and to know immediately the reaction of other States on the same matter”;<sup>40</sup> and that this may determine an acceleration of the custom-making process. We would not agree unconditionally, however, with the idea that such things happen “through the medium of the organization”<sup>41</sup> unless medium is understood in the sense of *material facility*.

As we understand the phenomenon, it is confined for the time being—and is likely to be confined for some time unless substantial reforms are introduced in the Charter system—to the material consequence of the existence of multilateral diplomacy facilities, such facilities “doing” in a permanent—and *in this sense* institutionalised—manner what occasional conferences previously “did” and still “do”.

In other words, the existence and operation of the General Assembly and other bodies undoubtedly multiplies and “regularises” the occasions of meeting, discussion, exchange, and eventually agreement, disagreement or quarrel among member States. In so doing, that presence and activity may even multiply geometrically the number of elements which the law-applier (and the scholar) must take into account in determining the existence-content of international custom in almost any field. It seems also correct to believe, more precisely, that the existence of such *fora* as the Assembly and Councils of the United Nations makes it less infrequent for a State to have a positive or negative say—or adopt a *positive, negative, or neutral*, position—with regard to a practice, a standard, or possibly a rule of conduct.

Whether such a multiplication and universalisation of evidence bring about either an acceleration of the law-making process or an improvement of the quality of the law, cannot really be said in general. The quantitative increase and universalisation of evidence will appear in itself not decisive if one realises that the United Nations practice embodied in a resolution is in its turn not decisive: unless one believes, as we do not, that United Nations practice *l'emporte* on practice *at large*, in that it were the expression—if we understand Tanaka and Ernest Gross correctly—of the “will” of mankind, of the will of the “international community”, or of the will of the “*organised international community*”<sup>42</sup> or the manifestation of “collective processes” of the international community.<sup>43</sup> Once the “United Nations evidence”, so to speak, is collected—assuming one should, perhaps not quite wisely, start with that—there would remain the task of probing more extensively and deeply into the attitudes of the States concerned (or, possibly, the single State concerned). Any other way of dealing with the matter would be an over-simplification.<sup>44</sup>

### *Section 3. Assembly Declarations and International Agreement*

31. The relationship of Assembly declaratory resolutions to international agreement is similar, *mutatis mutandis*, to their relationship to custom.

Just as they may be related to the content and the formation of a customary rule, Assembly declarations may be related, more or less closely, to the content of an agreement or

<sup>40</sup> Tanaka, quoted by Higgins, *The United Nations*, at p. 39.

<sup>41</sup> Tanaka, *ibidem*.

<sup>42</sup> *Supra*, paras. 5, 17–21 and *Appendix*.

Higgins seems occasionally to accept similar notions: as when she writes about resolutions “*seeking*” to “make law in new areas” (*The United Nations*, etc., at p. 42), in contrast, perhaps, with “non-legislative acts” which do not seek to secure, in any direct sense, “compliance” from Assembly members: “I refer here to the ‘law-declaring’ activities of the Assembly . . .” (*ibidem*). This is perhaps connected with the terminological problems pointed out *supra*.

<sup>43</sup> Higgins, *The United Nations*, etc., at p. 45.

<sup>44</sup> *Supra*, paras. 25–27.

to its conclusion. However, just as they do not, *per se*, integrate the elements of custom, Assembly resolutions do not, *per se*, integrate agreement either. Therefore, just as it would be inappropriate to say that the adoption of a declaration is an *organised* manner for States to “make” custom *in corpore* as opposed to the traditional *inorganic* process, it is inappropriate to consider declarations or any of them as an organic species of international agreements. This applies equally to unanimous resolutions and majority resolutions: and it extends, *a fortiori*, to the situation of States voting in favour of a resolution, whether the resolution was adopted or not.

One must admit that at first sight—considering what one could call the *informality* of international law with regard to the elaboration and *conclusion* of agreements—the analogy between the elaboration and adoption of a resolution in the General Assembly and the elaboration and perfecting of an agreement is tempting. Behind a resolution, after all, there is, it seems, the same substantive consent as behind a treaty. The analogy, however, is a false one.

One would perhaps distinguish, in discussing the matter, the role of the resolution in determining the *content* of an agreement and the role of the resolution in determining the *agreement itself*, namely the conclusion or perfecting of the agreement. From both viewpoints, of course, when we say “resolution” or “declaration” we refer not only to its adoption but to the whole “process” that led to such adoption. (And much of what is said about an adopted resolution applies also to a non-adopted draft.)

32. Any declaration, and, for that matter, any resolution recommending anything contains, as well as decisions, the formulation of some conduct prescription or prescriptions. The fact that in the case of any resolution not qualifying as a decision the prescription is only hortatory does not prevent that prescription from becoming the content of an international agreement, more than the merely ethical value of a prescription makes it unsuitable as the possible content of a legal rule.

It is equally obvious—but this is indeed not the real core of the matter under discussion—that the fact that the content of a declaration becomes the content of an agreement, formal or informal, express or tacit, does not transform the resolution into an agreement. It is not even a question of the content of the resolution being “transfused” into an agreement. This is a wrong image because the *vital* element comes really from the agreement. The simplest way of putting it is that the material content of a merely hortatory instrument turned into the content of a binding instrument and thus into law. The resolution remains clearly the exhortation that it was.

It goes without saying that it matters little, from the view-point of the *rapport de valeur* between resolution and agreement, whether the agreement follows the resolution or vice versa. It is also of no consequence, from the same viewpoint, whether the agreement is formal or informal, express or implied, or tacit. From the formal as well as the chronological point of view, the difference will only lie in variations in degree of *prima facie* perceptibility of the nature of the operation. The greater the chronological span between resolution and agreement (and the greater the “formality” of the agreement) the easier it will be to keep each element—resolution and resolution’s content on one side and treaty and content thereof on the other—in its proper place. The clearer it will be, in particular, that the binding force acquired by the resolution’s prescription comes from the agreement and not from the “organic” instrument, the latter remaining in its *subordinate*, ancillary position.<sup>45</sup>

33. Indeed, the core of the problem, and the main source of difficulty lies not so much in the role of the content of the declaration or resolution as in the possible role of the resolution

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<sup>45</sup> *Infra*, paras. 33 (and footnote thereunder), 46 (final part), and *Appendix*, 138–140, 142, 147.

itself, namely, not so much in the relationship resolution's content-agreement's content as in the relationship resolution-agreement *tout court*.

Of course, the “liberalism” of general international law being what it is with regard to the form of international agreements, the “contractual will”—the consent of the parties—can manifest itself in any factually conceivable manner and circumstances. It is therefore perfectly normal, that also the “yeas”, the “nos” and the abstentions declared in voting procedure in United Nations bodies with regard to a declaratory resolution constitute, in one with the adoption of the resolution and with the impact of the hortatory effect of the adopted resolution (and the material significance and impact of the text of the resolution), as many elements of States’ practice which may be of relevance as elements of an agreement process. Those yeas, nays and abstentions may well possess—in conjunction (and also contrast) with such other elements of the same practice as absence, statements, proposals, amendment, discussion or any other manifestation of States’ interest, behaviour, opinion, conviction, or will—some value as facts concurring to substantiate and/or to prove *assent* to an agreement on the part of given States or groups of States.

However, to equate the yeas to the resolution to the assents which are required for an agreement and to equate in any manner the resolution and the agreement would be arbitrary.<sup>46</sup> It would be even more arbitrary, perhaps, than to equate the favourable votes or attitudes of States toward an Assembly resolution to the factors of the custom-making process by which that resolution’s prescription may become a rule of customary international law. The arbitrariness of any identification of resolutions with the real “source” is even more clearly perceptible thanks to the more precise connotations of agreements in comparison with custom. An agreement is a deliberate transaction consisting of acts of consent the materialisation of which, however informal or tacit, can be “punctually” determined *in corpore* and *in tempore*. Of custom the opposite is so true that it is precisely this feature that constitutes one of the *differentiae* between custom and tacit agreement.

The higher degree of “determinability” of the *perfectionnement* of agreement makes the distinction between agreement and resolution more obvious.

34. As well as the “yeas” to an agreement the “yeas” to a resolution are punctual acts. The vote for a resolution is actually even more punctual than the assent constituting one of the elements of an informal agreement. There can hardly be a question as to the *deliberate* nature of the vote given by a State’s delegate to an Assembly resolution. This does not imply,

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<sup>46</sup> In the sense of maintaining the distinction, and in varying, decreasing order of clarity (in so far as the distinction under discussion is concerned) see Bind-schedler, “La délimitation des compétences des Nations Unies”, *Hague Rec.*, 108 (1963-I), at pp. 345–346; Sørensen, *Principes*, at pp. 55–58. Both writers distinguish almost absolutely the act committing the State from the State’s vote or the act of the organisation. *Adde Di Qual, Les Effets*, pp. 109 ff., especially at pp. 124–129.

*Contra*, if we understand correctly, Higgins in Schwebel’s (editor) *Effectiveness*, at pp. 398–399, and perhaps Bleicher, *The Legal Significance of Re-citation*, etc., at pp. 446–447 and 448–449.

A different view seems also to be expressed by Conforti, *La funzione dell’ accordo*, etc. Starting from a distinction between the Assembly’s *atto organico* and international agreement (pp. 1–16), but without “*situating*” the *atto organico* in what we considered (*Rapporti contrattuali*) and consider to be its “ancillary” position, and perhaps implicitly stressing, rather, its “institutional” connotations in essential conformity with the current view (for example Quadri’s views in *La Comunità internazionale*, 1952, book review, pp. 180–181: to be compared now with *Appendix*, paras. 138 ff.), that author states (at pp. 158–159) that the “affirmative vote” may commit the State: “and” *in this way* a resolution “*si comporta come se fosse un accordo internazionale*” (italics added). A similar identification seems to be assumed at the pages quoted hereunder, footnote 51–52.

According to Conforti’s view, declarations that would be binding for the States concurring to their adoption are those which, in formulating a principle expressly “ne equiparano l’inoservanza alla violazione della Carta”. We are unable to agree for the reason indicated in the present part of the text and *infra*, paras. 40–47 (Section 5 of the present Chapter).

however, any equivalence, under existing law, between affirmative votes in the General Assembly—whether successful or unsuccessful in determining the adoption of a resolution—and those assents of States to be bound which constitute the *composantes* of an international agreement.

The vote for an Assembly recommendation is an act concurring—together with other “yeas”—to determine the legal situation consisting in the adoption, by unanimity or by majority, of an Assembly enactment of hortatory effect. Contractual assent, formal or informal, is an act concurring to determine the legal situation consisting in the conclusion or, better, perfectioning of an agreement with binding effect. On both sides there is a *qualified* instrument. But the one is qualified as *binding* by a *customary* rule. The other is qualified as hortatory by a *treaty*.

Such being the case, under no circumstances can the vote *alone* be equalled to consent. The vote is the equivalent of consent *not even* in the extreme case, obviously, in which it was agreed so to consider the vote, as the latter agreement would be a decisive *additional* element to the vote. Under no circumstances can the unanimous adoption as such be equalled to a unanimous agreement; and under no circumstances can the concurring votes of the States voting in favour (whether the resolution was adopted or not) be equalled to an agreement between the States so voting. If an agreement comes into being it will always be, whatever the role of proposals, statements and votes in the Assembly, the result of *something more*, and *other*, than such proposals, statements and votes.<sup>47</sup>

In the evaluation of the role of the resolution (namely of its discussion and adoption) one should not be influenced so much by the *organic* nature of the process as to assume that the resolution is, in itself, more than the agreement. This is not the case because the *organic element* in *international organisation* is really situated *not* “over and above” the member States. As explained in the *Appendix*<sup>48</sup> international organisations are no more “over and above” the member States<sup>49</sup> than an arbitral tribunal or a diplomatic conference is.

Assembly resolutions would perhaps be usefully compared not only with the texts of recommendations adopted by diplomatic conferences but also with the very texts of *treaties* adopted by such conferences. Leaving aside the value that such texts *may* possess as (factual) evidence of custom, or as evidence of interpretation of other instruments, they are generally admitted to be only *materially* law-making. Resolutions are the same thing, except for *la différence en moins* consisting in the fact that they are not meant as a rule to be assented to in order to give rise to an agreement and *la différence en plus* represented by the hortatory element. Another difference, *en plus* or *en moins* according to the case, is represented by the variable of the General Assembly’s authority: higher or lower than that of a diplomatic conference according to the circumstances and the current level of the organisation’s prestige.

An essential aspect of the analogy (between resolutions and the texts of treaties adopted by international conferences) seems to reside in the fact that even in the cases where

<sup>47</sup> It should be noted that this is true even in the case of decisions. In so far can the vote in favour of a decision be understood as the equivalent of an agreement (provided that the decision is carried) as there has been an agreement qualifying the decision as binding. This is the agreement creating the provision on the strength of which the decision is binding.

<sup>48</sup> And in our works referred to therein (especially in *Rapporti Contrattuali*). Compare Quadri (review of *Rapporti contrattuali* quoted in footnote 46 to the present chapter).

It is perhaps the inadequate perception of this state of affairs that leads a part of the doctrine of international law either to miss the distinction between unanimous resolution and agreement (and between votes cast in favour of a resolution and agreement on the terms of the resolution) as if the organic act were, so to speak, *absorbing*; or not to maintain that distinction with the necessary rigour.

<sup>49</sup> This is correct in our opinion even when the international organ operates “over and above” the States’ subjects. (*Appendix*, paras. 134, 138 and *passim*).

ratification is not required, in so far there will be an agreement as the will to be bound—under *pacta sunt servanda*—results, whatever the form, from express or implied acts or facts other than the majority or unanimous votes cast in favour of the text in conference.

35. It must be said immediately, however, that with regard to agreement, as well as with regard to custom, it would hardly be possible to say, *in general*, what the impact of the votes on the declaratory resolution (and of the other elements in question) may be. Each concrete case, namely each allegedly agreed rule “produced” with the concourse of an Assembly resolution or with the votes and other manifestations relating to that resolution, must be judged on its own merits both with regard to the positive or negative result of the analysis (existence, inexistence or content of the alleged rule) and with regard to the impact of the resolution or any elements concerning its presentation, discussion, amendment, voting or adoption.

As well as with regard to the relationship between resolutions and customary rules, all that can be done, within a context such as the present, is to indicate a few, very tentative, general criteria.

- (i) States’ practice within the Assembly *integrates fully* with States’ practice *at large*, the result of the analysis being conditioned in an *equal measure* by practice “within” and “at large”;<sup>50</sup>
- (ii) the resolution—and any one of the various circumstances repeatedly mentioned and better understood as included in the term resolution (declaration) for the sake of brevity—may “intervene”, *coeteris* considered, at any time during what could be called the *iter* of an international agreement, namely in the formative or in the conclusive phase of such *iter*;
- (iii) just as the resolution—in the above wide sense—may concur to the formation-conclusion of an agreement, it may concur in its application or interpretation (by constituting, for example, subsequent practice of the contracting parties) and it goes without saying that it may concur in the termination of an agreement;
- (iv) the resolution in itself, once an agreement is ascertained to exist of a content identical, will never be itself the agreement; does not “operate as” an agreement; nor does it become binding;<sup>51–52</sup>
- (v) practice in the organisation will ordinarily be relevant, as a possible element of an agreement between States, merely as practice of States *tout court*, although carried out within one or more organs. However, there may also be, in the practice in the organisation, practice *of* the organisation *per se*. An example is the participation of the organisation (through the Secretariat) in the host country relations body, recently institutionalised by the General Assembly.<sup>53</sup> Within such a sphere, a will of the organisation may manifest itself. The area within which such a will is conceivable is that of the matters in which the organisation (represented by the Secretary-General in his capacity as Head of the Secretariat) acts as a

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<sup>50</sup> *Supra*, paras. 25–26.

<sup>51–52</sup> *Contra*, it would seem, Conforti, *La Funzione dell’ Accordo*, etc., at p. 154 (*à propos* resolution 1803 (XVII)). Of this work compare also (in addition to the pages quoted *supra*, footnote 46) pp. 14–15, 44, 137–139, 141–142, and particularly the initial part of para. 44.

<sup>53</sup> Resolution 2819 (XXVI) of 15 December 1971. It is noteworthy, in that connection, that although under some of the proposals before the Sixth Committee (XXVI session) the Secretary-General would be represented in the H. Country Committee, the staunch opposition of some States reduced the participation of the Secretariat to the mere ancillary function of “staffing” the meetings and providing the necessary facilities and services. In spite of this, it is presumable that through the Committee’s work (see the first Report, General Assembly, *Off. Documents*, XXVII Session, Suppl. No. 26-A/8726 of 1972) a practice of the United Nations as such *vis-à-vis* the Host Country will emerge, that may be of relevance (*as such*) in the relations with the Host Country and the “administration” of the Headquarters and other agreements or rules governing such relations.

primary person of international law in the sense explained in the *Appendix*;<sup>54</sup>

(vi) the dual approach is clear evidence that the agreement is not present prior to, or as a consequence of, a declaration.<sup>55</sup>

36. Among the declarations of the Assembly which have been somehow related with law-making processes by the doctrine of international law, one of the most significant is the Outer Space resolution 1962 (XVIII) of 13 December 1963. As mentioned already, the favour “at large” shown for that resolution and its ultimate adoption can be understood as a set of facts constituting manifestation of agreement between the two “Space Powers” and of accession thereto by the other United Nations Members.<sup>56</sup> For us, however, it is clear that the adoption of the resolution as such was certainly not the (possible) tacit agreement on the embodied rules or principles. The resolution as such has not created—as it could not purport to create—new law.<sup>57</sup>

Another resolution *with regard* to the content of which (not *in* which) one might perhaps envisage an agreement is the “Uniting for Peace” resolution.<sup>58</sup> We refer, more precisely, to some elements of that instrument.<sup>59</sup> It is possible that in this case the atmosphere in the Assembly at the time of adoption was such as to confer a comparatively greater weight (although not a really decisive one) on the formal act of voting in favour. Also in this case, however, the “consents” manifested themselves only in part in the voting on the resolution. In so far did contractual rules come into being envisaging, in given circumstances, a certain activity of the Assembly and certain obligations of the States involved (*inter se*) as there had come into being among such States, under the pressure of the current international situation and in particular of the emergency in Korea, the decision to provide for some form of collective security other than that envisaged in the Charter and to modify existing law at

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<sup>54</sup> Para. 137.

<sup>55</sup> *Contra*, it seems, Conforti, *La Funzione dell' Accordo*, at p. 155, who rejects the understanding of the dual approach's significance. recalled *supra*, Chapter I (at para. 11). The latter interpretation of the dual approach is shared (with Leo Gross) by Decleva, M., *Le dichiarazioni di principi delle Nazioni Unite*, *Annuario di Diritto Internazionale*, 1965, pp. 63–79.

<sup>56</sup> One could agree with Asamoah, *The Legal Significance*, etc., at p. 66. This author, however, includes in his paragraph on “declarations as agreements within the United Nations system” (a concept similar perhaps to Conforti's), a number of instances which in our perspective would not have much to do with the value of Assembly declarations. Those instances range from tacit agreement (p. 64) to manifestations of consensus not embodied in a resolution (let alone a declaration) (64), to bilateral agreements reached through negotiation in the United Nations or under United Nations sponsorship or good offices (64 and 65) and unilateral declarations of recognition (65). In addition to the Outer Space resolution, instances that may have some vague bearing on the matter, but do not concern Assembly declarations either, are:

(i) the “understanding . . . reached within the General Assembly on the admissibility of more reservations to the Genocide Convention” (International Court of Justice, *ICJ Reports 1951*, pp. 23–26);

(ii) the reference in Assembly resolution 1903 (XVIII) of 18 November 1963 to the fact that United Nations Members which were already parties to certain multilateral treaties of the League of Nations period *assented* to that resolution's purpose of facilitating the participation of other States to those agreements and *expressed their resolve* to use their good offices to secure the co-operation (to the same effect) of the other parties to the treaties (Asamoah, cited work at p. 64); and

(iii) resolution 24 (I) of 12 February 1946 on the Transfer of Certain Activities and Assets of the League, which *recorded* that “the parties assent by this resolution” (Asamoah, *ibid.*).

<sup>57</sup> Compare Asamoah, *The Legal Significance*, etc., who classifies resolution 1962 as “purporting to create new principles”.

<sup>58</sup> Resolution 377 (V) of 3 November 1950. On Uniting for Peace see, *inter alios*, Malintoppi, *Le raccomandazioni*, pp. 138–146; and Ziccardi, “L'intervento collettivo delle Nazioni Unite e i nuovi poteri dell' Assemblea generale”, *La Comunità Internazionale*, XII (1957), pp. 427 ff.; Alessi, “L'evoluzione della prassi delle Nazioni Unite”, etc., *Rivista di Diritto internazionale*, XLVII (1964), pp. 550 ff.; Poirier, *La Force internationale d'urgence*, 1962, pp. 167 ff.

<sup>59</sup> See for example Conforti, *La Funzione dell' accordo*, etc., pp. 144–145.

least in the measure necessary, *inter alia*, for an Assembly recommendation to constitute a sufficient legal justification, as against Article 2.4, of military action recommended by the Assembly.<sup>60</sup> Such an agreement, if any, has been redimensioned in any case by the subsequent practice of the “contracting States” in the organisation, such practice having rested, in the Suez (1956) and Congo (1960) cases, upon the doctrine of the specific, *ad hoc* consent of the interested States.<sup>61</sup>

#### *Section 4. Assembly Declarations and the General Principles of International Law*

37. The relationship of Assembly declarations with general principles raises many difficult problems.

In the first place, Assembly declarations are often formulated in terms of enunciations of principles. The temptation to equate the prescriptions they contain with as many principles is stronger.

Secondly, the very concept of general principles is controversial in international law.<sup>62</sup> The problems involved range from the very *existence* of general principles of international law comparable to the general principles of any other normative system, to the *nature* and the *source* of any such principles and to their *relationship* with the so-called “general principles of law recognised by civilised nations” referred to in paragraph 1 (c) of Article 38 of the Statute of the International Court of Justice. But these are only a few of the issues involved.

These preliminary problems are anything but simple. We shall confine ourselves, with regard to some of them, to indicate in the following paragraph (*a-f*) the view that we adopt, for our present purposes, as a *point de départ*.

38. (a) It seems reasonable to believe that as in any legal system, also within the body of international law one identifies principles and standards in addition to rules in a narrow sense.<sup>63</sup> Principles and standards are normative propositions of a general or very general character, less definite than rules, and determinable by way of induction (or induction-deduction) from the body of the rules themselves and/or from the very structure of the society of which the system is a “product” and a “conditioning factor”. Principles—and, in a different way, standards—perform a variety of functions. *Inter alia*, principles assist in the interpretation and application of the rules, help fill the interstices between one rule and another, act as sources of inspiration for the modification of existing rules and for the creation or formation of new rules.

Among the principles of international law so understood one would include, in varying

<sup>60</sup> Forlati Picchio, *La Sanzione nel Diritto internazionale*, Padova, 1974, pp. 231–234. According to this understanding, the resolution would have introduced, in other words, an “interchangeability” between an Assembly recommendation (in the envisaged circumstances) and a Security Council recommendation under Article 39: an “interchangeability” otherwise not justified under Articles 10–12, 14 and 24 of the Charter.

For this view—and the critique of Louis Sohn’s different understanding—Forlati Picchio, *La Sanzione*, etc., p. 233 and footnote 118 at pp. 230 f.

<sup>61</sup> *La Sanzione*, etc., p. 214.

<sup>62</sup> See especially: Verdross, “Les Principes généraux du Droit dans la Jurisprudence Internationale”, *Hague Rec.* 52 (1935-II), 195 ff. and *Völkerrecht* (1964), pp. 147–151; Balladore Pallieri, *I principi generali di diritto riconosciuti dalla Nazioni civili*, 1931; Morelli, *Nozioni di diritto internazionale*, 6th ed., 1963, pp. 43 ff.; Tunkin, G., “Coexistence and International Law”, *Hague Rec.*, 95 (1958-III), pp. 23–26.

<sup>63</sup> A clear presentation of principles and standards as opposed to rules is in Dillard, H. C., “Some Aspects of Law and Diplomacy”, *Hague Rec.*, 91 (1957–1), at p. 478.

In the Italian doctrine of public law see Crisafulli, V., *Per la determinazione del concetto dei principi generali del diritto*, Pisa 1941; Giannini, M. S., “L’analoga giuridica”, in *Jus*, 1942, especially pp. 44 ff., and Sandulli, A., “Fonti del diritto” in *Novissimo Digesto Italiano*, VII (1961), at p. 526 (para. 6).

degrees of generality and importance, equality and self-defence, effectiveness (in the field of territorial domain), the freedom of the seas, the principle that *tout dommage injuste doit être réparé*. It is also probable that in addition to principles and standards<sup>64</sup> one should consider—as integrating rules in a narrow sense—doctrines, concepts and theories in the measure in which they are not just arbitrary elaborations of jurisprudence but reflect the content and the structure of the legal system and the nature of its *milieu* as objectively determined by legal science. Close to general principles are probably legal policies.<sup>65</sup>

Among general *structural* principles are perhaps to be placed some of the “constitutional” or “fundamental” principles placed by Verdross, Romano and Balladore Pallieri at the basis or apex of international law.<sup>66</sup> One such principle might be—from our point of view—the principle that law-making and law-determining *remain*, in the international society, “private” functions of States, and are thus not really organised functions.<sup>67</sup>

(b) We are inclined to believe that the frequent statement of scholars and practitioners that principles—or given categories of principles (such as general principles of law recognised by civilised nations)—are *sources* of international law is either just another way of saying that principles are part of the normative “stuff” of the legal system or simply a consequence of the fact that the word source is used in a special sense, not far from the sense in which Gray spoke of legal rules as sources (material) of those more real sources of law which would have been, according to him, courts’ decisions.<sup>68</sup> Principles are really not *in themselves* sources, in the sense of law-making—formal or informal—*processes*. They are rather the direct or indirect “product” of the ordinary law-making processes of international law.

(c) We would be inclined to believe that while principles may be found both expressly set

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<sup>64</sup> On the latter see Dillard, cited work; and Schachter, “The Relation of Law, Politics and Action in the United Nations”, *Hague Rec.*, 109 (1963-I), at pp. 193–194.

<sup>65</sup> *Infra*, paras. 105–107.

It is perhaps thanks to the wider context offered by the addition, to principles, of standards, doctrines and policies (not to mention the concepts and other logical tools of jurists), that:

(i) a place could be found for non strictly “legal” principles such as the principle “que toute règle de droit doit avoir un contenu *raisonnable* et que, par conséquent, une convention doit être interprétée dans le sens qui peut lui faire produire un effet”, or at least the first of the two principles embodied here (Verdross, *Les Principes généraux* quoted above, at p. 14 of *tirage à part*); and

(ii) room could be found, among the policies, for very general propositions, in part perhaps *de lege ferenda*, emanating from occasional conferences or permanent bodies. These would fall among the so-called “political principles”. Rather than within a problematical dichotomy between legal principles and political principles (rightly questioned by Virally, “Le Rôle des ‘principes’ dans le développement du Droit International”, *Recueil Guggenheim*, at p. 535), we would say that the propositions in question (for example, recommendations from the Conference on the Law of the Sea relating to pollution; recommendations of the Vienna Conference on the Law of Treaties, *et similia*) are *formulations of policies* or *declarations of intention* (in the sense of policies) to be placed within the realm of *lex ferenda*. In some instances they may perhaps approach the status of *very general principles* (“programmatic”) or legal policies.

In so far, however, we would qualify a proposition as a *legal* or *juridical principle* or as a *legal policy* (or “policy of the law”) as it were *susceptible*, alone or, more plausibly, in conjunction with rules or less general principles, of giving rise to rights and duties within the given legal system, thus constituting a part of positive law in a wide sense. We fail to see how it could be that “Il ne suffit pas, en effet, de décider si un principe est juridique, c’est-à-dire s’il conduit à la définition de droits et d’obligations. Il faut encore établir qu’il a acquis une valeur positive, ou, en d’autres termes, qu’il est effectivement devenu partie intégrante de l’ordre juridique positif” (Virally, quoted work, at p. 535). If the proposition contributes to the definition of rights and duties, it is because it is part of the legal system. The first notion carries the other and vice versa.

<sup>66</sup> References and discussion in Moreli, *Nozioni*, etc., pp. 22–24.

<sup>67</sup> *Appendix*, paras. 131 and 115–116.

<sup>68</sup> Gray, John Chipman, *The Nature and Sources of the Law*, (1909–1921), 1963 edition by Roland Gray, especially at pp. 103–104.

A contemporary version—applied precisely to general principles—of the concept of source in Gray’s sense is perhaps in the passage by Friedmann, *The Uses of “General Principles”*, etc., quoted *supra*, footnote 15 to Introduction.

forth or implicit in a treaty or implicit in customary rules, the second alternative seems to be the most frequent. Therefore, until such time as the codification process made so much headway as to invest the summits, or the deepest roots, of the body of international law—a difficult achievement in view of the inherent limitations of the treaty<sup>68a</sup>—principles are more likely to be indirectly induced from primary, customary, rules than read out of treaties. Principles are not, as a rule, matters for voluntary, contractual—relatively ephemeral, or transient—law-making. Just as in municipal systems they are preferably embodied in constitutions, or in custom, or in legislation, in international law either they belong to the realm of the *primary law created by custom* (instead of just secondary or tertiary law made by treaty, or by treaty-created procedures) or they are *principles* only within a limited objective-subjective sphere. Of course one important instance of *treaty*-codified principles are the principles and purposes of the United Nations enumerated in Articles 1 and 2, (especially 2) of the United Nations Charter, and in other provisions.<sup>69</sup> It is an open question, however, to what extent they are *istituti* or part of objective law as understood in *Appendix*, Section 7.

(d) It will also be noted that precisely because they are mainly situated within the realm of unwritten, spontaneous, law, principles are not always easy to detect and determine. Just as it is difficult, within that realm, to tell one rule from another, it is hard to tell a principle from a rule and one principle from another principle. This explains the highly controversial nature of general principles and particularly the opposing extremisms of those who see very few and of those who see quite too many principles.<sup>70</sup>

(e) Reverting now to the category defined in Article 38.1 (c) of the Statute of the International Court of Justice as the “general principles of law recognised by civilised nations”, we are inclined to believe<sup>71</sup> that the part of that expression seemingly referring to the municipal law of States (or nations, or civilised States or nations) is redundant or pleonastic.<sup>72</sup> The principles or general principles really referred to in that Article are the

<sup>68a</sup> *Appendix*, paras. 117 (and 116), 133, 136–137 and 164.

<sup>69</sup> Of these principles—reference to which is made in other instruments,—some pre-existed the Charter in identical or analogous form. Identical is perhaps sovereign-equality (in so far as sovereignty was considered a principle rather than just a fact). Others, such as the prohibition of the threat or use of force, peaceful settlement, and the principle of *défense légitime* (as an exception to the outlawing of force), are new (except, in part, *par rapport* to the League Covenant).

In the measure in which such Charter principles pre-existed, they are merely declaratory or recognitive of existing customary principles or rules. In the measure in which they were new when the Charter came into force, they are not part of the *corpus* of the principles of international law unless they—or the rules of which they are the “inspiration” or generalisation—may have become customary law. This point is also related to the nature and inherent limitation of the international treaty (and agreement in general) discussed in the *Appendix*, paragraphs quoted in the previous note).

The possibility that such a development *has* taken place for all or given principles has repeatedly been mentioned during the elaboration of the declaration now embodied in resolution 2625 (XXV). Although (as noted by Virally, last quoted work, at p. 547, footnote) the affirmative opinion seems to have prevailed in the Special Committee for a number of principles, and although some of these are formulated as of universal application, we believe that the positive conclusion would need further objective exploration. Considering that the declaration is not binding, the fact that some of its propositions are expressed in “universalised” terms is, for us, not *decisive*. See also *infra*, para. 39 (i–iv). Evidence should mainly be sought, to that effect, of *concrete applications* by the Assembly rather than just *abstract formulations* of the principles in question. See also Virally, “La valeur juridique des recommandations des organisations internationales”, *Annuaire Français*, 1956, pp. 66 ff.

<sup>70</sup> See, for example, Sereni, *Principi generali di diritto e processo internazionale*, “Quaderni” della Rivista di diritto internazionale, 1955.

<sup>71</sup> See Anzilotti, *Cours*, 1929, at p. 117; Hudson, *La Cour Permanente de Justice Internationale*, at pp. 618 ff. of the French (1936) edition; Morelli, “La théorie générale du procès international”, *Hague Rec.* 61 (1937–III), at pp. 348 ff. and *Nozioni*, etc., pp. 44–45.

<sup>72</sup> *Contra*, it seems, Scerni, *I principi generali di diritto riconosciuti dalle Nazioni civili nella giurisprudenza della CPGI*, Padova, 1932, pp. 13–14.

principles or general principles of *international* law, as tentatively defined under (a) and (b) above.

(f) With regard to *application*, we believe that the self-sufficiency of principles is a question of *degree*. To say that a more or less general principle *is* or *is not* self-sufficient or executing would be to disregard, precisely, those very features of principles which are their *normative* function and *abstractness*. Self-sufficiency is a matter of degree as well as the generality or abstractness of the principles. The more abstract a principle is, the less likely it is that it will be operative except by way of integration with, or by, more precise rules or less general principles. The less a principle is abstract the closer it will be to being applicable without the concourse of other normative elements.

39. In conformity with the finding that Assembly resolutions are not binding legal instruments, declarations are not *per se* sufficient to create principles of international law. This follows from the fact that principles become part of the body of international law only in so far as they enter therein through the law-making processes of international society: mainly as shown, through custom or agreement. This general statement, however,<sup>73</sup> needs qualification in the light of what has been said earlier with regard to the relationship of Assembly declarations with custom and agreement.

(i) The most essential qualification is that the adoption of a declaration of a principle or set of principles (alone or in a context also including rules) is in itself neither the *only* element nor the *decisive* one for the existence of a principle. The whole United Nations practice, of which the adoption of the resolution is a part, will come into consideration, together with what we call States' practice at large. In particular, it is necessary that the adoption be integrated not only within the United Nations organ itself by other elements confirming the convictions or intentions of member States with regard to the proclamation or declaration of the principle and the nature of such principle, but *mainly* by conclusive evidence that the sentiment of States is *in concreto*, in the sense of effective conduct *and/or* effective *opinio*, with regard to the subject-matter covered by the principle, in conformity with the principle's prescription.

(ii) In view of the abstract and not always self-executing nature of principles, the requirement of effective conduct or effective *opinio* implies that not so much the underlying *principle* should be effectively practised—as a matter of *ius* or *necessitas*—as the *rule* to which the principle is inductively-deductively related.<sup>74</sup> It follows that the less a principle is

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According to our tentative understanding of *travaux préparatoires* (for which, in addition to the relevant records of the Committee of Jurists, we refer to Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, London, 1953, pp. 7 ff.), the whole wording of the sentence beyond the words “general principles of law” seems to be simply the result of language and doctrinal differences among members of the Advisory Committee of Jurists and perhaps of the non “specialised” notion of international law entertained by one or two of them. The original French (Descamps) version of the clause was clearly another way of designating international customary law (with some emphasis, however, on *peoples* rather than *States* and on *natural law* rather than *practised law*).

Once this became relatively clear, the common denominator was presumably found, really, in the notion that the Court would apply, as *any* tribunal, not only the rules produced by the sources in a narrow sense but also general principles of law in the sense in which this concept would be understood *also, mutatis mutandis*, by a national judge. This would mean, precisely, the general principles of *international* law as such, and not principles of national, supposedly civilised, law, even if some of the principles of international law would coincide—as many of them obviously would—with principles applied, notably to procedural matters, by national judges (*res iudicata*, equality of the parties before the judge, rules on *onera probandi* and presumptions, good faith, *lex specialis derogat generali*, etc.). Compare with Bin Cheng himself, at p. 16 of the quoted work.

<sup>73</sup> Which corresponds to rather widely shared views.

<sup>74</sup> This is rightly acknowledged by Virally, *Le Rôle des “Principes”*, at p. 552. We fail to understand, however, how far the clear exigency “que les principes qu’elles (the declarations) proclament soient effectivement *mis en œuvre* par les Etats dans les décisions concrètes qu’ils sont amenés à prendre dans la conduite de leurs affaires”

self-executing, the harder it will be to prove its existence as a matter of *lex lata*.

(iii) This very same reason should induce us to consider *cum grano salis*, particularly with regard to principles, the idea—authoritatively espoused by Judge Tanaka in the *South West Africa* cases (1966) and apparently subscribed by others—that declarations of principles are susceptible of accelerating “the sedimentation process, normally slow, which leads to the appearance of customary rules”.<sup>75</sup> No doubt there may be an acceleration. The acceleration, however, is *only* due, again, to the material concentration or cumulation of the manifestations of States’ practice afforded, in the sense already specified,<sup>76</sup> by the existence and operation of international organisations. Not in any other sense.

We would not be ready to accept, in this respect, the theory of “recognition”, according to which the proclamation of a principle by an Assembly declaration would constitute an act of recognition which, as the acts of recognition of “situations de fait ayant vocation à se transformer en situations juridiques (c'est-à-dire dont ceux qui les avaient créées entendaient faire des situations juridiques) permet ou parfait le passage du fait au droit. Ne peut-on dire que la reconnaissance remplit une fonction analogue, lorsqu’elle concerne des principes qui ont vocation à constituer des principes de droit positif? L'idée de reconnaissance, en vérité, n'est pas étrangère à la théorie traditionnelle des sources du droit international. Elle occupe, au contraire, une place importante, sous le nom d'*opinio juris sive necessitatis* dans la théorie de la coutume”.<sup>77</sup> In our opinion while an existing principle’s certainty as a *legal* principle will *gain*, as a rule, from the recognition contained in an Assembly declaration, such an “effect” cannot be equalled with the *legal* effects of an act of recognition *except* where it could be said that individual proposals, statements and/or positive votes, combined with any other indications of given member States’ attitude or intent, qualify as acts of recognition of, or acquiescence to, the existence of the principle as part of *lex lata*. It must be clear, in our view, that a majority or unanimous Assembly recommendation to the effect that a principle *exists*, or to the effect that that principle *should*, or even *shall*, be complied with, does not in itself—given the hortatory nature of the act—carry with it (be it only for the States voting in favour) the obligation to consider the principle as a part of existing law.

(iv) A closely related question is that of the role which the principles proclaimed in a declaratory resolution occupy in the international system. Assuming, of course, that they do *not* constitute either the repetition, for hortatory or other purposes, of existing principles, or the simple formulation by the Assembly, for similar purposes, of principles drawn, through correct inductive methods, from existing law, the role of any declared principles can only be, until a law-making process does not “make” them part of the law, the role of *material* sources of international law.<sup>78</sup> They are neither custom nor treaty nor legal principles yet.<sup>79</sup>

It will be a matter of further distinction whether the declaration of a principle at such a stage—namely as a material source—will concur to the formation of a *customary* (universal or regional) principle or to a *treaty* principle inoperative for third parties; and it will be a matter of subtler distinction whether a declaration—at the same stage of *source matérielle*—will contribute to the formation of a *principle* or a *rule*.

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(at p. 552) is consistent with the same author’s discourse at pp. 549–550, which seems to convey a notion of almost *automatic* effect of declarations simply on the basis of “actes de reconnaissance” they contain (p. 550) so that “les déclarations de principes constituent autant de précédents coutumiers. Ce sont des actes d’autorités étatiques, pris dans la vie internationale, et dont la signification en tant qu’actes de reconnaissance de normes juridiques est particulièrement évidente” (italics added). *Infra*, under (iii) below.

<sup>75</sup> Tanaka, cited *supra*, para. 30. The quoted words are from Virally’s last quoted work, at p. 551.

<sup>76</sup> *Supra*, paras. 24–30.

<sup>77</sup> Virally, *Le Rôle*, etc., at p. 549.

<sup>78</sup> On the understanding of this concept *supra*, para. 24.

<sup>79</sup> *Contra*, it would seem, Higgins, *The United Nations*, etc., at p. 38.

## *Section 5. The Role of Declaratory Resolutions in Legal Determination and Interpretation*

40. As well as for law-making, there is no rule in the United Nations Charter conferring upon the Assembly a power of legal determination or interpretation, either with regard to the Charter or with regard to other treaties or customary international law.

Not a few scholars, however, believe that Assembly resolutions do perform, whether law-creating or not, an authoritative—constitutive or declaratory—law-determining function.<sup>80</sup> Considering the high importance of law-interpreting and law-determining in any society and considering the great propinquity of both to law-making,<sup>81</sup> the question whether and in what sense Assembly recommendations perform any such roles must be discussed.

41. The most important datum is universally deemed to be document 887 (IV/2/39 of 9 June 1945) of the San Francisco Conference.<sup>82</sup> It emerges from this and other documents that the question of the interpretation of the Charter by the Assembly—raised by a Belgian amendment according to which the General Assembly would have (by a Charter provision) “sovereign competence to interpret the provisions of the Charter”<sup>83</sup> was resolved by the Conference as negatively as the closely related question of the Assembly’s “legislative” power.<sup>84</sup>

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<sup>80</sup> For example, Castañeda, *Legal Effects of United Nations Resolutions*, 1969, p. 171, states: “The General Assembly and other international organs have clearly shown, by the general sense as well as by the terms of some resolutions, that they consider themselves competent to make categorical pronouncements on the legal nature of certain principles and practices.” At p. 172: “the basic foundation for the binding force of rules or principles that are ‘declared’, ‘recognized’ or ‘confirmed’ by a resolution rests, in the final analysis, on the fact that they are customary rules or general principles of law” . . . “the declaratory resolution that incorporates and formulates them as a *fully probative legal value*.” After recalling Jessup’s statement that declarations in which the principles are embodied (Nuremberg principles and principles condemning genocide) “are *persuasive evidence* of the existence of the rule of law they enumerate”, Castañeda stresses that “the recognition and formal expression of a customary rule or a general principle of law by the General Assembly *constitute a juris et de jure presumption that such a rule or principle is a part of positive international law*” . . . , “that is a legal assumption or fiction that does not allow proof of the contrary, and in the face of which an opposing individual position therefore lacks legal efficacy” and “would not have greater legal relevance and significance than the opposition of a State to the customary rule incorporated in it”. See *infra*, para. 44.

A “declaratory”, but authoritative, law-determining value of Assembly resolutions is also recognised, *inter alios*, by Sørensen, quoted *supra*, footnotes 18–19 to the Introduction. Another example is Schachter, “The Quasi-Judicial Role of the General Assembly and Security Council”, *American Journal of International Law*, 58 (1964), at pp. 960–965; *Towards a Theory, passim*; and “The Relation of Law”, etc., *Hague Rec.*, 109 (1963-I), pp. 185 ff., especially 185–186 and 187. The views expressed in the Hague Course are maintained by Schachter in *Interpretation of the Charter*, etc., especially at pp. 271–273.

<sup>81</sup> See for example, Gross, “The International Court of Justice and the United Nations”, in *Hague Rec.*, 120 (1967-I), at p. 386.

<sup>82</sup> United Nations Conference on International Organization, *Documents*, Vol. 13, pp. 668–669 and 709–710. There must be added (United Nations Conference on International Organization) *Documents*, 664 (IV/2/33 of 29 May 1945) (same vol., pp. 633–634) 843 (IV/2/37, of 7 June 1945) (*ibid.*, pp. 645–646) and 873 (IV/2/37 of 9 June 1945) (*ibid.*, pp. 653–654).

<sup>83</sup> United Nations Conference on International Organization, *Documents*, Vol. 3, p. 339.

After stating that the “mere power of recommendation” envisaged for the Assembly in the Dumbarton Oaks proposals did not “correspond to practical requirements”, and proposing “that the Assembly should be granted certain further powers of decision” (it being understood that decisions on substance would require a two-thirds majority), the Belgian delegation suggested in particular that “The General Assembly” be given “sovereign competence to interpret the provisions of the Charter”. Belgium explained this proposal by commenting that “The experience gained at Geneva shows first of all the necessity of not allowing an isolated State to impose its interpretation of the Covenant by opposing the adoption of a decision sanctioning a different interpretation, whatever may be the majority” (at p. 339).

<sup>84</sup> It is worth noting that the denial of a power of Charter interpretation emphasised by the document constitutes an additional piece of evidence of the inexistence of a legislative power of the General Assembly.

The records show that the matter was not dealt with casually. The Conference was obviously aware not only of the importance of the conflicts that could arise in the interpretation of the Charter—differences between organs, differences between Members, differences between Members and organs—but fully cognisant of the possible solutions, notably of the devices adopted, with regard to constitutional interpretation, in the legal systems of national societies, where the interpretative function is vested in a “highest Court” or “other . . . authority”. It must be assumed, therefore, that the “Fathers” of the Charter made a *deliberate* choice. While turning down the Belgian proposal, they stated in fact that “the nature of the organisation and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision” of the “nature” of those which are typical of “unitary forms of national governments”. This deliberately negative conclusion was further emphasised by the equally unambiguous rejection of the idea that the interpretative power in question be vested in the International Court of Justice. In considering this suggestion it was recognised that if any organ should be vested with such a power it should be a “legislative” organ: which the Assembly was thus unambiguously denied to be.<sup>85</sup>

It was recognised, of course, that for the purposes of its day-to-day operation, an interpretative activity of each organ was “inherent” in the very establishment of the organisation. Any organ’s operation would otherwise be impossible unless one secured the consent of all the member States to every bit of Charter interpretation that were required. It was also recognised that this obvious principle would find a limit in the supremacy of principal organs over subordinate or subsidiary organs, in the sense that the latter would have to abide by any interpretations emanating from a superior organ. These points conceded, the matter was clearly disposed of, however, in the sense that the natural (inherent) day-to-day interpretative activity of each organ would constitute the only alteration brought about, in establishing the organisation, to that general doctrine according to which States, as international persons, are *de facto domini* in relation to each other, of the determination and interpretation of international law, such operations being not—as shown in the *Appendix*<sup>86</sup>—any more organised, under general law, than law-making itself.

The positive element consisting of the retention by member States of their inherent, *de facto*<sup>87</sup> prerogatives with regard to interpretation, results from the express indication that any interpretation given by an organ in the exercise of its day-to-day activity would not be binding unless generally acceptable and that for any binding effect to materialise, or for a precedent for the future to be established, “it may be necessary to embody the interpretation in an amendment to the Charter”: a result that “may always be accomplished by recourse to the procedure provided for amendment”.

This conclusion must now be considered:

- (i) in the light of the distinction, within the Assembly’s day-to-day activity, of decisions and recommendations; and
- (ii) in the light of the distinction between formal and informal Charter amendment.

42. In the course of the Assembly’s day-to-day activity, interpretations of Charter provisions—substantive or procedural—may happen to be embodied either in decisions or in recommendations.

Whenever there is a decision, it seems clear that the material interpretation embodied in it will be binding. It will bind, however, only for the case with regard to which the decision was adopted. This follows *both* from the limited value of the decision, not applicable beyond the case in hand, and from the express indication, contained in the last-quoted document, that an

<sup>85</sup> UNCIO Document 873 cited *supra*, footnote 82.

<sup>86</sup> Paras. 121 ff. and 161 ff.

<sup>87</sup> *Appendix*, quoted paras, especially 131.

organ's interpretation as such does not constitute a precedent for the future. With this limitation it can be said, however, that the fundamental principle under which "States have the right of auto-interpretation, that is, of interpreting their rights and obligations resulting from treaties or other sources of law",<sup>88</sup> suffers an exception, in so far as the Charter is concerned, in the sense that a General Assembly enactment qualifying as a decision brings about, for the case in hand, a binding interpretation. Assembly decisions thus range with such other exceptional phenomena as arbitral awards, judgments of permanent tribunals (International Court of Justice, Court of the European Communities, European Court for Human Rights, etc.), and decisions of other political bodies of an international character.<sup>89</sup>

Such is definitely not the case, however, with General Assembly recommendations, declaratory resolutions included. Unlike awards, judgments and political decisions, Assembly recommendations, including declarations, are not binding. However large, the law-determining content of such enactments does not require compliance in the sense in which compliance is due to legal rules. In so far as their *content* is law-determining with regard to Charter rules, Assembly recommendations are mere exhortations to consider such rules as existing and so to understand them as they are understood, in the recommendation, by the enacting body. This limitation applies both to the case in hand, and *a fortiori*, to future cases.

It is worth stressing—in a field where precision seems essential—that for Assembly recommendations to qualify as Charter *law-determining acts* (as fully law-determining as arbitral awards and court judgments) they should not only be "promoted" to the higher rank of decisions, thus acquiring the binding force they do not possess. In addition, they should also be *specifically qualified*—by a Charter rule or by any other conventional or customary rule of international law—as *law-determining* enactments. Non-binding and functionally unqualified as they are at present, they are law-determining acts in a material sense only and non-specialised.

Of course, the quoted Conference documents only concern the interpretation of the *Charter*. It is plain, however, that the absence, in the Assembly, of a Charter-interpreting power implies the absence of the power to interpret treaty rules other than the Charter or to determine customary rules.

It should be further recalled that Assembly decisions and recommendations are subject to the general possibility of objection to acts performed *ultra vires*.<sup>90</sup> The objection would obviously involve, with the procedural or substantive issue covered by the act objected to, the Charter interpretation embodied in it.

The fact that the legal determinations or interpretations embodied in Assembly declarations are deprived of legal force does not exclude that they perform a law-determining and/or interpreting—and ultimately developing—function, in a wide, non-technical sense. It

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<sup>88</sup> Leo Gross, "Expenses of the United Nations for Peace-keeping Operations: The Advisory Opinion of the International Court of Justice", *International Organization* XVII (1963), pp. 1 ff. at p. 11.

For us it would be a matter of *freedom* rather than "*right*" (*Appendix*, para. 131). When an agreement was involved the States' determination or interpretation would be a manifestation of the *pouvoir d'accord* under the relevant customary rules.

<sup>89</sup> A difference must be noted, however, between court judgments and arbitral awards on one side and decisions of political bodies on the other side. In addition to their binding character, arbitral awards and court judgments are instruments specifically intended for legal determination of procedural and substantive issues arising in the dispute that they settle. Decisions of political bodies—and of the Assembly—are not necessarily dispute-resolving instruments in a narrow sense.

This difference might have some bearing, *inter alia*, on the question of the position of States with regard to allegedly *ultra vires* deliberations of international (judicial or political) organs. (See below in the present paragraph.)

<sup>90</sup> A recent, thorough, analysis of this matter is made by Ciobanu, "Objections to Acts Performed Ultra Vires by the Political Organs of the United Nations", *Rivisita di diritto internazionale*, LV (1972), pp. 420 ff.

is not excluded either that determinations and interpretations contained in recommendations, and particularly in declarations, acquire a binding force.

43. A law-determining and/or interpreting function is performed by any Assembly unqualified recommendations, including of course declarations, in a *material* sense.

It is a matter of determination or interpretation in that there can hardly be any activity of an international body operating under a treaty in the field of the relations among, and the conduct of, States which does not involve in some measure the identification, ascertaining, understanding, explanation or application of the rules of the instrument under which the body operates and often of other contractual or customary rules. The extent, the depth and the frequency of the international organ's law-determining and interpreting activity are in fact directly proportional to the width of the scope of the organ's tasks as defined in the constituent instrument, to the intensity of the organ's operations and to the number of problematic or controversial provisions of the constituent treaty. Considering that the United Nations is an organisation of general competence, considering the . . . futility of the limit of domestic jurisdiction formulated in Article 2.7 of the Charter, and considering the high degree of generality or imprecision of many Charter rules and principles, one need hardly stress the quantitative and qualitative importance of the General Assembly's law-determining and interpreting activity.<sup>91</sup> It need hardly be added that this activity is of importance whatever one believes the function of legal interpretation to be.<sup>92</sup>

Important as the Assembly's law-determining and interpreting activity may be (technically and politically), it maintains, however, from the legal viewpoint, in so far as recommendations (and declaratory resolutions) are concerned, the connotations of merely *material* law-determining and applying in view of the non-binding character of recommendations. The only immediate, autonomous effect of *organic* law-determining and interpreting incidentally or deliberately effected by recommendation (or a declaration) is the hortatory effect of those instruments. Of course, this does not exclude compliance and the consequences of compliance. Compliance with an Assembly interpretation will come, however, either just as a matter of free choice of States or as an effect of the hortatory function, typical of international recommendations.

44. There are, of course, further possibilities than just spontaneous compliance.

One possible occurrence is the translation of an Assembly interpretation into a legal rule.<sup>93</sup> In the present chapter we have already considered the hypothesis that rules or principles embodied in Assembly declarations acquire legal force by way of formal or informal agreement simultaneous with, or subsequent to, an Assembly declaration (Section 3) or by way of formation of a customary rule (Section 2). The same phenomenon can obviously take place with regard to interpretations or determinations of existing Charter rules—or of any rules—embodied in Assembly declarations.<sup>94</sup> When document 887 quoted above only mentions, with regard to the problem of binding and precedent-setting Charter interpretation, the procedure envisaged for the amendment of the organisation's constituent instrument, it really falls short of the range of available ways and means. Charter interpretations endowed both with binding force and precedent value can also be achieved by treaty, by informal or tacit agreement or by custom, and it is more than just plausible that the contractual or

<sup>91</sup> We refer mainly, once more, to Rosalyn Higgins' well-known works. *Addre* especially: Schachter's *The Relation of Law*, etc.; and Detter, I., *Law-Making by International Organizations*, Stockholm, 1965.

<sup>92</sup> See mainly Kelsen, *The Law of the United Nations*, 1951, at pp. xiii–xvii.

<sup>93</sup> This may occur with regard to a “recommended” or “decided” determination or interpretation.

<sup>94</sup> Considering the relativity of the distinction between the substitution of a rule and a change in its interpretation or determination, the difference is only of degree.

customary rule embody an Assembly—deliberately or *obiter*—“recommended” legal determination or interpretation. No provision to that effect was obviously necessary in the Charter or in the *travaux préparatoires*.<sup>95</sup>

That custom is available to that effect (in addition to agreement) is particularly important both because custom does not require the consent of all *and* because the rules produced by custom possess, thanks to the inherent qualities of the custom-making process, a higher degree of regulatory authority and a higher potential (as explained in the *Appendix*, Section 7) than agreements, formal treaties included.

For the reasons stressed in Sections 2 and 3 of the present chapter, the question whether an interpretation or determination recommended by the Assembly has acquired the status of a customary or contractual rule is a question of evidence to be drawn from the practice of States within and without the Assembly or other organs.

The declaratory resolution will naturally be, together with statements, proposals, amendments, positive and negative votes and abstentions, *among* the elements of such practice. It does not seem correct, therefore, either to promote the resolution to the rank of a source of *binding* legal determination or interpretation, or to qualify the resolution as a legally *authoritative* act, constitutive or declaratory, of a legal determination or interpretation, or to speak of a legal determination or interpretation assisted by a *iuris et de iure* presumption. “Authoritativeness” can only be understood in a *factual* sense and will thus depend on circumstances rather than a treaty rule, legal title or qualification.

The resolution is never self-sufficient, in our view, not even in case of *unanimous* support by statements and votes. As a recommendation it cannot in itself constitute agreement or *opinio iuris* because those who support it—be they the whole United Nations membership—know it as a non-binding instrument of inter-State communication, are legally entitled to consider it as such and as such they do in fact consider it. There does not seem to be any legal presumption that the recommendation *carries a binding* interpretation. There is, on the contrary, a *iuris tantum* presumption, if one wants to put the matter in terms of presumptions, that it conveys an exhortation and not a binding enactment.

It need not be repeated that neither the *organic* nature of the Assembly’s deliberation<sup>96</sup> nor the nature of the Assembly itself<sup>97</sup> raises the instrument any higher than it materially and legally is. We remain, surely, within the realm of *relationnel* and *matériel*, and *below* the inter-State agreement.<sup>98</sup>

45. Any piece of legal determination or interpretation discernible in a recommendation or declaration of the General Assembly may also acquire binding force through other channels. These channels are awards of arbitral tribunals, judgments of international courts and decisions of political bodies, including the decisions of the Assembly itself. It is unnecessary to say that the situation is quite similar, *mutatis mutandis*, to the situation obtaining in the hypotheses considered so far.

Until the Assembly interpretation is only the object of the declaration there will be no legal law-determining effect. There will only be—through the exhortation—law-determining effects in a *material* sense. Once the interpretation is embodied in an act of adjudication or a

<sup>95</sup> The founding States and the whole membership of any time obviously retain, as contracting parties, the role of *domini* of their transaction. Such a role entitles them to alter their compact at any time and in any measure. A *fortiori* it entitles them to interpret it as they deem appropriate (*Appendix*, para. 158).

The Charter would obviously affect even less the normative impact of international custom.

In any case, the language of Document 887 leaves the door open for other law-making processes. It refers twice to Charter amendment as the procedure that *may* be resorted to.

<sup>96</sup> *Supra*, paras. 32–35, and references to the *Appendix* thereunder, especially in footnotes, 45, 46 and 49.

<sup>97</sup> Same paragraphs and references.

<sup>98</sup> *Ibidem. Adde: Appendix*, para. 166.

decision, there will be, of course, a legal law-determining effect. Such effect, however, will not derive from the recommendation. It will derive from adjudication or decision and from the conventional or customary rules on the basis of which it was rendered.

To contend that this is a “formalistic” way of looking at the matter would be not only technically incorrect (for the reasons explained in Chapter I and in the *Appendix*) but politically useless if not dangerous.<sup>99</sup> In particular, to maintain that law-determining and law-applying are matters of policy because they always involve, to some degree, a *political* choice, is totally beside the point. Of course the *adjudicating* court or the political body empowered to *decide* will also make political choices. It is quite possible that even a court will make a decision which, as inspired exclusively by political considerations, is, *in toto*, an innovative decision from the point of view of law, whatever the consequences or remedies may be. But in such hypotheses there is in the *first* place the power to *decide* with legally binding effect. On the strength of such a power, the political *content* of the judicial or political decision acquires, subject of course to invalidation in given circumstances, the legal value which is proper of award, judgment, or Assembly decision. When no such power is present the political choice remains a purely hortatory political choice. To present it in a different light by *jeux de mots* does not promote it to an “authoritative”—constitutive *or* declaratory—enactment.

46. The possibility for the United Nations *membership* to interpret or modify the Charter by agreement, particularly by unanimous, formal or informal, agreement, can be rightly referred to as *authentic* interpretation, based (in addition to *pacta sunt servanda*) upon the doctrine *eius est interpretari cuius est condere*.<sup>100</sup> It is worth emphasising, however, that this maxim, applicable as it undoubtedly is to Charter interpretation—and evolutive interpretation in particular—should not be misunderstood for another way of asserting the existence of an Assembly’s power of *authentic* interpretation or binding interpretation by unqualified resolutions (or declarations). The fact that the General Assembly consists of delegates of all Member States endowed with an equal voting power is likely to create ambiguities.<sup>101</sup>

The *ratio* of that municipal law maxim is to assert the obvious fact that if the legislator—situated as he is above the courts—is empowered to legislate anew, he is *a fortiori*—subject to possible constitutional limitations—empowered to re-legislate in order to clarify, interpret and adapt previous legislative enactments. This is the basis of what is called *authentic* interpretation. In other words, since the courts are subject to the law, and the legislator—Parliament—makes the law, *a fortiori* the same legislator—superior as he is to the courts—can enact interpretations of its own enactments by way, precisely, of authentic interpretation. The maxim is based upon three presuppositions: (i) the law-making power of the legislator; (ii) the superiority of the legislator over the judiciary; (iii) the fact that interpretation being less than modification of the law, he who possesses power to legislate *a fortiori* is entitled to interpret.<sup>102</sup>

<sup>99</sup> *Infra*, Conclusive Remarks, at para. 112.

<sup>100</sup> See, for example, Lachs, M., works quoted in the following footnote.

<sup>101</sup> Indeed, it could be intended that any unanimous or quasi-unanimous resolution of the Assembly interpreting the Charter, backed as such by the *whole* membership or by the *generality* of that membership (Lachs, Manfred, “The Law in and of the United Nations”, *The Indian Journal of International Law*, 1961, pp. 429–442, at pp. 439 ff.; and “Le rôle des Organisations internationales dans la formation du Droit International”, *Mélanges Rolin*, 1964, 157–170, especially pp. 10 ff. of the excerpt) carries with it the force of all “those who brought” (the Charter) into being or all those who are parties to the Charter at a “given moment”, namely a force equivalent to the original agreement, that is to say to the Charter itself as a treaty (Lachs, first quoted article, at p. 439).

The distinguished Judge applied this theory in particular to resolution 1514.

<sup>102</sup> It is easy to see how the maxim extends, in municipal law itself, into the realm of private law, and particularly into the field of private corporate bodies and organisations.

In the international society the situation is rather different. There is no organised legislative function. This and no other is the significance of the fact that States create law by agreement or custom. The only exceptions—very relative exceptions—are the rare cases in which States themselves have established (by contract) a *tertiary* law-making process, as where a decision-making power has been conferred upon the General Assembly. To be sure, there is no organised judicial function either.<sup>103</sup>

Within such a context, one thing is to say that the maxim *eius est interpretari cuius est condere* entitles the General Assembly to exercise an interpretative function with regard to its own enactments. Another thing is to say that that maxim entitles the General Assembly as such to interpret the Charter or to determine the law of the United Nations or to interpret treaties other than the Charter or to determine rules of customary, general international law, by means of enactments such as unanimous or quasi-unanimous recommendations or declarations.

(a) To the interpretation, by an international organ, of its own enactments we would have no doubt that the maxim applies as a matter of course. It applies, to be sure, *mutatis mutandis*.<sup>104</sup> In particular there will be no more legal value in the interpreting resolution than there was in the interpreted resolution. If the original resolution was a decision, namely a binding instrument, then interpretation can be given by the Assembly through another binding decision. If, however, the original enactment covered a matter with regard to which the Assembly was only empowered to recommend, the interpretative enactment—considering the subject-matter—will not be binding either. It can only be another non-binding recommendation.<sup>105</sup>

(b) Be that as it may of the self-interpretative function of the Assembly's enactments, the Assembly's power to interpret its constituent instrument—the *Charter*—or to determine the Charter's development,<sup>106</sup> is an entirely different matter. Here the proposition *eius est interpretari cuius est condere* is, in our opinion, out of the question. It is out of the question because not only is there no rule, in the Charter or elsewhere, by which such a power is granted (expressly or by implication) to the General Assembly, but the San Francisco Conference clearly indicated that the Fathers of the Charter did not intend to endow the Assembly with such power.<sup>107</sup>

As noted earlier, the fact that the Assembly is not endowed by the Charter with such a power does not exclude that at least for the concrete case covered by an Assembly *decision*, such a decision operates *as if* the Assembly were endowed (subject to the last resort remedy

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<sup>103</sup> *Supra*, paras. 41–42 and references thereunder.

<sup>104</sup> A felicitous application of the maxim is in Article 60 of the Statute of the International Court of Justice. There it is said that “In the event of a dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party”. There is thus no question that the International Court of Justice is the judge—on the unilateral request of either party—of the interpretation of the Court’s judgments. The operation of the maxim is thus extended to a juridical organ.

It better be noted, however, that the Court’s interpretative power does not follow simply from the maxim *eius est interpretari cuius est condere*. That power derives to the Court from Article 60 of the Statute and from the application of one of the parties. In centuries of arbitral practice no-one had ever asserted an automatic interpretative power of arbitral tribunals in the absence of *ad hoc* agreement. It must also be noted that the Court’s judgment—the one which is to be “authentically” interpreted by the Court—is binding; and a binding character of the interpretative judgment is implied in the language of Article 60.

<sup>105</sup> It should also be noted by way of incident that in both cases—unlike the case of the Court’s authentic interpretation—the maxim would operate as automatically as it would operate—*mutatis mutandis*—for a national legislature (or, for that matter, for the parties in a private contract).

<sup>106</sup> The value of Assembly interpretations of treatises other than the Charter and Assembly determinations of customary law is covered *supra*, paras. 40 and 43 ff.

<sup>107</sup> *Supra*, para. 41. See also Tunkin, “The Legal Nature of the United Nations”, *Hague Rec.* 119 (1966-III), at p. 25. On this author’s position, however, see footnote 108 below.

against *ultra vires* acts) with a power to adopt binding Charter interpretations. It must be recalled, however:

- (i) that even in that case it would not be a matter of authentic interpretation;
- (ii) that the value of the interpretative decision (or piece of decision) would not extend, *per se*, beyond the case covered by the decision; and, mainly,
- (iii) that any binding interpretative value attaches to a *decision*, *not* to a recommendation or other non-binding resolution or declaration, whether adopted unanimously or by any majority.

One cannot but stress once more the latter point, namely that an Assembly recommendation or declaration is, *under the Charter*, a non-binding instrument. To say that unanimous or quasi-unanimous recommendations or declarations can operate as if they were decisions when they formulate Charter interpretations is not justified. It amounts to stating that an interpretative recommendation—namely a non-binding interpretative resolution—of the General Assembly is a *juridical impossibility* unless it is adopted by a small majority.

In the light of such a result, the theory under discussion should in our view be rejected, as a matter of law, whatever is the meaning to be attached, in terms of *numbers*, to the so-called “*general acceptability*” test in the San Francisco Report on Charter interpretation.<sup>108</sup> Whether general means all, most or even many, “acceptable” and “acceptability” are matters of *agreement* or *decision* (or at least of *vote* in favour of a decision) not matters of recommendation. A binding Charter interpretation is an *agreed* or *decided* interpretation; it cannot be just a *recommended* interpretation.

It is of course another matter to say that the United Nations *membership* can at any time—*prior*, during or after the adoption of an interpretative resolution—translate the recommended interpretation into an agreement or customary rule.<sup>109</sup> Occurrences such as these, and the agreement among the membership in particular, would constitute, of course, *authentic* interpretation.<sup>110</sup>

The tendency to situate the Assembly at the place of the member States, which is implicit in the doctrine discussed in the text, is perhaps consciously or unconsciously related, as well as other theories of Assembly recommendations or declarations, to the general tendency to consider international organisation, on the basis of the municipal law models discussed in the *Appendix*, as something situated “over and above” the member States<sup>111</sup> and to the related concept of the acts of the Assembly as *organic* acts, superior as such in legal value to the very agreement among the member States. One forgets, *inter alia*, that organic acts of the Assembly are of different kinds.

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<sup>108</sup> UNCIO Documents quoted *supra*, para. 41.

The opposite opinion is preferred, *inter alios*, by Tunkin, according to whom: “the conclusion which may be drawn from this Report is that unanimously adopted resolutions of the General Assembly constituting an interpretation of the provisions of the Charter, to the extent that they constitute, such an interpretation, are binding upon the Members of the United Nations” (*The Legal Nature of the United Nations*, at p. 35).

<sup>109</sup> As it may have been or be the case with the content of resolution 1514 (below in the present paragraph).

<sup>110</sup> It seems to us that to invoke the maxim *eius est interpretari cuius est condere* in order to justify as a matter of law a power of the General Assembly to enact binding interpretative resolutions is a bit like reading the maxim upside down. The meaning of the maxim is that the *Member States* of the organisation, the founders of the United Nations (that is the implication of the word *condere*) namely, the Fathers of the United Nations as opposed to United Nations *organs*—retained, collectively, the interpretative power as a corollary of the power to make a new organisation or to modify the constituent treaty of the existing organisation. It cannot mean, the maxim, that the Assembly, *the created entity*, had the power to take the place of the creators. Far less by acting within the sphere of a power of non-binding recommendation attributed to it by those creators.

<sup>111</sup> *Supra*, Introduction, para. 5 and *infra*, para. 49 and *Appendix*, paras. 134 ff., especially 138–140 and 146–147.

As regards resolution 1514, in connection with which the maxim *eius est interpretari* has been invoked, in the measure in which it reiterated Charter provisions there was no problem. In so far as any innovative provisions or interpretations were concerned, it was a matter of *de lege ferenda* exhortations. If any new rules, or (which amounts to the same) binding interpretations or determinations of existing rules with regard to colonialism and decolonisation, came into being at that time or at any subsequent time (to the effects indicated in the innovative provisions or interpretations of resolution 1514), they were created by inter-State agreement or custom. It would have been an informal agreement modifying the Charter or adding thereto, in so far as it were demonstrated, by conclusive evidence based on actual, concrete behaviour of States regarding the subject-matter, that there was a general agreement to the effects of the content of those innovative or interpretative provisions of resolution 1514. It would have been custom in so far as it had appeared that customary rules; had developed to the same effect.<sup>112</sup> In either case resolution 1514 would not be decisive.<sup>113</sup> Of course, with regard to the ultimate result consisting in legal reform by general agreement among the United Nations membership (or reform by custom), Assembly resolution 1514 may well have been and still be of high importance.

Under no circumstances, however, could that importance amount to an alleged binding force of resolution 1514 as such, namely as an act of *authentic* interpretation. The only conceivable act of authentic interpretation would have been the general agreement of the States as *domini* of the Charter as an inter-State compact.

47. The conclusion that the General Assembly is not empowered to enact binding interpretations by recommendation or declaration would also be contradicted, in theory, by other doctrines which in one way or another would seem to bring about, *inter alia*, a higher value of Assembly recommendations. One of these doctrines is Kelsen's well-known doctrine of the "measures power" of the Security Council under Chapter VII. Another is the doctrine of the so-called "financial power" of the General Assembly, as embodied in the oversimplified understanding of the Charter which lies at the basis of the International Court of Justice's Opinion on *Certain Expenses* (1962).

Kelsen's doctrine is not directly relevant for us in that the authoritative effect would derive not from the Assembly's enactment as from the Security Council's.<sup>114</sup> In addition, it

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<sup>112</sup> "Procedurally", the customary development is more valid as it does not require unanimity, and from the point of view of substance, it is a more fundamental development of a less precarious impact than just agreement. Some of the reasons are given in the *Appendix*, paras. 162 and 164.

As we see it, the development of custom in the relevant field should affect and presumably will affect a wider range of issues than just colonialism. It affects neo-colonialism as well. It affects self-determination of colonial *and* non-colonial peoples. To envisage the development as brought about by agreement would mean, also from this wider viewpoint, to belittle it. The possible development of custom with regard to *colonialism*, neo-colonialism and universal *self-determination* is touched upon *infra*, paras. 76, 81 and 106 (final part).

<sup>113</sup> Our opinion is not based on the fact that the resolution in question was not really unanimous because of the nine abstentions. To be sure, the abstentions were there: and, if nine missing affirmative votes may mean little in a national parliament, they mean more in an international body composed of about one hundred odd States and operating on a one country one vote basis. But more than the abstentions—the presence of which would anyway exclude the equivalence with the authentic interpretation (or the modification) of the treaty by *all* the Parties—more than those nine abstentions, we say, one must consider the Charter provisions on amendment and the general rules on the modification of treaties, formal treaties in particular. Of course, international law is not "formalistic" with regard to the conclusion of agreements. But the Assembly could not circumvent, at one and the same time, the provisions of the Charter on amendment and revision and the general rules of international law relating to the modification of treaties. Far less could it do so by an instrument known to all concerned as a non-binding recommendation.

<sup>114</sup> *The Law of the United Nations*, 1951, at pp. 294–295. According to Kelsen, from the fact that the Charter "does not provide that the decisions—except those of the International Court of Justice—in order to be enforceable must be in conformity with the law which exists at the time they are adopted", it follows that "The

would only be the question of an authoritative effect of an Assembly declaration's *application* to a specific case rather than of a general authoritative effect of the declaration as such.

The "financial power" doctrine is also not relevant directly. The Assembly's financial power would be brought to bear not in support of a general normative authority of a rule or principle embodied in an Assembly's declaratory resolution—let alone the resolution as such. It would operate in support of an Assembly deliberation on a concrete issue covered by the relevant rule or principle, and requiring a financial commitment.<sup>115</sup> The doctrine of the Assembly's "financial power" is in any case, according to qualified scholarly opinion, a rather weak one to say the least.<sup>116</sup>

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decision enforced by the Security Council may create new law for the concrete case" (see also pp. 446–450). Kelsen had previously noted (at p. 294) that his reasoning applied to decisions of "any organ" of the United Nations "whether they have in themselves a binding character or not". That the doctrine would obviously also cover Assembly recommendations is expressly stated by Kelsen at p. 459 (and 445–446 for Security Council recommendations).

<sup>115</sup> The International Court of Justice has thought it wise—and in any case in conformity with the Charter—to assert that recommendations of the General Assembly, although lacking in binding force, can be made to bind Member States by the use of the Assembly's "financial" or "budgetary power". The General Assembly could achieve that, it seems, also with any non-binding Security Council recommendations (Congo), just as by Kelsen the Security Council could make any Assembly recommendation binding by qualifying any other conduct as a threat to the peace, breach of the peace or act of aggression (and consequently applying measures under Articles 41 ff.)

If both doctrines were valid, the United Nations would wield, in the measure in which Assembly and Council agreed, a terrific amount of power, *each organ turning into binding enactments the non-binding resolutions passed by the other*. An astonishing result indeed.

No doubt, *doctrines* are, under certain conditions (*supra*, paras. 38 (a) and 105–107), part of law. But we doubt that such doctrines would be.

<sup>116</sup> Prominent among the critics is Leo Gross, "Expenses of the United Nations for Peace-Keeping Operations. The Advisory Opinion of the International Court of Justice", *International Organization*, XVII (1963), pp. 1–35. See especially pp. 8–10 and 17–23. Equally critical is Judge Sir Gerald Fitzmaurice where he states: "*The core of the difficulty* is how to reconcile the obligatory character of the liability to meet the expenses . . . with the *non-obligatory character of many, indeed most, of the resolutions under which these expenses are incurred*" (*ICJ Reports* 1962, at p. 210).



### CHAPTER III

#### THE STATUS OF RESOLUTION 2625 (XXV)

48. Considering all the *considerata*—far too many—of the relevant resolutions, the purpose for which the General Assembly adopted the declaration was the codification and progressive development of the seven principles, rightly or wrongly deemed to be a part of the law of the United Nations as it was at the time of the coming in force of the Charter and as it had developed in the meantime.<sup>1</sup> This was done, *inter alia*, on the strength of Article 13.1 (a) of the Charter, according to which the Assembly is to initiate studies and make recommendations for the purpose of . . . promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.<sup>2</sup> In comparison with other declaratory resolutions of the General Assembly, it would seem that the development-codification intent of resolution 2625 (XXV) is distinctly emphasised. Some of the relevant instruments, including preambular paragraph six of resolution 2103 and preambular paragraph four of resolution 2625 itself, point to the declaration as something that should constitute or did constitute, respectively, a landmark in the development of international law.

It is plain that the operation that led to the adoption of the declaration could also have been carried out within the framework of provisions relating to the competence of the Assembly in the substantive matters, or some of the substantive matters, covered by the seven principles. For instance, in resolution 1815 (XVII) of 1962, the General Assembly recalls, *inter alia*, “its authority to consider the general principles of co-operation in the maintenance of international peace and security” . . . The language of that paragraph reproduces partly the text of Article 11 of the Charter.<sup>3</sup>

It should be noted, however, that it makes little difference, legally speaking, whether the declaration was adopted on the *strength* of Article 13.1 (a) or on the strength of other provisions among those contained in Articles 10–14 of the Charter. In either case the Assembly was entitled to cover *any* subject, either because the scope of the “codifiable” international law is *not* limited in any way *ratione materiae*<sup>4</sup> or because there is hardly

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<sup>1</sup> On the framework within which the declaration was prepared, see especially Briggs, “Reflections on the Codification”, etc., in *Hague Rec.*, 126 (1969-I), pp. 284–293; Hazard, *New Personalities*, etc., *American Journal of International Law*, 1964, pp. 952–959.

<sup>2</sup> That the Assembly intended to operate within the scope of Article 13.1 (a) results first of all from operative paragraph 2 of resolution 1815 (XVII) of 18 December 1962, by which (referring also to principles embodied in Articles 1 and 2, of the Charter) the Assembly “Resolves to undertake, pursuant to Article 13 of the Charter a study of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter with a view to their progressive development and codification, so as to secure their more effective application”, the principles being then indicated as the prohibition of the threat or use of force, peaceful settlement of disputes, non-intervention and co-operation. The idea of development and codification was resumed in resolution 1966 (XVIII) of 16 December 1963, which established a Special Committee to carry out the task with regard to the four principles covered by resolution 1815 and with regard to the further principles of equal rights and self-determination of peoples, of sovereign equality and fulfilment in good faith of obligations assumed in accordance with the Charter. The second preambular paragraph of resolution 1966 (XVIII) reads: “Recalling its resolutions 1505 (XV) of 12 December 1960, 1686 (XVI) of 18 December 1961 and 1815 (XVII) of 18 December 1962, which affirm the importance of encouraging the progressive development of international law and its codification and making it a more effective means of furthering the purposes and principles set forth in Articles 1 and 2 of the Charter”. The same intent of codification and progressive development is further confirmed, *inter alia*, by the seventeenth preambular paragraph of resolution 2625 itself.

That the operation was situated within the framework of Article 13.1 (a) also results, more or less explicitly, from the original proposal (USSR) concerning the consideration of principles of peaceful coexistence and from many statements made and episodes occurring during the relevant debates in the Sixth Committee from the 15th (1960) session to the 25th and in the Special Committee. That the matter was deemed by the General Assembly to be one of codification is further confirmed by the instruction, imparted to the Special Committee, to take account, in drafting the declaration, of the practice of United Nations organs (since inception) and of the relevant resolutions of the General Assembly.

<sup>3</sup> Similar references are to be found, in the same or other resolutions, to other miscellaneous provisions of the Charter. Article 10 certainly covered all the matters covered by any one of the seven principles. It is clear, however, that all the matters covered by these other general provisions were to be the *object* of a work of codification and progressive development.

<sup>4</sup> Appendix, paras. 164 (and 132), and Conclusive Remarks, para. 110 (and footnote 18 thereunder).

a limit, except for Article 2.7,<sup>5</sup> to the objective scope of the Assembly's "substantive" competence as determined by Articles 10–14.

In either case, on the other hand, the Assembly was clearly empowered only to recommend. The emphasis on "progressive development and codification" can only be of interest from a substantive point of view and from the viewpoint of an assessment of the declaration's "effective" impact as compared to the declared purposes.

The essential fact is that we are confronted with one of the most typical, if not the most typical, among those General Assembly declaratory resolutions (recommendations) the legal effects of which we have discussed in two previous chapters.

49. It is equally plain that first by deciding in 1962 (by resolution 1815) to "do it itself" and then by setting up the Special Committee in 1963, the General Assembly set aside, for the purpose of the Friendly Relations operation, the International Law Commission channel.

Unlike the draft declaration on the Rights and Duties of States, the elaboration of the present declaration was not only accomplished without the help of the International Law Commission but deliberately entrusted to a *longa manus* of the Assembly's (and the Sixth Committee's), namely to a body composed of representatives of governments. The recommendation of paragraph 2 of resolution 1966 that member governments appoint jurists in that capacity did not alter a state of affairs radically different from that obtaining in the "regular" work of development and codification entrusted to the International Law Commission.<sup>6</sup>

The political connotation—stressed by many, notably by the Soviet Union<sup>7</sup>—was even more obvious in the object, the method and the result of the operation. The *object*—rather curiously—was a part of international law consisting not of a more or less developed set of customary rules, principles or standards (as ordinarily is the case with the subject-matters of codification) but rather of rules *already codified*, totally or in part, in the Charter. The only point where work similar to that of codification would be involved was the practice of the United Nations, in the light of which the principles should be (but seemingly were not quite) considered by the Special Committee.

The *result* was to be even more different. Unlike the work of the International Law Commission, concerning ordinary matters of codification and progressive development, and unlike other subject-matters covered by "declaratory resolutions", it was clear that the result of the Special Committee's endeavours was not meant to go, *tel quel*, through that essential part of the ordinary codification and progressive development procedure which translates the prepared material into a treaty, whether by means of a Diplomatic Conference of the traditional kind or through the work of a special or ordinary United Nations organ (as was done, respectively for Outer Space and for the Human Rights Covenants). On the contrary, the draft worked out by the Special Committee was meant to become, precisely, once processed by Sixth Committee and Plenary, a General Assembly declaratory resolution.

What happened can perhaps be summed up by saying that the Assembly has proceeded to a piece of codification and progressive development which:

- (i) differed from *ordinary* codification and development operations—those leading to a treaty—in that it was ultimately codification and development in a *material* sense, effected at the merely *organic* level, as opposed to legally binding, formal,<sup>8</sup> directly inter-State or contractual codification and development;<sup>9</sup>
- (ii) differed from other instances of *extra ordinem*—organic and material—codification and development, such as those which resulted, respectively, in the Declaration on Rights and Duties of States, in the Code of Offences against the Peace and Security of Mankind and in the Declaration on the Nuremberg Principles. It was, in fact, as a work of codification and development, comparatively less *technical*—in view of the nature of the drafting body, and its method of work—and more *political*.

<sup>5</sup> Appendix, para. 152 (and footnote 158 thereunder), pp. 274–275.

<sup>6</sup> It should be noted that although it was correct to state, judging from the terms of resolution 1966, that the people sitting in the Special Committee were meant to be "a combination of legal knowledge permitting manipulation of legal techniques and political acumen tied through employment relations to foreign offices" (Hazard), the political element has prevailed very heavily (*infra*, para. 108).

<sup>7</sup> See quotation of USSR representative in Briggs, *Reflections*, etc., at p. 286.

<sup>8</sup> In the sense in which the dichotomy between *formal* and *material* is being used by us in connection with international law-making and determining, *supra*, paras. 22–24.

<sup>9</sup> "Directly inter-State" and contractual is the codification treaty, as opposed to the organic nature of a "codifying" Assembly resolution. "Organic" is used in the sense specified in the Appendix, paras. 140, 146–147, namely as something quite different from the "organic" of municipal law. We refer to that *international* "organic element" which we are inclined to place *below* rather than "over and above" States and inter-State compacts. See also *supra*, paras. 34 ff. and 46 (and footnote 111 thereunder).

From the first feature derives, obviously, the non-binding nature of the formulations. The second feature—a consequence of the fact that the Special Committee was so set up by the member States as to consist of only a few jurists, some diplomatic jurists and many jurist-diplomats all three “types” working in an official capacity—determines a lower degree of “credibility” of the formulations as compared with both unratified ILC codification treaties and “unprocessed” ILC drafts themselves. It is known that these possess both a rather substantial *de facto* authority.

There can hardly be any doubt, in conclusion, that the declaration embodied in resolution 2625 (XXV)—the “Friendly Relations” declaration—is to be considered, from the legal point of view, as an instrument of a purely hortatory value.

50. When one deals with a codification treaty—one is confronted with a text all the articles and paragraphs of which are not only—if the text is properly conceived and drafted from the technical point of view—interrelated in such manner as to constitute an *organic* whole, but also of *equal* force, regardless of whether they represent pure codification of existing customary law (or of piecemeal treaty rules) or rules or principles created by the treaty *ex novo*. Except in so far as some of the factual elements that may have to be taken into account in the interpretation of given provisions may be different from the elements to be used for the interpretation of other provisions, and except, of course, for the higher rank and wider subjective sphere of application of customary rules, both the repetitive provisions of *lex lata* and the innovative provisions are all placed, once the treaty has come into force, *at least* on the footing of binding treaty rules.

When one deals instead with an Assembly declaratory resolution, the situation is different. While the inclusion in the treaty is a sufficient condition for any rule to be beyond the threshold dividing non-law from law, the inclusion of a rule in such a resolution is not so sufficient. Any formulations of a declaration which are innovative will thus remain (in spite of their inclusion) part of *lex ferenda*. It follows that unless a declaration consists exclusively of codification-interpretation of existing law in a narrow sense or exclusively of innovative prescriptions in a narrow sense it will be a combination of *lex lata* with *lex ferenda* exhortations.

As such seems to be the case of the Friendly Relations declaration, any assessment of the text as a whole must be preceded by a vertical assessment of the value of each provision of the declaration. To that effect, each provision or organic set of provisions of the declaration must be “compared” in order to determine its legal weight, with the rules of international law (Charter, other treaty or general international law) which would be relevant if the declaration did not exist.

51. *Grosso modo* three possibilities will arise and combine in all the conceivable manners.<sup>10</sup>

(i) If the declaration’s provision or set of provisions reiterates a principle or rule of Charter law or another rule or principle—written or unwritten—of international law, the provision or provisions in question will be considered as binding, namely as the re-iteration of a binding rule or principle, possessing the same value or rank as the latter. The only plus-value they would possess in comparison to the original reiterated rule or principle will be

- (a) the Assembly’s exhortation to observe it, if it is a rule or principle the existence of which was unquestioned or unquestionable; and
- (b) the Assembly’s exhortation to observe it, *accompanied* by the Assembly’s exhortation that the existence of the rule be not contested (if the existence of the rule is questioned or questionable).

(ii) If the content of the declaration’s provision does not correspond to an existing rule or principle (Charter, other treaty or custom), it will be a merely hortatory rule or principle. In such a case, it is possible that under the influence of the exhortation coming from the General Assembly, the formation either of a corresponding treaty rule or principle or of a corresponding customary rule or principle be “promoted”. In either case—new treaty rule (bilateral, multilateral, universal) or new customary rule—the declaration’s effect will only be an indirect one.

This is to be understood in the sense that if the new rule is created by *treaty* (or an informal or tacit agreement) the declaration may help the will of the parties to form and meet on a content of an agreement corresponding to the content of the declaration. If the new rule is a customary rule, the declaration’s indirect role will be exercised through the *medium* of the conduct and attitudes of States—United Nations Members or non-members—to which the declaration is addressed. In other words, in so far will a given new custom come into being as States will conform themselves to the exhortation contained in the relevant part or parts of the declaration.

(iii) If the provision of the declaration constitutes the determination-interpretation of a customary rule or the interpretation of a treaty (or tertiary) rule of international law, its value will be to support—in a hortatory

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<sup>10</sup> Compare with Briggs, quoted work, at p. 288.

sense—the given determination-interpretation.<sup>11</sup>

Of course, one can envisage innumerable interpolations corresponding to intermediate situations between the three possibilities. With regard to *outer space*, for example, it is possible that at the time when the resolutions were adopted which paved the way to the Outer Space Treaty—namely, resolutions 1721 (XVI), 1802 (XVII), 1962 (XVIII) and 1963 (XIX), more notably resolution 1962 (XVIII) entitled *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*—the rule on the *inappropriability* of the Moon and other Celestial Bodies was a *tacit* agreement between the two major Outer Space actors. Some distinguished writers, however, contend that there might also have been at that time an “*inchoate*” custom to the same effect.<sup>12</sup>

In any case the weight of the hortatory element, which constitutes the essence of the declaration’s “contribution”, so to speak, to the rules’ support, the rules’ creation or the rules’ interpretation, will naturally vary as a function of a number of variables it would be difficult to enumerate.

52. The impact of the declaration on existing international law—and in particular on the law of the United Nations (and mainly on the Charter)—can thus be described in the sense that the declaration could be considered *per se* neither as a part of customary or general international law, nor as an authentic determination or interpretation of custom or treaty. The declaration places itself *below* general—written or unwritten—international law, *below* existing treaties, and, in particular, *below* the Charter of the United Nations.

That does not exclude, of course, that the declaration could have *an impact* on the formation, development and application of rules of international law, whether customary or conventional.

This relationship between the declaration’s provisions on one side and the United Nations Charter on the other, and between the declaration and other rules or principles of international law, is confirmed by paragraphs 2 and 3 of the declaration.

By paragraph 2: “Nothing in this declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of member States under the Charter or the rights of peoples under the Charter taking into account the elaboration of these rights in this declaration.” This means that the Charter is not *tampered with* by the declaration except by way of *exhortation*.

So, any principle of United Nations Charter law embodied in the declaration continues to be valid *as part of the Charter* and by virtue of the *Charter* alone. The declaration *only adds* a hortatory element to those principles which are and remain binding on the strength of the Charter.

Second—and conversely—any principles of Charter law found to exist—expressed or implied—in the Charter but not embodied in the declaration are not any less a part of international law. In other words, any part of the Charter law which had been overlooked in the drafting of the declaration, would not be any less a part of Charter law.

The same is to be said of any principles or rules of general international law, or of treaty law other than the Charter, embodied or not embodied in the declaration. Those embodied are legal on their own strength (treaty or custom), the declaration adding hortatory emphasis. Rules and principles not embodied are nevertheless equally a part of general international law or treaty law.

Paragraph 3 of the declaration further states in the first sentence that “The principles of the Charter which are embodied in this declaration constitute basic principles of international law”. This paragraph should be read, however, in conjunction with the first part of the previous paragraph, according to which the declaration is of no prejudice to Charter provisions. So read, paragraph 3 does not bring about—in view of the non-binding nature of the declaration—any alteration in the status of the principles that this paragraph refers to or of any principles not embodied in the declaration. Just as the principles embodied in the declaration are not more existing than those not embodied, the principles embodied do not acquire a higher rank by virtue of the declaration, except by way of exhortation. In law, subject to future development by treaty or custom, the rank relationship remains unaffected by the declaration as such.<sup>13</sup>

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<sup>11</sup> It follows that with regard to the provisions of the Declaration that constitute interpretation of the Charter or determination of rules of general international law, the conclusion is the same as with the provisions of the Declaration which formulate new rules of international law. Also in the field of interpretation, the Declaration must be read as operating, from the normative point of view, *as a set of exhortations*. Each one of these exhortations is subject, in so far as its weight is concerned, to general international law, to the *Charter* of the United Nations, and *to any relevant piece of treaty law other than the Charter*.

<sup>12</sup> See mainly Lachs, “The Law-Making Process for Outer Space” in *New Frontiers in Space Law* (ed. by McWhinney and Bradley), Leyden, 1969, pp. 13 ff. See also *supra*, paras. 29 and 36.

<sup>13</sup> An excellent summary of the position, except for the very first sentence quoted hereunder is in Witten, R. M., “The Friendly Relations Declaration”, etc., in *Harvard International Law Journal*, 12 (1971), at pp. 517–519. In that author’s words (references omitted): “The Declaration is tentative and ambiguous as to its very status. It

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declares that, ‘the principles of the Charter which are embodied in this Declaration constitute basic principles of international law’, but does not grant the actual Principles of the Declaration the same status. The Declaration merely ‘appeals to all States to be guided by these principles . . . and to develop their mutual relations on the basis of their strict observance’. The Declaration, therefore, perceives itself as aspirational rather than programmatic, as a guide rather than a mandate.

The delegations, however, varied in their opinions of the document’s value. Chile held that it enunciated authentic principles of international law. Romania agreed. Venezuela and Yugoslavia considered it a current interpretation and elaboration of the Charter which might prove an effective contribution to future codifications. Australia and Japan deemed it an elaboration of the Charter. The Netherlands found that it could not and should not be interpreted as a carefully drafted legal document. The United States advised that the Principles ‘would merit attention to the extent they were complied with in fact’. Presumably then, the United States will not acknowledge the Principles as binding international law until they are enshrined by custom. Italy voiced scepticism and argued against a mere exposition of normative elements without elaboration of the organisational elements prerequisite to their realisation. The mere articulation of principles, unbalanced by provisions effecting imperative compliance and enforcement procedures, ultimately reduces the impact of the Principles. The Netherlands and Cameroon agreed with the Italian position. Italy also criticised the work of the Special Committee as ‘too highly politicised’. She concluded that the Declaration was not a directly binding text of international law nor an authentic interpretation of customary or treaty law.

The Italian delegation’s criticism is forceful and persuasive, for the Declaration is a product of political consensus. Its value resides in its quantification of the lowest common denominator of norms acceptable to nations with conflicting political philosophies. It reaffirms the Decalogian premises of the Charter. It is a first step toward interstitial development of the Charter, but a halting and tortuous one. Indeed, the text of the Principles appears almost secondary in importance to the various reservations and interpretations appended to them. These qualifications, and the motivations which impelled them, provide the key to eventual acceptance of the Declaration’s Principles. These motivations can easily be related to current foreign policy objectives or postures. Thus, the singular interpretations of the United Arab Republic and Syria derive directly from their struggle with Israel. Similarly, the emphases and glosses which the United States stressed reflect its position in Indochina. The delegations also manifested a desire to preserve to the utmost their future flexibility.

The Declaration suggests, as so often is the case, that the Members of the UN are not prepared to do more than agree on hortatory texts which do little to answer how far they are binding on Members and, if they are, what steps should be taken to ensure compliance”.

The numerous useful references contained in the passage are omitted by us.



## CHAPTER IV

### THE FORMULATION OF THE SINGLE PRINCIPLES

#### *Section 1. The Prohibition of the Threat or Use of Force in International Relations*

53. The formulation of this prohibition opens by a paragraph which reiterates Article 2.4 of the United Nations Charter, except for the words “Every State”. Compared with the language of the Charter, which only refers to member States, those words raise the issue of the subjective scope of the prohibition, namely whether it extends to all States. We deem it preferable, however, to deal first with the *objective* scope of the formulation of the prohibition.<sup>1</sup>

In so far as the repetitive part of the first paragraph is concerned it should be said that it would have been preferable to leave it out of the formulation of the principle. *Repetita iuvant* does not seem to be a sound principle of codification or “legislative policy”. Re-iteration may weaken the credibility of a rule and its effectiveness.

Repetitive as it is the text of this paragraph represents, however, a great improvement over Article 9 of the draft declaration of Rights and Duties of States adopted by the General Assembly on 6 December 1949, in that it does not attempt, as was done in that Article, to combine into a single formula the prohibition of war of the Pact of Paris with the prohibition of force contained in the Charter.<sup>2</sup>

54. The first problem in the elaboration of the prohibition of the threat or use of force is the meaning, within paragraph 4 of Article 2 of the Charter, of the word “force”. This problem has given much food for debate in the Special Committee, in view of the difference between the theory that force is only armed force and the theory that force is also economic, political and other forms of pressure or coercion.

In conformity with our deliberate restriction of our task,<sup>3</sup> we do not intend to examine the legal and political merits of this difficult question. In so far as the declaration is concerned, it is our impression that it marks a point—subject to the general limitation of its legal effects—in favour of an interpretation of “force” in a sense wider than just armed force. This construction is based upon the fact that forms of pressure or coercion other than armed force are also condemned in the declaration.

No doubt, the text itself of the prohibition of the threat or use of force would support the restrictive interpretation in the sense of *armed* force. However, even if there were not the express provision of operative paragraph 2 of the resolution embodying the declaration, according to which “In their interpretation and application the . . . principles are interrelated and each principle should be construed in the context of the other principles”, the declaration must be read as a whole, whatever its legal value;<sup>4</sup> and if one reads the declaration as a whole

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<sup>1</sup> On the declaration’s formulation of the prohibition of force see especially Houben, P. H., *Principles*, etc., at pp. 707–708; and Rosenstock, R., *The Declaration*, at pp. 724–725.

<sup>2</sup> The poor drafting of Article 9 is noted by Kelsen, *The Draft Declaration on Rights and Duties of States*, at p. 271.

On that text see the *Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States, Memorandum submitted by the Secretary-General*, United Nations Doc. A/CN.4/2 of 15 December 1948, pp. 92 ff.

<sup>3</sup> *Supra*, para. 2.

<sup>4</sup> Indeed, this criterion is subject to reservation in that the method followed in the drafting left too much to be desired for the co-ordination of the various formulations (and their several elements) to be considered as reliably achieved. It does not seem, however, that this general reservation plays any role with regard to the issue of forms of force other than “armed force”, which (whatever their exact definition) are undoubtedly condemned in

one must acknowledge the fact that forms of violence or pressure other than armed force are condemned. They are condemned in the formulation of the “Duty not to Intervene”.

It is of course contended that there is no better argument in support of the interpretation of the term “force” as meaning only armed force—the so-called Western interpretation—than the fact that “economic and political pressure” is mentioned under a heading other than “force”. *Prima facie* one could say that it is a different kind of prohibition because armed force is prohibited under the title “Prohibition of the threat or use of force” and economic and political force is prohibited under the title “Duty not to Intervene”. But this is one of those arguments that prove too much. There would be a difference if the transgression of the prohibitions textually placed under title A (force) met, or were supposed to meet, with legal consequences different from the legal consequences attached to the transgression of the prohibitions textually placed under title B (intervention). There would be a difference, in other words, if illegal recourse to *armed* force met sanctions or measures different from those attached to the illegal recourse to *economic or political force*.

But such is not the case in the Charter; and it is not the case in the declaration. Apart from the fact that the measures envisaged in Chapter VII and in other provisions of the Charter do not qualify as sanctions in a proper sense<sup>5</sup> and apart from the fact that the Charter does not seem to envisage, as we shall see, any distinct prohibition of intervention, there is nothing in the declaration itself that would justify a different treatment of the transgressions in question. Nowhere in the declaration is it stated that violations of principle A differ from violations of principle B, in the sense in any way similar to the sense in which manslaughter or murder differs from assault.

The only reasonable interpretation of the presence in the declaration of a prohibition of certain forms of economic and political pressure seems thus to be that such forms are treated—in the measure in which they are prohibited—in the same fashion as resort to force or threat of force. This is another way of saying that the prohibition of force covers, in addition to armed force, also forms of economic or political coercion. As we shall see, not only the clarity and certainty of the law but also its effectiveness would have gained from a bold inclusion of such forms of economic and political coercion into the concept of prohibited force. This shows—in addition to bad legal technique in all quarters of the Special Committee—that the delegations opposing the broad interpretation of force did not gain anything by relegating economic and political pressure under another principle.

What exactly would be prohibited as forms of force other than armed force is of course another matter. Within the specified limits, we shall deal with it in the section covering the part of the declaration concerning Non-intervention.

55. Further objective elements of the prohibition are “indirect aggression”, defined in paragraphs 8 and 9, and armed reprisals.

Indirect aggression constitutes, especially in the form of subversion, one of the most serious threats to international peace and security and to the preservation and development of free institutions. It was essential that all forms of indirect aggression be condemned unambiguously. It was especially so within the framework of a declaration which, according to some of the proponents was to codify the law of “peaceful coexistence” as understood by certain powers and parties. According to some of those understandings peaceful coexistence should only mean absence of direct confrontation either between the Great Powers or in general. In either case internal subversion, could be compatible with the law of “peaceful coexistence”.<sup>6</sup> The presence in the declaration of paragraphs 8 and 9 of the section under

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the declaration. On the Special committee’s method of work, *supra*, paras. 48–49 and *infra*, para. 108.

<sup>5</sup> Forlati Piccho, L., *La Sanzione*, etc., pp. 31 (footnote) and 128–133.

<sup>6</sup> *Infra*, paras. 86 ff.

review seems sufficient, *prima facie*, to eliminate, at least within the limits of the declaration's impact, any possible ambiguity.

We would not doubt that paragraphs 8 and 9 are interpretative elaborations of paragraph 4 of Article 2 of the Charter.

Armed reprisals, which were probably not banned by the League of Nations Covenant, constituted, and still constitute, one of the most delicate problems raised by the generality of language of the Charter concerning the threat or use of force.<sup>7</sup> The express mention of armed reprisals as prohibited is, therefore, a useful service to the certainty of a rule which many commentators considered to be implied in the Charter.

Unfortunately, this clarification is not accompanied by an adequate development with regard to the definition of the cases in which resort to force is permissible.<sup>8</sup> It follows that the formulation does not clarify the issue as much as it would be desirable. It remains to be seen, *inter alia*, once armed reprisals are included in the prohibition of Article 2.4, under what conditions and to what extent those reprisals may also fall, as well as other forms of violence—in so far as they were resorted to in self-defence—under the exception of Article 51, thus to be considered as permissible in given circumstances.

56. The formulation of the prohibition of force would also have gained from the inclusion of provisions on crimes against the peace and war propaganda less superficial and ambiguous than those finally embodied in paragraphs 2 and 3.

The provision on crimes against the peace leaves untouched most delicate questions concerning the responsibility of individuals and the impartiality of the tribunal. Considering that some developments were perhaps under way in unwritten law, it would have been preferable to avoid mentioning the matter unless more precise statements (*de lege lata* or *ferenda*) had been possible.

According to a proposal of Italy and the Netherlands, the provision on war propaganda should have been connected with human rights and freedom of information. Under that proposal “In order to ensure the implementation of the prohibition of the threat or use of force and to contribute to the maintenance of international peace and security, the Members of the United Nations should, *inter alia*, favour the free exchange of information and ideas essential to international understanding and peace, and take appropriate steps to discourage propaganda against peace, in the light of General Assembly resolutions 110 (II), 290 (IV), 881 (V) and 819 (IX).”<sup>9</sup> This proposal was rejected.

We find it less easy to take a position with regard to paragraph 10 of the formulation under review, which concerns military occupation and the acquisition of territory by force. According to the first part of that paragraph, “The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognised as legal.”

To begin with the most important matter, namely with the forcible *acquisition* of territory, the provision contained in the second sentence of this paragraph is either repetitive of the prohibition to use force or the threat of force against the territorial integrity of any other State contained in Article 2.4 of the Charter, and already reiterated in paragraph 1 of the section under review, or too ambitious. It would be too ambitious if it aimed at a declaration of *legal*

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<sup>7</sup> Among the recent contributions see especially Falk, “The Beirut Raid”, etc., *American Journal of International Law*, 63 (1969), pp. 415–443; Blum, “The Beirut Raid”, etc., same *Journal*, 64 (1970), pp. 73–105; and Bowett, “Reprisals involving Recourse to Armed Force”, in the same *Journal*, 66 (1972), pp. 1–36.

<sup>8</sup> *Infra*, para. 57, at the end.

<sup>9</sup> 1967 Report of the Special Committee, at p. 27.

*invalidity* (albeit within the limits indicated in the second, unquoted, part of the paragraph) of forcible territorial acquisitions. According to the prevailing doctrine on the matter,<sup>10</sup> the illegality of the means used does not, hélas, affect necessarily or absolutely (to say the least) the ultimate acquisition of territory. This is another aspect of the merely contractual nature of Article 2.4. A modification of this state of affairs would involve a major reform of international society: and a reform which implied, precisely, a far greater effectiveness of the “community”’s reaction to the illegal use or threat of force.<sup>11</sup> If the statement does not aim, then, at the invalidation of conquest, it is only the reiteration of a reiteration, as such not commendable, in spite of the moral and political merit of any condemnation of forcible appropriation of territory.<sup>12</sup> Similar considerations seem to apply to the prohibition of military occupation.

Notwithstanding the fact that it is also ambitious—but perhaps less conspicuously—a greater merit is perhaps to be found in the third sentence of the paragraph, which deals with the different question of the *recognition* of forcible territorial acquisitions.<sup>13</sup> As in 1949, when a similar article was introduced in the draft declaration on Rights and Duties of States,<sup>14</sup> the *pros* and *contras* of this “Stimsonian” prohibition are still almost balanced.<sup>15</sup> On one side it is contended that the prohibition (even if limited in its scope as in the unquoted half of the paragraph under consideration) is premature and might be cause of more tension than it may manage to avert, without really curbing forcible appropriations of territory. From the opposite side it is contended that until an effective security organisation is made available in international society, at least the position of principle, as advocated by Scelle in 1949, ought to be asserted (even at the price of seeing it seldom complied with). In the paragraph under consideration the espousal of the latter policy is realistically attenuated by the qualification of the obligation (not to recognise) by the words “as legal”. This qualification, however, may reduce the already problematic impact of the rule.

Although the prohibition in question is set forth in declarations and treaties among the American States and is codified in Article 17 of the Charter of the OAS, it is not part of general international law. This issue is similar and closely related to the question of the subjective scope of the prohibition of force to be discussed below.<sup>16</sup>

57. The tentatively positive evaluation of the elements considered so far does not extend to paragraphs 4 and 5, which also aim at defining the *objective* scope of the prohibition of the threat or use of force. Paragraph 4 concerns the duty to refrain from violating boundaries, and paragraph 5 assimilates lines of demarcation to boundaries.<sup>17</sup>

<sup>10</sup> See however, Oppenheim’s *International Law*, I (*Peace*), 8th ed., 1965, pp. 574–575.

<sup>11</sup> Compare with the Indian and the United Kingdom comment to the quoted text of Article 11 of the Draft on Rights and Duties of States, in the cited *Preparatory Study Concerning the Draft Declaration*, etc., at p. 111 (*supra*, footnote 2).

<sup>12</sup> As in the 1949 text concerning non-recognition, the words “by another State” are intended to except the case of secession from the condemnation (*Yearbook of the International Law Commission*, 1949, pp. 112–113).

<sup>13</sup> See Blix, “Contemporary Aspects of Recognition”, *Hague Rec.*, 130 (1970-II), especially at pp. 662–665.

<sup>14</sup> Article 11 of the 1949 Draft Declaration on the Rights and Duties of States, confined itself to declaring that “every State has the duty to refrain from recognising any territorial acquisition by another State acting in violation of article 9” (which article enounced the obligation “to refrain from resorting to war . . . and to refrain from the threat or use of force . . .”).

<sup>15</sup> The International Law Commission’s discussion is reported in the cited *Yearbook* for 1949.

<sup>16</sup> See for example Kelsen, “The Draft Declaration on Rights and Duties of States”, *American Journal of International Law*, 1949, at pp. 272–274.

<sup>17</sup> According to para. 4: “Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States”. Para. 5: “Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in

More than just useless, these paragraphs are detrimental to the clarity and certainty of the prohibition of force in international relations and thus to the promotion of that effective compliance with Article 2.4 of the United Nations Charter which was among the main purposes of the declaration.

The prohibition contained in Article 2.4 is a general one. It prohibits the threat or use of force *anywhere*, and in any circumstance in which force—or the threat thereof—is applied “against the territorial integrity or the political independence of a State” (in international relations, of course) or “in any other manner inconsistent with the purposes of the United Nations”. Any such use or threat of force is condemned as illegal *wherever* it took place and *whatever* the nature of the dispute or conflict of interest with regard to which the test of force (or threat of force) was applied. The dispute may be legal or political, territorial or economic, financial or ideological. The place where the force or threat is applied may be on land, sea or air, within the atmosphere or in outer space. Force or threat thereof need not even be applied—to fall under the prohibition—beyond the limits of the territory of the offending State. Article 2.4 may well be violated by a State within its territory. We refer, for instance, to application of force or threat by country A against the diplomatic envoys of B in A’s territory; or to force or threat of force by A against the Prime Minister or the Foreign Minister of B while a guest (voluntary or forced) of A’s.

It is plain, therefore, that a State need not violate a frontier or a borderline in order to contravene the general prohibition of Article 2.4. The only exceptions are the lawful uses of force or threat thereof.

*Inter alia*, the provisions under review alimented a long discussion in the Special Committee as to whether the declaration should condemn only *frontier* violations or also the violation of *other* lines, and whether these should include *any* lines or just given international lines. It was of no avail to point out that frontiers and lines being irrelevant for the prohibition, one could have mentioned as well *any* kind of line, including the line drawn by a farmer to divide potatoes from wheat or the line drawn by children across a square to play football.

The presence in the declaration of paragraphs 4 and 5 confirms our scepticism with regard to the intentions of the drafting powers and of the majority of the United Nations membership. Had they thought that they were carrying out a serious elaboration of vital principles of law they would have been concerned more with principles of permanent importance and less with “occasional” issues which happened to divide them momentarily such as the question of “lines of demarcation”.<sup>18</sup>

In conclusion, the formulation of the prohibition of force appears to us, in so far as the *objective* aspect of the prohibition is concerned—not without some merit. On a number of points, however, it is so defective as to justify the doubt that it might not really mark a step forward in the codification and progressive development of the law of the Charter or of general international law.

Among the gaps we cannot but stress the poverty of inspiring ideas with regard to the institutional aspects of peace-keeping,<sup>19</sup> and the lack of any contribution to the clarification of the cases where resort to force is lawful under the Charter (para. 13). Being a mere “*renvoi*” to existing rules (“Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful”), paragraph 13 might pass as without fault or merit. It is

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the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character”.

<sup>18</sup> Final statement of the Representative of Italy in the 1970 Special Committee (A/AC.125/12, para. 136) and Working Paper of the Delegation of Italy to the same Special Committee (in the same document).

<sup>19</sup> Following paragraph.

disconcerting, however, to read so little on such a vital problem in a text supposedly intended to secure a more effective application of the prohibition of force.

58. The objective aspect of the formulation of the prohibition seems on the whole to be too weak for the attempt to extend the prohibition to all States to be convincing. We refer again to the noted difference represented, in the formulation under review (as compared to the Charter), by the fact that the first paragraph addresses itself to any State, whether a member or not. The express generalisation is stressed in the second sentence of the paragraph, according to which any act in violation of the prohibition (of the threat or use of force) "constitutes a violation of international law and the Charter".

The generalisation would imply that the injunction contained in Article 2.4 of the Charter would have acquired, in so far as the declaration is concerned, not only the wider application deriving from the extension of the negative imperative to non-members of the United Nations, but also the higher rank of a general rule of international law, namely the higher authority of international custom (*Appendix*, para. 162). The declaration would thus lend support to the view, expressed by Brownlie and others, that States are now deprived of that *ius ad bellum* or of that "freedom to resort to war", which constituted the most typical feature of "classical" and XIXth-century international law. It would not be clear whether the corresponding rule of general international law came into being before or after the adoption of the Charter of the United Nations.<sup>20</sup> It would now be, at any rate, a *coutûme accomplie*, with or without the help of the influence deriving from the contractual prohibition contained in Article 2.4. In superseding the fundamentally passive attitude of the law of nations with regard to war—or force in general—such a rule would have introduced into positive law (and with regard to force) a distinction similar to that distinction between condemned wars and just wars that had existed, as a doctrinal assertion, in the Middle Ages.<sup>21</sup>

It would not seem, however, that such a major development has taken place yet, and the reason for our disbelief is not just scepticism.<sup>22</sup> There are legal or historico-legal reasons, some of which actually coincide with the very reasons that made the medieval doctrine of just and unjust wars unacceptable to secular writers.<sup>23</sup>

In this matter one should not omit to weigh against one another, in assessing the state of international law, positive and negative data. Positive elements are, obviously, the League Covenant, the Briand-Kellogg Pact of 1928, the proceedings and the judgments for crimes against the peace, paragraph 2.4 of the United Nations Charter and related provisions, the endorsement by the United Nations Assembly of the rules asserted by the Nurnberg Tribunal and the condemnation of some concrete episodes of resort to force—or threat thereof—by the General Assembly itself and/or the Security Council *et similia*.

Weighty as they are, and decisive as they may appear at first sight, these data seem to be

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<sup>20</sup> According to Brownlie, for example, the development would have taken place in the inter-world wars period.

In the Italian doctrine the question has been dealt with recently by Curti Gialdino, A., "Guerra", in *Enciclopedia del Diritto*, XIX (1970), pp. 849–890 especially at pp. 873 ff.; and Lamberti Zanardi, *La legittima difesa nel Diritto internazionale*, Milano, 1972, at pp. 302 ff.

<sup>21</sup> If the content of the contemporary general rule were modelled on the Charter's paragraph 2.4 and Article 51, the only just wars would be defensive wars. According to Thomas Aquinas and Vitoria the princes of their time would be entitled to resort to war "for just causes", such causes including the purpose of "redress for a wrong suffered" (Aquinas) or a "wrong received" (Vitoria) not necessarily in the form of the armed attack envisaged as a condition for self-defence by Article 51 of the Charter. The contemporary prohibition would be stricter than that of the Church Fathers. In addition, the latter did not seem to restrict recourse to forms of violence short of war.

<sup>22</sup> It must be noted, *inter alia*, that it is far from sure that the "just" and "unjust" wars doctrine corresponded to the law actually in force at its time.

<sup>23</sup> Quincy Wright, *A study of war*, 6th impression, 1959, Vol. I; and von Elbe, J., "The Evolution of the Concept of the Just War in International Law", *American Journal of International Law*, 33 (1939), pp. 665 ff.

outweighed by the *combination* of such negative elements as:

- (i) the frequent resort to force by great and small powers before, during and after the Second World War, including the period following the entry into force of the United Nations Charter;<sup>24</sup>
- (ii) the often ambiguous and inadequate reactions of other States to the most obvious infringements of the obligation set forth in Article 2.4;
- (iii) the utterly inadequate reaction of United Nations bodies, both in terms of deeds and, often, even of words;<sup>25</sup>
- (iv) the inadequacy of steps taken or seriously proposed, to make States abide by the prohibition and to render the United Nations less impotent in facing violations.

The latter element finds a clear expression in the very declaration, and blatantly so within the same context. We refer to paragraphs 11 and 12 of the section we are considering. These paragraphs—devoted, respectively, to disarmament and collective security, could not but counterweigh by their presence alone the entire set of the positive data. According to paragraph 11, “All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States”. By paragraph 12, “All States shall comply in good faith with their obligations under the generally recognised principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based upon the Charter more effective”.

With regard to disarmament it would seem that in a declaration setting forth the desirable lines of development of international law after one quarter-century of failures of the United Nations in the field of disarmament, measures more substantial than reduction of tension and strengthening of confidence and short of general and complete disarmament should not go without mention. Account should at least have been taken, with a view to promoting *further* efforts in the field: (a) of the existence of the 1963 Test Ban Treaty and the Non-Proliferation Treaty; (b) of resolution 2602 of the General Assembly; (c) of resolution 2603; (d) of current endeavours within the CCD to find ways and means to improve the method of work and approach of that Conference; (e) within the framework of “reduction of tension” and “strengthening of confidence”, of the promotion of the free flow and exchange of information and ideas across frontiers. Compared with such current endeavours and issues, and compared with the magnitude and multitude of dangers that mankind is facing in terms of global *and* local violence,<sup>25a</sup> the formula of paragraph 11 is much too lenient not to give the impression that the members of both the Special Committee and the XXVth Anniversary Assembly were determined to leave the matters of disarmament exactly where they were. If that choice was a realistic one, it is realistic not to believe that force is condemned as a matter of international *custom*. The prohibition was skin deep in 1945 and appears to be even more superficial in 1970.

The paragraph concerning the maintenance of international peace and security (which originates from a Canadian proposal of 1964 and from the Italy-Netherlands proposal of

<sup>24</sup> On the non-absolute degree to which compliance may be necessary as a factor (or evidence) of custom, *supra*, para. 27.

<sup>25</sup> We refer to the tendency of United Nations bodies to put preferably the condemnation of violence in generalised, edulcorated or otherwise inadequately blunt language. One example is the frequent condemnation of resort to armed force as “intervention” (*infra*, para. 66). Another example is “defusing”, mentioned *supra*, para. 15 (iii).

<sup>25a</sup> Molodcov, S. V., *The Principle that States should refrain from the Threat or Use of Force in International Relations*, in WFUNA Seminar (see Bibliography), pp. 31 ff., at p. 31.

1966) contains an odd obscurity in the first part. We refer to the phrase “to the generally recognised principles and rules of international law with respect to the maintenance of international peace and security”. What could possibly be provided with regard to international peace and security by the “generally recognised principles and rules of international law” that would promote the maintenance of peace is a mystery. The presence of such a sentence is an instance either of unusually outspoken cynicism or of the low degree of reliability of the declaration’s technical language.

Our conclusion on the subjective scope would then be that the universal character and the more solid (customary) foundation of the prohibition implied in the words “every State” is not in conformity with existing law.

*De lege ferenda*, of course, the statement is quite acceptable. Even from this limited point of view, however, we contest that all the governments who voted in favour of the declaration—especially those which took part in the Special Committee—were in good faith. The bad faith is represented by the clear refusal of the majority of the membership of the Special Committee to deal seriously with security and disarmament. No-one can seriously believe that governments so obstinately attached to the maintenance of the disastrous contemporary state of the United Nations peace-keeping system; to the continuation of the nuclear and conventional arms race; and to *laissez faire* with the trade in arms and ammunition in favour of smaller or less developed countries—one can hardly believe, we say, that governments and peoples so minded are really trying to give up, in their conscience, their *ius ad bellum*.

## *Section 2. The Obligation to Settle International Disputes by Peaceful Means*

59. The principle of peaceful settlement is more difficult to apply and to develop, technically and politically speaking, than the prohibition of the threat or use of force.

The negative obligation expressed in paragraph 4 of Article 2 is of relatively easy application in practice. Of course, political or technical factors may get in the way and make it difficult or impossible to establish a transgression or to adopt a pronouncement, let alone to apply sanctions, against the transgressor in given circumstances. It may be so, for example, when the transgressor is a power rejecting successfully any fact-finding or when it is otherwise difficult to determine which State or group, among those involved in an armed conflict, first resorted to force. Otherwise it is not hard to ascertain whether in fact the prohibited act of aggression was committed and on the part of whom.

It is not the same with the obligation to settle disputes peacefully.

Firstly, the obligation to settle (setting aside the peaceful nature of the process, supposedly ensured by Article 2.4 and the peace-keeping system) consists in *positive* conduct: a matter of something happening not just a matter of something—like resort to force—not happening or ceasing.

Secondly, peaceful settlement is an “obligation of result”, the result consisting in a settlement *between* two or more parties. Assuming always that the peaceful nature of the process is ensured by the obligation of each party to refrain from violence, there remains the problem of compliance with the duty to achieve that result. And here it is much harder to determine non compliance. In the first place it is not easy to tell which of the litigants is responsible, or more responsible, for failure to settle the dispute or for its aggravation. Each party can always blame some attitude of the other as being the cause. Second, it is always difficult—if not impossible, short or resort to violent means by either party—to determine *when* a dispute can be said . . . not to have been settled.

Between the two related objectives—of curbing inter-State violence and ensuring settlement of international disputes—there is a parallel difference from the viewpoint of the implications of the undertaking that States should make for the objective to be attained.

In order to preserve the peace—by renouncing force and setting up a security system—States must give up quite a lot of their prerogatives. They should ultimately give up so much as to lose their very attribute of powers. Considered *per se*, however, what States would give up (let's say at the *theoretical outset* of the operation) is what the Pact of Paris and Article 9 of the draft declaration on the Rights and Duties of States indicate as an instrument of policy: and however important and vital this renunciation may be (and accompanied by a relatively efficient security system) it does not require, *per se*, the acceptance by States of the subjection to any organ's dictates affecting their substantive interests and (use of force and possible measures or sanctions excepted) their substantive conduct.<sup>26</sup>

In order to organise the settlement of disputes in any comparable measure it seems that States would have to renounce much more than an instrument of policy. They would actually have to renounce from the outset, so to speak, in addition to the instrument of policy, all those “corollary” facilities and prerogatives that they would ultimately lose only as an *aftermath* of the renunciation of force. They would have precisely to submit, in order to organise peaceful settlement, to the dictates of some organ concerning their substantive interests and their substantive conduct.

Considering actually that the disputes so to be dealt with would have to include—for the organisation of settlement to attain a degree of “tightness” close to that achieved on paper, for example, by the United Nations peace-keeping system—all legal and political disputes, a serious commitment with regard to settlement of disputes would mean very much indeed. It would mean, for every State participating in the reform, to accept not just to comply with the organisation's dictates as to what the law is (*lex lata* as in a legal dispute) but also to comply with the organisation's dictates as to what the law *should be* (*lex ferenda*, as in a political dispute). Peaceful settlement “taken seriously”, in other words, would mean for States to accept the organised judicial function and the organised normative function at one and the same time. A far greater measure of *substantive* world government would obviously be involved. And this is why, in the Charter, the peace-keeping system resulting from Article 2.4 and Chapters VII and VIII looks so solid, at least on paper, while the settlement system resulting from the combination of Article 2.3 and Chapter VI, appears to be, even on paper, feeble and inconclusive.

60. Indeed, while the United Nations peace-keeping system is based, in Chapter VII, on binding decisions of the Security Council, and on the predominance of the United Nations system over any other system (Chapter VIII)—the self-defence of victims of aggression being in principle only exceptional—Chapter VI is based, except for the obligation not to resort to violence, on a number of choices to be made by States among themselves. The Charter system of peaceful settlement hinges in fact:

- (i) on the free choice by the parties of settlement procedures to be agreed upon (Arts. 33.1 and 2);
- (ii) on the reliance—by the Charter—on any international agreements other than the Charter itself into which the parties may have entered prior to or after the Charter and instituting as between the parties, on a bilateral or multilateral basis, binding or non-binding settlement procedures such as conciliation, inquiry, arbitration, judicial settlement, etc. (Art. 33);
- (iii) on a hortatory function with regard to *means* of settlement carried out by the Security Council (or the General Assembly), such hortatory function being intended to induce the parties—by a non-binding recommendation—either to *choose* freely a peaceful settlement

<sup>26</sup> We do not by any means intend to suggest that renunciation of force by States and the organisation of peace-keeping are easy matters. We are only trying to specify, by way of comparison, the inherent nature of the problem of peaceful settlement.

procedure within or without the range of possibilities listed in Article 33.1; or *freely* to try a *suggested* procedure (Arts. 33.2 and 36);

(iv) on a hortatory function with regard to terms of settlement, namely with regard to the *merits* of the dispute, carried out, again, by Council or Assembly: such function again to be performed by means of *non-binding recommendations* (of *terms* of settlement) (Arts. 37 and 38, etc.).

What has been said in the preceding paragraph also explains the rather discouraging record of the first quarter-century of the United Nations system in the area of the peaceful settlement of international disputes.

Based as Charter Articles 33–38 essentially are on the choice or agreement of the parties for both procedure and substance, the system of Chapter VI depends either purely on the moods of each couple of litigant States, or on undertakings separate and distinct from the Charter (arbitration treaties, conciliation treaties, mixed treaties, treaties of judicial settlement, compromissory clauses, regional settlement arrangements, etc.).

In the first case, if the mood is to refrain from the adoption of settlement procedures involving “third-party” pronouncements, in so far will the dispute be settled as the parties manage to co-operate in finding a settlement by negotiation with or without the help of the United Nations. If they do not co-operate the dispute remains unsettled. One of the few “strong points” of the United Nations may be, if the peace-keeping system is alert, the deterrent represented against any of the parties that were tempted to resort to force by the peacekeeping system of Chapter VII.

In the second case, namely where a separate agreement *does* bind the litigants to adopt a given procedure, all will depend, apart from the assistance of the Organisation as in the previous case, upon the degree of perfection of the instrument which either party may use or invoke. Except for the general “deterrence” against resort to force on either side and apart from hortatory resolutions, there is little that the United Nations is empowered to do.<sup>27</sup>

61. Even a realistic assessment such as this, however, is not sufficient to excuse the spirit with which the principle of peaceful settlement has been dealt with by so many countries, large, medium and small, in the Special Committee and in the Sixth Committee.<sup>28</sup>

One would have expected that under the guidance of the excellent background documentation prepared by the Secretariat on this principle as on the others, the Special Committee would apply itself to a study of at least *some* of the possibilities of improving the existing system. One could have hoped, for example, that for arbitration one resume the matter where it had been left in 1953. One would have hoped that for judicial settlement (and *avis consultatifs*) the Committee initiate immediately a review of the role of the International Court in *some* at least of the directions now indicated, for example, in Gross’ recent article.<sup>29</sup>

One would have hoped that an accurate review would be undertaken of the causes which seemed to have reduced so much, as compared to 1945 expectations, the “settlement” role of United Nations bodies in general, not excluding, for the Court in particular (especially after 1966), a revision of the rules concerning the Court’s composition.

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<sup>27</sup> We leave out deliberately marginal United Nations powers such as those provided in Article 94.

<sup>28</sup> A comparable event in the history of the law of peaceful settlement is the treatment reserved by the United Nations Assembly to the ILC Draft on Arbitral Procedure and to George Scelle’s Report on that Draft. We refer to Documents: A/CN.4/18 of 21 Mar. 1950; A/CN.4/46 of 28 May 1951; A/CN.4/57 of 6 June 1952 (Scelle’s *Reports* and *Addenda* thereto); A/CN.4/35 of 21 Nov. 1950 (*Memorandum* prepared by the Secretariat); A/CN.4/59 of 16 Sep. 1952 (*Draft on Arbitral Procedure* prepared by the ILC at its fourth Session, 1952); and Documents A/CN.4/68 of 1 May 1953; A/CN.4/68 Add. 1 of 8 May 1953; and A/CN.4/68/Add.2 of 6 Aug. 1953 (Comments by Governments).

<sup>29</sup> Gross, Leo, “Review of the Role of the International Court of Justice”, *American Journal of International Law*, 66 (1972), pp. 479–499.

62. Considering the obvious difficulties, the few mild “reformers” who were present in the Special Committee soon realised that they had better reduce their demands to a minimum. Summed up by Rosen-stock, who describes them as “a primer of steps to be taken to provide alternatives to a world ruled by force”, all that the “reformers” suggested was approximately the following: “Legal disputes should as a general rule be referred by the parties to the International Court of Justice . . . General multilateral conventions . . . should contain a clause providing that disputes relating to the interpretation or application of the convention . . . may be referred on the application of any party to the International Court of Justice . . . Every State should accept the compulsory jurisdiction of the International Court of Justice”.<sup>30</sup> To these suggestions, all expressed in terms of “should”, there were added by the “reformers” (the proposal was made in 1966) two paragraphs (*c* and *d*) under which: “(*c*) Members of the United Nations and United Nations organs should continue their efforts in the field of codification and progressive development of international law with a view to strengthening the legal basis of the judicial settlement of disputes”; and “(*d*) The competent organs of the United Nations should avail themselves more fully of the powers and functions conferred upon them by the Charter in the field of peaceful settlement, with a view to ensuring that all disputes are settled by peaceful means in such a manner that not only international peace and security but also justice is preserved”.<sup>31</sup>

But, to put it again with Rosenstock, “The debates on this matter were another depressing example of the rigid, anachronistic doctrines of State sovereignty still adhered to by the Soviet Union and the curious tendency of some of the new States to prefer negotiation and to eschew third-party settlement as contrary to their interests or beyond their means”.<sup>32</sup>

The resulting formulation, indeed, is too poor for words.<sup>33</sup> It sounds so respectful of the situation obtaining in general international law<sup>34</sup> that the subjective extension of the settlement obligation to “Every State” appears at first sight—except for the implied negative obligation with regard to the use or threat of force—hardly problematic. Rather odd for a

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<sup>30</sup> 1966 Proposal by Dahomey, Italy, Japan, Madagascar and the Netherlands, in 1966 Special Committee Report, para. 157.

The quoted words are from Rosenstock’s paper cited *supra*, footnote 1.

<sup>31</sup> Proposal cited in the preceding note.

<sup>32</sup> Rosenstock, quoted article, at pp. 725–726.

A *propos* of sovereignty, however, it must be pointed out that there was also some doctrinal confusion (*Appendix*, paras. 149 ff., especially para. 152). See also *infra* para. 110. But it was certainly not a decisive factor.

<sup>33</sup> “1. Every State shall settle its international disputes with other States by peaceful means, in such a manner that international peace and security, and justice, are not endangered.

2. States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement, the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

3. The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

4. States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

5. International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

6. Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes”.

<sup>34</sup> *Supra*, paras. 41–42 (and footnote 88 to para. 42).

“land-mark” resolution.

It must be noted, however, that the delegations of countries other than those mentioned by Rosenstock did not do better either in the Special Committee or in the Sixth Committee. Even those which initially spent many words in favour of the described “reforms” gave up very soon, in the course of the seven years’ negotiation, any effort to improve the text of the section under review.<sup>35</sup> Needless to say not one word of regret came from the General Assembly during the celebration of the XXVth Anniversary of the Organisation.

It has been written that in the formulation of peaceful settlement “the phrase in the penultimate paragraph”—“recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality”—represents the only positive achievement of the Committee”. Presumably, that writer adds, that will lay to rest once and for all the retrograde notion that a “State derogates from its sovereignty when it agrees to submit future disputes to binding third-party adjudication”.

The quoted phrase of the penultimate paragraph is perhaps the best piece one can find in the formulation of peaceful settlement in the XXVth Anniversary Declaration. But in all sincerity we feel less enthusiastic. We are inclined to suspect that the intention of the excellent proponent of that addition was rather to pull the leg of the experts sitting in the Special Committee. Only in this manner can be understood the inclusion, in a solemn United Nations declaration, of such an indisputable statement of a fact that the average law student learns in his first year. But perhaps we are wrong. It seems that it was necessary that a modern Grotius tell the princes old and new—and their lawyers—that a “third-party” settlement treaty freely entered into by two States does not bring about a *diminutio* of the sovereign equality of either.<sup>35a</sup>

The whole formulation on peaceful settlement should perhaps have been rejected. And it is hardly necessary to add that the formulation will have to be read in the light of the criteria indicated in the previous chapter (para. 52) with regard to the principles or rules disregarded in the declaration.<sup>36</sup>

### *Section 3. Non-Intervention*

63. Wolfgang Friedmann wrote with regard to intervention that “almost the only agreement among writers is that this term covers an area of great confusion”;<sup>37</sup> and O’Connell recalls<sup>38</sup> that Winfield “expressed the typical reaction when he said that ‘a reader, after perusing Phillimore’s chapter upon the subject, might close the book with the impression that intervention may be anything, from a speech of Lord Palmerston’s in the House of Commons to the partition of Poland’”.<sup>39</sup> As everybody else, we are of course confused. But we are also torn by a dilemma.

On one hand we see great merit in the particular contribution which the Latin States of the American continent have made and are making to the development of a concept of unlawful intervention which they deemed and deem indispensable to protect themselves against the

<sup>35</sup> The Committee’s attention was called to the problem of improving the formulation until the very last session. See, for example, the Working Paper cited *supra*, footnote 18.

<sup>35a</sup> Appendix, para. 152.

<sup>36</sup> See, *inter alia*, the final statements of the Delegations of Italy, Japan and the Netherlands at the 1970 Special Committee.

<sup>37</sup> *The Changing Structure*, at p. 267, footnote.

<sup>38</sup> *International Law for Students*, 1971, at pp. 127–128.

<sup>39</sup> Winfield, “The History of Intervention in International Law”, *British Year Book of International Law*, 1922–1923, at p. 130. By the same author: “The Grounds of Intervention in International Law”, same *Year Book*, 1924, pp. 149–162.

acts of other Powers, European or American.

The other branch of the dilemma is that if the principle in question had plenty of reason to be in the last century and until the First World War, and some reason to be in the twenties and thirties of the present century, there is less or no use for it since a United Nations Charter has come into being, with the participation of the Latin American Republics and the United States, and including a provision of as wide a scope as that of Article 2.4.

64. It would lead us too far from the chosen task to describe how the *raison d'être* of international rules on non-intervention developed in Europe and in America. It would also be too long to describe in particular those European and United States interventions which prompted the codification of the principle by the Latin Americans through the XIXth and the first half of the XXth centuries.<sup>40</sup>

The essential point is that the purpose of the principle of non-intervention as ultimately embodied, in a very broad formulation, in the Charter of Bogotà,<sup>41</sup> is to condemn forms of resort to force short of war which had unfortunately "become the lot", so to speak, of the Latin American Republics. Not that there were no instances of intervention outside of the American hemisphere. On the contrary, the history of Europe after the Congress of Vienna is "interspersed" with episodes labelled in diplomatic language as acts of intervention and one can find plenty of similar acts in earlier episodes. There remains the fact that the distribution of might was such, in Europe on one side and in the Americas on the other, that resort to forms of violence short of war has been in the Americas, in the last century and in the present, more frequent; and almost invariably from the same (European or American) side. It so happened that in the Americas the European Powers and the United States—mainly the United States—were always on the side of the culprit and the Latin American Republics on the side of the victim. Furthermore, while in the relations between European Powers and within Europe, the threat or use of force by one Power or group of Powers was followed less infrequently by full-scale war because the victim was strong enough, alone or with partners, to resist intervention by armed force, in Latin America the opposite was more frequently the case. The victim of the military, economic or diplomatic pressure was too small or weak and too isolated to put up a resistance that would lead to a state of war.

This is perhaps the main reason why the principle of non-intervention came into being as, so to speak, a Latin American principle. When the development of a less anarchical international system was considered in Europe and in the United States, the problem of curtailing undesirable forms of intervention was practically absorbed into the problem of war.

<sup>40</sup> Thomas, *Non-Intervention*, Dallas, 1956, pp. 15–54. On the history of non-intervention, see also Fenwick, "Has the Spectre of Intervention been laid in Latin America?" *American Journal of International Law*, 50 (1956) pp. 636–639.

<sup>41</sup> By Article 18 of the (Bogotà) Charter of the Organization of American States (that Article being a part of Chapter IV on Fundamental Rights and Duties of States): "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or its political, economic, and cultural elements". Article 22 of the Bogotà Charter provides, however, that "Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Articles 18 and 20" (the latter articles dealing respectively with non-intervention and inviolability of territory).

The "measures" of Article 22 are the so-called "collective intervention" (by armed force or by economic or diplomatic measures) provided for by the Rio Treaty of Reciprocal Assistance of 1947. See Thomas, *Non-Intervention*, p. 64.

Article 19 provides that "No State may use or encourage the use of coercive measures of an economic or political character to force the sovereign will of another State and obtain from it advantages of any kind".

Articles 18, 22 and 19 are numbered after the amendments embodied in the Buenos Aires Protocol of 27 February 1957. On the history of those rules see Thomas, *Non-intervention*, pp. 63–64.

In Latin America, instead, albeit war was far from absent between the weaker members of the region, intervention was seen as the plague.

65. Be that as it may of its origin, it should have been easy for any lawyer gifted with prophetic abilities to predict at the beginning of the present century that the principle of non-intervention and the prohibition of resort to war were bound to meet, sooner or later, and eventually merge in the measure in which they might cover a common ground.

The two principles or sets of rules did not have very much in common at the time of the League of Nations. Not that the Covenant disregarded territorial integrity and political independence of States, which are precisely a good part of the “common ground”. Article 10 (territorial integrity and political independence) and Article 11 (any “war or *threat* of war”)—not to mention the articles on peaceful settlement—would afford, in law, condemnations of some of the practices which worried the Latin American Republics. It is true, on the other hand, that the Covenant only condemned war as such—not any war and far less any use or threat of force short of war. Even the Briand-Kellogg Pact, which in part did fill the gap of the Covenant by condemning all wars (at least non-defensive), confined itself to war. Some of the practices in question were thus not covered by the prohibitions of the League period. So, a rule or principle specifically condemning intervention—or certain forms thereof—could be considered, at that time, as an indispensable part of the new law of peace-keeping. As things went with the United States participation in the League any merging would not answer the main Latin American preoccupation anyway.

But the situation did undergo a radical change with the adoption of the United Nations Charter. A sweeping prohibition such as that of Article 2.4 was bound to cover at least some of the problems met by the principle of non-intervention. And a meeting ground between the two principles would have been available, either at San Francisco or at Bogotà.

We do not exclude necessarily—although we doubt—that there may be actions condemned as forms of illegal intervention which escape the Charter condemnation of illegal threats or use of force: force being, clearly, more than just armed force. But whatever the number and variety of such “non-covered” actions—in any case not great<sup>42</sup>—there was evidently a great deal of redundancy between non-intervention on the one side and paragraph

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<sup>42</sup> For example, according to Friedmann, *The Changing Structure*, pp. 267–268, “it seems clear that the following” . . . (of the forms of intervention previously mentioned by him) “were illegal, by the standards of international law:

“(a) The political and military assistance given by the Hitler and Mussolini régimes of Germany and Italy to the Franco rebellion, by its immediate recognition, on the outbreak of the rebellion, as the legitimate government of Spain.

(b) The armed intervention of the Soviet Union in support of the Communist régimes of East Germany and Hungary, with the purpose of crushing the anti-Communist rebellions.

(c) The support given by the United States to a revolutionary force against the Castro régime in April 1961, as distinct from the quarantine imposed by it against missile supplies to Cuba, whose purpose was a military threat against the United States.

(d) The intervention by the United States in the Lebanon in 1958, unless this intervention could be justified as an answer, on the request of the Government, to substantial foreign assistance given to a rebel force” (Friedmann quotes here Quincy Wright, *American Journal of International Law*, 53 (1959), p. 124).

The legal merits of each one of these episodes would require a separate discussion. *Prima facie*, we would be inclined to qualify the Italian-German action in Spain as internationally illegal. But there is no need, in order to do so, to invoke a principle of non-intervention. Apart from premature recognition, *per se* illegal, Hitler and Mussolini were violating the territorial sovereignty and the political independence of the Spanish Republic and were waging in addition an undeclared war against that Government. If non-intervention was violated it was because of the specific Non-Intervention agreement which at one point of the struggle had been concluded among a number of European Powers.

The cases of Hungary (1956), the Lebanon (1958) and Cuba (1961) are briefly discussed *infra*, para. 66.

2.4 (and connected provisions and principles) on the other side.<sup>43</sup> The more the necessity of some co-ordination should have been perceived as the Charter of the United Nations, while not using the term intervention in Article 2.4 or elsewhere (with regard to the restriction of the liberty of member States) did urge, by paragraph 7 of Article 2, the non-intervention of the organisation in matters of domestic jurisdiction. This means that the Fathers of the Charter did not ignore the concept of intervention and non-intervention. They simply refrained from covering it expressly. Conversely, the Bogotà (OAS) Charter—unlike the American Treaty of Pacific Settlement (Pact of Bogotà), Article 5 of which excludes the application of certain settlement procedures to “matters which, by their nature, are within the domestic jurisdiction of the State”—does not contain a provision equivalent to paragraph 7 of Article 2 of the United Nations Charter.<sup>44</sup>

66. The coexistence with another negative general principle such as that contained in Article 2.4 of the United Nations Charter does anything but strengthen the prohibitions in question. Not only does it confuse further the concept of intervention—whatever it may be—but weakens *both* the impact of Article 2.4 and the impact of the prohibitions covered, or allegedly covered, by the principle of non-intervention.

Recent instances of confusion are the official and scholarly pronouncements according to which the United States “intervened” in Cuba (or in the Dominican Republic), the Soviet Union “intervened” in Hungary and in Czechoslovakia, and Sukarno’s Indonesia “intervened” in Malaysia. The United Nations General Assembly itself seemed to prefer to qualify the USSR armed action in Hungary as a matter of intervention. Quincy Wright not only speaks of the United States action in the Lebanon (1958) as “intervention” but under the title “Intervention 1956” deals with both the action taken by Israel, the United Kingdom and France in the Middle East in 1956 and the USSR action in Hungary of the same year.<sup>45</sup> Confusingly—but quite significantly—all three cases are discussed by Quincy Wright on the basis of Article 2.4 of the Charter (“aggression” or other “breach of the peace”). Not only that author refers, for the 1956 cases, to a previous article of his in the same Journal, devoted to the concepts of “aggression” and “breach of the peace”, but he uses for all three cases the test “whether there were present any of the circumstances in which a violation of paragraph 4 of Article 2 of the UN Charter” was to be excluded in the light of the Charter itself.

It seems to us that in the episodes in question, there was no real need, from the legal point of view, to invoke the principle of non-intervention. As regards the Lebanon operation of 1958 and Cuba in 1961—the prohibition of the threat or use of force as spelled out in

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<sup>43</sup> The redundant nature of the prohibition of intervention (in co-existence with Article 2.4 of the United Nations Charter) was noted by Kelsen, *The Draft Declaration*, etc., p. 268, with regard to Article 3 of the draft declaration on Rights and Duties of States. It is worth recalling that Article 3 of that declaration presented at least the merit of conciseness. It read: “Every State has the duty to refrain from intervention in the internal or external affairs of any other State.” The understanding of the word “intervention” was prudently left to the interpreter.

<sup>44</sup> This is not the occasion to discuss whether any principle or rules of non-intervention had been a part of *inter-American* (or perhaps even general) customary or treaty law *prior* to 1945, or only came into being by virtue of or following the Bogotà Charter. It is a fact that by the time the Bogotà Charter was adopted (1948) and came into force (1951) pretty much of the ground covered by the principle of non-intervention, if not all, was unquestionably covered by the Charter of the United Nations.

It is also worth considering that by Article 137 of the OAS Charter: “None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations”.

<sup>45</sup> Wright, Q., “Intervention, 1956”, *American Journal of International Law*, 51 (1957), pp. 257–276, and “The Cuban Quarantine”, same *Journal*, 57 (1963), pp. 546–565. For the Lebanese episode see Wright, “United States Intervention in the Lebanon”, *American Journal of International Law*, 53 (1959), pp. 112–125, especially 114–115.

paragraph 2.4 of the United Nations Charter was amply sufficient to condemn them. In the United States action in the Lebanon in 1958 and in the anti-Castro United States action (in support of rebels) of 1961, armed force was used against the political independence of a State (at least) with or without extenuating circumstances in the case of the Lebanon. The forcible action of the USSR in Hungary also qualified, if we are not mistaken, as a violation of rules or principles other than non-intervention. Although resolutions 1004 (ES-II) and 1005 (ES-II) are very insistent on the concept of intervention with regard to Hungary, misdeeds other than intervention are mentioned in both instruments. The same is to be said of General Assembly resolution 1133 (XI), where mention is made of violation of the Charter in general, of violation of political independence, of violation of fundamental human rights. In any case, even the actions qualified by the General Assembly as "armed intervention" also qualified as a use or threat of force. Nor is it necessary to invoke non-intervention principles to condemn other USSR actions in Hungary such as mass deportations and violations of the Geneva Conventions of 1949.

Had the concept of intervention been left aside and the correct terms used, in these and other cases the condemnation would have been only more impressive. It would also have been more in conformity with the United Nations Charter: which was, after all, the governing instrument allegedly violated.

The General Assembly and Security Council preference for the term intervention has, unfortunately, a distressing explanation. It reflects a tendency, typical of the contemporary universal organisation to "control" its language, especially when it deals with a Big Power. So, while the League of Nations did not hesitate to call Italian, Japanese and Russian acts of aggression against—respectively—Ethiopia, China or Manchuria, and Finland, as aggressions and gross violations of the Covenant, the United Nations generally seems to prefer to save the feelings of the culprit. The United Nations either orders cease-fires to all concerned without taking trouble or risk in labelling the culprit as in breach of the Charter; or it uses a milder word like "intervention".<sup>46</sup> Generalising the cease-fire call may well be a wise, practical course: but why the embellishment of downright aggression into intervention?

While both the overlapping rules are thus weakened in effectiveness the *less solid one*—non-intervention—is eroded by the more solid one in the part that is really meaningful: with the result that the only way to save a function for the principle of non-intervention is to widen dangerously the area of theoretically prohibited actions. Every State may feel entitled to discuss as acts of intervention the most normal tools of diplomacy. Every other State will reciprocate: and in the end the most serious breaches of the prohibition of the threat or use of force will be classified under the same rubric as the most innocent diplomatic practices.

It is time now to turn to the relevant section of the declaration. The XXVth Anniversary could have been a very good occasion to try to co-ordinate the principle of non-intervention with the obligations deriving from Article 2.4 of the United Nations Charter.

67. If it is true that one can tell the day from the morning, the section of the Friendly Relations declaration devoted to non-intervention opens on bad auspices if the title describes

<sup>46</sup> It is worth comparing the League's resolutions (especially the Council Conclusions of 7 Oct. 1935) condemning the Italian aggression against Abyssinia (see Rousseau, Ch., *Le Conflit italo-ethiopien*, 1938, especially pp. 119 ff.) and the League's resolution condemning the Soviet aggression against Finland and expelling the USSR for breach of the Covenant, on one hand, with the mild language used by the United Nations Assembly on certain occasions. The texts of the League resolutions on Finland (Assembly 14 Dec. 1939; and Council, same day) are in Whiteman, *Digest of International Law*, Vol. 5 (*Rights and Duties of States*), pp. 962–963. In the Italo-Ethiopian case the failure of sanctions—at least *applied* by the League—and the failure to pursue the proposal of Argentina that something be done against recognition of conquest (under the auspices of the Declaration of American States of 3 August 1932) and the *embrassons nous* conclusion of 1938, do not diminish the correctness of the application of the relevant Covenant provisions to the conduct of Italy.

only one half—or one side—of the subject-matter covered by the text.

The title recites “The Duty not to Intervene in Matters within the Domestic Jurisdiction of any State, in accordance with the Charter”: but paragraph 1 of the following text declares immediately, by the first sentence, that “No State or group of States has the right to intervene . . . in the internal or external affairs of any other State”. Assuming that “internal affairs” and “matters of domestic jurisdiction” were synonymous expressions, the text would add nothing less than the category of “external affairs”. Confronted with two possible delimitations of the crucial area, the Special Committee thought it better to do its share in the general confusion by preferring one for the title and the other for the text. The matter is perhaps not very important. Clearly the text would prevail. Considering, however, that the Committee’s (and the Assembly’s) *lapsus* re-iterates an identical *lapsus* which occurred to the General Assembly in 1965 on the occasion of the adoption of resolution 2131 (XXI)—such resolution being a declaration on the “Inadmissibility of Intervention in the internal affairs of States and the protection of their independence and sovereignty”—one may wonder whether the discrepancy is deprived of significance. Might it not mean, if not a reluctance, on the part of the responsible parties, at least a smaller degree of enthusiasm for the part of the operation involving the “external” affairs.

Be that as it may of the denomination, the confusion it involves is a trifle in comparison to the difficulties of the text. This can be divided into three portions consisting respectively of a general definition of the principle, given in paragraph 1; of a series of specifications contained in paragraphs 2–4, which spell out types of behaviour that the principle generally would condemn; and of a limiting or saving clause spelled out in paragraph 5.

The saving clause, which aims at excepting from the prohibition measures taken under the “provisions of the Charter relating to the maintenance of international peace and security”, need not retain our attention. We need not concern ourselves with the third and fourth paragraphs either which relate to matters covered by other principles.<sup>47</sup> The essential clauses are the first paragraph and the second.

Of these two clauses, the general principle of the first paragraph seems to be so sweeping and all-embracing as to obscure the indispensable distinction of prohibited from non-prohibited conduct. Since, in addition, the saving clause only covers the most obvious—and least problematic—part of the area of non-prohibited behaviour, the combined effect of rule and exception seems to be hardly conducive to the normative clarity that would be required—in such a controversial field—in order to make the application of the principle more effective.

The situation might be remedied by the specifications contained in the second paragraph, were it not that most of the prohibitions spelled out in that provision are repetitive of prohibitions envisaged in Article 2.4 of the Charter and embodied in the section of the declaration covering the duty of States to refrain from the threat or use of force.

68. According to the first sentence of the first paragraph on non-intervention, “No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State”.

As pointed out by many in the Special Committee debates, a sentence such as this condemns indiscriminately undesirable and innocent (or even useful) conduct. The possible examples are obvious. Under such a definition intervention could really mean “anything from

<sup>47</sup> The third paragraph, according to which “the use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention” really belongs to self-determination.

The fourth paragraph, by which “Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State” is redundant in relation both to paragraphs 1 and 2 of the same Section and to the formulations of self-determination and sovereign equality.

Palmerston's address to the Commons to the partition of Poland". It could also get to mean, however, nothing at all in practice: because when a legal prohibition is so drafted as to prohibit, together with the objectionable action, the most normal practices of inter-governmental relations, it risks being overlooked.

For the sentence in question to be acceptable it should have been followed either by an improved version of the technically defective formula suggested by the Indian Government in 1948 *à propos* of Article 3 of the draft declaration on the Rights and Duties of States,<sup>48-49</sup> or by one of the paragraphs proposed by Australia and Italy in the Special Committee,<sup>50</sup> or by another proviso to the same effect.

In the absence of any such proviso, it seems reasonable to assume that the part of the text now in question should be read in the understanding indicated by Sinclair, delegate of the United Kingdom, at the last meeting (114th) of the 1970 Special Committee.<sup>51</sup>

69. We now turn to the second sentence of paragraph 1. This sentence also is drawn from Article 18 of the Charter of the Organization of American States, except that the Special Committee introduced an amendment. According to the OAS Charter, "The foregoing principle"—namely the sweeping statement we have just commented upon—"prohibits not only armed force but also any other form of interference", etc. Our document abbreviates the reference to the "foregoing principle" . . . into a simple "Consequently"<sup>52</sup> and substitutes "intervention" for "force", so that the second sentence of the paragraph reads "Consequently, armed intervention", etc., "are in violation of international law".

At first sight, the substitution of "intervention" for "force" would seem to define intervention clearly by distinguishing it from both innocent interference and belligerent or otherwise violent action. Force being covered by the separate section (of the declaration) that we have read, the present rule would seem to contemplate something specific. We doubt, however, that "*armed* intervention" is anything but force or threat of force. Of course, one must consider that an effort to distinguish the "intervention" as dealt with in the present section of the declaration from the "force" dealt with under the section covering the prohibition of the threat or use of force—and perhaps under Article 2.4 of the Charter—is being made here. The effort, indeed, goes further than just using the word "intervention" in the place of "force". "Force" in the formulation of the prohibition of the use or threat of force

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<sup>48-49</sup> "Except in so far as permitted by the provisions of the United Nations Charter or of the principle(s) of international law." The contradiction inherent in this formula is plain.

<sup>50</sup> "Nothing in the foregoing shall be construed as derogating from:

- (a) The freedom which as a recognised fact is universally exercised by States in the normal course of their international relations to influence one another in accordance with international law and in a manner compatible both with the principle of the sovereign equality of States and with the duty of Members of the United Nations to co-operate in accordance with the Charter;
- (b) The relevant provisions of the Charter of the United Nations relating to the maintenance of international peace and security, in particular those contained in Chapters IV to VIII inclusive."

This text, the wording of which was drawn from a previous Western proposal, had been under consideration in the Drafting Committee, in the form of a Working Paper in 1966.

<sup>51</sup> "In considering the scope of 'intervention', it should be recognised that in an interdependent world, it is inevitable and desirable that States will be concerned with and will seek to influence the actions and policies of other States, and that the objective of international law is not to prevent such activity but rather to ensure that it is compatible with the sovereign equality of States and self-determination of their peoples.

The United Kingdom delegation wished to state its understanding that the concept of intervention in the 'external affairs' of States was to be construed in the light of that commentary." UN Doc. A/AC.125/SR.114 (1970 Report of the Special Committee).

The term "external affairs" would probably have to be understood, for the purposes of this statement, in a rather wide sense.

<sup>52</sup> This is a formal improvement. It avoids conferring the title of "foregoing principle" to the previous sentence.

and in Article 2.4 of the Charter is followed by the specification “against the territorial integrity and political independence of any State”, etc. Intervention in the present part of the text is qualified by the words “against the personality of the State or against its political, economic and cultural elements”. This last phrase would seem important.

It would seem, however, that in so far as the paragraph under review refers to “armed intervention”, that phrase is not sufficient to achieve any substantial specification. If intervention is some kind of action, “armed intervention” is an “armed action”: and we fail to see how an “armed action” of State A against the “personality” of State B or “against its political, economic and cultural elements” would not also be a use or threat of force against the “territorial integrity or political independence” of B, prohibited under the other relevant part of the declaration.

If this is the case, the only actions condemned under the second sentence of paragraph 1 of the section on non-intervention which are not condemned in paragraph 2.4 of the United Nations Charter and in paragraph 1 of the relevant section would remain:

- (i) “all other forms of interference . . . against the personality of the State or against its political, economic and cultural elements”; or
- (ii) “attempted threats against”, again, “the personality of the State or against its political, economic and cultural elements”.

“Other” would seem clearly to mean that the “forms of interference” and the “attempted threats” condemned in the sentence now in question would be actions different from armed intervention, namely actions *not* involving *armed force*. Were such not the case, one would have to conclude that the part of text now under consideration does not add anything to the prohibition of force either. Both parts of the first paragraph of the declaration concerning non intervention would be mere repetitions of the formulation of the principle contained in Article 2.4 of the Charter.

70. The exclusion of “armed force”, however, is a merely negative finding. It does not resolve the problem of the interpretation of the second sentence of the first paragraph of the declaration devoted to non intervention. The “forms of interference” and the “attempted threats” referred to are indeed very hard to define in positive terms.

As our personal effort has not been successful we leave the matter for more ingenious lawyers to resolve. We would only contribute a very modest warning and a supposition with regard to the term “interference”. It might be too simple to read “other forms of interference” as just “interference”. On one hand, one would risk again condemning innocent actions of the kind described earlier. One could perhaps avoid that by emphasising the word “against” so that it would mean “detrimental to”. Then “interference” would be qualified by the aim or the result. It would be confined to evil-doing interference, bad-faith interference, unjustified interference. Although it is difficult to see why no such words were added, the text would start to make some sense in so far as interference is concerned.

With regard to “attempted threats”, we surrender. We have tried hard. We thought it could perhaps be again a clumsy way of referring—by the word “attempted”—to the “intention” or “wilfulness” to harm the victim State. This would help qualify the action, together with the “against”, in the inimical, evil, bad-faith sense we just referred to . . .

There still remains—for both “interference” and “attempted threats” the further problem represented by “and”. Why political, economic and cultural? Would political, *or* economic, *or* cultural not be sufficient? But here it would be easier to assume that it was just a material error—a typing error perhaps—which slipped at the last minute into Article 18 of the OAS Charter and was mechanically repeated in the formulation of non-intervention of our

declaration.

71. The second main paragraph of the section on non-intervention seems by far more understandable than the first. It also seems to contain a prohibition which does not appear in the section concerning the prohibition of force or elsewhere in the declaration.

The first sentence of paragraph 2 coincides actually so little with any element of the formulation of the prohibition of the threat or use of force as to cover that point—political and economic pressure—which some members of the Special Committee proposed to include—also or exclusively—in the definition of the term force as used in paragraph 4 of Article 2 of the Charter. By condemning such kinds of “non-armed” force, the text we are now considering is happily not redundant, in so far as the declaration is concerned.

Other questions are the following:

- (a) how does one define exactly, also in the light of a comparison with Article 18 of the OAS Charter, the actions prohibited in the first sentence of paragraph 2;
- (b) whether the prescription expressed by that sentence corresponds to a rule other than the prohibition of the threat or use of force, thus justifying its formulation as a separate rule;
- (c) whether the rule is an acceptable or reasonable one *de lege ferenda*.

With regard to point (b) we have already expressed the tentative opinion that Article 2.4 of the Charter does cover forms of force other than armed force. Questions (a) and (c) we leave unanswered. It is worth noting that the formulation embodied in paragraph 2 of resolution 2131 is improved, in the declaration, by the substitution of “and” for “or” after the words “sovereign rights”.<sup>52a</sup>

The content of the second sentence of paragraph 2 seems close to paragraphs 8 and 9 of the formulation of the prohibition of the threat or use of force.

72. There remains finally the problem, in any case, of explaining how come such a substantial part of the formulation of the duty of non-intervention prohibits conduct already prohibited according to the section of the declaration formulating the duty to refrain from the threat or use of force. One must wonder, more appropriately, why the Special Committee and the General Assembly did not make use of the occasion to remedy the lack of co-ordination between Charters discussed earlier.

The answer to that question is rather distressing.

First of all, too many jurists, while rightly acknowledging the state of confusion that characterises the concept of non-intervention, seem not to believe in the possibility of at least reducing that confusion. Many seem to think, furthermore, that to question, even in part, the “legitimacy” of a concept of non-intervention (as distinguished from the duty spelled out in Article 2.4 of the United Nations Charter) would constitute an offence to the States of Latin America.

It is a fact that when anyone in the Special Committee said anything with regard to the close relationship between the duty not to intervene and the duty to refrain from force, he was looked upon as the enemy of Latin America and the accomplice of United States interventionists.

It was thus felt by the majority, since after the first session of the Special Committee, that drastic steps better be taken to prevent any manoeuvre that might be detrimental to the principle of non-intervention: so that before the Committee ever got to consider the matter of

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<sup>52a</sup> See, however, the 1970 Special Committee’s Report, para. 88.

non-intervention *ex professo*, the General Assembly adopted resolution 2131.<sup>53</sup>

Indeed, even once resolution 2131 had become a *fait accompli* in 1965, the Special Committee could still have laboured on that text in order at least to co-ordinate it with the prohibition of force. But by that time everybody had forgotten that the Special Committee was a committee of lawyers. The issue became political to the point that no substantive discussion ever took place on the formulation of non-intervention.

The XXVth Anniversary chance was lost for the cause of clarification, in a field in which a few lines could have been of greater help to the victims of intervention than the present language either of resolution 2131 or of resolution 2625.

#### *Section 4. Self-Determination*

73. Considering the difficulties which arise in connection with self-determination in international law, we must agree with the majority of commentators in the sense that the formulation of that principle in resolution 2625 (XXV) is not lacking in merit.

The situation of doctrine and practice confronting the Special Committee when it applied itself to this part of its task was difficult indeed. It has been written that what is stated with regard to self-determination in “big print”—i.e., all peoples have the right to self-determination—is drastically modified by what follows in “small print”.<sup>54</sup> Every international lawyer is familiar with the “small print” issues. Reducing them to a minimum, we would put them<sup>55</sup> as follows:

- (i) is self-determination a matter of right and correlative obligations under international law?;
- (ii) assuming that the obligation is—as a matter of international law—incumbent upon States, to whom does the right belong: peoples and other collective entities, or individuals (or just *other States*)?;
- (iii) assuming that there is a right, is it a universal one or is it in any manner subjectively limited: does it apply to all States and peoples, old and new, developed and developing, large and small; or does it apply, as many contend, only to colonial peoples as a right?;
- (iv) if the right exists, what is the content of such a legal situation; does it mean just freedom; does it mean free or representative government, or independence; are there—for example—any alternatives to independence, if independence is one of the possible outcomes of the exercise of the right?;
- (v) assuming a right with given beneficiaries and a given content, how is the obligation to be executed or how is the right to be exercised by the beneficiary?;

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<sup>53</sup> On resolution 2131, see Kenneth Bailey’s opinion in Schwebel, S. (editor), *The Effectiveness of International Decisions*, at p. 390. According to Sir Kenneth “The language of that resolution was so loose and so wide that, in its ordinary meaning, (it) would prohibit not only *all normal* practice of diplomacy but every type of endeavour to influence other governments by negotiations: and that we thought to be dangerous as well as silly”.

The relevant Section of the Friendly Relations Declaration reproduces resolution 2131. This was the outcome of the only majority decision taken in the Special Committee on a question of substance and of a series of incorrect interpretations of that decision that practically *prevented* any discussion on the merits of the formulation of the principle of non-intervention.

<sup>54</sup> Emerson, “Self-Determination”, *American Journal of International Law*, 65 (1971), at pp. 459 ff. at p. 459.

In addition to the literature indicated in the Bibliography: Kunz, J. L. “The Principle of Self-determination of Peoples, particularly in the Practice of the United Nations”, excerpt from *Selbstbestimmungsrecht der Völker*, Band I, München 1964, pp. 128–170; Nawaz, M. K., “The Meaning and Range of the Principle of Self-Determination”, *Duke Law Journal*, 1965 (Winter), pp. 82–101; Lachs, *The Law in and of the United Nations* cited in footnote 101 to Chapter II; Levin, “The Principle of Self-Determination of Nations in International Law” (summary of the Russian original), *Soviet Yearbook of International Law*, 1962, pp. 45–48.

<sup>55</sup> Emerson, quoted work, at pp. 459.

(vi) assuming one or the other of the possible alternatives on the five preceding points, what would be the position of third parties with regard to the principals' (States' and peoples') conflicts of interests and possible struggle over the exercise of self-determination? A closely connected question is what, if any, are the functions of international organisations, notably of the United Nations, with regard to the promotion of self-determination and the exercise thereof?;

(vii) whatever the content of the right, is this legal situation without limit or condition; does it exist in any case and under any circumstances: or are there limits or conditions the presence of which restricts the scope of the right or otherwise affects its existence or exercise?

The declaration does not and could not solve any of these problems, least of all the preliminary question whether it was itself, as an instrument, adequate to dispel any doubt with regard to the legal status of the principle by declaring it to be within the realm of existing law. The declaration does take a stand, however, expressly or implicitly, on almost all the named issues.

74. On the question whether self-determination is a matter of right the declaration makes a decided pronouncement in the sense that self-determination is a legal situation. There would be according to paragraph 1, a "right of . . . peoples" and a "duty" of States. This "by virtue of the principle . . . enshrined in the Charter". Self-determination would thus be a matter of Charter law, namely of contractual law. By saying, however, that the right belongs to all peoples and especially that the duty is incumbent on every State, the same paragraph seems to assume a generalisation of the rule conceivable only on the condition that the rule is a part of customary international law.

The question whether self-determination is the object of a legal rule or principle of law or the expression of a moral or political exigency not translated yet into law, seems to be still an open issue in spite (and because) of the Charter provisions regarding the matter and the numerous United Nations enactments thereon.<sup>56</sup> International lawyers are rather divided on the matter. Higgins asserts the certain existence of an international rule and of the corresponding rights and duties.<sup>57</sup> Notwithstanding our sympathy for the idea, we feel closer to the position held by Leo Gross:<sup>58</sup> "self-determination" is not established as a right in the United Nations Charter and "subsequent practice as an element of interpretation does not support the proposition that the principle of self-determination is to be interpreted as a right or that the human rights provisions have come to be interpreted as rights with corresponding obligations either generally or specifically with respect to the right of self-determination".<sup>59</sup>

The question whether self-determination has been promoted internationally from an ideal—or from a political goal occasionally pursued by governments in the course of a longer or shorter chapter of the history of mankind—to the more substantial rank of a rule of international law, is complicated by the very special nature of the objective-subjective content of the rule. Subjectively the beneficiaries are either individuals or peoples, such individuals or peoples being the very constituencies of States. Objectively, it is not just the question of the enjoyment and exercise by individuals or groups of any political, civil, socio-economic or cultural rights within the community to which they belong. It is a matter of whether the human element within the several States is entitled to choices that may lead to

<sup>56</sup> We refer especially to Articles 1.2 and 55 of the Charter and to the relevant provisions of Chapters XI, XII and XIII. On the rich proliferation of United Nations enactments on the subject see Srnska, M., in *WFUNA Seminar*, pp. 119 ff.

<sup>57</sup> Cited by Emerson at p. 460, footnote 2.

<sup>58</sup> Quoted by Emerson, p. 461.

<sup>59</sup> Still Gross' paper quoted by Emerson.

severing their destiny from that of a given State and ultimately disrupt the State's body-politic.

It is this uniqueness of self-determination that makes the existence of a corresponding international rule, whether contractual (Charter) or general (customary international law), far more problematic. Individuals, peoples, nations are the very components of States, By providing for a right of self-determination international law would put into question, with the fabric of existing States, the present foundation of international law and its very *raison d'être* as a law among States.<sup>60-61</sup>

This uniqueness—ultimately present in any case—varies in degree, of course, according to whether the “right” is conceived as a people’s or an individual’s “right”, or whether it is conceived as a right directly conferred by international law or as a right which States are internationally obliged to ensure within their municipal legal systems. The more we move from the concept of a right of *individuals* within municipal law *indirectly* “protected” by an international legal obligation of the State to which they “belong” towards the concept of a right of *peoples*, a collective right, *directly* granted by international law (the peoples thus confronting States as equally collective and substantial international persons) the more we face something unique or even revolutionary.<sup>62</sup>

75. Turning now to the part of the declaration concerning the determination of the beneficiaries of self-determination, it seems that of the two doctrines—right of peoples or right of individuals—the doctrine that the right pertains to the peoples as collective entities prevails, in our document, over the doctrine according to which the right pertains to individuals as any other human right.

Of course, one does not miss—even within the limits of a first reading—the reference to human rights in a phrase at the end of paragraph 2. But the language of this phrase, and its incidental nature, seem to confirm that the essential, direct function, or supposed function, of the “principle” would be to confer a right upon peoples assumed as collective units.

The right, moreover, seems to be conceived as a right conferred upon the peoples *directly* by international law. The further reference to human rights and fundamental freedoms in paragraph 3, a most essential reference, does not alter this state of affairs. Within the internal logic of the declaration, human rights and fundamental freedoms are mentioned here as secondary. The duty of all States “to promote . . . universal respect for, and observance of, human rights and fundamental freedoms” (“in accordance with the Charter”) appears rather to be, in the context of the whole section, as just one element, albeit essential, for the exercise of the *people's international right* of self-determination.

Indeed, it is a daring statement.<sup>63</sup>

76. The relevant section of the declaration is also explicit with regard to the subjective scope of the right.

The obligation would be incumbent upon all States and the right would belong to all peoples. This is not only and not so much the question—however important—whether the declared principle or rule on self-determination is understood as a merely contractual rule binding only the membership of the United Nations or a customary rule addressing itself to every State. The present issue is whether the rule formulated in the declaration extends the purported obligation to all the States among which the rule exists because the right is extended to all the peoples under their jurisdiction—which is the universal understanding of the subjective scope of the principle—or affects some of those States only by granting the

<sup>60-61</sup> Appendix, paras. 121 ff.

<sup>62</sup> *Infra*, para. 81.

<sup>63</sup> *Infra*, conclusive paragraph of the present Section.

right only to given peoples. This is the issue whether the principle of self-determination creates a right just for the peoples under colonial rule or for all peoples.<sup>64</sup>

On this issue, the wording seems to be decidedly in the sense that self-determination is universal. The whole formulation supports the understanding of the declaration in the sense that self-determination is not considered to be, by the authors of the declaration, a “privilege” of the peoples under colonial rule.<sup>65</sup>

The only element of the formulation which *prima facie* would seem to make an exception (apart from para. 6, which relates to a special problem) is the sentence in the second part of paragraph 2 which enjoins us to bear in mind “that subjection of peoples to *alien* subjugation, domination and exploitation constitutes a violation of the principle”, etc. It does not appear, however, that this part of the formulation constitutes (together with the special provision of para. 6) anything more than an expression of particular concern for the current problem of the residual colonial situations. This interpretation finds further support in the omission, in the declaration, of any express reference to resolution 1514.<sup>66</sup> We like to believe that in giving up their wish to find in the declaration an express mention of that resolution, the countries of the Third World understood what others did not seem to perceive: that self-determination is not just another word for decolonisation in a narrow sense. They understood that colonial self-determination is but an aspect of a universal problem.<sup>67–68</sup>

At the threshold of the second quarter-century of the United Nations there are still a number of peoples awaiting “decolonisation”. It is our impression, however, that mankind will find, in spite of the difficulties, ways and means to bring decolonisation to full completion. But in spite of this accomplishment, self-determination will remain—we believe—a most essential dynamic element in the world community. Indeed, self-determination must ensure to all peoples what one would call *internal* self-determination, namely the fundamental constitutional liberties in the absence of which the possession of statehood might even appear to be a secondary goal.

So understood, and in the measure in which it was to become a part of international law, self-determination is there to stay. There are not only colonies to “liberate” or keep liberated. In addition to ensuring the freedom of all individuals—and thus of all peoples, nations and any other groups—self-determination would be the best defence of peace. If it is true that the roots of war are in the minds of men, it is also true that they are more in the minds of the rulers than in those of the ruled.

Free peoples are perhaps a better hope to keep the peace than the United Nations Organisation. They are also the best hope, in our view, for the United Nations itself and international organisation in general to develop along lines less strictly constrained within the narrow sociological and legal framework of the inter-State system within which—as shown in the *Appendix*—it seems to be still constrained at present.

#### 77. The *content* of the right of self-determination is defined in paragraph 4.

In resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, self-determination was identified, with some reason but rather rudimentarily, with the acquisition of independence (by colonial peoples). However meritorious that identification may have been in accelerating the decolonisation process, it is rightly felt that to identify self-determination with independence is unwise. First, it might vanify in certain

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<sup>64</sup> A concept of self-determination in terms of universality is implicitly assumed by Quincy Wright, “United States Intervention in the Lebanon”, *American Journal of International Law*, 53 (1959) at p. 121.

<sup>65</sup> Signs of a conception of self-determination as “universal” were perhaps not totally absent from resolution 1514 itself.

<sup>66</sup> *Infra*, para. 79.

<sup>67–68</sup> *Infra*, para. 106.

cases the very substance of the right of self-determination by leading to the setting up of an independent State regardless of any choice of the population; second, it might lead in any case to an over-simplification of the various choices which may suggest themselves for the peoples concerned.

Paragraph 4 of the relevant section of the declaration wisely indicates that the exercise of self-determination may bring about not only “establishment of a sovereign and independent State” but also the “free association with an independent State” (existing or to be created) or the “emergence into any other political status freely determined” by the people concerned.

The alternatives offered might reduce, together with the difficulties pointed out above, the tension which in many cases has accompanied the exercise of self-determination. The last set of alternatives, consisting as it does in a freely determined political status other than the establishment of a new independent State and other than the free association or integration with an independent State, might be of particular interest in view of the exercise of self-determination by peoples other than colonial peoples.

78. Paragraphs 5 and 6, also part of the definition of the right, address two important injunctions to the duty-bound State.

The first part of paragraph 5 enjoins it to “refrain from any forcible action which deprives people” (referred to above in the elaboration of the present principle, namely *any* people) “of their right to self-determination and freedom and independence”.<sup>69</sup> Qualified as it is by the end, it is obvious that this provision does not impose upon States the obligation to renounce, in their metropolitan, trusteeship or overseas territories, the essential function of maintaining law and order. Forceable action not aimed at depriving the people of its right of self-determination or its freedom or independence is evidently not covered by the prohibition.

The prohibition contained in paragraph 6 constitutes the only provision of the relevant part of the declaration which refers decidedly to colonial or quasi-colonial powers and territories only. Paragraph 6 concerns those territories and peoples which are subjected to colonial rule or to any other régime not qualifying as self-government and provides that such territories and peoples will have, in so far as the United Nations Charter is concerned, a “status separate and distinct” from the rest of the territory of the duty-bound State. This is meant to qualify as not compatible with international law and in any case irrelevant from the point of view of the formulated rights and duties, any constitutional, legislative or administrative enactment of the duty-bound State conferring upon the territory and people in question, any *status* the possession of which would jeopardise the right of self-determination or in any manner be an obstacle to the exercise of that right. The rule is intended to discourage and neutralise, in so far as the declaration is concerned, the tendency of States to “dissimulate” the dependent condition of a people by promoting it to the status of a province or overseas *département* or other municipal law subdivision, or to any other more or less autonomous status.

79. For the beneficiary of self-determination, the same paragraph 5 which condemns any forcible action depriving it of self-determination (or freedom or independence) envisages a “right of resistance”. This right is expressed rather questionably in terms of “actions against and resistance to such forcible action in pursuit of the exercise of self-determination”. The same paragraph provides that the peoples acting in resistance to the condemned repressive actions—and “in pursuit of the exercise of their right”—are entitled to “seek and receive support in accordance with the purposes and principles of the Charter of the United Nations”.

The drafters of the declaration were faced here with the well-known contrast between

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<sup>69</sup> The mention of freedom is another element corroborating the conception of self-determination as a universal “right”.

those who claimed that dependent peoples enjoy a right of self-defence against the ruling power and those who, at the opposite extreme, denied the dependent people any title whatsoever to active resistance. According to the first doctrine, the peoples resisting or taking arms against the duty-bound power would be entitled to use force in "individual or collective self-defence" under Article 51 of the United Nations Charter. This Article would bring about not only the legitimation of the people's struggle but also the consequence that any third State or States which supported by armed force the struggle of a dependent people would be acting, together with the people itself, under the cover of self-defence. One cannot fail to see how far this might take third States on the road of resort to force.

This is not the place to discuss at any length the dangerous theory of the extension—and an indiscriminate extension—of the scope of Article 51 of the United Nations Charter to any "liberation movement". We shall confine ourselves to recall that it is not inconceivable that the provision of Article 51 be applicable in the—probably very infrequent—case of a liberation movement which just attained statehood by becoming the leading party or the governmental machinery of a separate State. To invoke in such a case Article 51 to condemn a persistent use of armed force by the State formerly "in possession" would be quite reasonable. There would be met, in such a case, all the conditions under which Article 51 is meant to operate in conformity with its *raison d'être*. There would be a State—a new State—born out of a "separatist" movement; this State would be suffering an armed attack by the dispossessed government; and until the Security Council took measures it would be natural that the "liberated" State under attack proceed to self-defence and possibly to *collective* self-defence thanks to the military help afforded it by friendly States against the attempt of the dispossessed State to restore its domination.

However, to apply Article 51 to the struggle of the "liberation movement" before the attainment of that minimum of stability without which statehood is still in question, would mean not only to throw overboard any doctrine condemning premature recognition, but also to stretch the meaning of Article 51 beyond any reasonably wide interpretation and open the way—in so far as the law of nations is concerned—to a dangerous instability.

It is fortunate that the formulation finally accepted within the Special Committee was such as to attenuate the consequences that might derive in the long run from some of the formulations contained in resolution 1514 (XV) and other instruments. It is also felicitous, from this point of view, that an express reference to resolution 1514 in this respect was opposed by a group of members of the Special Committee and renounced—as mentioned earlier—by the Representatives of the Third World. The latter countries' moderate attitude is the more to be commended as the lack of an express reference to resolution 1514 in this part of the declaration was considered by the representative of a major power as the reason for not being able—at the last meeting of the Special Committee of 1–2 May 1970—to express its agreement except *ad referendum*.

80. Even the most liberal of the drafters of the section on self-determination could not fail to see, however, that some limit would have to be drawn with regard to self-determination, in the interest of the preservation of both internal stability and international peace. This is the function performed, within the declaration, by paragraphs 7 and 8.

Paragraph 8 is meant to confirm, within the context of self-determination, the general obligation, proclaimed under the prohibition of force and the principle of non-intervention, to "refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of another country".

According to paragraph 7, "Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting

themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". This clause is meant to protect the political unity and the territorial integrity of all the parties duty-bound under this principle, namely all States, whether possessed of colonies or similar overseas territories or not; whether multi-national or multi-racial; whether monolithically compact in the ethnic composition of their peoples or ruling also over minority groups of different origin, culture, or creed. While duty-bound, under paragraph 1, to "respect this right in accordance with the provisions of the Charter", each of these States would benefit, by virtue of paragraph 7, of a presumption of compliance.

For the presumption to come into play the conditions are fairly clear and equitable. The State must be "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". Key requisites are the possession of representative government and the existence of a situation by which all the elements of the population of the territory are represented in the appropriate—representative—institutions. In the present state of the world, only a minority of the States participating in the United Nations would really satisfy both requirements. It is precisely because of this that self-determination—whether a matter of law, morals, or just expediency—must be considered of universal application.

81. In our view, self-determination could be envisaged at most, from the point of view of existing international law, as a human right or fundamental freedom which every State would be bound, under general law, under the Charter or under other instruments, to ensure to all the persons under its jurisdiction. As stated at the outset, however, we doubt that such is really the case in the law of the Charter or under general international law. Self-determination seems to remain, even as an obligation of States to ensure it to persons or groups within their legal systems, a matter *de lege ferenda*. Exceptions are of course to be found in given arrangements of particular, conventional law.

As we do not believe in the personality of *individuals* in international law, existing international law is even farther from ensuring a right of self-determination as a matter of *direct* right under international law itself. A similar consideration applies to the concept of an international right of *peoples* or *nations* envisaged as a new class of international persons at the side of States, international organisations and other entities. The international right corresponding to any legal obligation with regard to self-determination would presumably develop—short of a fundamental change in the system—as a right of other States *vis-à-vis* the duty bound one.

The whole part of the declaration concerning self-determination must be understood, therefore, as a *de lege ferenda* formulation. As such, however, it appears to us to constitute, especially in view of its emphasis upon the universal character of the principle, the most advanced part of the Friendly Relations Declaration. It is also plain, we submit, that just as colonial self-determination is but a part of self-determination for all, the whole problem is but an aspect of the development of the international law of human rights. This is perhaps an aspect of the matter with regard to which the declaration could have been more committal.<sup>70</sup>

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<sup>70</sup> According to the quoted Working Paper submitted by the Delegation of Italy (1970 *Special Committee Report* (A/AC.125/12)): "there is a close interrelationship between . . . (the principle in question) . . . and the promotion of human rights. In so far can the exercise of equal rights and self-determination of peoples as collective entities be effectively secured, as the individuals composing those entities are allowed effectively to exercise their rights and fundamental freedoms before, during and after the self-determining process. The very existence and functioning of structures and machineries through which self-determination is to be expressed depends upon the possession and effective exercise of individual rights and freedoms."

### *Section 5. The Other Principles: Co-operation; Sovereign Equality; Compliance in Good Faith With International Obligations*

82. Co-operation had been understood by us, when we first heard it mentioned as one of the cardinal principles of inter-governmental relations in the second quarter-century of the United Nations, as one of the most vital.

As we saw it, the principle of co-operation should be a sort of procedural super-principle that would be meant to operate, in practice, as a set of as many procedural sub-principles as were the other (six) principles of Friendly Relations.

The other principles to be embodied in the declaration were mostly what lawyers call substantive or primary prescriptions. Exceptions would of course be the prohibition of force and peaceful settlement, two principles closely related to the procedures and institutions to be entrusted with the functions on the performance of which their effectiveness would depend. Actually, as little or nothing was said, in the formulations on force and peaceful settlement, about procedures or institutions, it seemed natural to expect that the formulation of the principle of co-operation should include the procedural or institutional aspects of any one of the other six principles. That the principle of co-operation should assume such an ancillary function—but the vital function, to be sure, of ensuring the effective translation of each of the other principles into reality—was proved also by the fact that to “co-operate”—without any further qualification—does not mean much.

We were encouraged, in so conceiving a principle of co-operation, by further considerations. In the first place, the principles were meant to be “codified” and “progressively developed” within the framework of an international organisation—a relatively institutionalised entity—which could hardly conceive of separating rules of mere behaviour from the rules which constituted its own essence. Secondly, it was the declared purpose of the whole exercise to make the application of the principles more effective. This had been since the beginning the ultimate practical end. Thirdly, the denomination of the declaration was precisely “principles of friendly relations *and co-operation among States*”. Relations on one side, co-operation on the other; mere rules of conduct on one side, organisation—at least as a *goal*—on the other: *problèmes relationnels et problèmes institutionnels*. It seemed logical that the two elements should be harmonised, within the projected codification and development, into a whole. In brief, under the heading “co-operation” we expected to find much.

As matters developed, however, the principle of co-operation was only meant to repeat to the United Nations membership—better, to all States—that they shall or should co-operate. We are frankly unable to find anything in the formulation of this principle, but the repetition of that statement, except perhaps a certain general emphasis on economic co-operation as distinguished from peaceful settlement, peacekeeping and human rights.

In paragraph 1 the Assembly has gone so far as to state that “States have the duty to co-operate . . . in order . . . to promote . . . (*inter alia*) . . . international co-operation”.

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“A vague reference to human rights exists . . . in the formulation of the principle of co-operation, and a small paragraph on human rights seems to be envisaged within the framework of the formulation of the principle of Equal Rights and Self-Determination according to one of the informal documents circulated. Both texts reproduce the general language of Articles 55 and 56 of the Charter”. But, it was stressed, “while that language seems appropriate for the principle of Co-operation and for one of the . . . ‘special’ preambular paragraphs of the draft declaration, a more significant language could be adopted for the human rights paragraph which should appear in the formulation of self-determination. The problem, in this case, is to find a language susceptible of conveying more clearly the desirability that every State ensure fundamental freedoms and human rights to all individuals within its jurisdiction, whether such individuals are members of dependent communities, foreigners or citizens”.

The four subparagraphs of paragraph 2 are mostly either reiterations of Charter provisions and in some cases of paragraph 1 itself (as sub-paragraph *a*), or reiterations of other principles (as subparagraph *c*) or reiterations in different words of the statement that States should co-operate.

As for paragraph 3, it combines the repetitious nature of the other two paragraphs with the substitution of the forcefully expressed obligation of paragraph 1 and the forceful “shall” of paragraph 2 (*a–c*) with two “should”. According to paragraph 3, in other words, States are *not* duty bound to, but simply *should*, co-operate “in the economic, social and cultural fields as well as in the field of science and technology and for the promotion of international cultural and educational progress”. Think, for example, of the protection of the environment. According to the same paragraph 3, States are not obliged to, but merely *should*, co-operate “in the promotion of economic growth throughout the world, especially that of the developing countries”. Think for example of the problem of hunger. Think of the problem of ocean development and exploitation.

Combined with this great respect for the freedom enjoyed by States under general international law, some merit is to be found in parts. For example, in the first paragraph—otherwise pretty insignificant—there is an opportune stress on the obligation to refrain from *discrimination* in trade and economic relations. Paragraph 3 stresses co-operation in the promotion of economic growth throughout the world, “especially that of the *developing countries*”. Even this statement, however, repetitive as it is and in itself very general, appears to us as a meagre and uneloquent contribution to those immense and urgent problems of the developing world which the most enlightened students of international relations consider to be the great issue of the seventies.

83. On the very questionable “principle” of sovereign equality of States we find the declaration too tautological for words.<sup>71</sup>

In the first place, we would doubt that there is anything like a *principle* of sovereign equality. “Sovereignty”, one of the elements of this alleged legal attribute, is, in our opinion, as well as independence, a fact.<sup>72</sup> An entity is sovereign if it is independent. It isn’t if it is not.

As for equality, there is no doubt that States in international law—as individuals in municipal law—are “equal” before the law, or in the eyes of the law, in the sense that the *actions* of all States are to be equally *judged*. In other words the actions of each State must be judged on the basis of the *same* standards or rules on the basis of which are judged the actions of any other State: *provided*, of course, that a rule of the legal system itself does not envisage a *special* situation calling for a diversified treatment.

We therefore see no objection to the main statement contained in a part of the second sentence of paragraph 1 of this formulation. We refer to the phrase “(All States) are equal members of the international community notwithstanding differences of an economic, social, political or other nature”. We would not be able, however, to accept the initial words “All States enjoy sovereign equality” because it puts the same concept in a less clear language. With regard to the statement: “They have equal rights and duties”, we believe it should be crossed out because it is untrue *de lege lata* and . . . impossible *de lege ferenda*.

The rest of the formulation contains a series of repetitions within the same formulation of equality and sovereignty and within the whole declaration. Subparagraphs (*c*), (*d*), (*e*) and (*f*) repeat, respectively, pieces of other rules one can easily trace within the declaration (albeit not always in international law). Subparagraph (*a*) states for the third time (fourth if one counts the title) that “States are juridically equal”. Subparagraph (*b*), in addition to insisting on the presentation in legal terms of a factual situation, is intolerably tautological. To say that

<sup>71</sup> Compare *International Conciliation*, 1966–1967 (Sep. 1966-No. 559) at pp. 189–190.

<sup>72</sup> Appendix, paras. 149 ff.

a “State enjoys the rights inherent in full sovereignty” is a doubly vicious circle. Obviously, the term “each State” does not cover such States as Virginia or Louisiana. It only covers independent States, namely sovereign States. To say that such States are “sovereign” is meaningless. To add that since they are sovereign they enjoy the rights inherent in full sovereignty is not any better.

84. Of the four paragraphs devoted to “Compliance” two are equally tautological or repetitive.

Paragraphs 2 and 3 tell us, respectively: that general international law is binding and that valid treaties are binding. To do so was not only superfluous—and in any case beyond any powers of the General Assembly—but also detrimental to the effectiveness of the very rules the binding character of which is affirmed. “Thou shalt not take the name of the Lord thy God in vain”. The wanton repetition of the binding character of the law—binding because it is law and law because it is binding—is detrimental to the dignity of the law.

The fourth and last paragraph—the second of which also happens to be the conclusive statement of the XXVth Anniversary Declaration—is either simply repetitive of Article 103 of the Charter<sup>73</sup> or a big novelty. It is repetitive if, in spite of the materially slight difference in language, it were to be understood, as well as Article 103 of the Charter, as providing for the primacy of Charter obligations only for States which are Members of the United Nations. Were it instead to be understood as a maxim of universal scope—in view of the omission of “their” (and in view of the appurtenance of paragraph 4 to a formulation, all the other paragraphs of which address themselves to “every State”—it would be not in conformity with the general rule that treaties, including the Charter, only bind the contracting parties.

The statement of the first paragraph—“Every State has the duty to fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations”—is rather puzzling.

At first sight, considering that the following paragraphs 2 and 3 cover respectively the whole *corpus* of general international law<sup>74</sup> and all valid international agreements, one would think that the special importance of the Charter justified the dedication of the first paragraph to that fundamental instrument notwithstanding the fact that it is also mentioned in paragraph 4. So, the obligations contemplated in the first paragraph would be *Charter* obligations. We find it hard to see, however, how:

(i) Charter obligations could be assumed *according to the Charter* itself;<sup>75</sup> and (ii) how could this apply to *non-member States*, as the expression “every State” seems to imply.

It would seem therefore preferable to assume that paragraph 1 of the section under consideration is only the opening statement of a very general character, or a sort of paraphrase, not unusual in the declaration, of the title of the “principle” in question. If such is the case, the wording should not have been “obligations *assumed*”, but obligations *incumbent* upon it; and not so much “*in accordance*” as “*in conformity*”. But is this correct? One last point on this section concerns a matter with which it does not deal but could usefully have dealt: more usefully, at least, than the paragraphs *included* in the formulation of the principle we are now considering seem to deal with their object. Some delegations had

<sup>73</sup> “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and obligations under any other international agreement, their obligations under the present Charter shall prevail.”

<sup>74</sup> A *propos* of which we must also note the restrictive reference to custom as “generally recognised principles and rules”. See para. 28 (and footnote 26–27 thereunder).

<sup>75</sup> Charter obligations derive from the Charter. If they derive according to anything they derive according to general international law.

proposed that it be declared expressly that a State could not validly invoke its Constitution or any provision of municipal law in order to evade obligations under international law. The proposal was rejected. It was stated, more precisely, that it would be acceptable only if the statement would also include a paragraph declaring the invalidity of “unequal treaties”: which was obviously an entirely different matter. From the point of view of the so-called “primacy” of international law over municipal law the draft declaration on Rights and Duties of States of about 25 years ago appears to have been more advanced than the present declaration.<sup>76</sup> Article 13 of that draft was by far superior also for the terms by which it designated the sources of international law.<sup>77</sup>

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<sup>76</sup> Article 13 of that draft declaration declares, *inter alia*, that a State “may not invoke provisions of its constitution or its laws as an excuse for failure to perform” the duty to carry out its international obligations. Notwithstanding technical imperfections (Kelsen, *The Draft Declaration*, at pp. 275–276), this provision holds good and conforms to general international law.

<sup>77</sup> These were indicated as “treaties and other sources of international law”. There was no question of general *recognition* of customary law. *Supra*, footnote 74 to this Chapter and reference therein.



CHAPTER V  
THE FUNCTION OF THE DECLARATION  
*Section 1. "Co-ordination of International Legal Systems"*

I. Introductory

85. The work which led to the adoption of resolution 2625 (XXV) had been preceded and accompanied by a rather intense debate—official and academic—in the course of which most of the principles now embodied in that resolution were envisaged under a variety of terms such as principles of “Peaceful Coexistence”, “Developing Inter-Bloc-law”, “Legal Accommodation of Contending (or ‘Competing’) Systems of World Public Order”, “New International Law”. *Leit-motiv* of the debate was—and still is, in a measure—the concept of different, or supposedly different, systems of international law, variously identified. At times they are seen, dualistically, as a “Socialist” opposed to a Western system. Other times—or for different purposes—it is a matter of distinction or confrontation between each one of those two systems and a “Third World”, “Developing Countries”, system.<sup>1</sup> Other times one speaks, dualistically again, of a North-South confrontation.

The principles embodied in resolution 2625 (XXV) have thus been related to two recent phases of the question of the universality of international law. One is the phase which opened, in the period between the two World Wars, as a consequence of the real or supposed rejection, by the Soviet Union, of traditional or “capitalist” international law, as opposed to a not well-identified “socialist” international law. The other is the phase which would have developed in our time as an aftermath of the acquisition of statehood by an increasing number of Asian and African nations, and of those nations’ challenge to international law which merged, at least for some aspects, with the older challenge from Latin-America.

Set against such a background, the principles and rules embodied in the declaration would be meant, judging from the debate recalled, to function as harmonising normative elements between *coexisting systems of international law*. The title “Principles of Peaceful Coexistence”, originally proposed for the declaration, would seem to confirm that view, seemingly shared, judging from the abundant literature, by a considerable number of scholars. A closer look at this supposed function of the declaration seems to be necessary.

The most notable among the theories in question is the doctrine of peaceful coexistence as developed from 1924 to our time.

86. The doctrine of peaceful coexistence appeared, originally, in the Soviet literature on international law, as a substitute for the denial of any international law, which would logically follow from the idea that law and State would have no *raison d'être* within a socialist system. Once it appeared that a universal success of Communism was not imminent and that in any case law and State were there to stay, some kind of orderly relations of the Soviet State with other States had to be envisaged. However, according to the doctrine that prevailed in the twenties, it could not be conceived, apparently, that such relations be governed, *sic et simpliciter*, by existing international law. According to Korovin (1924–1926) there was no such thing as a general international law applicable to the relations of all States.<sup>2</sup>

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<sup>1</sup> Another example. As noted by Grzybowski, *Soviet Public International Law, Doctrines and Diplomatic Practice*, Leyden, 1970, at p. 15, Korovin spoke of three systems: the capitalist and the socialist, and a third system for the relations between those two.

<sup>2</sup> See Kelsen, *The Communist Theory of Law*, pp. 156 ff. especially 156–157 and 158, Korovin’s denial of a general international law is criticised by Tunkin,

There existed instead a number of international legal systems: European, American, capitalist-colonial. According to the same author, to such systems there had been added, since the establishment of the Soviet régime, a system governing the relations between socialist and capitalist States,<sup>3</sup> and within which the Soviet State and the capitalist States would, *justement*, coexist. Whether Korovin's theory reflected precisely the official view is beside the point. It is a fact that the attitude of the Soviet Government with regard to certain matters seems to have given some credit to the idea that Korovin's thought was not considered unorthodox.

Korovin's "pluralistic" theory, which had been presented under the denomination of international law of the time of transition, was attenuated in the course of time by the same author,<sup>4</sup> the attenuation consisting mainly in the rejection of the "attempt to construe a special socialist international law of the transition period" and the recognition of the existence of a legal international order binding upon all the States of the world. This universal law of nations, however, was conceived by Korovin and others as characterised by two conflicting trends—one could say, perhaps, conflicting "souls". In Kelsen's words, the "democratic-pacifistic, progressive" soul was represented by the socialist Soviet State, while the "imperialistic, reactionary" inspiration came from the "capitalist" States,<sup>5</sup> the first trend being prevalent or bound to prevail in modern international law under the impulsion of the Soviet State. The "pluralistic" conception was thus still alive, albeit in a different form.

It should also be noted, however, that already in Korovin's post-war article in the *American Journal* a list of "novelties" is presented (as part of contemporary international law) in which appear not a few of the principles or rules now embodied in the Friendly Relations Declaration albeit not under a specific denomination.<sup>6</sup>

The idea of competing or rival systems was in fact to revive, in spite of the consolidation of the concept of universality of international law, in the practice of the Soviet Government, with the creation of the United Nations and the establishment of a number of Communist régimes (or Popular Republics) in Eastern Europe and elsewhere. As a consequence of the latter development, on the Socialist side there now is—facing the "Capitalists"—no more just one country, however large and important, but—in spite of macroscopic exclusions—a numerous group of countries bound together into an association by a common ideology and a similarity of régimes and by a close co-operation sanctioned by a number of bilateral and multilateral instruments.

At the side, above, or in between these two systems—expressly qualified as "diametrically different social systems"<sup>7</sup>—the contemporary Russian doctrine recognises the

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*Co-existence and International Law*, at pp. 59–60.

<sup>3</sup> Kelsen, last quoted work, at pp. 156–157. On the content of this system and its relationship with the other systems see Kelsen himself at p. 157.

<sup>4</sup> *Inter alios*, on the historical setting of this attenuation, Lissitzyn, *International Law in a Divided World*, at pp. 54 ff.; and Friedmann, *The Changing Structure of International Law*, at pp. 336 ff.

<sup>5</sup> Kelsen, *The Communist Theory*, at p. 172, footnote 45; Schlesinger, Rudolf, *Soviet Theories of International Law*, *Soviet Studies*, Vol. 4, n. 3 (1953), p. 334 f. For the evaluation of this theory on the part of Korovin himself in terms of *primacy of national law*, see Kelsen, last cited work, at pp. 158–160, especially 159.

<sup>6</sup> Korovin, "The Second World War and International Law", *American Journal of International Law*, 40 (1946), pp. 743 ff.

<sup>7</sup> Tunkin, *Co-existence*, etc., at p. 53.

existence of a general international law, decidedly rejecting any past negative attitudes or interpretations. In the terms of Professor Tunkin, “La doctrine soviétique du droit international se fonde aujourd’hui comme par le passé sur le fait qu’il existe un droit international général, dont les normes règlent les relations entre tous les Etats indépendamment de leurs systèmes sociaux, et que les possibilités de son développement progressiste futur augmentent avec l’accroissement des forces de la paix”.<sup>8</sup> Tunkin adds that “Les tentatives de certains internationalistes bourgeois d’imputer à l’Etat Soviétoïque ou à la science du droit international soviétique une conception négative du droit international général s’expliquent dans la plupart des cas par une connaissance insuffisante des faits et parfois par leur dénaturation délibérée”.<sup>9</sup> However, the existence of general international law would depend, according to the same author, “de la possibilité de coexistence pacifique des Etats des deux systèmes”,<sup>10</sup> such peaceful coexistence depending in its turn on negotiation, agreement, compromise on any questions. The fact that no compromise is possible with respect to the diametrically opposed ideological-political conceptions and régimes would not constitute an obstacle to peaceful coexistence and to the existence of a general international law in that such differences do not constitute insurmountable obstacles to the adoption of concrete international rules of conduct.<sup>11</sup> According to the same author, “En la possibilité d’une entente entre les Etats des deux systèmes sociaux opposés pour la solution des questions internationales réside la condition fondamentale indispensable à l’existence du droit international général, dans la mesure où ses principes et ses normes se créent par voie d'accords entre les Etats”.

Peaceful coexistence—as a condition of the existence of general international law—would consist, according to Tunkin, in a number of principles coinciding in great part with the principles now embodied in resolution 2625 (XXV): “renunciation of war, settlement of disputes by negotiation, equality of rights, understanding and mutual confidence between States, reciprocal respect of interests, non-intervention in the internal affairs, right of each people to settle any questions concerning its country, strict respect of sovereignty and territorial integrity, development of economic and cultural co-operation on a basis of entière égalité et réciprocité des avantages”.<sup>12</sup> These principles or attitudes would occupy, according to Tunkin, if we understand correctly, a central position in that law—namely general international law—which is to ensure, together with the discipline, presumably, of the relations among *all* States (including those of the Third World, the place of which would not seem to be covered by the two systems) the coexistence between the States of the socialist and capitalist systems.

The principles would appear to be at one and the same time politico-historical *preconditions* of the existence of general international law and essential *parts* of the very content of the rules of general international law as produced—according to Tunkin—by agreement among States.<sup>13</sup>

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<sup>8</sup> Tunkin, *Droit International Public*, 1965, at p. 33 (quoting Khrouchtchev).

<sup>9</sup> Tunkin, *Droit International Public*, pp. 33–34. The author cites here Kelsen’s *Communist Theory*, together with works by Kulski, Charles De Visscher and Ulloa.

<sup>10</sup> *Id.*, same work, at p. 20.

<sup>11</sup> *Ibidem*, p. 21.

<sup>12</sup> According to the PCUS programme quoted by Tunkin, at p. 20.

<sup>13</sup> See especially pp. 20–21, 128–139 and 63 ff., especially 78–89 (on custom as tacit agreement). From a first reading of pages 19–21, we had had the impression that the principles of peaceful coexistence were conceived perhaps

The notion of peaceful coexistence—or the law thereof—seems thus to have acquired, if we are not mistaken, a wider scope. Conceived originally, at least by Korovin, as a special socialist international law of the transitional period aimed at ensuring the coexistence with the capitalist system or systems, it was subsequently integrated, so to speak, as the “democratic” trend, line, or subdivision, of international law conceived as a universal system. According to contemporary Soviet doctrine, instead, peaceful coexistence would be not just a “bridge”—within the enlarged international community of States—between the “Socialist” and the non “Socialist” system but the very condition for the existence of international law as a whole.

The other main inter-systematic relationship with which the principles would be concerned is the Developing-Developed, but mainly New States-Western States relationship.

In the course of the survey of the formulations contained in the Friendly Relations Declaration, particular points of view of developing States have been occasionally mentioned.<sup>14</sup> With regard to rights and duties of States in general one can list three sets of exigencies of the Developing States concerning respectively the completion of the decolonisation process, the prevention of neo-colonialism and—as the positive side of the latter—development.

With regard to more general and fundamental issues, mention should be made of the prevailing reservations of Third World countries with regard to customary law, of their attitude with regard to unequal treaties, of the particular exigencies they advance with regard to the promotion of the work of codification and progressive development of international law, and of their inclination to favour—as a rule—the adoption by the Assembly of declaratory resolutions.

It is known that these generally “progressive” attitudes are accompanied by a great caution, often an outright conservatism with regard to “third-party” procedures for the settlement of disputes and—in many instances—with regard to any substantial increase of the powers of international organisations, which in the eyes of the new States might affect their more or less newly acquired “sovereignty”.<sup>15</sup> The caution of Third World countries in this respect extends, it seems, to the organisation of their own co-operation *inter sese*.

## II. The Alleged Confrontation of “International Legal Systems”

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by Tunkin as performing a function similar to that of the *Grundnorm* postulated within the framework of other, well-known theories. However, that impression is clearly dispelled by Tunkin’s *critique* of those theories—partly not dissimilar from the *critique* developed by Ago, *Scienza giuridica*—and especially by Tunkin’s conclusion at page 139. In the words of Professor Tunkin, “En réalité, le droit international ne s’est nullement développé à partir de quelque ‘norme fondamentale’. Le principe *pacta sunt servanda* a lui même évolué comme une règle coutumière parmi d’autres. Il est très intimement lié à des principes tels que ceux du respect de la souveraineté des Etats, de l’égalité de droits, etc. A l’instar d’autres principes fondamentaux du droit international contemporain, ils sont liés et se conditionnent mutuellement. Ils expriment et consacrent juridiquement le fait que ce sont les Etats souverains qui se trouvent engagés dans les relations internationales contemporaines” (last cited work, at p. 139).

<sup>14</sup> *Supra*, Chap. IV.

<sup>15</sup> Whether it would be a matter of restricting sovereignty or freedom is discussed in the *Appendix*, para. 150.

87. The view that there are two or three separate *international legal systems* is not justified.

As we see it, the data which prove the existence of the body of rules known as international law also prove that international law is, horizontally (as the vast majority of scholars believe) a universal system in the sense that the bulk of its general rules of customary law address themselves to all independent States and to all other entities in a similar condition of independence, regardless of political, economic or social régime.<sup>16</sup>

That the law of nations applies equally to all independent entities *regardless* of régime—what we would call the political “neutrality” of the law of nations—is actually proved, in our opinion, not only by obvious attitudes of States since time immemorial but also, and foremost, by the very *raison d'être* of international law. Such *ratio* is the inexistence of a *public law of mankind* and the operation, among the exponents of *separate political communities* and in the place that would otherwise belong to *that public law*, of a special body of rules.<sup>17</sup> One of the most essential aspects of the coexistence of separate political communities is precisely the possibility that they live under *different*, and possibly conflicting, or incompatible, political, economic and social régimes.

It is not, therefore, a prerequisite of international law that there exist, among States, affinities of ideology or of political, economic or social order. Where such affinities exist it is possible that among the States concerned there obtain more “friendly” and intense relations and co-operation. Difference of régime—and especially the presence of totalitarian States—is a serious obstacle to the development of international organisation, let alone integration. However, affinity or identity of régime is far from a decisive element. It is hardly necessary to recall the international relations of the time of absolutism and of the time of “constitutional” monarchies, or the contemporary sharp rivalry between certain powers, to demonstrate that affinity of régime is perfectly compatible with, and sometimes one of the main causes of, tension or conflict, both in their turn compatible with relations governed by international law.<sup>18</sup>

88. The pluralistic conception of international law—namely the distinction of two or more international legal systems—is *in part* a logical consequence of the confusion, pointed out by Kelsen, between legal situations and political situations. Such confusion leads to the transposal into international law of *factual* elements which, however important in determining the external conduct of one or more States, are not part of the body of international law. This is but one of the many instances of confusion between international relations and international law, very easy to detect.

But the main “scientific cause” of the distinction between two or more international legal systems identified by prevailing ideology or political régimes is in our opinion the arbitrary conception of international law as a kind of constitutional or public law of mankind. This

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<sup>16</sup> The exclusion of dependent entities, and in particular of States’ subdivisions and States’ subjects, only limits the universality of international law in the *vertical* sense.

<sup>17</sup> *Appendix*, paras. 121 ff., especially 123, 125–129.

<sup>18</sup> The interaction between the régime of States and the development of the rule of international law—and especially the maintenance of peace and the growth of international organisation and integration—would require a long discourse. A few considerations in *Rapporti Contrattuali*, pp. 149–154, especially footnote 219, pp. 151–153. See also *supra*, para. 81 (and 75–76).

kind of “confusion”, more frequent and less easy to detect, leads to transpose into international law normative elements which belong to the *national public law* of given States or groups of States and only affect international law—positively or negatively—through the internationally relevant conduct of the State or States concerned.

We are confronted with another error brought about by the theory of international law as a “primitive” stage of the law of mankind (in *lieu* of a very sophisticated stage of private law of coexistence among sovereign States).<sup>19</sup> This misconception prevents many scholars from realising that international law finds its place between two theoretical extremes consisting in a total lack of . . . communication between States, at one end, and of the legal community of mankind or of a given portion thereof, at the opposite end.<sup>20</sup> The case of a State so isolated as to exclude any relationship with other States is obviously a scholastic one. The opposite situation is of course a far less scholastic one. Utopia as it may be for the whole of mankind, it is within the range of historical experience within *parts* of the universal society. But international law is not the legal community of mankind in any measure.

As we try to show in the *Appendix*, the law of nations is not the public law of mankind or of any parts thereof. It presupposes the inexistence of such an interindividual public law.<sup>21</sup> The scholars who assume, on the contrary, that such a law exists and identify it with international law are inevitably led to entertain a deformed, qualitatively and quantitatively magnified concept—so to speak—of international law.<sup>22</sup> This leads them curiously to equally unjustified extremes of optimism or pessimism, according to the case. Faced, for instance, with a regional integration process and/or with the operative functions of a—regional or universal—organisation they hail the advent of supranationalism *in* international law and relations.<sup>23</sup> This is a *perfectly logical* consequence of taking international law as the public law of men. Faced, on the contrary, with a (contemporary) phase of very intense and

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<sup>19</sup> The idea of the co-existence of different international legal systems based on ideological, political and similar affinities among States is the *pendant*, in terms of space, of the arbitrary identification of different international legal systems—or different “types” of international law (Vinogradoff)—succeeding each other *in time* since the downfall of the Roman Empire (*Appendix*, para. 115 ff.). Also this theory stems in fact from the conception of international law as supra-constitutional law. A similar distinction of historical types—except for the different types identified—is presented in the *Soviet Textbook of International Law* (by Korovin and others) edited by the Institute of State and Law of the Academy of Sciences of the USSR, pp. 27–88. On these theories, *L'Etat*, at pp. 377 ff.

To the same “family” of distinctions belongs, in our view, the contemporary types or *strata* of international law identified by Schwarzenberger, *A Manual*, etc., pp. 8 ff., and by Friedmann, *The Changing Structure*, especially pp. 37 ff. But see also *Appendix*, 115, 147. Of Schwarzenberger’s, see also *International Law and Order*, 1971, pp. 16–26 and 67 ff.

<sup>20</sup> Such a case is not to be confused, of course, with the less scholastic situation of a State which obstinately rejected—in theory and/or in fact—any international obligations of a legal character.

<sup>21</sup> *Appendix*, paras. 123 and 125; *L'Etat*, pp. 10 ff.

<sup>22</sup> *Appendix*, paras. 114 ff., 147; *L'Etat*, pp. 26 ff., 347 ff.

<sup>23</sup> Footnote 28–29 below.

extended ideological contrast and confrontation—for example, the so-called “Cold War”—the authors of the same school get to fear the dislocation, the breakdown of international law or its dismemberment into two or more competing international “systems”.<sup>24</sup> Another logical consequence . . .

It seems more correct to believe that just as it does not justify the disruption of the essential unity of international law into two or more systems—in terms of the doctrine of peaceful coexistence or in any other terms—the ideological and political difference does not justify, in spite of its gravity, the desperate conclusion that international law is thrown, by that difference or rivalry, out of existence or *raison d'être*. Were it not so easy to lose any sense of orientation in such a maze of ambiguities and contradictions, it would be curious to note how close get to be, when dealing with this matter, doctrines and schools of thought one would expect to be the most incompatible. Kelsen, for example, has never described so clearly (as noted in the *Appendix*) the *factual* nature of the State in the sense of international law and the indifference of the law of nations to political régimes—a *datum* which he obviously disregards in his presentation of the State in the sense of international law as a *legal creature* of that law and in his whole inter-individual conception of the law of nations—as when he criticises Korovin’s pluralism of international systems.<sup>25</sup> Soviet scholars, for their part, are never so close to these conceptions of Kelsen’s and others (otherwise decidedly rejected by them) as when they present their international systems—the “Socialist” and the “Capitalist”—in terms which obviously imply a “constitutionalistic” conception of the law of nations.<sup>25a</sup>

89. It should go without saying—but perhaps had better be said—that the fundamental unity of international law (and the rejection of any theories asserting a pluralism of international legal systems) is contradicted neither by the existence of secondary international systems corresponding to groups of ideologically or politically related States nor by the differences between such groups of States. This horizontal universality of the law of nations is of course subject to exceptions deriving from the well-known *limitation* of the subjective sphere of application of treaties, from the existence of treaties and institutions of *regional* co-operation, and from the existence of customary rules with a *limited* sphere of application *ratione personarum*. These exceptions really *confirm* the essential unity of the law of nations. Similarly, the fact that sharp differences often arise between given groupings of States as to what international law is or should be with regard to given matters, and the fact that such disputes, especially those *de lege ferenda*, assume at times a high degree of gravity, are perfectly reconcilable with the universality of international law.

No doubt, each one of the groups of countries known as Capitalist, Socialist or Third World is characterised by special ties of solidarity among the members, by “particular” rules, written or unwritten, concerning military, political, economic and/or social and cultural co-operation (more or less organised) and perhaps by the presence of one or more hegemonic powers. However, the countries involved in each group are equally subject, as among themselves and in their relations with members of the other group or groups, to general international law and to the rules of those treaties in which they participate—as is frequently

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<sup>24</sup> See, for example, the authors quoted by Tunkin, *Droit International Public*, at pp. 28–31. A similar difficulty seems to be present in Hoffmann, “International Systems and International Law”, *World Politics*, 1961, pp. 205–237.

<sup>25</sup> *Appendix*, para. 115 (end).

<sup>25a</sup> A more organic *critique* of the “constitutional” concept of international law and its corollaries is now presented in *L’Etat*, pp. 3 ff.

the case—together with members of other groups. Even assuming that as among the States belonging to a given group, the political, ideological, economic and other ties were so strong and organic, or the impact of the leadership of a hegemonic power so heavy and absorbing, that infra-group relations presented at one point the features of a partially or relatively integrated society of the peoples involved, unless the integration process is so wide and deep as to annihilate the international personality of all or some member countries, international relations in a proper sense would continue to exist side by side with the integrated relations: and we strongly doubt that the special ties in question are such—even in the case of the European communities of the “Six” or “Nine”—as to warrant the notion of a “Socialist”, “Western”, or “Western European” “public law”. At most there may be, here or there, areas of *common* “internal” or “external public law”.<sup>26</sup> Except perhaps in the case of the British Commonwealth, where there are residual constitutional ties, it is, rather, a matter either of more intense influence—reciprocal or one sided—or of uniformity of régimes or constitutional principles, or of common administrative or judicial organs.<sup>27</sup>

Elements such as these will obviously reflect in infra and extra-group (international) relations, just as the régime of a single country and its constitutional law affect its external relations. They will justify, however, neither the qualification of the infra-group “system” as an “international *legal* system”, nor the conclusion that international law as traditionally understood is inoperative in infra-group relations, nor the notion that one is confronted with a new, revolutionary kind of international law. Within each group there will be, at most, a special “blend” of mere policies and affinities plus, in extreme cases, some common or uniform *municipal* public law—and perhaps common organs—on the one hand, and the traditional, general and particular, international law, on the other hand.<sup>28–29</sup>

90. It follows that while tensions or conflicts between the groups in question, or between given members of different groups—may contribute to crises of effectiveness of international cross-group rules or, more simply, to the more frequent violation of such rules, or may give rise to particular difficulties in the application of individual or “organised” sanctions, there is no basis, either for the denial of the universality of international law or for a search of special rules of an inter-system international law. As a matter of *lex lata*, this is far from being proved. *De lege ferenda* it would be the disruption of international law. *De lege lata* the pluralism of the doctrines under discussion may also serve—as it has served in well-known

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<sup>26</sup> Instances are obvious. One of the clearest is those rules of the treaties establishing the three European Communities which concern the negotiation and/or conclusion of agreements with the more or less decisive concourse of the Communities’ Commission. For the characterisation of such activities of the European institutions as “vicarious State activities” of international organs, see paras, 134, 135, 138, 141 of the *Appendix*.

<sup>27</sup> *Appendix*, paras. 134,135.

<sup>28–29</sup> That contemporary international conflicts between States governed by conflicting political systems are nothing but “traditional interstate conflicts, matters of adjustment between national interests and sovereignties” (“not as such sensitive to the ideological or political differences between the parties”) is recognised for example by Friedmann, *The Changing Structure*, at pp. 60–61. This clear vision contradicts, in our opinion, the notion (shared by Friedmann with other scholars) of the appurtenance of certain integrative processes to the realm of international law (*supra*, footnote 19 and *Appendix* para. 147).

cases—the purpose of presenting patent violations of international law as matters of prevalence of the “system”.

The legal answer to such attempts should be that if the system is a really international system, infra-group rules can serve as an excuse for the violation of inter-system rules only in so far as such rules are susceptible of derogation and have concretely been derogated from by an infra-group rule internationally valid. If, on the contrary, the infra-system rule invoked belongs to the legal system of a community undergoing an integrative process which still leaves room for international intercourse between the several States, the plea must be rejected in any case on the strength of the same principle under which the necessity of complying with a rule of national law does not justify an international wrongful act.

While as fallacious as the theory (of the legal community of mankind) from which it ultimately derives, the doctrine of a pluralism of international systems is in comparison less attractive in perspective. It presents the disadvantage of the mother-theory without its advantages. The identification of the law of nations (conceived as universal) with a primitive stage of the legal community of mankind presents, in spite of the disadvantages of any false theory, at least two merits. First, it saves the unity (and primacy) of general international law. Second, it preserves—notwithstanding the difficulty of conceiving the metamorphosis of a sophisticated and consolidated body of *private* law among States into the *public* law of men—the illusion—however dangerous—that we are heading toward a better future as a matter of “spontaneous” evolution.<sup>30</sup> The theory of plural international legal systems, on the contrary, disrupts the unity of international law and at the same time offers no hope for the future. It promises at most distinct integration processes system by system, the result of which would only seem to be an ultimate confrontation between giants of 1984 dimensions.

### III. The Doctrine of Peaceful Coexistence

91. The *critique* contained in the preceding paragraphs applies particularly to that notable formulation of the “systems” theory which is the doctrine of Peaceful Coexistence.

As a matter of terminology, the notion of peaceful coexistence is not without considerable merit. As applied to the inter-State system, peaceful coexistence would indicate literally, in point of “fact”, the highly desirable situation resulting, as amongst two or more States or groups of States—possibly all States—from the absence of armed conflict, or threat of armed conflict. In a normative sense, one could speak of a law or of principles of peaceful coexistence as of a set of existing and/or developing rules of international law, through the normative action of which the above situation could be attained or preserved, mainly by abolishing “any right of war”. The term peaceful coexistence would be particularly appropriate from our viewpoint, in that we believe that the nature of international society is such that it is more appropriate to speak of a coexistence of States than of a “society of States”.<sup>31-32</sup>

Were just the literal meaning of the doctrine involved, we would be inclined to think that the title Principles of Peaceful Coexistence would have been preferable to the title which the General Assembly adopted. “Friendly Relations” in itself is anything but a felicitous wording. As it is obviously not for legal rules or any authority to oblige or constrain people to be friendly, the expression is technically inappropriate from the viewpoint of the function of law. This weakens the impact of the declaration, the minimum ambition of which is to set forth principles or rules one finds existent and/or desirable as parts of a *legal* order.

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<sup>30</sup> Appendix, paras. 146–147 and *passim*.

<sup>31-32</sup> Appendix, paras. 128–129. Further developments in *L'Etat*, pp. 22 ff. and 357 ff.

Furthermore, “Friendly Relations” sounds inadequate—from a political and psychological viewpoint—in a world in which the elimination of war and other forms of undesirable violence is far from achieved. The same difficulties would not have arisen with the term “Peaceful Coexistence” especially if combined with the idea of co-operation.<sup>33</sup> Peaceful coexistence would be a more accurate description of the fundamental purpose of any set of principles of conduct as well as of any legal system.

92. On the other hand, the idea of a law or principles or rules of peaceful coexistence meets with obstacles of a far more substantial nature than the terminological difficulties raised by the term “Friendly Relations”.

However unfelicitous from the technical viewpoint, these terms convey the notion of principles constituting a developed or developing part of an international law (general or particular, according to the case) conceived in its turn as being “on the whole” effective for *all* States or the entire United Nations membership, irrespective of affiliation to one or the other of the three or more conceivable political or’ socio-economic groups. In addition, it is expressly recognised that that set of rules or principles are the result of the more or less impersonal—or, so to speak, anonymous—contribution of *all* the members of the “society of States” (and indirectly of all the members of the universal, natural society of men) as long as, and in the great or small measure in which, such States *participated* in international intercourse as enlarged or restricted at any time by historical factors of any kind.

The idea of peaceful coexistence, on the contrary, seems to be characterised, even in the most open-minded among its versions—by features diametrically opposed. In the first place it challenges, by the idea of competing international systems—albeit “bridged” by a general law of rather obscure description,<sup>34</sup> the more realistic and vital idea of a universal law of nations. Secondly, it conceives peaceful coexistence, described as a *condition of existence and development* of general international law, as the principal or exclusive *apport*, so to speak, of *one* system, the Socialist system and particularly of the country exercising leadership within that group. However justified it may be to emphasise the contribution of Socialism—greater, in our view, than that of Communism in particular—to the progress of international law, there is no justification either for the minimisation of the contribution which has come since olden times and may be expected in the future from any other quarter—notably from the Third World—or for the maximisation of the contribution of any power, however strong and leading-minded. The general acknowledgment of the contributions made or to be made by any progressive forces does not dispel this impression.

93. Another difficulty, also related to a certain onesidedness of inspiration, is the implication of the most authoritative representatives of the school of thought known as the doctrine of Peaceful Coexistence that both the principles or rules of peaceful coexistence and general international law are the superstructure of society in the sense in which the Marxist theory of law assumes legal phenomena to be such.

For example, it would not be possible for us—or for all countries—to share the view that international law, as one of the elements of the superstructure, “est déterminé par le régime économique d'une société”.<sup>35</sup> We would certainly not deny the great importance of economic factors in the structure and content of any legal order, the law of nations included. One need

<sup>33</sup> On the history of the term, McWhinney, “‘Peaceful Coexistence’ and Soviet-Western International Law”, *American Journal of International Law*, 1962, pp. 951 ff.

<sup>34</sup> *Infra*, para. 94.

<sup>35</sup> Tunkin, *Droit International Public*, at p. 143.

only think of the evolution of the law of the sea or the law of the air, or of the development of international economic organisations. Unlike the economic factor, however, the economic *structure*, as an element, belongs, really, to *national* societies—and is a determining factor of the law of such societies—rather than an element of a society or coexistence of sovereign States.

Professor Tunkin's emphasis on the concept<sup>36</sup> seems to be somewhat in contradiction with his clear and justified *critique* of the conception of international law as a primitive stage of the legal community of mankind and of the doctrine of the alleged tendency or destiny of international law to become the law of a World State or the World State itself.<sup>37</sup> Although our views *de lege ferenda* (or *constituenda*) with regard to World Government differ from Professor Tunkin's,<sup>38</sup> we fully share that critical view. But precisely because of this we are unable to accept the direct transposition into the law of nations—whether general international law or a law of peaceful coexistence—of aspects of the Marxist theory of law which, whether one accepts them or not, seem conceivable only within the framework of relations which are typical of a society of individuals, and are hardly appropriate for the coexistence among States. In any case the transposition is another element of objective weakness of the doctrine of peaceful coexistence as such.

94. A further fault we find with the doctrine of peaceful coexistence—but this is a relative fault—is the notion of general international law as a “bridge” between the systems.

Were international law really performing an inter-system bridge-function, it would have to be assumed that it has only been in existence since the two systems started . . . coexisting, namely since the youngest—the “Socialist” system—came into being. This interpretation, justified by certain attitudes and formulations of the “original” phase of the doctrine, seems now to be felicitously excluded, for example, by the Soviet Manual. That Manual distinguishes a number of types of international law, corresponding to the times of the slave States, of the feudal State, of the absolutist State, and so on. But doesn't this confine general international law to a very narrow role?

In fact, peaceful coexistence seemed to designate, in the terms in which it was originally put forward in the twenties, not so much a theory of the elimination of war, or violence, from the realm of the relations among *any* States, as a theory of the kind of relations that would or should obtain as between the USSR on one side and “capitalist” States on the other side in spite of differences of régimes and in spite of the permanent or inherent struggle over the prevalence of one or the other of such régimes. So understood, the doctrine would seem to be not a matter of universal application but a particular method to be applied to the relations between *given States*. In addition to presenting the not negligible fault consisting in the inclusion, into the same “capitalist” lot, of such entities as the three and more nazi-fascist powers of the time (the liberation of whose peoples from totalitarian rule might not have been achieved if the Western democracies had not taken the Axis' challenge at a tune when the Soviet Union was not ready yet to bring what was to become later its outstanding contribution) that vision was decidedly a narrow one.

In its contemporary formulation the doctrine plainly does more justice to the rest of the world, and particularly to the “Third World” States old and new. We still find it difficult to accept the idea that these States should either be conceived as part of one or the other of two “diametrically opposed” systems or, more probably, if we understand the doctrine correctly,

<sup>36</sup> In *Droit International Public*, as well as in *Coexistence*, etc., and in *The Nature of the United Nations*.

<sup>37</sup> Tunkin, *Droit International Public*, at pp. 147–155.

<sup>38</sup> *Infra*, para. 112; and *Appendix*, paras. 113 (end), 146–147.

as a third, Southern group, characterised internationally under the narrow and undignified label of the “have nots” or the “hungry”. The single members of such a group would seem to be placed in a kind of limbo, or waiting list, in view of admission into one or the other of the “substantial” systems. The members of the “Capitalist” and “Socialist” systems, in their turn, would look like aristocratic candidates competing for the favour of the commoners they should lead to one or the other of the rival paradises.

95. A further difficulty lies within the notion of the principles or rules of peaceful coexistence as *the* condition or one of the conditions of existence of general international law. It is not clear, as regards this conditioning role of peaceful coexistence, whether the conditioning is meant to be performed by peaceful coexistence understood as a *factual* state of affairs or as a *normative* element, namely as a set of legal principles or rules. In either case, it remains obscure how—in comparison with the traditional universalistic conception—the conditioning would work. This difficulty exists independently from any *procès aux intentions* of the Soviet Union Government, or of any other “Socialist” government with regard to the acceptance of general international law.

(i) In so far as peaceful coexistence would be understood as a factual condition, it would be either a matter of general disposition of States preferably to live in peace or a sort of heavenly state in which peace was never broken. In the latter case the condition of existence of international law would be simply as impossible as a situation of “no crime” or “no delict” within a national society. The condition being an impossible one, general international law would have no reason to exist. If, more plausibly, one supposed instead that breaches of the peace—as well as delict in a national society—would remain among the factual alternatives to a state of otherwise absolute perfection, there would be no difference between the doctrine under consideration and the traditional notion that international law presupposes the coexistence of States in peaceful or non-peaceful relations with each other. Peaceful coexistence as a *factual* condition of the existence of international law is thus either a logical impossibility or nothing new.

(ii) If, on the other hand, peaceful coexistence—as a condition of existence of general international law—were to be understood by the doctrine in question in a normative sense, the conditioning would mean, if we understand correctly, that in so far would there be a general international law as the principles of peaceful coexistence as legal principles were part of it. In so far, for example, would there exist a law of nations as war were prohibited and any forms of inequality condemned. Logically, this does not convince either. *Ius ad bellum* seems not to be abolished yet in general international law;<sup>39</sup> and there are cases of inequality covered by treaty rules, including, for example, the rules envisaging the privileged position of the permanent members of the Security Council. In spite of that, international law is deemed to exist and to exercise a useful function.

The proposition that international law exists only if it contains principles or rules such as those known under the label of peaceful coexistence could of course be meant in the sense that international law contains (*de lege lata*) or should contain (*de lege ferenda*) such principles. In this sense, of course, the proposition is perfectly acceptable. It would mean exactly what is usually meant when one recommends compliance with, or the adoption of, the principles of Friendly Relations and Co-operation Among States. So understood the principles of peaceful coexistence would represent neither *conditioning elements*, nor a sort of novel *foundation* of international law. They would be just a matter of *actual* or *desirable*

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<sup>39</sup> *Supra*, para, 58.

content of international law.

Only as a matter of content of international law—*de lege lata* or *ferenda*—the doctrine of peaceful coexistence should be then assessed.

96. From the point of view of its general contents, it should not be overlooked that the old doctrine of peaceful coexistence was as unsatisfactory *ratione temporis* as it has been shown to have been lacking *ratione personarum*.

Far from postulating a renunciation of violence such as the one now contained in the Charter and reiterated in the declaration (also in the wake of the known draft of the Soviet Branch of the International Law Association), the doctrine would only seem to cover, in the twenties, a certain phase of the relations between the USSR and the countries of the other alleged system. The phase of peaceful coexistence would presumably have to be followed, if we understand the original doctrine correctly, by the disappearance of any inter-State system after the withering out of States themselves (or at least capitalist States) as a consequence of the establishment of a universal—classless and stateless—Communist society. Were such a result not achieved peacefully, it seems inevitable that a phase different from one of peaceful coexistence, and not just peaceful, would ensue, wherever the first strike might come from. The limitation was apparently inherent in the conception that Lenin himself professed of peaceful coexistence with capitalist States.

No doubt, the contemporary formulation of peaceful coexistence seems to be a more solid one *ratione temporis* as well as *ratione personarum*. It is our impression, however, that in the most favourable hypothesis the doctrine's impact would not bring about a situation different from the situation resulting for the member States of the United Nations from the presence in the Charter of paragraph 4 of Article 2 and Article 51 (and provisions ancillary to both), namely from the obligations of United Nations Members deriving there from and the declared intentions of those Members not to have recourse to the threat or use of force except in the circumstances in which such recourse would be “legal” under the Charter, such intentions being always subject—for all sides—to the proviso that the Charter (or the doctrine) *stand*, namely that a situation would not arise in which any State would consider itself legally free to exercise that *ius ad bellum* which regrettably does not seem to be abolished in general international law. If such were the case, the doctrine of peaceful coexistence would not represent any improvement.

97. Were any possible trace of limitations *ratione temporis* or *personarum* totally eliminated, there would still remain, in the doctrine of peaceful coexistence, that most serious limitation *ratione materiae* which consists in the rejection of any step towards the more effective institutionalisation of any aspect of the relations among States or peoples which is present in all the formulations of the doctrine including the contemporary one. The anti-institutional feature—the tremendous importance of which can be measured if one considers that it applies to *any aspect* of inter-State relations and States' activities (from the protection of human rights to peaceful settlement of disputes)—sounds so irreducible that one cannot but think that the only step towards an integration of mankind that the doctrine does not condemn would be the establishment of a world Communist Commonwealth. The preservation of international law in the condition of a *purely* regulatory system combined with the rejection of any idea of an improved international organisation *and* with the notion of an increasingly integrated and organised “socialist” Commonwealth, represents a very conservative attitude towards the development of any machineries other than existing State or *infra-system* machineries. This implies the maintenance of a *purely horizontal* line of development (of the international system) which, however “natural” it may be for States to prefer it, leaves very little hope, in our view, for the future.

It should be stated immediately, however, that in finding fault with the doctrine of peaceful coexistence in the latter respect we do not intend to join those critics who make too much of the absence of an express reference to co-operation among States. We do not intend either to identify the countries from which that doctrine originates as the only conservatives in the “society” of States.<sup>40-43</sup> With a few exceptions, the countries of the Western group do not seem to have acquired significant merits with regard to the institutional development of the “international community”, except—in a few instances and in a carefully delimited measure—*inter se*. We have noted already that the old and new countries of the Third World seem to be equally unaware of the necessity for institutional developments and equally unwilling to accept the limitations of freedom that the development would entail. But this is an additional reason why the doctrine of peaceful coexistence is not satisfactory. Instead of forcing the hand of conservatives it seems to encourage them.

#### IV. The North-South Confrontation

98. In the North-South contrast of interests, the developing States put forward a rich set of claims, *de lega lata* and *ferenda*, which appear to be more substantial than the reciprocal claims between the so-called Socialist and Capitalist “systems”. The most significant among the claims of the “Socialist” group actually originate from exigencies of the “Southern” group itself which the Eastern European countries acquired often the merit of supporting as against the “Capitalist” group. It does not seem, however, that one faces a “Southern” system in any sense; or, for that matter, a “Northern” one.

As shown above, the substantive claims of the developing countries can be grouped under the headings of decolonisation,<sup>44</sup> struggle against neo-colonialism,<sup>45</sup> and development.<sup>46</sup> Under a fourth heading can be grouped the “theses” of the Third World countries with regard to the institutional development of the international society.

Whatever the chapter of international law which is affected, claims such as these are all determined by elementary exigencies of the Third World countries that could all have been easily listed *avant la lettre*. It is a matter of acquisition of statehood, consolidation and preservation of independence, enjoyment of equal dignity and status with other nations and

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<sup>40-43</sup> *Infra*, paras. 99, 109.

<sup>44</sup> In the field of decolonisation, the claims of the Third World concern essentially self-determination and independence of peoples under colonial rule, wars of liberation and self-defence from colonial rule. To these general theses must be added various corollaries concerning the status of League of Nations mandates, the fate of Portuguese territories, conditions in South West Africa and Rhodesia, and other important matters.

<sup>45</sup> Under this heading are grouped mainly the attitudes of the Third World with regard to non-intervention, sovereign equality, control of national resources, law of the sea, and certain aspects of self-determination.

<sup>46</sup> To the realm of development belong well-known progressive claims of Developing States with regard to economic co-operation (“right to development” and economic duties of developed States) accompanied in some cases by less progressive attitudes in the field of human rights, presumably due to the close relationship between human rights and fundamental freedoms on one hand and matters of sovereignty, domestic jurisdiction, equality, non-intervention, national self-determination and national resources on the other.

refusal to accept the economic, social and cultural “gap” as a permanent fact of life.

To fill or reduce that serious gap without jeopardising the sovereign equality of the developing States is viewed—*de lege lata* or *ferenda*—as an international duty of the developed States and a right of the interested parties. Ideas such as these were bound to be brought to universal attention as soon as the decolonisation process gave the developing countries at least the power of numbers.<sup>47</sup>

It is plain that at the root of these attitudes there is nothing more than the set of fully understandable and justified exigencies—economic, political, social, cultural or psychological—that prompt them.<sup>48</sup> It would not seem, therefore, without minimising any conceivable indirect or secondary causes, that at the root of the North-South confrontation there are ideological, ethnic, religious or cultural factors of a permanent, “constitutional” nature.

Notwithstanding the difficulty of the problems involved to meet the claims of the South in a really adequate measure within a reasonable time,<sup>49</sup> there is thus no basis for a dichotomy of international legal systems. In spite of the greater human relevance of the confrontation, there is even less justification to distinguish a “Southern” international legal system from a “Northern” one than there is to distinguish a “Socialist” system from a “Capitalist” system.

99. Of greater significance, from the point of view of the structural development of international law, would seem to be, at first sight, the attitudes of the Third World with regard to international organisation. The main aspect of these attitudes is the attachment to “sovereignty”, and to equality. This means: no “supranationalism” and no exceptions to the one country/one vote method.

Coming from States with such a vital interest in development this is not, in our submission, a wise policy.

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<sup>47</sup> Of course, the impact of decolonisation on international law is qualitatively and quantitatively greater than the impact of other major changes in the so-called society of States. Quantitatively, the expansion which has followed the Second World War is far superior to the expansions which followed the independence of the Latin American Republics and the First World War, respectively, as well as to the changes brought about by the establishment of a number of Popular Republics in Europe and in Asia. From the qualitative viewpoint, the change now in question differs from the emergence of the Latin American Republics (with which it adds up anyway) in that the North-South confrontation is not confined, as in the case of the Latin American States, to the relationship with a single privileged country (the United States) but is multipartite in both directions. In addition, the contemporary socio-economic confrontation involves, as a consequence of more advanced technologies and higher degrees of interdependence among nations in any field, far wider areas of possible conflict or co-operation. But whatever this may mean from the point of view of the acuteness of possible conflicts, and of the difficulties of meeting adequately the developing countries’ demands, it does not seem that there is a greater threat to the fundamental unity and universality of international law.

The North-South confrontation presents of course similarities with the East-West confrontation. Some of the critical attitudes of Third World States with regard to parts of international law resemble attitudes of the “Socialist” States. The two groups are together in proposals and votes in the General Assembly. There are, however, marked differences. The most important for the development of international law and organisation is perhaps the smaller degree of the Third World States’ reluctance to “open up” to other countries.

As this factor might perhaps also contribute to the relaxation of the East-West “competition” it might represent an additional element against the theory of competing systems of international law.

<sup>48</sup> In a similar sense Friedmann, *The Changing Structure*, at pp. 317 ff., especially 321; and Lissitzyn, *International Law to-day and to-morrow*, at pp. 80 ff., especially 96–101.

<sup>49</sup> See especially Röling, *International Law in an Expanding World*, Amsterdam, 1960.

The problem of development in the international society is identical to the parallel problem within national societies in one aspect at least. It cannot be solved merely as a matter of *do ut des* left to the free initiative of the parties. In a national society the problem is met by means of massive intervention by the government as the trustee of the general interests of the whole community and of the interests of any sections thereof, including the developed *and* the underdeveloped sections. General welfare, in other words, is achieved where there is some measure of welfare *State*. Similarly, the establishment of an “international welfare” is not conceivable unless *some* form or measure of international State—*however infinitesimal*—is accepted. The only substitute for the most improbable “international State” is operational—not necessarily *supranational*<sup>50</sup>—organisations. But operational organisations cannot be established on the basis of the absolute preservation of sovereignty as commonly understood or, for that matter, of the one country/one vote rule.<sup>51</sup>

On this score, however, the Third World States are for the time being in good conservative company.<sup>52</sup>

Here also, therefore, there does not seem to be a basis to look at North and South as at two competing *international legal systems*. Also with regard to North and South, the principles embodied in the declaration do not have to fulfil an inter-system function any more than they are meant to fulfil such a function between East and West. Between the countries of the Northern and those of the Southern group there are just contrasts over the content of international law in many areas.

### *Section 2. The Declaration’s Objectives*

100. That the principles and rules embodied in the declaration are just meant, whatever they may be worth, to deal with *such* matters or contrasts, and that they are not really meant to perform a kind of “constitutional” mediation between two or more rival or competing *international legal systems* is confirmed, in any case—*de lege lata* or *ferenda*—by a number of elements which clearly reveal the intentions of the United Nations membership in that respect. In spite of the fact that so much had been said and written, over fifteen years, about rivalry of systems, coexistence between systems and rules governing such coexistence the terms of the resolutions under which the declaration was prepared, and the terms of resolution 2625 (XXV) itself, indicate that such notions are, *en définitive*, totally extraneous to the declaration. This emerges, *inter alia*, from:

(i) the denomination of the declaration, clearly exclusive of any notion either of peaceful coexistence in any sense different from the literal meaning of the expression<sup>53</sup> or of any similar North-South “systems-confrontation”;

(ii) the fact that only States, nations, peoples, are mentioned in the preamble and text of the resolution or in the declaration. The main reference to the political, economic, social or other differences upon which any doctrines of the coexistence of international *systems* might rely, appears in the third preambular paragraph of the declaration in terms that indisputably presuppose the unity and universality of the law of nations;<sup>54</sup> there is no other assumption in these words than the *neutrality* of international law;<sup>55</sup>

<sup>50</sup> *Appendix*, paras. 134–135, 147.

<sup>51</sup> An example is the international Agency which is being envisaged within the framework of the reform of the law of the sea.

<sup>52</sup> *Supra*, para. 97 (end) and *infra* 109.

<sup>53</sup> *Supra*, para. 91.

<sup>54</sup> According to that paragraph the Assembly was “Bearing in mind the

(iii) there is an emphasis, throughout the text, on the *universality* of the principles or rules involved, such rules to be applied both within and without the United Nations;

(iv) the fact that so much of the declaration's formulations of principles is part of the United Nations Charter, which is to be conceived as a system of constitutional mediation neither between "Socialist" and non-"Socialist" countries nor between North and South.

101. The fact that the co-ordination of conflicting "systems" was not the intended target does not make the Assembly's declared pursuit less ambitious. As mentioned earlier, the declaration was meant, in the words of the resolutions of the preparatory stage and in the words of resolution 2625 (XXV) itself:

(a) to "contribute to the strengthening of world peace and constitute a landmark in the development of international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter",<sup>56</sup> and

(b) to secure, in particular, the "faithful observance" of the principles and their "more effective application" in order to "promote the realisation of the purposes of the United Nations".<sup>57</sup>

Combined with the terms of the previous debate and with the declared intentions of the main sponsors of the Friendly Relations exercise, such a statement of purposes must have given rise to not small expectations. To put it with just one scholar who considered the matter immediately after the first (unsuccessful) session of the Special Committee in 1964, the declaration was intended, *inter alia*, to fulfil "the high hopes of small and newly emergent nations, who sought peace and security through translating the ideals of the United Nations Charter into a practical code of conduct", to "embody an agreement on the basic principles in question, thus strengthening the rule of law and removing the causes of war", and to "open up new possibilities for a wide and more important role of international law in the regulation of relations between States".<sup>58</sup>

To see whether and in what measure any such purposes are attained, or likely to be attained, one should perhaps distinguish, as far as feasible, between the propositions of the declaration which are merely interpretative (codification in a narrow sense) and the provisions that would represent innovations (progressive development).

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importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development". Differences in the political, economic and social systems are referred to in the same terms in the first paragraph of the formulation of the principle of co-operation and in the first paragraph of the principle of equality. In no case are the differences of *internal* systems indicated as implying the existence of a corresponding *international* system.

<sup>55</sup> *Supra*, paras. 87–89; *Appendix*, paras. 121–123 and 129.

<sup>56</sup> Fourth Preambular paragraph of resolution 2625 (XXV).

<sup>57</sup> Preambular paras. 5 and 17 of the Declaration.

<sup>58</sup> The quoted passages are from Lee, "The Mexico City Conference of the United Nations Special Committee on the Principles of International Law Concerning Friendly Relations and Co-operation Among States", *International and Comparative Law Quarterly*, 1965 (XTV), at p. 1297.

102. In so far as the clarification of the relevant Charter or customary rules is concerned, it seems that the declaration achieves not much. The statement on Force, while rightly making explicit the condemnation of indirect aggression and armed reprisals implicit in the Charter, adds unwisely superfluous and ambiguous precisions with regard to territorial and frontier aspects of a prohibition which in Article 2.4 is unquestionably general in nature. At the same time the formulation adds nothing to Charter language by way of elaboration of the non-condemned uses of force, which it defines more succinctly—and not any better—than they are defined in Article 51. We have also seen that the paragraphs concerning security (peace-enforcing and peacekeeping) and disarmament—with the absurd reference to “generally recognised principles and rules of international law”—sound more like an attempt at the final disposal of the non-fulfilled Charter rules in the field than like an elaboration of such rules. The statement on peaceful settlement detracts from Chapter VI of the Charter and on one or two points casts doubts where there were none. The relevant part of the statement on non-intervention misses entirely the exigency of a serious co-ordination with the rules and principles concerning the prohibition of the threat or use of force.

The statement on co-operation omits to elaborate either on economic, social and cultural co-operation in general or on human rights. On the problem of national resources, so vital for economic co-operation, no attempt has been made, *de lege lata* or *ferenda*, to reduce the state of uncertainty in which the relevant rules of customary law seemed to have been reduced also by the ambiguities of previous enactments of the General Assembly. Among human rights—the Covenants of which are not even mentioned—freedom of information, so vital, *inter alia*, for the preservation of peace, for self-determination, and ultimately for the development of a community of mankind, is not considered at all. A proposal with regard to that matter, put forward in connection with another principle, was ignored.

The statements on sovereign equality and on compliance with international obligations, in great part tautological, do not strike either for clarity or significance. Self-determination, the most valuable piece, seems to remain almost exclusively—but that was inevitable—within the domain of *lex ferenda*.

103. The parts of the various formulations which are projected toward the future (*lex ferenda*), should represent, as we would have understood that purpose, “an outline of the most desirable lines of development” of international law. The declaration should have been in that respect an outline of those “voies de développement et de renforcement du droit international” of which—according to Professor Tunkin—“il faut se mettre à la recherche . . . malgré le conflit idéologique existant”.<sup>59-62</sup> These lines should have been drawn by deduction-induction not only from general international law, written or unwritten, but also from the purposes and principles and other provisions of the Charter, from the practice of the Organisation in the course of the 25 years of its existence, from other relevant international instruments, and mainly, of course, from *recognisable exigencies* of the contemporary world.

The considerations developed in the previous chapter with regard to the formulations of the several principles show that the declaration does very little in the indicated direction.

(i) Considering that with regard to both peace-keeping (let alone peace-enforcing) and peaceful settlement the declaration moves backwards, if anything, from *lex lata*, we need hardly mention the lack of imaginative and progressive spirit in the paragraphs devoted to those matters and in which the reader would seek a ray of hope in the future developments of

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<sup>59-62</sup> “Le conflit idéologique et le Droit international contemporain”, *Recueil en hommage à Paul Guggenheim*, Geneva, 1968, at p. 890.

law or practice. A less inadequate expression of concern over some obvious failures would at least have avoided the impression that the Members of the United Nations are so sceptic about such developments as to believe that the only remedies against legal resort to the use or threat of force in international relations—illegal forms of intervention included—remain self-restraint, self-defence and balance of power.

(ii) With regard to economic co-operation, the declaration is totally defective in relation to *instruments* of co-operation. *De lege ferendat* it contains provisions which are very meagre indeed. Vital matters such as the law of the sea and the environment are not even mentioned. National resources are not treated *de lege ferenda* any better than *de lege lata*.

Nothing really significant is said under this principle—*de lege ferenda*—with regard to the development of the international law of human rights<sup>63–64</sup> and of cultural exchange and of freedom of information at a pace and in a measure more adequate to the increasing degree of interdependence among peoples. The relevant exhortations sound as perfunctory and conservative as the exhortations concerning peaceful settlement and the maintenance of peace and security,

(iii) Even the formulation of the principle of equal rights and self-determination, which is in our view one of the most felicitous and promising formulations of the declaration, presents a serious gap with regard to the status of peoples, and particularly their political, civil and economic rights. Admittedly, the major problem, for peoples under colonial domination, was the achievement of independence or another equivalent status. From that point of view, it was natural that the utmost emphasis be put, in the text, on independence and on the other principal “modes of implementing the right of self-determination” indicated in the fourth paragraph of the formulation. It is regrettable, however, that except for the reiteration of the vague Charter provision on human rights and fundamental freedoms, no specific mention is made of the specific political, civil and economic rights and freedoms, the full enjoyment of which—together with non-discrimination—every State should in any case ensure to the people under its jurisdiction regardless of whether such people are to become independent or to remain under that jurisdiction. For many *non-colonial* peoples, as well as for the remaining colonial ones, it seems odd to put so much emphasis on statehood and so little emphasis on the full enjoyment of those benefits of *representative government* and civil, economic and social *rights* that for most peoples may well mean more—in the meantime or *at any time*—than the problematic or unattainable, or undesired, goal of independence or other “external” or quasi-“external” status.

With regard to both declaratory and innovative provisions, it must be added that the drafting in general is not *à la hauteur* of the best traditions. The double preamble—one to the resolution and the other to the declaration—is heavy and obscure. In addition, the preambles do not even attempt to maintain an order of priorities among the principles that would be in unison with the order of the formulations. Some such order would have been helpful for the interpreter in coordinating the formulation of each principle with the formulation of related or contrasting principles.<sup>65</sup>

While gross material errors are not absent, too many provisions are ambiguous.<sup>66</sup>

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<sup>63–64</sup> The provision on human rights (para. 3) of the formulation of the principle of self-determination only mentions, for its part, “joint . . . action” in general.

<sup>65</sup> Cf. the quoted Working Paper of the Delegation of Italy (at para. 82 of the Special Committee Report for 1970).

<sup>66</sup> A general comparison should be made here between the declaration and the various drafts considered or mentioned by Hazard, J. N., in his many interesting contributions on the subject: “Co-existence Codification Reconsidered”,

104. But the most serious fault with the declaration—again with regard to interpretative and innovative elements—is the determined disregard of its authors for the institutional aspects, however problematic, of the rule of law in inter-State relations.

It could hardly be contended that the task of the Special Committee—and that of the General Assembly—was to deal with principles alone, namely with general, abstract statements of a purely normative character. Apart from the fact that such a limitation does not appear to have been present—explicitly or by implication—in the resolutions concerning the preparation of the text, there were a number of reasons for the task of the Special Committee to include, and be understood as including, the organisational aspects of inter-State relations.

As principles set forth in the Charter, *all* the principles were connected with the United Nations as the existing international organisation of general competence. Furthermore, as noted earlier, a number of the principles were clearly not divorceable from a minimum of international institutions. Such is perhaps also the case with self-determination, at least in the measure necessary for that principle to be enforced, where necessary, in an orderly manner and without exposing the interested peoples to the bloodshed, the moral and material sacrifices and the risks involved in insurrection and wars of liberation.<sup>67</sup>

The objection that principles *are* merely regulatory by nature is utterly inconsistent. Firstly, the declaration clearly embodies, in addition to principles or titles of principles, not a few rules. One example is the rule condemning armed reprisals, Secondly, if there are elements of a legal system the operation of which is not conceivable without an adequate institutional support, these are precisely principles. Rules are comparatively less difficult to apply and more difficult to elude by argument over their meaning. Principles, on the contrary, only assume precise connotations, severally or jointly, when they are adapted and applied to concrete situations.<sup>68</sup> It is in any case elementary that no legal system can live on rules alone. An institutional framework—itself set up or in any way conditioned by rules—is indispensable for the further elaboration, interpretation/application and enforcement of the

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*American Journal of International Law* 57 (1963), pp. 88–97; “The Sixth Committee and New Law”, same volume of the *Journal*, pp. 604–613; and “New Personalities to Create New Law”, same *Journal*, 58 (1964), pp. 952–959; and in the quoted interesting works by McWhinney.

<sup>67</sup> Cf. the quoted Working Paper of the Delegation of Italy (1970 Special Committee Report).

<sup>68</sup> To put it with Dillard, a “dictionary” is essential (“Conflict and Change: the Rôle of Law”, 1963 *Proceedings*, American Society of International Law, pp. 50 ff. at pp. 54 f., 62 ff. and 67). We are not sure, however, that the kind of institutions indicated by Dillard—clearly beyond acceptability in many quarters—would do. The institutional element is also emphasised in Lasswell, “A Brief Discourse About Method in the Current Madness”, same 1963 *Proceedings*, pp. 72 ff., at p. 77; and by Schwebel, “The United Nations and the Challenge of a Changing International Law”, *ibid.*, pp. 83 ff.

A similar preoccupation inspires McWhinney’s urge (*American Journal of International Law*, 1962, pp. 954 and 967) that the codification of peaceful coexistence be not confined to the formulation of “primary”, very abstract, principles but include the formulation of “secondary”, more readily applicable, rules.

rules. Without such mechanisms the system remains a congeries of static, abstract, impotent propositions.

It is hardly necessary to show that exigencies such as these have not attracted the least attention in the course of the operation. On the contrary, the endeavour was so constantly—and from so many quarters—in the opposite direction,<sup>69</sup> that one wonders whether the declaration was not conceived by its authors as a set of diplomatic “jousting” equipment rather than as an instrument to promote the rule of law.<sup>70</sup>

### *Section 3. The Declaration and Legal Policies*

105. Considering the nature of the formulations it contains, the declaration seems to be conceivable, in theory, as a material “source” of international legal or public policies. Legal policy or public policy is admissible in international law as an instrument of legal decision as well as in municipal law.<sup>71</sup> It seems to be, after all, an equivalent of general principles.

Naturally, in so far would any of the principles embodied in the declaration be susceptible of application as legal policies as they were at the time of their formulation, or have become at a later stage a part of international law,<sup>72</sup> determinable as such as any other element in a legal system.<sup>73</sup> We do not believe *pure* policy or policy *tout court*—not crystallised into a

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<sup>69</sup> The Soviet Branch of the International Law Association—Brussels meeting—went so far as to include the “troika” principle as a feature of the structure of international organisations: such a principle to be included into the framework of the codification of peaceful coexistence. See Hazard, “Coexistence Codification Reconsidered”, *American Journal of International Law*, 1963, at pp. 89 and 91.

<sup>70</sup> On “jousting” Hazard, *New Personalities*, etc., at p. 956.

<sup>71</sup> With the proviso that immediately follows in the text, we would not consider the application of a legal policy by an international tribunal as an infringement of any allegedly inherent prerogative of States.

<sup>72</sup> *Supra*, Chap. II, paras. 23, 32 ff., 39 (iv).

<sup>73</sup> It goes without saying that rules in the widest sense are not a static system. On the contrary—perhaps with some exceptions—they are in a continuous process of evolution—involution, among the factors of which one finds not only law-making facts and acts in a narrow sense but also the law-determining and law applying action of courts, administrative organs and law subjects in general. The notion that any such action is totally divorced from law-creation is obviously an image of thought as no judge can do his job without making choices about rules and about the facts to which the rules apply. That notion, however, reflects the essential fact that in so far the judicial function has a distinct *raison d'être* as the courts decide the cases submitted to them essentially on the basis of criteria which—subject to human error—are found by them to be *present* in the existing body of rules in a wide sense.

The notion of law as a body of rules in a wide sense is neither supplanted, nor necessarily contradicted, in our view, by the notion of law as “authoritative decision-making process” (Schachter, *Toward a Theory*, etc., at pp. 15–16) or as “a particular, specialised decision-making process” or “a particular process of making authoritative decisions” (Higgins, “Policy Considerations and the International Judicial Process”, *International and Comparative Law Quarterly* 1968, pp. 58 ff., at pp. 58 and 61, respectively). As explained in paras. 19 ff. definitions such as these are acceptable only in so far as they represent *descriptions*—and felicitously articulate descriptions, for that matter—of the

*legal* policy—to be applicable by a court of law except when such a court operated within the sphere of a discretionary capacity. To put it with Wilfred Jenks, it is “the policy of the law which is relevant and not of any individual, government or school of thought which claims to be above the law”.<sup>74</sup> Once such a condition was met, the legal policy or principle in question would actually be more than just susceptible of application as a matter of choice. It would have to be taken full account of by the court as well as by any other “operator” of international law.

106. The application of legal policies or public order in international society is more problematic than in national societies for a number of reasons, substantive and procedural, which lie perhaps—together with the concept of law and the distinction between legal policy and policy *tout court*—at the root of the current debate on the subject.<sup>75</sup>

On the *substantive* side, the difficulty is frequently indicated in scarcity of values common to the generality of States, regardless of political or socio-economic régime. As shown in the *Appendix* it is not perhaps so much a matter of scarcity of common values among States as a matter of contrast or non-coincidence between States’ values and human values.<sup>76</sup> It is from this factor that derives the peculiarity of the problem of international legal or public policy as compared to the homonymous problem in a municipal system.

An even more decisive factor, closely related to the one just mentioned, is the fact that precisely because it is the law of the inter-State system (and not the public law of mankind) international law is essentially *private law* in the sense explained in the *Appendix*.<sup>77</sup>

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mechanisms through which the law evolves, *as a body of rules*, either through direct law-creating or through law-determining, in the sense indicated earlier in this footnote. See also *Appendix*, Section 7, especially para. 164.

<sup>74</sup> Quoted by Schachter, *Law and Policy*, RIIA, *Diverging Attitudes* (see Bibliography) at p. 11.

<sup>75</sup> I refer to the “schism” dividing, with regard to the place of “policy” in international law, some American and British scholars (Higgins, *Policy Considerations*, etc., in the cited RHA, *Diverging Attitudes*, at p. 84).

After perusing the “Papers of the Joint Meeting (RIIA and ASIL)- on Diverging Anglo-American Attitudes to International Law”, notably the stimulating contributions by Schachter, Falk and others, we feel particularly close, if we understand them correctly, to Johnson, “Policy and the Law in International Society”; and Lauterpacht, E., “Policy and the Law in International Society”, both among those *Papers*, pp. 15–22 and 23–28 respectively. The Meeting’s Papers are further cited as *RIIA, Diverging Attitudes*.

<sup>76</sup> Para. 126 of the *Appendix*.

<sup>77</sup> While admitting (*The Prospect*, etc., at pp. 457 ff.) that public policy is of infrequent application in international law, Wilfred Jenks appears to be unduly optimistic with some of the positive examples he cites.

In the *Reparation* (1949) case, for example, we are unable to see (apart from redundancies such as the reference to the United Nations as the “supreme type of international organisation” at p. 179), we fail to see in what sense “the reasons given by the Court for its decision on this point were essentially reasons of international public policy” (Jenks, quoted work at p. 482). As explained in the *Appendix* there is nothing necessarily “public”, nothing really “corporate” and nothing really functional in the international personality of the United Nations. But, be that as it may, it does not seem to help the “constitutional” concept of international organisation to state (as Jenks states at p. 498) that by admitting that 50 States were able to create an organisation endowed with legal personality the Court would have placed “on third States an obligation which a traditional conception of the implications of sovereignty must reject”. Apart from the fact that we believe the Court’s reliance on the treaty in order to found the organisation’s legal personality to be incorrect (*Appendix*, para. 137), we do not see in what sense the *situation* created by the founding States (as described by us in the *Appendix*, quoted

But the difference between legal policies in municipal law and international law is particularly marked *procedurally*. In national legal systems, legal policies are determined authoritatively as well as ordinary rules. Since time immemorial, it is a task of the courts. In England, for example, it was, as it is, the task of the King's courts.

In the international society the situation is a diametrically opposite one. We do not refer now to that usual "gap" in the law of nations which is the absence of a central power of coercive enforcement. We refer simply to law-determining.

Whenever one or more governments decide a matter of international legal relevance by themselves—as is mostly the case—authority is no more present than it is when private parties do the same in municipal law. The fact that they are governments does not turn them by a miracle into authorities vis-à-vis each other or into "organs of the international community".<sup>78</sup>

When the decision comes from an international organ, there is of course a third party's binding enactment. Whenever that party is the Permanent or the International Court there is also, together with the prestige of the institution, a precedent-setting and tradition-building phenomenon. One is bound to consider, however, that even in the most favourable case, namely when the matter is justiciable within the sphere of that Court's *compulsory jurisdiction*, the Court is *very far* from an authoritative position comparable to that of municipal courts.<sup>78a</sup> Indeed, the International Court's jurisdiction does not cover

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paragraph) differs, with regard to the legal position of third States, from the situation that would derive, for third States, from the setting up of a new State, from the creation of a free city or the setting up of common organs of external relations by means of an international agreement between the interested States. Also in such cases, once the entity or organs had come into being, third States would be *bound* to acknowledge the existence of a new person or the modification in the structures of one or more existing persons. This used to be a frequent occurrence in connection with protectorates. And what about a treaty envisaging the integration of a number of States into a federal structure? Would third States be bound to accept the new entity as a matter of *public policy* or on a far more modest, *terre à terre*, account?

We do not see either the "consideration of public policy" that according to Jenks (p. 488) would have inspired Sir Percy Spender's *dictum* according to which—once ascertained that the maintenance of peace is "the purpose pervading the whole of the Charter"—"Interpretation of the Charter should be directed to giving effect to that purpose, not to frustrate it. If two interpretations are possible, in relation of any particular proviso of it, that which is favourable to the accomplishment of purpose and not restrictive of it must be preferred" (*ICJ Reports 1962*, p. 186). Jenks is reminded of the federal analogy and of *Missouri v. Holland* (discussed in the *Appendix*, para. 148). We are reminded simply of a general rule on the interpretation of legal instruments, and of private law transactions in the first place. Nor should one be impressed by the Court's *dictum* that "Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent". Apart from any discussion of the body corporate concept, and of the municipal law "model", in the theory of international organisation (*Appendix*, paras. 132–138), this is a rule which also stems from other principles, typical of *private* not less, if not more, than public law.

The only occasion in which the Court has seemingly resorted to "public policy" has been the *South West Africa* cases (*ICJ Reports 1966*, pp. 1–51): and the Court has been led to the absurd conclusion that the "conduct clauses" of the Mandate, being envisaged for the protection of *general interests*, could only find their legal guarantees in the "securities" made available by, or of, the general institution (cited *ICJ Reports 1966* at pp. 25–26), namely in *no security at all*. Indeed, the only "securities" envisaged by the Covenant and the Mandate would have been those which consisted in the League's controls. That recourse to public policy in 1966 was not felicitous seems to have been recognised implicitly by the Court in 1971 in the Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, etc. (*ICJ Reports 1971*, especially pp. 46–47). The General Assembly's deliberation purporting the revocation of the Mandate is not envisaged by the Court as an *act of public authority*. It is envisaged merely as an exercise, by a not clearly defined "whom", of the right (very *private*) to terminate a contract or agreement in view of the other party's failure to comply.

In the sense that general "sanctions", such as termination of an agreement because of non-compliance, are applicable to, and within, international organisations, Forlati Picchio, Laura, *La Sanzione*, etc., pp. 303–314 and 432–438.

<sup>78</sup> *Appendix*, paras. 123 ff. (and 115–116).

<sup>78a</sup> *Appendix*, para. 135.

automatically any *other future* case involving the same subject-matter and/or any parties other than the current litigants.

In so far a legal or public policy is valid—and validly applied in any given case—as it can be found or expected to possess that objective, neutral value, which is an essential element of any legal rule, existing or in the making. One essential test of objective and neutral value of a legal rule or policy is that it has been applied and/or is expected to be applied with a minimum of “regularity” or uniformity, by the same or another organ, to *cases of the same kind*. This is *not* a requirement of absolute compliance<sup>79–80</sup> or of absolute enforceability. It is a matter, really, of reasonable expectation of future application on the part of the law-applying or determining organ and of the parties, and notably of the party against which the policy should apply in the given case. Now, it is precisely this expectation that is lacking *in the law of nations* as a consequence of the lack of institutionalisation of the law-applying function.

If a law-applying organ within a federal State finds in operation at one time, within the society, a legal or public policy condemning racial discrimination, it will have little difficulty in applying it as against a defendant member State, because it has no reason to assume that the same could not be done (by the same or another organ) with regard to any *other* member State against which a similar claim was filed. It has actually all the reasons to assume the opposite.<sup>81</sup> The mind goes immediately, as an example, to racial integration in the United States. Wherever, in terms of “rules”, the principle of integration derives from, it is certainly a matter of public or legal policy within that nation enforceable, as such by any American court and notably, against any member State, by the Supreme Court. In considering any case, that Court would have no reason to doubt, once it had found the principle, that it would be applied as against any State.<sup>82</sup>

Would the International Court—let alone an arbitral tribunal—be in a comparable situation? Would this Court be able to entertain, at the moment of deciding whether to apply or not to the case in hand a given policy of a novel or quasi-novel character, similar expectations? Surely, the Court can . . . vouch for itself, thanks to its permanent character. But what are the chances that another occasion will arise? Obviously, this question is not the exclusive concern of the judges. It also concerns the actual defendant and any member of the so-called “society of States” which may find itself in the position of defendant or plaintiff over the same or a related issue in the future.<sup>83</sup>

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<sup>79–80</sup> We agree with Schachter, “Law and Policy”, *RIIA, Diverging Attitudes*, at p. 12.

<sup>81</sup> This is precisely the impartiality, and automatic operation, of the legal policy. Indeed, it would actually be more accurate to say that in so far does the law-applying organ reach the conclusion that a given principle (moral, social, humanitarian) is a principle of legal or public policy—or, which amounts to the same, a *valid* principle of legal or public policy—as that condition is met; thus conferring to the principle, *inter alia*, the indispensable elements of impartiality and automatic operation.

<sup>82</sup> Indeed, that Court will not even *seek to find out* whether the above conditions of impartiality and automatic application are met. It will not even wonder about those conditions. They are in the natural order of things within the federal State in question.

A number of factors, considered generally in paras. 148 and 155 of the *Appendix*, concur to determine this result.

<sup>83</sup> What is stated in the text with regard to the availability of legal remedy

Had the International Court reached the stage of the merits, in 1966, in the *South West Africa* cases, it would have been able to rely, in our opinion, mainly on the contractual obligations of South Africa. If so, the Court would have had no need to apply any legal or public policies (or general principles), in order to condemn South Africa's practices of racial discrimination. But what if the Court had had no alternative but legal or public policy? Could the Court have overlooked completely the fact that racial discrimination would not, in most instances *other* than the actual cases, be non-justiciable before the Court itself or any other court?<sup>84</sup>

Another example is the possible evolution of a principle envisaging self-determination as proclaimed in the Friendly Relations Declaration, namely as a universal (*de lege ferenda*) right. As others, we believe that decolonisation has been essentially the outcome of a historical process seconded by a number of favourable circumstances, ranging from local situations determined by events of the Second World War to the policies of two great powers not involved in the traditional forms of colonialism, and to the spontaneous realisation, on the part of some of the interested governments, that colonialism was obsolete. Decolonisation, in other words, has been the result not of *legal* or public policies but of policies *tout court*. That means, precisely, that a law or legal policy of self-determination can only be considered to be in the making. Self-determination as a possible legal or public policy, however, must be viewed as of universal application. So, when we claim self-determination for the peoples of Africa still under colonial rule—particularly ruthless and hopeless forms of colonial rule—we must keep in mind the not dissimilar violations of the principle of self-determination which are being perpetrated at the same time by despotic governments throughout the world: and we must realise that in so far as the development of a legal or public policy of self-determination is concerned, the lot of peoples under colonial rule could not be separated from the lot of any other (metropolitan) population without reducing in proportion the degree of "legal credibility" and vitality of such a policy. Looking at the past, one of the reasons which have prevented self-determination from crossing the threshold of the law during the past 25 odd years has precisely been the fact that one could not easily divorce, from the point of view of legal development, the fate of colonial peoples from the fate of any other people.

In synthesis, the substantive and the procedural difference between federal law and international law with regard to legal policy reflect the gap between intergroup justice in general and inter-State justice in particular on the one hand, and inter-individual, human justice on the other hand. This may sound far-fetched and theoretical but it is a very practical matter indeed.<sup>85</sup>

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applies not only to existence or inexistence of the Court's jurisdiction *vis-à-vis* given States. It also applies to the availability of some State—considering that only States can be parties before the Court—willing to take up the case as a plaintiff. And the whole discourse can be extended, *mutatis mutandis*, to the chances that the matter be taken up at all at intergovernmental level, short of arbitral or judicial proceedings, through the ordinary diplomatic channels.

<sup>84</sup> Of course we do not mean that a court should not condemn a murderer until it is satisfied that no murders went unpunished in the past or will remain unpunished in the future. We do mean, however, that justice should not and *cannot* be haphazard.

<sup>85</sup> Appendix, paras. 125, 146–147 and 153 ff.

It goes without saying that similar perplexities occur with regard to any aspects of the application of international law, be it a matter of rules or of legal policies

107. Reverting to the declaration as a whole, the vagueness of its formulations, the scarcity of progressive content, and the lack of an adequate co-ordination between conflicting or partially conflicting principles, do not seem to recommend it as the rich and reliable source of legal policies (or *de lege ferenda* policies *tout court*) one should have expected to emerge from about seven years of a work aimed at setting a *landmark* in the progressive development and codification of international law.

But more than anything else, the noted absence in the declaration of any progressive outlook in the field of the institutional development of the coexistence of States and especially the monumental backwardness of the statement on peaceful settlement—indicative as it is of the unwillingness or inability of the United Nations membership to understand the essential function of third-party determination in the application of general principles or legal policies—is very discouraging with regard to the chances that the positive *de lege lata* or *ferenda* elements contained in the declaration acquire the desirable measure of impact on the rule of law in the contemporary “society of States”.

Under such circumstances, the declaration seems bound to remain, at least for some time, little more than an object of re-citation on the part of the same organ from which it emanates, and a relatively organic assembly of materials of lego-diplomatic jousting among States within and without the United Nations.

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or general principles, and regardless of whether the application is to be made by a court, a political body or a government legal adviser. One example among many is perhaps the 1956 Middle East crisis compared with the Hungarian crisis of that same year. The choice to comply with the prohibition contained in Article 2.4 of the Charter by ceasing from their military action was made at one point, however late, by certain governments (under a certain measure of political pressure partly expressed through a General Assembly resolution). Had we been in the legal service of one of those governments, and had anybody asked us about the legal merits of the issue, we should have probably suggested that the military action should, as a matter of law, be stopped. We would have mentioned, however, that at least *some* consideration should also be given, by the governments concerned, to developments in Hungary and, in so far as the legal aspect of the matter was deemed to be of relevance, to the manner in which they were being handled by the General Assembly.

## CONCLUSIVE REMARKS

108. The result that we deem to be in part not satisfactory, may be due in a measure, as some have noted, to the procedure by which the declaration was prepared.<sup>28</sup> That procedure was appropriate neither for a serious work of codification in a narrow sense nor for progressive development.

The Special Committee had resulted in a kind of duplication of the Sixth Committee. The only difference was the greater efficiency afforded by the restriction to about one-fourth the Sixth Committee's size, too small a departure from the usual pattern for the *ad hoc* body to set a "landmark" in the progressive development and codification of international law. It was inevitable that the official mantle placed upon the back of the members of the Committee reduced their freedom to exercise both adequate legal expertise for codification and adequate, however restrained, imagination for progressive development. From both points of view the governmental capacity was bound to prevail; and it led in fact the members of the Special Committee to engage in that diplomacy of the law which is typical of the Sixth Committee and consists essentially in a search for drafting compromise at any price.

An evident alternative would in theory have been, short of referring the matter to the International Law Commission, to entrust the first drafting to *ad hoc* legal experts in their individual capacities (as the members of the Commission), endowed, as has been said, with adequate technical ability and professional integrity to produce reliable elaborations of the Charter and other rules, and with sufficient experience of international affairs to produce viable—minimal and maximal—*de lege ferenda* suggestions. Anything politically unpalatable could be disposed of by the Assembly through the Sixth Committee. The ultimate outcome not being a piece of legislation or a treaty but a piece of *material* codification and progressive development,<sup>29</sup> namely the production of *raw* law-making and *raw* law-determining stuff (to be "offered" to the United Nations membership for it to make the decisive choices), one might have been more daring at the first drafting stage.

But this is wishful thinking. The political interest of the subject-matter was too high for States to accept the notion that private parties appointed by them determine, on the basis of a mandate from them, the content of *lex lata* and the desirable content of *lex ferenda*. No one ignores the fact that not only unratified codification treaties but even the drafts of the International Law Commission possess, *de facto*, a high probative weight with regard to the state of the law. It would be the same with an *ad hoc* Committee of similar composition.

Even for *lex ferenda*, a very considerable number of States simply do not let scholars say what international law should be. The majority of States seem to dislike it. Of the few which do not dislike it very few seem to be ready to accept that it be done under their auspices.

Short of adopting a different composition for the drafting body, procedural devices could have perhaps been adopted as an alternative within the framework of the Special Committee as constituted, with a view to introducing into the work of the Committee a higher degree of objectivity and technical elaboration. Although it would have been plainly objectionable on the part of States for the Committee to adopt the International Law Commission's system based on annotated drafts prepared in advance by "special rapporteurs", some substitutive formula could perhaps have been devised in order to make proposals, counter-proposals and statements more "to the point" and the debate technically more fruitful. During the third (1967) session of the Special Committee tentative suggestions to that effect were made by one delegation.<sup>30</sup> Notwithstanding the interest shown by a few members in the course of

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<sup>28</sup> In addition to the literature mentioned under Chapters III and V, Lee, L. T., *The Mexico City Conference*, etc., pp. 1296–1297 and 1306–1310.

<sup>29</sup> *Supra*, paras. 49–50.

<sup>30</sup> 1967 Special Committee Report, paras. 481–483.

informal exchanges, the result was totally negative.

109. Procedure alone, however, could not be so decisive. The main cause of the disappointing result has been—together with the *immense* difficulty of the endeavour—the lack in the United Nations membership, testified, *inter alia*, by the choice of procedure, of a serious disposition to do more and better.

This appeared to be true of the whole United Nations membership regardless of contingent policies and in spite of the great amount of lip-service paid to the purposes of setting a “land-mark” and in particular to the idea of making the seven principles “more effective”. In pursuing these aims the United Nations membership have followed—as they often do—the policy which consists of using the Organisation and its functions, including the development of the rule of law in international society, essentially as an instrument of national policies.

It was not necessarily a question of bad faith. Whatever may have been the intentions of the initiators of the Friendly Relations operation, with regard to which some severe evaluations have been expressed,<sup>31</sup> and whatever the intentions of those who acquiesced to the initiative, the operation has been in fact so conducted and seconded as to achieve the result that would leave as much room as possible for that “game of nations”—to put it with Aron and Hoffmann—which is in “the logic of a decentralised” (we would say “centreless”) “milieu, whatever the specific nature of the units or the social and economic systems which they embody”.<sup>32</sup>

That this was not surprising does not make it less discouraging and less condemnable. It has been said, by someone who was most concerned with the United Nations, that “certain members conceive of the (United Nations) organisation as a static conference machinery for resolving conflicts of interest and ideology”, while others think of it “primarily as a dynamic instrument of government through which they jointly . . . should seek . . . also . . . to develop forms of executive action to resolve and forestall conflicts”<sup>33</sup> The “first concept”, it was added, “is firmly anchored in the time-honored philosophy of sovereign national States in armed competition, of which the most that may be expected in the international field is that they achieve a peaceful coexistence. The second one envisages possibilities of intergovernmental action overriding such a philosophy, and opens the road towards more developed and increasingly effective forms of constructive international co-operation”<sup>34</sup> It seems more correct to believe that there is no such division of the United Nations membership. Each State, as a Member, would wish or would seem to wish the organisation to be one thing or the other *according* to the procedure or merits of each case, and according to the conception that suits best that member State’s interests in relation to that case. It is thus inevitable that the United Nations should conform, as a rule, to the lowest denominator.

This state of affairs is but a consequence and the cause of the lack of that organised legal community of mankind which only the “constitutionalists” are able to see through the combined deforming lenses represented by the concept of international law as the public law of mankind and of the Charter as a constitution.<sup>8-9</sup> Inspired, as Dag Hammarskjöld’s quoted statement, by a relatively great dose of realism, other observers have noted that the United Nations has turned in its lifetime, *inter alia*, from “universal community” to “instrument of national policies”<sup>10</sup>

<sup>31</sup> See especially Lasswell, “A Brief Discourse”, etc., *Proceedings*, American Society of International Law, 1963, pp. 72 ff.

<sup>32</sup> Hoffmann, “Weighing the Balance of Power”, *Foreign Affairs* 1972 (July), at p. 620.

<sup>33</sup> Dag Hammarskjöld, *Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1960–15 June 1961*, G.A., O.R., 16th Session, Supplement 1A, at p. 1.

<sup>34</sup> *Ibidem*.

<sup>10</sup> Robinson, “Metamorphosis of the United Nations”, *Hague Rec.*, 94 (1958-II), pp. 497–592, especially p.

It is possible that at one time or the other the United Nations appeared (and perhaps appear) like a community to the minds of some, and in particular, again, to the “constitutionalists”.<sup>11</sup> But in fact the United Nations has always been, sociologically and legally, ever since the Charter came into force, an “instrument of national policies”. If the “Fathers” really conceived it otherwise they did not really make it anything else: and we see little point in presenting it as anything else.

In drafting the declaration the United Nations membership have so used the United Nations: as an instrument,<sup>12</sup> both procedurally and substantively. From the *procedural* viewpoint they have used the United Nations as such even in that phase of the operation in which they could have had recourse, without serious inconvenience, to a method that would temporarily reduce their exclusive control of the matter. This is why they left out the International Law Commission and did not consider an *ad hoc* body of experts in individual capacities. From the *substantive* viewpoint they have assembled in the declaration a set of formulations of not major significance, and most of which do not affect substantially—even as exhortations—the freedom of each one of them to determine unilaterally the existence or content of any one of the formulated principles or rules and any question concerning an alleged violation of such principles or rules. In particular, United Nations Members have taken good care not to envisage for the “instrument”—even in a non-binding document—any role that might imply its metamorphosis into an actor.

It is perhaps this perplexing state of affairs that led us to state earlier that the only really encouraging element in the declaration of principles is the formulation of self-determination as a *universal* right, belonging to any people, colonial or non-colonial, constituting or not constituting a sovereign State. *Lex ferenda* as it may be, that formulation offers at least a promise that somehow peoples might manage to make their presence more directly and more substantially felt, in the drafting of the next Charter or declaration, than they have been able to make it felt in 1945 or in 1970.

In addition, one can find reason for hope in all those factors which, in the world of our time and the future, may reduce the exclusivity and the preponderance of the weight of the sovereign State in determining the development of the law within the universal society of men.<sup>13</sup> These factors might create more room, together with self-determination (in so far as it were respected), for a . . . community-building by the peoples more effective than the community-building very seldom pursued seriously—if at all—by the sovereign States.

110. But the members of our profession are not without fault for the addition of another failure of the governments—after so much fuss—to increase the certainty and improve the content and the effectiveness of international law. We agree with Falk when he writes that “in a world as the one in which we live the values of national maximisation, international conflict and competition are so deeply entrenched within the existing structure of international society that it is a serious error to believe that . . . élites are presently receptive to reform” . . .; and that international lawyers, who have been operating “at the essentially irrelevant margins by trying to make the present system, with its value commitments, work a little better and last a little longer” . . . “are not now contributing and do not have the potential capacity to contribute to the development of a world order system responsive to the need of mankind”.<sup>14</sup> Well taken, the point concerning the role of scholars needs qualification.

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<sup>11</sup> Appendix, paras. 117–118 and 132 ff.

<sup>12</sup> In the sense explained in the Appendix, paras. 138, 140, 146.

<sup>13</sup> Some of these factors are indicated by Hoffmann, “Weighing the Balance of Power”, at pp. 632–633 and 635–636.

<sup>14</sup> Falk, “Can International Law contribute to World order”, American Society of International Law Proceedings, 1972, pp. 268–272, at pp. 270–271.

In our opinion, in so far as international lawyers deal with international law, *de lege lata* or even, indeed, *de lege ferenda*, they simply cannot take care of mankind except in a very marginal way.<sup>15</sup> They are bound to operate *within* the international system of sovereign States. Within such a system international lawyers can only operate essentially in the interest of sovereign States themselves: and in so doing they operate not marginally but *centrally*.

In order to be able to “contribute to the development of a world order . . . responsive to the needs of mankind”, international lawyers should first of all, in our humble opinion, be more fully cognisant of, and more candidly ready to admit, on every occasion, the particular *raison d'être* of international law, the inherent peculiarities of the object and the value of international law and organisation, the permanent socio-historical, structural conditions by which those features of international law and organisation are determined, and the obstacles and difficulties deriving, from the features in question and from their causes, on the way to the development of the rule of law in the universal society as distinguished from the so-called “society of States”.

In addition to the scientific and didactic advantages represented by a realistic presentation of the subject-matter, such an approach would have, in our view, a number of merits. In the first place, one could help discourage illusions in the remedies that international law is likely to offer. At least one would not foster new illusions with regard to such remedies. Secondly, one would make all concerned realise more fully what and how much one can expect to draw from, or achieve through, international law and how serious are the dangers, actual and potential, of letting the present state of affairs perpetuate. Thirdly, one would place all concerned—peoples (especially the young) and rulers, laymen and clerics—in front of the necessity and responsibility of applying themselves less occasionally and perfunctorily to the pursuit of ways and means really *adequate* to bring about, whether from within *or without* the existing system (possibly from both quarters, but *especially* from without) the breaking up of the vicious circle from which mankind has apparently been unable to escape since the end of the (at least supposed) unity of the universal order of the Middle Ages.<sup>16</sup>

An essential condition for a realistic presentation of international law would be, in our opinion, to admit its “natural” and persistent character of a strictly inter-State system, in which human values are relegated, precisely, to the margins.<sup>17</sup> From that fundamental *datum* derive an endless number of consequences—real consequences and not just “doctrinal” or “theoretical” assumptions—spreading throughout the system and involving all the multiple aspects of the infinite number of inter-State or inter-individual issues which the law of nations directly or indirectly deals with.<sup>18</sup>

In other words scholars should keep their feet on the ground not just in the commonly recommended, “conventional” sense of distinguishing international *lex lata* from international *lex ferenda* and, within the latter, the feasible from the not-feasible. The peculiarities of the *inter-State* legal system as distinguished from national legal systems, the peculiarities consisting in, and deriving from, the fact that it is a system operating among groups while invariably affecting—at the same time—individuals—peculiarities ultimately due to the fact that international law governs the relations among States coexisting in the midst of a universal human society *of which it is not the law*—place international lawyers in front of the *unique* difficulty and *unique* responsibility of keeping in mind the distinction

<sup>15</sup> Appendix, para. 126.

<sup>16</sup> Appendix, paras. 124 ff., 142 (and 116, 119).

<sup>17</sup> Appendix, para. 126.

<sup>18</sup> There is nothing true, from our viewpoint, in the doctrine of the “objective” limitation of international law. The limitation—and an inherent one—only exists with regard to the fundamental *rationes* and aims of international legal rules and with regard to the results they are “able” to achieve: which are also conditioned by the inter-State nature of the system. Examples in Appendix, paras. 121, 132, 164 (and 136).

between the inter-State plane and the interindividual plane at every step and with regard to any matter *de détail* or *d'ensemble* with which they deal, from piracy to whether the high seas is *res communis omnium*, from the status of the individuals to the personality or the functions of the United Nations. Such a distinction would of course be unacceptable from the historical or sociological point of view. Historically or sociologically the inter-State aspect and the inter-individual, directly human, aspect of each phenomenon (piracy, the high seas, the individual, the United Nations) merge into one phenomenon, one trend, and as such will be assessed and evaluated. But from the legal viewpoint, which is an inherently relative one—the two aspects are different, distinct and often incompatible.<sup>19</sup> Any solution of the legal problem arrived at by mixing up the inter-State normative element and the inter-individual normative element (as distinguished in the *Appendix*) will be inevitably an arbitrary, misleading solution.

111. An increasing number of international lawyers, on the contrary, while aware, and occasionally outspoken about, the gaps and deficiencies of international law, seem to show a rather marked tendency to place themselves in a different perspective.

*Technically*, the general trend seems to be to move farther and farther from a conception of the law of nations as an essentially inter-State law and to approach proportionally—more or less deliberately and in the variety of measures described in the *Appendix*<sup>20</sup>—that other conception of international law as the legal community of mankind or universal public law of men, the existence of which postulates not only a socio-historical state of affairs diametrically opposed to the existing “social basis” of international law but radically different *rationes* and content of customary and conventional international law in any field. The result is not only (although it is already too much) that transposal “into an alien environment” of single “institutions that have grown up in national societies” which others have denounced.<sup>21-22</sup> It is also the transposal, *telles quelles* except for some quantitative aspects, into the framework of the imaginary public law of men and its rules (for which many keep mistaking international law) of all the features of integrated societies with regard to structure and development,<sup>23</sup> and particularly with regard to organisation.<sup>24</sup>

*Politically*, the trend consists essentially in the belief that it is the task of international lawyers to participate in, or contribute to, the development and improvement of the rule of law in international society not just in the sense in which lawyers have always done so in any society by discussing *lex ferenda* as well as *lex lata*, by getting involved in private or public practice or entering politics, but in such a manner as to become, *qua* lawyers, real *actors* or *the* main actors in that development and improvement: and this precisely, *inter alia*, by indicating as *accomplished*, or *possible*, developments of international law of the kind just

<sup>19</sup> Within a law of nations so conceived there is of course room for both static and dynamic phases with regard to the pursuit of States’ values and/or human values. Within that same framework there is also ample cause—and need—for healthy divergence of views, among governments, among judges and among scholars, with regard to any issues concerning the structure and content of the system, the existence or non-existence of customary rules, the validity of voluntary rules, the interpretation and application of such rules, and naturally the determination of the relevant facts related to any actual or conceivable issue to be decided within the system. *A fortiori* there is room for taking, *vis-à-vis* the inter-State legal order, the critical attitude which any observer cannot but take with regard to a system in which—as Falk points out—“the realms of national maximisation, international conflict and competition are so deeply entrenched within the existing structure . . . as to make *the system itself* too little receptive, or even, at times, *totally deaf* to fundamental, let alone secondary, values and best interests of mankind”.

<sup>20</sup> Especially paras. 114–120.

<sup>21-22</sup> Corbett, P. E., “Social Basis of a Law of Nations”, in *Hague Rec.* 85 (1954-II), at p. 475. See *Appendix*, paras. 132 ff., 140, 148 ff.

<sup>23</sup> *Appendix*, paras. 116 and 130.

<sup>24</sup> *Appendix*, paras. 131 ff., especially 148–152.

indicated (and discussed in the *Appendix*).

The technical trend and the political trend combine in supporting each other. Every “conquest” in the technical realm—such as the disposal of the . . . indignity of the “object” theory of the international condition of the individual, or the assertion of the concept of the United Nations Charter as a “constitution”—becomes thus at one and the same time a technical or scientific accomplishment of the policy-oriented, modern and open-minded international lawyers, and a contribution to the development of the rule of law in international society. The compound result, as shown in the *Appendix*, is the description of the law of nations in such magniloquent terms that scholars like Triepel or Anzilotti would not recognise it as a subject they had ever passed or given an examination in: and not because they had not heard in their times of ICAO or the United Nations, of the World Bank or FAO, of IAEA or Euratom, but because of the manner in which the corresponding international legal phenomena are described in the literature. Brierly himself might be puzzled at some of the theoretical notions put forward since his untimely death with regard to international law and its outlook.

## 112. One may wonder *cui prodest*.

(i) To begin with *lex lata* it is very questionable that “federalistic” presentations of the law of nations (often accompanied by protests against the tendency of others to be too prone to the models of municipal law) are likely to achieve much towards committing States to behave “as if” they lived under a more organic system. One need not be so realistic as to believe that a “State Department has no conscience” or question *in toto* the law-abiding disposition of States to realise that. Even assuming a sensitive conscience and a law-abiding spirit, it is easy to predict what a government’s legal advisers and the Foreign Minister would do if they find that an intended course of action, while in conformity with international law understood as inter-State law, would be condemned under an international law understood as the law of the legal community of mankind. Suffice it to recall the practical impact of such Opinions as those of Judge Alvarez on *Admission* and of the International Court on *Certain Expenses*.

*De lege lata* itself, it is more than just a matter of futility of the grandiloquent theories. There may well be instances in which the theory is actually detrimental to the cause one tries to promote. We have often wondered, for example, since we read the *South West Africa* cases judgment of 1966, whether the chances of the plaintiffs would not have been greater if their essentially good cause had been pleaded with less emphasis upon assumed or alleged novelties of contemporary international law and society.<sup>25</sup>

The sponsors of the new doctrines do not seem to realise that the usefulness of such doctrines is rendered problematic, in the relations among States, by the recalled lack of institutionalisation of the judicial process. One thing is to supply daring progressive doctrines

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<sup>25</sup> There was available enough conventional law (considering also South Africa’s “renewal” of its mandate commitments) and perhaps enough customary law on racial discrimination for the issue to be argued either as a matter of purely contractual obligations of South Africa towards the plaintiff States, or as a matter of contractual obligations strengthened or qualified by obligations deriving from customary law, and for the good cause to have fair chances to break through the scruples of the most conservative or prudent among the Court’s members.

To say that the case would or could be actually won on that basis would be temerity. It is perhaps not temerity to say, however, that the injection into the discussion of ideas such as public order or public policy of mankind, or of the organised international community with the related succession of the United Nations to the League, and the final intimation that the plaintiff States were bringing a kind of *action populaire* on behalf of the universal society of men or of States: all that was not—with respect—a felicitous move. Had the case failed just the same, the impact of the miscarriage of justice might have been greater if Judge Sir Gerald Fitzmaurice, for example, had been given less cause for argument against some of the plaintiffs’ propositions.

to national courts whom any person in the law can seize against *any* other *and* on *any* legal issue. Another thing is to elaborate them with regard to a legal system in which the judicial process remains a matter of agreement between the parties and is not only rarely resorted to—in itself a very sound tendency in any milieu—but so rarely really available in a *legal* sense (namely as a matter of unilateral initiative of one of the parties) as to justify the impression that the adjudication of a legal issue (as distinguished, of course, from that issue's legal nature) is almost literally a matter of *chance*.

(ii) The import of the new doctrine should be cause for even greater concern *de lege ferenda*.

Until international lawyers will go on believing, and make believe, that international law is the “primitive” law of mankind or the law of the organised international community, they will be unable to contribute to the “world order system” Falk refers to. They will be unable to do the only thing they can really do—modestly, perhaps, but usefully—in the interest of mankind: describe the inherent ineptitude of international law—as law among States—to be really responsive to the interests of mankind.

Until international lawyers will instead apply their skills to cover up the immense gaps that divide the existing inter-State legal system from the public law of mankind, they will simply help the conservatives, official or private, to keep the reformers quiet. Governments, for example—as a rule among the conservatives—will continue to use the international lawyer, to his heart's content, in order to go on promoting the habitual kind of very mild or substantially irrelevant changes in the law of nations in the justified confidence that scholars will not fail immediately to process each change or alleged change “scientifically”—if they have not done so *avant la lettre*—in such a manner as to make it appear euphemistically as another “decisive”, “unprecedented” or “revolutionary” reform of the “public law of mankind”; and another piece of evidence, of course, of the fact that international law is precisely that “public law of mankind” awaiting development. Everybody seems to be happy that way. Scholars in particular, while going on serving “centrally” the inter-State system and marginally the law of mankind to be, will be able to boast “central” service to both.

One of the many examples in point is the concept of a soft law, something which had always been there but seems to have become the great discovery, and fashion, of our time. Something good to achieve anything in words and tittle or nothing in substance.<sup>25a</sup>

The Friendly Relations operation, which is the most typical instance of misuse of the “soft law” method, has in fact been favoured by international lawyers in many ways. Directly, it was favoured by those scholars who hailed a code of coexistence between competing—supposedly international and supposedly legal—systems. Indirectly, it has been encouraged by the scholars who easily accept notions like the Organised International Community or the constitutional nature of the Charter of the United Nations and the notion of the General Assembly's “legislative” or “quasi-legislative” powers.

Terms such as these are not the invention of States. They are invented by the most gifted among international lawyers. While States use them to sell conservative declarations as instruments of progress, public opinion is led astray by the authorities in the field, who serve it the theory of the indefinite potentiality of the United Nations, as a primitive federal structure, to evolve gradually—if not overnight—into the structure of a “more perfect union” endowed with a legislative function.

Of course, we are by no means sure that the concepts of international law and organisation which are expressed or implied in these pages (and in the *Appendix*) are “scientifically” more correct than the concepts professed by the majority of international lawyers. We have not been able to test our views with the help of computerised data or of the “game theory” or of the mathematics of conflict and conflict resolution.

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<sup>25a</sup> See also *supra*, para. 16 and reference thereunder.

Be that as it may of our views, there must be something not quite right with the contemporary doctrine of international law if one can find simultaneously, within its *corpus*, Jenks' statement that the federal analogy and the theory of divided sovereignty apply in the law of the United Nations as a matter of course and Leo Gross' statement that it will take 100 years for the federal analogy to begin to come true in international organisation.<sup>26</sup> There must be something wrong in the doctrine of international law if a distinguished practising lawyer, in discussing the role of the International Court of Justice in the international community a few years after losing before that Court a case he had deserved to win, has been led by his severe experience to brood disconsolately, neither about the bad understanding by the Court of the relevant rules or of their existence or inexistence, or about the bad or impossible state of the law—common occurrences within any society—nor about the technical competence and moral integrity of the Court or any of its members—a less frequent but equally conceivable complaint—but about nothing less than the inexistence of the judicial “function” or of any legal function, and about the inexistence of the very legal community under the law of which the case had seemingly been tried by the Court and argued by that very same lawyer<sup>27</sup> with not little emphasis on the concept of an Organised International Community.

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<sup>26</sup> Leo Gross' estimate sounds reasonable. We hardly dare to add that it might still be an optimistic evaluation.

<sup>27</sup> Gross, Ernest, “The Function of the International Court of Justice in the World Community”, cited *RIIA, Diverging Attitudes, (Georgia Journal of International and Comparative Law, 2 (1972))*, Supplement 2, pp. 65–69. Cf. *Appendix*, paras. 113 ff. and Gross' Address to the International Court of Justice in the *South West Africa* cases on 19 May 1965, as reported in *The Strategy of World Order* (Editors Falk and Mendlowitz), Vol. 3, at pp. 80–89, especially at pp. 81–82 and 84.

APPENDIX  
THE CONCEPT OF INTERNATIONAL LAW AND THE THEORY OF  
INTERNATIONAL ORGANIZATION<sup>\*</sup>  
*Section 1. Introductory*

113. The trend of thought referred to in the text as the doctrine of the “Organised International Community”<sup>1</sup> consists of the tendency so to transpose into the study of international organisations the concepts typical of the study of organisations and collective bodies of municipal law as to assume international organisations as a phenomenon essentially not dissimilar from the constitutional structures of national communities and their subdivisions.

Of course, this tendency manifests itself in a great variety of degrees. In most cases the analogy is neither deliberately adopted nor organically developed. It is just assumed: and it goes without saying that no one pushes the analogy so far as to assert, for example, that the United Nations is the World State.<sup>2</sup> On the contrary, a multitude of differences are pointed out with acumen and accuracy.

There remains the fact that the “municipal” model makes its presence felt at every step, not just as the goal which the universal society is bound, or likely, to attain, but as a pattern which has already materialised, however imperfectly or rudimentarily, in the given international organisation, be that the League or the United Nations. *Mutatis mutandis*, the pattern applied to the League or the United Nations is also used for the Specialised Agencies and for any regional organisation of general or special competence.

To put it bluntly, and confining ourselves for the moment to the United Nations, the tendency in question is to assume not just, or not only, that the destiny of mankind is, politically and legally, to be organised into a federal structure: which we deem to be a very reasonable futurable. The assumption seems to be, more precisely, that the League or United

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\* In order to abbreviate our discourse as much as possible, we shall often refer, in the footnotes, to previous works of ours dealing with the social basis of international law and with the general theory of international law and organisation. Upon the references contained in those works we shall mainly rely, to the same end, also for the most relevant literature. The works in question are: *Gli enti soggetti dell'ordinamento internazionale*, Milano, 1951, cited as *Gli enti*; “Rapporti contrattuali fra Stati e organizzazione internazionale”, in *Archivio Giur. Filippo Serafini*, VIII, serie 6a, 1–2. 7–158, cited (from *tirage à part*) as *Rapporti contrattuali*; *La persona giuridica come soggetto strumentale*, Milano, 1952, cited as *La persona giuridica*; *Sulla dinamica della base sociale nel diritto internazionale* (*Annali della Facoltà giuridica dell'Università di Camerino*, 1954, pp. 1–176) cited (also from *tirage à part*) as *Dinamica*; *La questione cinese* (*Scritti in onore di Tomaso Perassi*, Vol. I, 1957, pp. 65 ff.); *Diritto internazionale e personalità giuridica*, Torino, UTET, 1971, reprinted by Cooperativa Libraria Universitaria, Bologna 1972, cited as *Diritto internazionale*; *L'individuo e il diritto internazionale*, *Rivista di diritto internazionale*, LIV (1971), pp. 561–608, cited as *L'individuo*; *L'Etat dans le Sens du Droit des Gens et la Notion du Droit International*, published by Cooperativa Libraria Universitaria, Bologna 1975 (independent extract from “Oesterreichische Zeitschrift für Oeffentliches Recht”, Vol. XXVI, parts 1–2 and parts 3–4). This is cited as *L'Etat*. Some comments are listed in footnote 61a to the present Appendix.

<sup>1</sup> *Supra*, paras. 5, 17–18 and 21.

<sup>2</sup> The doctrine is not less careful, in this respect, than the International Court of Justice in its motivation of the Advisory Opinion (11 April 1949) on *Reparation for Injuries Suffered in the Service of the United Nations*, *ICJ Reports* 1949, at p. 179. See however, as a typical example of the trend under description, Judge Alvarez’ Individual Opinion on *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, *ICJ Reports* 1947–1948, pp. 67 ff., and especially that Judge’s statement that “The preparatory work on the constitution of the United Nations Organization is of but little value. Moreover, the fact should be stressed that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life” (at p. 68). In addition see the same Judge’s Dissenting Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion of 3 March 1950), *ICJ Reports* 1950, pp. 12 ff. See also footnotes 39 and 41 hereunder.

Nations structure is, albeit in embryo, precisely *that* federal structure in an early stage of its development, in a sense similar to that in which the Continental Congresses *were*, in a way<sup>2a</sup> the antecedents of the United States Government.

In its turn, the adoption of the municipal (or federal) law model in the theory of international organisation is based logically, expressly or implicitly, on those conceptions of international law which envisage the universal society of men as a magnified version of a national society, within which international law would approximately occupy the place—and perform the functions—occupied—respectively performed—in a national system by the constitution, preferably a federal constitution, or by constitutional law in general. If the terms were not objectionable these conceptions could be characterised as the theories of international law as a *kind* of constitutional law or *the* constitutional law of mankind. For the sake of brevity we shall often refer hereafter to these theories as the “doctrine”, *tout court*.

The relationship between the theory of the United Nations as an early stage of world federation and the theory of international law as an early stage of the legal community of mankind is manifest.

In our opinion, since one must talk about *futuribles*, mankind is naturally one and is bound to become politically and legally one. It is therefore undeniable that the present state of affairs, international law and international organisation included, is an antecedent, historically speaking, of that other state of affairs which will be some day the world federation. It is at the same time very doubtful, in our opinion, that any student of the constitutional law of that federation will be able to look at international law as an early stage of his federal constitution or at the United Nations as an early stage of development of his federation. *Rectius*, he will be able to do so if he confines his study to the *doctrine* of the present time: to the concept of international law as the primitive law of the community of mankind and to the doctrine of international organisation as the primitive stage of the world State. If, however, that student used a Time Machine instead of a library, he might well *not* think the same way. In spite of the credit accruing to the doctrine in question thanks to the attainment of the goal, he might not consider the law of nations of the first half of the XXth century and in particular the League or the United Nations as the initial phase of the universal public law or of the universal constitution. His reason, it seems to us, would be similar to the reason that prevents us from believing that the present international system, as it has developed over about ten centuries (or more),<sup>3</sup> can be characterised as a “decentralised phase” of a universal legal order previously centralised or less decentralised.

## *Section 2. The Concept of International Law as the Constitutional Law of the Universal Society and the Theory of International Organisation*

114. An express or implied concept of international law as the constitutional, or quasi-constitutional law of mankind is frequent among contemporary writers of the most diverse connotations. The common *point de départ* seems to be an “inter-individual” conception, as distinct from an inter-State conception of international law. To put it with Corbett, “Among the sixteenth and seventeenth-century writers . . . there was a great deal of fluctuation between a world-society of States and a world-society of individuals. The clear-cut image of the constituency of international law as a society of States came later. By the nineteenth century it had dominated doctrine”.<sup>4</sup> If we are not mistaken, the literature of the XXth century indicates on the whole, particularly since the end of the First World War, an express or implied favour for the image of a constituency of international law as the society, or

<sup>2a</sup> *Infra*, para. 144.

<sup>3</sup> *Infra*, paras. 124 ff.

<sup>4</sup> Corbett, P. E., “Social Basis of a Law of Nations”, *Hague Rec.*, 85 (1954–I), at p. 479.

community, of individuals.

Indeed, the conception of international law as a body of rules of inter-State relations is still quite alive. There are only a few writers in whose work that conception does not make its presence felt continuously by express *dicta* or by more or less evident implications. The prevalent trend, however, seems to be in the indicated direction, and not only among scholars deliberately proposing or accepting, for example, the definition of international law as the legal community of mankind at an early stage of development.

To put it in French—a language which is closer to our Italian—"La doctrine contemporaine du droit international montre une tendance de jour en jour plus marquée de s'éloigner de la conception qu'on pourrait appeler interétatique du droit des gens pour y substituer une conception plus ou moins décidément interindividualiste. L'inter-dépendence croissante des peuples, le développement de l'organisation internationale, l'établissement des institutions européennes—pour ne mentionner que les éléments les plus voyants—amènent les juristes d'un peu partout à envisager le droit international sous une lumière plus ou moins nouvelle par rapport au dix-neuvième siècle. Même les auteurs qui généralement ne professent pas des idées radicales tournent le dos tôt ou tard à la conception interétatique telle qu'elle dominait encore, peut-être, jusqu'à la deuxième guerre mondiale.

Cet éloignement des conceptions traditionnelles se présente dans les formes et les proportions les plus diverses. Des variations minimes—ou en apparence minimes—sur les idées négatives en matière de personnalité des individus, par l'admission de la personnalité dans quelques hypothéses, on arrive à l'idée que toute limitation de ce phénomène, si jamais elle a existé, appartient au passé. De l'admission de quelques exceptions à la séparation du droit international du droit interne on passe à l'idée que cette séparation n'est plus justifiée par les réalités contemporaines ou n'a jamais existé dans l'imagination de quelques auteurs d'esprit borné ou conservateur, détournés du bon chemin par des tendances 'impérialistes' ou par des fausses conceptions volontairistes ou négatives du droit international. De la découverte de quelques limitations de la souveraineté des Etats, on arrive à l'idée que cette souveraineté s'ébranle de tous les côtés et dans tous les domaines, jusqu'à en conclure que les Etats eux-mêmes, base du droit international traditionnel, sont en train de s'écrouler devant les organismes internationaux et supranationaux, manipulés par des individus et incident dans une mesure croissante dans la vie juridique des peuples. Encore, on vient d'avancer l'idée que la conception selon laquelle la formation et le régime des Etats n'est pas du domaine du droit des gens serait surannée elle aussi. Elle devrait être abandonnée, soit en considération de la 'création' de nombreux Etats sur la base de traités ou de résolutions d'organes internationaux, soit simplement en vue du fait que le principe de l'Etat représentatif serait devenu désormais une règle du droit international coutumier.<sup>5</sup> C'est dans l'ensemble de ces idées plus ou moins nouvelles que trouve sa place également la tendance de jour en jour plus marquée de traiter la théorie et la pratique des organisations internationales, même des organisations de type 'classique', comme théorie et pratique du 'gouvernement international'. Il devient chaque jour plus fréquent de se référer à la Charte des Nations Unies comme à une Constitution:—la Constitution 'volontaire', par contraste avec la Constitution coutumière et non écrite représentée par les règles du droit international général, ou la Constitution de la communauté internationale tout court. Et on pourrait continuer avec d'autres exemples".

Naturally, this tendency manifests itself, as well as the trend observed in the preceding paragraph, in a variety of degrees and *nuances*. "Dans la plupart des cas ces idées sont avancées sous une forme inorganique. Chaque auteur présente, dans un article, une monographie ou un manuel, la nouveauté ou les nouveautés que ses intérêts scientifiques l'amènent à rencontrer sur son chemin. Mais puisque à un certain moment l'idée nouvelle

<sup>5</sup> See, for example, Ziccardi, "Les Caractères du Droit International", in *Hague Rec.*, 95 (1958–III), pp. 364 ff. A critique (*avant la lettre*) in *Dinamica*, pp. 112–114.

s'ajoute au grand courant de la doctrine, les nouveautés finissent par faire boule de neige. Et la boule de neige roule et grandit d'autant plus rapidement que toutes les idées du même genre—qu'on pourrait qualifier de progressistes si le progrès du droit international s'identifiait avec les théories des juristes—trouvent leur couronnement dans les conceptions radicalement novatrices d'ouvrages tels que celui d'Alvarez sur le ‘droit international nouveau’ et celle que Jessup a publiée sous le titre de ‘transnational law’ . . . C'est justement sur les propositions de la nature de celles rappelées plus haut et sur ces théories nouvelles que trouve son appui la notion de la communauté juridique universelle des hommes dont nous parle si efficacement Wilfred Jenks. Le droit international serait la couche supérieure—*apparemment ou relativement* interétatique—de cet ordre universel. Il serait l'ensemble des règles concernant la légitimation et la délimitation des ordres juridiques étatiques, les compétences des gouvernements étatiques etc., toujours en fonction, pour ainsi dire, du gouvernement de l'humanité ou de ses ‘provinces’, les Etats”.

The most organic, refined (and redoubtable) presentations of this concept of the law of nations—putting aside earlier doctrines dating back to the XVIIth century—are Alfred Verdross' *Verfassung der Völkerrechtsgemeinschaft*, that alternative of Hans Kelsen's theory which is known as the direct “primacy of international law” and Georges Scelle's theory of the law of the universal society as “droit intersocial”. The doctrine we are concerned with, however, spreads far more widely, in the contemporary literature, than the range—certainly not narrow—of these organic theories.<sup>5a</sup>

115. According to our understanding of the most coherent and elaborate among the presentations of the doctrine in question, the international society in a narrow sense—what other writers generally refer to as the society of sovereign States—and the international society in a wide sense—the universal society of men—would seem to be one thing. The elementary units of the social basis of the international system would be not States but individuals. Human beings would have always been bound up into a universal legal community of mankind.<sup>6</sup> States, in their turn, would be as many partial communities of that universal community: *provinciae totius orbis*. International law would be placed above and between the constitutions of States as a kind of super-constitution of the legal community of mankind (*civitas universalis*). Legally speaking, sovereign States would represent as many *juridical subdivisions* of the universal order, their respective legal systems finding in international law the ultimate source of their validity and reciprocal delimitation. States thus appear not as the “private” persons of international law which otherwise they seem to be (not seldom in *dicta* of the very same followers of the doctrine in question) but as *intermediate institutions* between the human social basis and that universal legal order of which the body of international law would represent the supreme echelon.

As well as the legitimization of the constitutions of States, the sovereignty of States would be not a question, or situation, of fact. It would be the condition in which a State is placed once, having achieved independence, it becomes directly connected with international law (*Völkerrechtsunmittelbarkeit*). Sovereignty would be a legal quality, *octroyée* to States by the law of nations—together with legitimization—on the basis of the principle of effectiveness.<sup>7</sup>

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<sup>5a</sup> More in *L'Etat*, at pp. 4–6, 351 ff., 391. See also, now, Verdross-Simma's *Universelles Völkerrecht*, Berlin, 1976.

<sup>6</sup> See the literature cited in *Gli enti* and *Rapporti contrattuali* and the works referred to by Opsahl, Torkel, “An International Constitutional Law”, *International and Comparative Law Quarterly*, X (1961), pp. 760–784. While aware of the “constitutional” trend, the latter author does not seem to consider it so decidedly and substantially relevant to the concept of international law as we believed, and still believe, it to be (*infra, passim*, especially paras. 116–120, 123–130 and 140–147).

<sup>7</sup> Compare *infra*, paras. 121–123. Some insufficiencies of Kelsen's views are pointed out by Gross, Leo, “States as Organs of International Law”, etc.

In one with sovereignty, and the quality of a juristic person in a narrow sense, the *Verfassung* would endow States with the quality of *organs* of the universal legal community, namely organs of international law.<sup>8</sup> As well as the constitution of any national community, international law would govern, as the *Verfassung* of the universal society, such fundamental functions of the legal system as the creation, the determination, the enforcement of rules. The peculiarity of such a constitution of the universal society would essentially be that those functions are entrusted *not* to central organs. They are entrusted instead to States themselves by virtue of a *principle of decentralisation*, combined with effectiveness. States would thus perform the law-making, the law-determining and the law-enforcing function in the universal legal community in the alleged capacity of *decentralised organs* of that community: and this on the strength of international law, the community's constitution. States appear, within the doctrine in question, as the *delegated agents* of the international community. In Scelle's theory this corollary of the doctrine is presented as a matter of *dédoublement fonctionnel* of the organs of States, operating as national *and* international organs.

From the smallest national societies to the universal society of men all the forms of human association are thus conceived as parts of one *legal* whole. All societies or groupings other than the universal society are, *in law*, as many parts or subdivisions of that society. States are parts of the universal society just as municipalities, counties, provinces or *départements* are parts of a unitary State, or, more precisely, as member States are part of a federal State.

Within this legal *grand dessin* the universal society would differ from national integrated societies only by the degree of centralisation, just as a federal State differs from a unitary State as a less centralised structure. It is in fact in the light of the degree of centralisation that some of the writers referred to—Scelle, Kelsen, Kunz—would compare the unitary State, the federal State, the confederation and the universal society. The unitary State is the most centralised one. In between are situated, one next to the other, the other two kinds of human organisations: the federal State, less centralised than a unitary State but more centralised than international law; and the confederation, less centralised than a federal State and more centralised than international law.<sup>9</sup>

All the forms of human organisation—this is the essential point to be retained—are thus placed along a *continuum* in order of degrees of centralisation. No qualitative line of demarcation would separate, for instance, the *international* forms of coexistence from the forms of association which are typical of *national*, integrated communities. We shall see how international organisations are interpolated between confederation and general international law while supra-national organisations are placed somewhere between the federal state and the confederation.

Reduced to its core, the doctrine actually implies that international law itself is just another form—extremely decentralised—*of State*.<sup>10</sup> An example of this trend of thought is

<sup>8</sup> Compare *infra*, paras. 123, 131. The concept of States as organs of international law in the above or a similar sense is apparent in the works indicated in the previous footnotes. As an example of what is meant suffice it to recall that according to Falk, for example, the international régime of piracy would be “a special case of decentralised ordering” (*The Future*, etc., Vol. I (*Trends and Patterns*) 1969, at p. 69). According to Anzilotti and others (*Diritto internazionale*, at pp. 168–172 and references therein) the repression of piracy is not an international function of States any more than it is an international function of States to punish any other crime within their respective jurisdictions. The main sense in which piracy is internationally relevant from a legal viewpoint is that a customary rule derogates from any general rules or principles limiting the freedom of States to exercise jurisdiction over foreign subjects or ships on the high seas.

<sup>9</sup> This idea is also tied to the notion that there are types of international law corresponding to different degrees of decentralisation of the universal society. See *supra*, para. 88 (footnote 19).

<sup>10</sup> The general trend is not dissociated, of course, from blatant inconsistencies. Kelsen, for example, who maintains that States are legitimised by international law (with all the corollaries that such a *point de départ* implies in the sense described above) also rejects emphatically, in *The Communist Theory of Law*, at pp. 169–

the statement by such a sharp and measured writer<sup>11</sup> as Waldock, lecturing at the Hague Academy in 1962: “international law, *like federal law*, recognises as a *constitutional principle* that some matters fall within the reserved domain of the individual State”.<sup>11</sup> But we must repeat that this is just one example among many that it would be pedantic to enumerate. Suffice it to say that the “constitutional” conception looms so large in the doctrine of the law of nations that one finds not a little trace of it in the Soviet theory of international law. I refer to those variations of that conception which imply that international law as a whole, or any system or subsystem thereof, takes a “socialist” or “capitalist” connotation, precisely as one of its possible *constitutional* connotations.<sup>12</sup> Another example is Korovin’s definition of international law as the “sum total of legal norms guaranteeing international protection of the democratic minimum”.<sup>13</sup> And it is rather curious that Kelsen himself—one of the most determined representatives of the conception of international law as constitutional law—retorts to Korovin that “there is hardly any *possibility* of a democratic or antidemocratic international law”.<sup>14</sup>

116. To demonstrate the doctrine’s impact—express or implied, immediate or mediate—on the analysis of the multitude of international legal issues or phenomena with regard to which it is relevant, would lead us very far from our problem. Suffice it to say that there is hardly a chapter of a treatise on the law of nations which is not affected. The doctrine affects, and is in turn affected by, the solution of such questions as, *inter alia*: the historical origin and development of international law;<sup>15</sup> the evolution of the international legal system;<sup>16</sup> the theory of sovereignty;<sup>17</sup> the identification of the features of international law;<sup>18</sup> the inter-State or inter-individual nature of custom and treaty with regard to both the making and the destination of the rules;<sup>19</sup> the relationship between international and municipal law (and inter-individual law in general);<sup>20</sup> the notion of States and other international persons;<sup>21</sup> and the

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170, any notion that international law is concerned in any way with a State’s government: “General international law of the past as well as of the present time is *strictly indifferent* to the ‘form of government of the States’”. This problem is discussed *infra*, para. 121. Further references therein.

<sup>11</sup> Waldock, Sir Humphrey, “General Course of Public International Law”, *Hague Rec.* 106 (1962) at p. 122 of the *tirage à part*. Italics are added. The federal analogy is also recalled by Waldock at p. 123.

Of course, that distinguished scholar is not inadvertent to the differences. Immediately after the quoted passage, he recognises the difference implicitly when he states that in international law “indeed, the general principle is that all matters with regard to which the jurisdiction of a State is not bound by international law fall within domestic jurisdiction” (pp. 122–123); and even more clearly when he states that in the spheres in which the State is bound by international law “the matter is no longer one of domestic jurisdiction and the international responsibility of the State is engaged” (at p. 123). The cited author also recognises expressly, in relation to the application of State law by an international tribunal, that “the position in the international system (*vis-à-vis* the law of the State) is . . . quite different from that of a federal system. So far from national law being regarded in an international court as forming part of the court’s own legal system, it is treated rather as an extraneous system of “foreign law” to be proved by evidence in much the same way as national courts treat the law of a foreign State” (at p. 124).

<sup>12</sup> *Supra*, Chapter V, paras. 85 ff., especially 87–89.

<sup>13</sup> Korovin, “International Law After the War”, *American Journal of International Law*, 1946, at p. 743. *Supra*, paras. 86 and 91 ff.

<sup>14</sup> *The Communist Theory of Law*, at p. 169 (emphasis added).

<sup>15</sup> *Infra*, paras. 119, 124 and 129; and *L’Etat*, 377 ff.

<sup>16</sup> Paras. 129, 147, *passim*; and *L’Etat*, 357 ff.

<sup>17</sup> Paras. 149–152; and *L’Etat*, 364 ff.

<sup>18</sup> Herein, paras. 106, 110–112, 125–130, 146–147, 160 ff; and *L’Etat*, 347 ff.

<sup>19</sup> *Infra*, paras. 136 and 161–164; and *L’individuo*, pp. 602–608; and *L’Etat*, 372 ff.

<sup>20</sup> *Infra*, para. 129; *Gli enti*, pp. 7 and 388–390; *L’individuo, passim* and our review of Guggenheim’s “Traité de Droit International”, *Rivista di diritto internazionale* 1953, at pages 294–297; Add *L’Etat*, loc. cit. preceding footnote.

<sup>21</sup> *Gli enti; Dinamica; Diritto internazionale*; and *La questione cinese*. More specific references *infra*, footnote

general theory of the social basis of international law;<sup>22</sup> the organisation of international persons for purposes such as treaty-making and international responsibility;<sup>23</sup> the condition of private parties in international law;<sup>24</sup> the legal relations among States concerning nationals and aliens (personal jurisdiction);<sup>25</sup> the legal relations among States concerning territory;<sup>26</sup> the condition of the high seas and non-appropriated areas or spaces in general.<sup>27</sup>

In so far as international organisation is concerned, the fundamental corollary of the doctrine is that organisation has somehow *always* been—before *and* after Westphalia—a feature of the universal society. Logically, once the social basis of international law is placed in the universal society of men and States are conceived as intermediate structures between a “constitutionally” conceived international law on one side and that universal social basis on the other, organisation will seem to be fundamentally *dans la nature des choses* within the universal society, even if it varies quantitatively in time and space. Indeed, it would logically appear that prior to Westphalia—or prior to the involution of which that Peace was the consecration—the universal society was organised into the form of the feudal super-State and under the more or less effective authorities of Pope and Emperor. Since Westphalia, there would have been a change, decentralisation prevailing at the universal level while an opposite process of centralisation developed within “national” societies.

The interindividual conception of the law of nations seems thus to attenuate or obliterate, by one and the same stroke, the *inter-State* nature of the international system and its *inorganic* structure. Instead of a society of States we face nothing less than the legal community of mankind. At the place of a lack of organisation we find organisation even at stages of development preceding the Covenant and the Charter. *Vis-à-vis* the fragments of the universal society of men they respectively control, sovereign States would seem to exercise—*mutatis mutandis*—the very same legal functions formerly exercised by the supreme authority of Emperor or Pope.

That organisation be construed as a condition already *inherent*, in a way, within the universal society, is not a point to be minimised. On the contrary, it is a point of the greatest importance. Clearly, one thing is to organise a totally inorganic, anarchic society, another thing is to *develop* an existing organisation. One thing is to *create* organised functions where there are *none*, another thing is to shift gradually, towards some centre, the functions once or presently decentralised but, after all, placed as highly as in the hands of States (allegedly) operating as *internationally* organised institutions of as many *provincial* subdivisions of the world.

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59a; *L'Etat*, 28 ff.

<sup>22</sup> In addition to the works cited in the previous footnotes, Sperduti, “Sulla Soggettività Internazionale”, *Rivista di diritto internazionale* LV (1972), pp. 266–277.

<sup>23</sup> On the organisation of States for “international legal purposes” (treaty-making and wrongful acts), *Gli enti*, pp. 319–371; and *Diritto internazionale*, pp. 58–75. Precisions with regard to the various doctrinal trends on this matter, and on *legal imputation* (also with regard to the comparison of our position with Quadri’s), *Gli enti*, pp. 124 ff., especially 131–134; and *Diritto internazionale*, pp. 29 and 61–75). See also Ferrari Bravo, *Diritto internazionale e diritto interno nella conclusione dei trattati*, Napoli, 1964; Add *L'Etat*, pp. 311–331.

<sup>24</sup> Paras. 110, 114, 122–123, 126; and *L'individuo*. Morelli in “Stati e individui nelle organizzazioni internazionali”, *Rivista di diritto internazionale*, XL (1957), pp. 3–25, at p. 9, footnote 10, makes a correct point. We could not mean, of course (in *Rapporti Contrattuali*), that the activity of individuals is irrelevant for international law. We only meant that the acts of individuals are not acts of international persons. Compare, anyway, *Gli enti*, 250 ff. and *L'individuo*, especially at pp. 561–570.

<sup>25</sup> *Dinamica*, especially at pp. 75–92 (for the relationship between the State and its subjects).

<sup>26</sup> *Dinamica*, at pp. 55–75; and *Diritto internazionale*, pp. 92 ff., 123 f.: for the territory; *L'Etat*, pp. 50 ff.

<sup>27</sup> Battaglini, G., *La condizione dell'Antartide nel diritto internazionale*, Padova, 1971, especially Chapter II of first Part (pp. 142 ff.) and Chapter II of Second Part (pp. 235 ff.); Mengozzi, P., *Il regime giuridico internazionale del fondo marino*, Milano, 1971, especially pp. 122 ff.

117. Indeed, the same doctrine that so aptly removes, from the road to world government, the stumbling block represented by what in another theoretical framework is described as the *anarchic* structure of a “society of States”,<sup>28–30</sup> also provides the *centralising device*. Such device—the organisation-improving machinery—is the inter-State compact, naturally viewed, in harmony with the conception of the law of nations as constitutional law, as a virtually omnipotent/tool of constitutional reform.

According to the constitutional conception of international law, international agreements are omnipotent objectively and subjectively. From the objective point of view they are omnipotent because, subject to the possible limit of *ius cogens*, there is nothing that an agreement is not “enabled” validly to provide for. This may well include centralisation, effected by means of the *further delegation*, by States, in their alleged capacity of decentralised, *delegated* organs of the universal society of *men*, of the functions previously exercised by them exclusively (but in that same *delegated* capacity). From the subjective viewpoint, according to the same doctrine, international agreements reach individuals. As members of the social basis of States conceived not as *separate* political formations but as *provincial subdivisions* of a universal legal order, all individuals would be the constituency of international law. As such all individuals are *in law*—according to tenets or implications of the doctrine in question—the direct or indirect makers and addressees of any rules of international law. As a distinguished representative of the same doctrine opposed to us, international agreements resemble, supposedly from the point of view of their inter-individual origin and “destination”, the collective labour contracts, concluded by unions on behalf, and as delegates, of their respective members.<sup>31</sup>

According to the doctrine in question, the situation would thus appear to be the same, *mutatis mutandis*, as the situation obtaining in municipal law.<sup>32</sup> As well as an integrated community, the universal society would be provided with a legal order of the whole embracing its individual members regardless of their affiliations to partial groups. Such a legal order, in its turn, would be naturally provided with “original” organisation (the several States as international institutions) and with an inter-institutional compact (the treaty) able to modify or develop such organisation just as the constitutional or ordinary legislation can provide, within a national society, for the modification or development of the community’s central or local organisation. Objectively, States would be legally enabled to create, in their capacity of international institutions, further institutions, just as individuals, corporations and States themselves can do so in municipal law. Subjectively, individuals themselves being involved in the constitutive instrument, there is no difficulty for them to be vested with international positions similar to those occupied by the individuals holding offices and exercising functions within the structures of public or private institutions of municipal law. The “directly human” basis of the legal order (the social basis) would be an adequate humus, so to speak, for the growth of a hierarchical system, vertically more developed and continuous from the social basis up to the top and vice versa.

According to the “constitutionalists”, in effect, the treaty as envisaged operates directly as a *centralising device* among the States involved and their peoples. The resulting institution would thus be a body corporate, embracing the member States and their peoples into a more

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<sup>28–30</sup> As opposed (*infra*, paras. 130–131) to the *organised* constitution of the legal community of *mankind*.

<sup>31</sup> When, some time ago, we made this point and the following with regard to the potentiality of the inter-State compact—*Rapporti contrattuali*, at pp. 15 ff., it was opposed by Kunz, in his review in *Oesterreichische Zeitschrift*, 1955, that we had overlooked the analogy between international treaties and “collective labour contracts”. On the contrary, this matter was deliberately discussed by us (not only in *Rapporti contrattuali*, at pp. 24, 48 ff., but also in *Gli enti*, p. 390), precisely to demonstrate the fallacy of the analogy arbitrarily established by the “constitutionalists”—Kunz among them—between “collective contracts” and international agreements.

<sup>32</sup> For the differences *infra*, paras. 131 ff., 136–137 and 148 ff.

centralised legal fabric. Such a legal fabric would be just a development or a ramification, in its turn, of that continuous texture of the universal order which already embraced—through a law of nations conceived in constitutional terms—the legal systems of the several States.<sup>33</sup>

118. The constitutional (“public law”) nature of the rules governing the relations among States seems to merge at this point with the pattern of the private law corporation. On one hand the “public” character attributed by the doctrine to States themselves and to the decentralised legal structure under which they coexist—international law—would warrant the notion of a centralising process developing within a world constitution. On the other hand the idea of the collective body created by States at will like a joint stock company would convey the idea of a “collective will” and of organs “representing”, or “making” that “will”.<sup>34</sup>

The result—especially since the establishment of international unions of general competence like the League and the United Nations—is a hybrid structure in which the gigantic proportions of the system of coexistence among powers combine with the elements of solidarity and vertical (hierarchical) organisation which are common to most forms of private associations of municipal law. Both trends thus conspire to convey the concept of a “constitution”—of a more centralised constitution. As we were saying above, this leads one

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<sup>33</sup> This point is central for the full understanding of the doctrine in question: “La dottrina in parola—se bene la intendiamo—considera gli ordinamenti delle unioni di Stati come diritto interindividuale distinto, al pari di tutto il diritto internazionale, in due categorie di norme: norme interistituzionali *indirettamente* interindividuali e norme interistituzionali *direttamente* interindividuali. Le prime sarebbero le norme internazionali di tipo classico, quali si rinvengono anche nella maggior parte degli articoli degli statuti di enti internazionali. Le seconde sarebbero per l’appunto—oltre alle norme statutarie che coinvolgano direttamente individui—le norme degli ordinamenti interni degli organi internazionali. In coerenza con le premesse tratterebbe però in entrambi i casi di norme della medesima qualità e origine ‘umana’. La sola differenza risiederebbe nel carattere *più o meno diretto* della determinazione delle persone fisiche che sarebbero destinatarie giuridiche ultime delle norme in questione come di ogni altra norma internazionale. Lo stesso diritto internazionale classico rappresenterebbe dunque una fase transitoria dell’organizzazione della società umana universale; esso sarebbe già dotato—in potenza (normativa)—degli strumenti giuridici di superamento di carenze che si riassumono in ultima analisi nel *decentramento* delle funzioni. Tale superamento si starebbe per l’appunto svolgendo sotto i nostri occhi grazie a quella illimitata potenzialità dell’accordo internazionale della quale abbiamo avuto già occasione di parlare. . . In questo . . . disegno scompare—una volta eliminato con un tratto di penna il salto qualitativo fra diritto internazionale e diritto interindividuale—non solo ogni distinzione di qualità fra organizzazioni *internazionali* e *sovranazionali* ma addirittura la distinzione fra unioni *costituzionali* e unioni *internazionali* quali la confederazione, la Società delle Nazioni e le Nazioni Unite . . . Tutti i fenomeni associativi umani—Stato unitario, Stato federale, confederazione, Nazioni Unite, enti sovranazionali, e domani lo Stato mondiale—si collocherebbero, dal punto di vista normativo, entro un *continuum* giuridico universale costituito dal diritto più o meno perfetto dell’umanità.

L’innesto nel diritto internazionale della normativa interindividuale-gerarchica interna degli organi internazionali non presenta, a questo punto, nessuna problematicità. Secondo Kunz, per es., la comunità internazionale sarebbe sempre stata essa stessa una unione di Stati, intesi questi come comunità giuridiche parziali (Kunz, *Die Staatenverbindungen, Handbuch* di Stier Somlo, vol. II, Stuttgart, 1929, pp. 258 e segg.) . . . Ogni unione internazionale impone in un ambito umano e spaziale nè più nè meno di come ciascuno Stato impone nel proprio. In virtù dello statuto dell’Unione postale universale, per es., esisterebbero *un territorio* e *un’ amministrazione postale universali* . . . (Guggenheim, *Lehrbuch des Völkerrechts*, I, 1948, p. 221). Nel sistema della Carta delle Nazioni Unite l’insieme dei popoli degli Stati membri formerebbe *il popolo dell’organizzazione* . . . (*Rapporti contrattuali*, pp. 82–83, e *La questione cinese*). Basta che gli Stati concludano e attuino gli accordi necessari perché ogni ‘lacuna’ o carenza del diritto delle genti venga gradualmente colmata sino alla costituzione, mediante accordi di unione sempre più perfezionati, della federazione mondiale” (*Diritto internazionale*, etc., pp. 217–219).

<sup>34</sup> Both concepts—the corporate body’s and the constitution’s—are present in the writings of the most prudent and realistic among international lawyers. For a recent example one can see Schachter, in *Proceedings*, American Society of International Law, 1970, at pp. 281 ff. “Constitutional matters” would seem to be the “whole international constitutional system”, with regard to which the United Nations, obviously as the main constitutional body, would take care of “orchestration” (at p. 284).

to conceiving the United Nations, while denying, of course, that it is a Super-State, as a primitive stage of the world federal structure. Isn't the doctrine's assumption that the idea of the State is already inherent in the law of nations? Indeed, that idea is *doubly* inherent in the doctrine. It is inherent in the sense that there is a "State in the sense of international law" and in the sense that international law is only a decentralised form of the same kind of normative structure which in national societies takes the form of the State.

All the elements are thus assembled for the specialised scholar to testify that we now live in an "organised" or more "organised legal community of mankind".<sup>35</sup> The new "voluntary" institutions seem to be grafted without difficulty into the body of the law of nations as additional infrastructures operating among the old *provinciae*—the sovereign States—and gradually to supersede the organs of the latter in the performance of the functions formerly entrusted by the universal order to States alone.

119. As the constitutionalists envisage it, the process appears like the reversal, three centuries later, of a decentralisation into the hands of States of the functions of the *civitas maxima*. Westphalia would have marked the outcome of a process consisting in the decentralisation of the functions into the hands of States. In our time, the universal and regional organisations of general or special competence would represent as many manifestations of a centralising process, by which some of the functions exercised for so long by States alone are transferred to new institutions.

As a result, to the classic forms of human association recalled earlier—the unitary State, the federal State, the confederation, international law<sup>36</sup>—two main new forms would be added. One is represented by the League, the United Nations and the other universal or regional, general or specialised, inter-State organisations. These qualify as the "international organisation" type. The other form is represented by the three communities of European integration, qualified as the "supranational organisation" type. The *continuum* considered earlier is thus completed, without losing in . . . continuity and without any qualitative *saltus*, by the interpolation of the "international organisation" and the "supranational" between the federal State on one side and the international community or international law on the other.<sup>37</sup>

In the XXth century as in the centuries preceding Westphalia, the decisive element, the *centre moteur* of the process is the will of the universal community as expressed by, and

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<sup>35</sup> One could cite here innumerable authors. Suffice it to refer the reader, in addition to already quoted works, to Jenks' writings.

Other authoritative representatives of the trend of thought in question—albeit with very considerable differences of degree—are Waldock, quoted *General Course*, pp. 5 ff. ("the beginnings of an organised international community"), especially at pp. 7 bottom, 20, 26 ff., 31; and Lauterpacht, according to whom "While, obviously, the General Assembly is neither the sovereign nor the legislative organ of the international community, it is the common and probably the highest organ of the *sovereign States organised in the United Nations*. It is in a distinct sense the repository of such ultimate authority as there exists in the *organised international society*" (from *The Development of International Law by the International Court*, at p. 326: italics added).

Significant examples are also Waldock's summary (at p. 26) of the International Court's Opinion on *Certain Expenses of the United Nations*, and the same author's concept of the State as an international person (at p. 107). Waldock's position with regard to the federal analogy has been mentioned earlier.

In a similar vein are less deliberate, often incidental, viewpoints expressed here and there by scholars belonging to the most disparate schools of thought. As an example, see Jessup's celebration of the XXVth anniversary of the United Nations, in *Hague Rec.* 1970—I, especially at p. 23.

<sup>36</sup> *Supra*, para. 115.

<sup>37</sup> One version of the *continuum* seems thus to be, in decreasing order of centralisation, unitary State-federal State-confederation-supranational community-international organisation (United Nations)—international community. In other versions the supranational organisation type would precede confederation, or, better, precede confederation or follow it according to the aspect of the supranational communities which is being considered.

sanctioned in, the law of nations as the law of mankind. *Voluntas civitatis maxima*e. This would always be the ultimate source—today as yesterday—manifesting itself through treaty or custom. Yesterday the *will* of the organised legal community of *mankind* chose decentralisation. That same *will* provides in our time for a gradual centralisation process.<sup>38</sup> The same *peoples*, it would seem, which at Westphalia—acting supposedly through the *princes*—empowered the princes themselves as their law-making and law-determining agents, are now proceeding, in the XXth century, to a kind of redistribution of functions between States on one side and international and supranational institutions on the other side.

This would be, somehow, the profound meaning of the initial statement of the Charter preamble: “We the peoples”. Although set up by States by means of treaties, international organisations would thus be vested with international functions by a *will transcending* or bypassing—in a way—the will of States: because the States themselves have always been according to the doctrine, in the alleged capacity of decentralised organs, the spokesmen of the universal community.

120. It is natural, at this point, that in the study of international organisation the lawyer should have recourse to the federal analogy and the theory of divided sovereignty. Like federal institutions, the institutions that the international community is creating would acquire a constitutional life of their own. Accordingly, one should extend automatically to the United Nations Charter the *dictum* of Justice Holmes of the Supreme Court of the United States: “When we are dealing with words that are also a constituent act, the Constitution of the United States, we must realise that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a Nation”<sup>39</sup>

This is but the logical consequence of the constitutional conception of international law. As the ultimate emanation of the will of the peoples—the will of mankind as one people—the Charter is an expression of the centralising will of the universal community in the same way as the constitution of a federal State is the expression of the centralising will of the peoples of the federated States as one people.

It follows that except for matters covered by the problematic and practically ineffective reservation contained in paragraph 7 of Article 2,<sup>40</sup> the Charter provides, in substance, for a kind of division of sovereignty between member States and the organisation, just as the federal constitution provides for the delimitation of the respective spheres of competence of the member States and of the federation. One can say, consistently, that the time has come to set aside the old prejudice of the indivisibility of sovereignty.<sup>41</sup> The close connection of this

<sup>38</sup> An example is in Fitzmaurice, “Judicial Innovation”, etc., in *Cambridge Essays* at pp. 24 ff., quoting *dicta* of the International Court of Justice on questions concerning the powers of the United Nations. It remains to be seen whether the Court really shares, as Fitzmaurice seems to believe (at p. 25) the concept of a *voluntas civitatis maxima*e. See also Bowett “The impact”, etc., *Proceedings*, American Society of International Law, 1970, pp. 48–51, and Quincy Wright, *ibidem*, at p. 52 for the idea of an “historical turning point” of the international community.

<sup>39</sup> *Missouri v. Holland*, quoted in Jenks, *The Prospects*, at p. 488. Strong doubts are formulated, about Jenks’ assumption, by Gross, Leo, “The International Court of Justice and the United Nations”, in the *Hague Rec.*, 1967, at p. 403: “the United Nations is not like the United States *even in its infancy*. The *possibility*, of course, cannot be excluded that after a century, and as Mr. Justice Holmes said, much sweat and blood—not to mention Sir Winston Churchill’s tears—the United Nations will acquire the degree of integration which will make the comparison with the federalism of the United States more tenable” (emphasis added). The federal analogy is discussed, *infra*, Section 5, paras. 148, 149 and 155 ff.

<sup>40</sup> *Infra*, para. 152 and footnote 158 thereunder.

<sup>41</sup> According to Jenks, *The Prospects*, etc., 1964, pp. 497–500, especially at p. 499, the notion of *divisible* sovereignty, inconceivable to the dogmatic school of thought which regarded the essence of sovereignty as

theory with the concept of international law as the constitution of the universal community is demonstrated by the fact that its main representative is also the most ardent supporter of the assumption that international law is the legal community of mankind at an early stage of development.

### *Section 3. The Lack of Integration of the Universal Society and the Nature of International Law*

121. The image of international law and organisation resulting from the doctrine described in the preceding Section—a doctrine spreading far wider than the circle of the authors referred to in that Section—is very attractive for anyone believing, as we for example do believe, in the unity of mankind. It is our impression, however, that that image is largely artificial: and that impression is confirmed by the study of the social basis of international law.

That study—carried out by us a number of years ago—was sufficient to prove, in our opinion, that the reality of the State—its constituency, its organisation, its very establishment, form and vicissitudes—escapes international law in such a measure as to prove that the current conception of States as juristic persons, let alone as organs of international law or legal subdivisions of the legal community of mankind, is an unwarranted, theoretical assumption.

Hans Kelsen describes the attitude of international law towards the State and its form of government as a “strict indifference” of general international law to the form of government of States.<sup>42</sup> Perassi, for his part, describes that attitude in terms of a “freedom of organisation” enjoyed by States under general international law.<sup>43</sup> If, however, one looks at the matter in greater depth, one finds that there is much more than “indifference to” or “freedom of” organisation.<sup>44</sup> It is really something deeper. The absence, in general international law, of rules concerning the establishment, form of government, organisation, modification of States means absence of rules establishing States as legal subdivisions of the universal society. It means absence of rules legitimising the State’s or government’s power *vis-à-vis* their subjects, namely the absence of rules of international law *telling human beings* that they are legitimately—also and primarily for international law—subject to that State’s or government’s power and not to any other’s, or that they are subject only to the power of such a State or government as has been established in a certain area and is governed in a certain manner.

Rules playing such a role with regard to the subdivisions of the national society abound in municipal law. Under such rules only given entities—created in a certain manner and/or governed in a certain manner—are legitimised in the eyes of the *whole national society*. As will be shown further on, there are a multitude of obvious examples.<sup>45</sup> Suffice it to mention here the “Enabling Act” of the Congress of the United States which lies at the basis of the legitimisation of new member States.<sup>46</sup>

The existence of such rules in municipal law is precisely the consequence and evidence of

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being its absolute quality, has been made “familiar”—in the domain of international law—“by the constitutional theory of federalism”. Discussion *infra*, paras. 149 ff.

<sup>42</sup> Kelsen, *The Communist Theory of Law*, pp. 169–170.

<sup>43</sup> Perassi, *Lezioni di diritto internazionale*, parte prima, 4th reprint, 1955, pp. 102 ff.

<sup>44</sup> Perassi’s theory is particularly objectionable in that no such “freedom of organisation” is even conceivable prior to the establishment of a State (*Gli enti*, pp. 340, 345). Kelsen and Perassi of course admit that the situation obtaining in general international law (“indifference” to, or “freedom of”, organisation of States) can be derogated from by conventional rules (*L’Etat*, pp. 6–9 and 265 ff.).

<sup>45</sup> *Infra*, para. 133.

<sup>46</sup> *Ibidem*.

the fact that the legal order in question, as any national order, is an essentially inter-individual law, able and willing as such to tell *all* concerned who, within that system, governs whom and by which ways and means.<sup>47</sup> This applies to all private as well as public bodies within a federal or unitary State, without exception, whatever the degree of the promoters' or founders' autonomy.<sup>48–49</sup>

If international law does nothing of the kind with regard to States—and we refer not to *enforcement* of given régimes or structures—it is not just a matter of indifference or respect for the freedom of States. It follows from the fact that international law—general or particular, customary or contractual—is not the supreme echelon of a public law of mankind in the sense in which the federal constitution (as originally adopted and evolved through practice) is the supreme law of a nation. When a State or a government is established or modified, international law has nothing to say for or against that fact *to the human community* involved, either prior or subsequently to the fact.

Treaty rules which make exception to the so-called ideological or political “indifference”, or limit the so-called “freedom of organisation” prevailing at the level of general international law, simply do what rules of international law, contractual *or* customary, usually do with regard to the conduct of States concerning *any* subject-matter.<sup>50</sup> Such rules bind the contracting States, for instance, to some action or inaction with regard to the formation of a new State. Or they bind the contracting States to recognise or to refrain from recognising given States or governments, or any States or governments established not in conformity with the criteria set forth in the treaty. Or they bind a State to maintain a certain form of government or not to establish another. It is arbitrary, in our opinion, to understand such rules—or the doctrines such as the *Tobar*, *Wilson* and *Estrada* doctrines—as rules affecting the constitution of the State or government in question *vis-à-vis the subjects of that State*.<sup>51</sup>

122. This is confirmed by a host of further data. One set of such data is the peculiar position—*vis-à-vis* the law of nations—of the individual subjects of States as compared to the position—*vis-à-vis* municipal law—of the individual members of the State's subdivisions and of municipal law corporations.<sup>52</sup> Another set of data is represented by the peculiar position—*vis-à-vis* the law of nations—of the agents of States as compared to the position of the agents of a State's subdivisions or municipal law corporations *vis-à-vis* the national law.<sup>53</sup> As well as the establishment of States and their form of government (and their vicissitudes) these problems are inadequately explored by the current doctrine of international law.<sup>54</sup>

Under municipal law the members of any public or private subdivision are legally bound to the whole society in the *first* place. They belong in law to the whole community *before* belonging to a canton, a *département*, a province, or any private association. However tight the partial community's bond may be, the national bond prevails. The national allegiance is legally supreme. The national bond is actually so prevalent that it is precisely by being a

<sup>47</sup> *Gli enti*, pp. 56 ff. *Infra*, para. 133; and *L'Etat*, pp. 265 ff.

<sup>48–49</sup> *Gli enti*, pp. 57–65; and *Diritto internazionale*, paras. 16 and 52.

There is no need to concern ourselves with the further *datum* that these rules are also enforced by the State.

<sup>50</sup> The prevailing view that the object of international law is not restricted in any way *ratione materiae* is, in our opinion, correct. Of course, international law can concern itself with any aspect of the *internal* as well as the *external* conduct of States. See, however, *supra*, para. 110, footnote 18 thereunder and *infra*, para. 164.

<sup>51</sup> *Diritto internazionale*, etc., quoted paragraphs, especially pp. 111–113.

<sup>52</sup> For individuals, *Gli enti*, pp. 250 ff.; and *L'Etat*, pp. 28 ff.

<sup>53</sup> For the agents, *Gli enti*, pp. 319 ff; and, further, *Diritto internazionale*, pp. 36–38. Add: *L'Etat*, p. 311 ff.

<sup>54</sup> Having studied the whole matter *ex professo* (including the international status of private parties) as the most significant among the elements relevant for the determination of the social basis of international law, we must refer for developments to our indicated works. What follows in the present paragraph and in the subsequent one is only a summary.

person under the whole community's law that an individual participates in the "founding" of a private corporate body and is subjected to its by-laws. The situations of individuals in international law is diametrically opposite. The bond of each human being with a given political subdivision—the sovereign State—is supreme and original. It is supreme in that there is no legal bond with the universal society as a "whole" society. It is original in the sense (just explained) that the subjection of a person to a given State or government is neither provided for nor legitimised by international law. The individual, as a rule, is not even a subject of international law. When he is, allegedly, assumed as a subject, the international rule does not really involve him directly and self-sufficiently (as is the case with the rules addressing themselves to the members of a municipal law subdivision). The operation or the very existence of the international rule "addressed" to individuals presupposes municipal rules and/or States as the makers and direct addressees of the international rule.

Similar considerations apply to the position of the agents of sovereign States as compared to the position of the agents of municipal subdivisions. In a national society, the agents of public subdivisions or private corporations—the rulers of partial communities—are subject, so to speak, to a double set of "controls", in the form of legal directives or sanctions. On the one hand they are subject to directives and sanctions embodied in the subdivision's or corporation's charter. At the same time the agents in question are subject to directives and sanctions emanating from the legal order of the whole national society: of which, it should be added, the subdivision's or corporation's charter is an integral part. In other words, the subdivision's or corporation's agents are legally *such*—and legally bound as such to provide for the good government of the subdivision or corporation—in the eyes of the legal order of the whole community.

On the contrary, the rulers of the several national communities are only subject to the "control" of their respective national systems. They are not subject to external "controls" emanating from the universal society. Even when international law affects their conduct, it does so by rules addressed to the "body politic" of each State as a whole. Attempts made so far to condition the individual rulers of States by international law have not attained results so significant as to allow the conclusion that those rulers are answerable to the universal society in any sense comparable to the sense in which the administrators of a national subdivision or corporation are bound by the law of the whole national society. The problem is closely related to the international condition of individuals in general.<sup>55</sup> For the "agents" of national communities to be affected by international law in the sense here envisaged, the individual rulers and their subjects should be international persons *in the first place*: and they should be such persons on their own, and not just through the "media" of the States to which they belong, or of such States' legal systems.

123. The peculiar condition of States' subjects under international law and the peculiar condition of the agents of States under international law are at one time causes and effects of the attitude of international law towards the State as a whole. And this attitude proves that the entities with the relations of which modern international law is essentially concerned—the modern sovereign States—do not appear to be the *provinciae totius orbis* that Vitoria and Suarez in the old time, and Kelsen, Verdross and Scelle in our time, deem them to be. Of course, they are collective entities, held together, *inter alia*, by normative factors, notably by

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<sup>55</sup> For the consequences in the field of treaty-making and international tort see *Gli enti*, pp. 320–333 and 335 ff. See also *Diritto internazionale*, pp. 58–75. The essential differences from the prevailing doctrine are summed up in the latter work in the footnotes of pp. 60–64, 67–68 and 72–75. At p. 63 (footnote 1) we compare our view with Morelli's (*Nozioni*, 1963, pp. 183 ff.), the latter being generally shared in the Italian doctrine. At pp. 29–30 and 60 we compare with Quadri's views, old and new. Developments (esp. on Ago's position) in *L'Etat*, pp. 311–331.

the legal systems obtaining in the human societies over which they rule. From the point of view of international law, however, States are not *provinciae*.

Unlike municipal law subdivisions, sovereign States—States “in the sense of the international law”—are not conditioned from within by a universal law of men. Even when it concerns itself with “matters internal”—the enjoyment of human rights within a State, or the juridical, administrative or legislative activities of the State, or the very constitutional structure of the State—international law does not mould the State in the sense in which juristic entities are moulded by any municipal law. Sovereign States coexist, of course, in the middle of the universal society of men as a *natural* society. However, the above-mentioned data—together with many other facts not seldom accepted or stressed by the “constitutionalists” themselves—prove that in regulating inter-State relations with regard to matters external or internal, the law of nations does not function as a supra-constitutional law of mankind.<sup>56</sup>

The State is a fact in the law of nations in a far more decisive, radical sense than the sense in which it is generally considered to be a fact from the viewpoint of the State’s own law.<sup>57</sup>

The States of international law are factual collective bodies definable as “corporate bodies” only if this term is used in a purely material sense.<sup>58</sup> In international relations, and therefore in the *sense* of international law, the State is not a secondary, artificial, person. The “State in the sense of international law” is a “given” person, a real entity, one of the elementary units among which international law operates. It is thus a primary person.<sup>59</sup>

States are the entities composing the “social basis”, the constituency of international law. In relation to international law, States occupy a position similar to the position of physical persons in municipal law. States are the private parties of the international system.<sup>59a</sup>

The most plausible explanation of this fact—corroborated by the history and the sociology of international relations of any time—is that the universal society of men has not developed yet, especially in the field of public law, into a universal legal community.

Indeed, even the transnational legal relations between private parties are usually attracted under one or the other of the coexisting national orders by the interplay of the various systems on conflicts of laws and conflicts of jurisdiction. In spite of this, it is *perhaps* conceivable that *some* measure of community of *private* law manifest itself within the universal society. We refer to such uniform rules or principles of private law as might

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<sup>56</sup> This state of affairs—not an allegation of ours (as thought by Kunz, book reviews quoted *infra*, footnote 59)—is not altered by the United Nations Charter. The matter is discussed in *La questione cinese*, pp. 91–95.

<sup>57</sup> It is obvious, however, that the perception of the factual nature of the State from the viewpoint of international law will be obscured if one starts from a “factualized” vision of the *legal* situation obtaining in municipal law. For example, when Fitzmaurice describes questions of representation, including presumably *representation in national law*, as questions of *fact*, the peculiarity of the State-government relationship under international law will inevitably be attenuated, or vanish altogether. References, and discussion of Sir Gerald’s *dictum*, in *La questione cinese*, at pp. 88–89.

<sup>58</sup> The term “corporate body”, would be appropriate for the State in the sense of international law in so far as it stressed only the *non-visible unity* of the State as an international person. That same term is very misleading, however, in so far as it implies—as in the technical language of lawyers it does imply—that the law under which the entity is a person (namely the law of nations) would perform any regulatory function in legitimising it, in keeping its constituency together, in moulding its structure, in governing the competence of its organs, etc. Compare Corbett, *Social Basis of a Law of Nations*, pp. 482–485.

<sup>59</sup> See especially *Gli enti* and *Dinamica*.

<sup>59a</sup> Our conclusions with regard to the *State* in the sense of international law are fully confirmed by the study of all international persons other than States: the Holy See (*Dinamica*, pp. 43 ff., 83, 87; and *Diritto internazionale*, pp. 76–98); Insurgents (*Dinamica*, pp. 48 ff. and 9 ff.; *Diritto internazionale* pp. 99–116); Committees and Governments in Exile (*Dinamica*, pp. 148 f., 151 ff. and *Diritto internazionale*, 117–145); International Organisations (*Rapporti contrattuali, passim*; *Diritto internazionale*, pp. 196–268 and *infra*, Sections 3–7 of the present *Appendix*). Add: *L’Etat*, pp. 36–50.

qualify, rather than just as *uniform* law, as common private law of all peoples or a few.<sup>60</sup>

At the level of public law, however—or at the level of what one roughly understands by that term—there does not seem to be any evidence that such a community exists.<sup>61</sup> States operate, in their mutual relations, in a space “empty” of rules of an interindividual public law stemming from the whole society of men.<sup>61a</sup>

124. This seems to be confirmed by the historical origin of international law. This law does not seem to have originated from an involutive process of the legal order of *Respublica Christiana*. The beginnings of modern international law are to be found—many centuries before Westphalia<sup>61b</sup>—not so much in a process of “decentralisation” of the universal order of the feudal State as in the distinct formation of inter-sovereign rules in the course of the centuries during which that universal order underwent so many *alterne vicende* before reaching the stages of evanescence and extinction. International law originated in the “gaps” and because of the very “gaps”, temporal and spatial, of the increasingly ineffective universal law of Empire and Papacy.

The rules of the law of nations (embassies, arbitration, the law of war and truces, immunities) developed naturally in the “spaces” permanently or occasionally exempt from the hierarchical authority of Emperor or Pope.

It was within such spaces that kings, *seigneurs* and cities got to stand up as independent entities and to entertain mutual relations *as such*, long before their “sovereignty” was recognised or even spoken of. It is in, and with regard to, such egalitarian relations that the rules in question came into being, in *coexistence*, over some centuries, with the claims of Emperors or Popes to universal obedience and in *coexistence* with the idea of the universal State but *not within the framework* of the temporal or spiritual order of that State.

Of course, once the effective power of Emperor or Pope came finally to an end, and the idea of the universal community of mankind became a remembrance of the past and a more or less utopian aim to pursue, there only remained, to govern the relations of kings, *seigneurs* or governments, the egalitarian law of nations. From a distance this may convey the concept of a kind of metamorphosis of the universal order itself from a hierarchical to an egalitarian structure. But such was not really the case. The egalitarian, inorganic law of nations was a new growth. It was not another, decentralised, form of the universal order of mankind.

We may be mistaken, of course. But decentralisation seems not to have been the process by which the immense gap left over by the downfall of the *Respublica* was occupied, and has now been occupied for centuries, by international law.

125. The fact that from the juridical point of view the universal society of men expresses not a legal order “of the whole” creates a very special situation both *below* and *above* the

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<sup>60</sup> The problem is discussed by Dekkers, *Le droit privé des peuples*, Bruxelles, 1953.

<sup>61</sup> *Dinamica*, pp. 25 ff.; *Diritto internazionale*, pp. 33–43.

<sup>61a</sup> Among the works mentioned in the footnote to the title of the present Appendix, *Gli enti* was reviewed by Mazziotti, “Rivista trimestrale di diritto pubblico”, 1953, pp. 153 ff.; by Münch, in *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht*, 1952, p. 560; by Kunz in *American Journal of International Law*, 1953, pp. 512–513 and (together with *Rapporti contrattuali*) in *Oesterreichische Zeitschrift für Oeffentliches Recht*, Band VI (Neue Folge), 1955, pp. 105–107. *La Dinamica* is reviewed by Quadri, in *La comunità internazionale*, 1955, pp. 202–203; and *Rapporti contrattuali* by Quadri himself, same periodical, 1952, pp. 180–181.

<sup>61b</sup> Adde: Oddini, “Elementi internazionalistici ed elementi interindividuali nell’ organizzazione internazionale”, *Rivista di Diritto internazionale*, 1953; and Sperduti, “Sulla soggettività internazionale”, same *Rivista*, LV (1972), pp. 266–277. See also Morelli, *Stati e individui nelle organizzazioni internazionali*, cited *supra*, footnote 24 to the present Appendix.

<sup>61b</sup> Gross, “The Peace of Westphalia, 1648–1948”, *American Journal of International Law*, 42 (1948), pp. 20–41.

level of the vertices of coexisting political communities.

Below that level, there are as many systems of inter-individual law as there are sovereign States, and not connected with each other by a continuous normative texture. Above that level, one finds, instead of such a continuous texture—instead of a public law of mankind as inter-individual law—a body of *sui generis* rules, the existence, structure and contents of which derive their *raison d'être* from inter-State relations as such.

In other words, the lack of the continuous normative texture corresponding to the public law of mankind determines a discontinuity not only between each national legal-system and the other national systems but also between international law on one side and each national system on the other.

The discontinuity between international law and each national system—and with inter-individual law in general—is actually even more pronounced than the discontinuity between any two or more national systems. In the latter case it is a matter of separation between the sovereignties and the law-making processes of different political communities. In the case of international law and national (inter-individual) law, the analogous separation of *milieu* and law-making processes is deepened by the concurring *qualitative* difference between inter-group rules and inter-individual rules: between rules finding their *raison d'être* in inter-group relations as such and rules finding their *raison d'être* in the relations among individuals.

The *raison d'être* of international law—its essential *raison d'être*—is the conflicts of interests between States and the adjustment thereof.

126. The features of international law are frequently explained by the doctrine in terms of scarcity of values common to States of different cultures and different political and socio-economic régimes. In this scarcity would reside, for example, the main cause of the alleged primitiveness of the law of nations.

But States do share, *qua* States, not a few common values. Suffice it to compare legal policies proposed at a meeting of private persons from different countries and devoted to any issue of international relevance with the legal policies emerging from a meeting of governmental delegates—or “governmental scholars”—concerned with the same issue. The most likely result of the comparison will be that States have a very precise set of values in common. These are the values of independent governments determined not to accept dependence and to preserve the exclusive control of the community over which by love or by force they rule. Those values, and a series of corollary values, are universally shared by States.<sup>62</sup> Typical States’ values of that kind embodied in the Friendly Relations Declaration (as in the Charter) are sovereign equality, with its corollaries, and self-defence. A principle deriving from a universal States’ value is also the so-called “last resort” right of member States to resist *ultra vires* acts of international organs. There are also *sectorial* values, more or less permanently or occasionally shared within given groups of States. Examples are the external projections of ideological, political and socio-economic values common to the “Socialist” States or to the “Capitalist” countries; or purely States’ values common to the countries of one or the other group or of the “Third World”. Among the latter are the values which determine the particular sensitiveness of the developing countries with regard to matters of economic development and with regard to equality; and the values which determine the similar sensitiveness of “Socialist” States with regard to sovereignty.<sup>63</sup>

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<sup>62</sup> An exception, of course, is the case of States which prepare to merge into a larger political unit. The exception only operates, however, *vis-à-vis* the envisaged federal structures.

<sup>63</sup> *Supra*, Chap. V, paras. 86, 97, 99. For the Soviet position see especially Tunkin, “Coexistence and International Law”, *Hague Rec.*, 95 (1958), pp. 36–44; and McWhinney, “‘Peaceful Coexistence’ and Soviet-Western International Law”, *American Journal of International Law*, 56 (1962), pp. 951–970, especially at pp. 958 ff. Add McWhinney’s works indicated in the Bibliography.

What is commonly considered to be a scarcity of common values among States is rather the particular relationship between human values and States' values which is at the basis of the existence of international law as a body of *sui generis* rules of inter-State conduct.

No doubt, human values are becoming increasingly relevant in international law.<sup>64</sup> In so far, however, human values emerge in the law of nations, as the national and international forces behind them manage deliberately or unconsciously to translate them into States' values of international legal relevance. And although it is not excluded that human values obtain in the law of nations, under given circumstances, a very high degree of satisfaction, it is also possible that they either result so incompatible with States' values (or with the values of the States whose will or attitude would be decisive for the transposal) as to remain *below* the threshold of inter-State law, or result not sufficiently compatible with States' values to obtain *adequate* satisfaction. But in any case, whatever the degree to which a human value manages to emerge in the law of nations, it will have undergone, in the process, a certain measure of alteration or deformation, in the absence of which it would not emerge as an international—namely inter-State—legal value. A physical analogy is perhaps the emergence of a ray of light from under the surface of a more or less limpid water.

An example is the value of human life in a national society and in international society. In national law "Thou shalt not kill" is an almost absolute rule. In general international law the rule is altered very substantially. The States' values underlying, or manifesting themselves through, *ius ad bellum*, self-help (and self-defence) act as deforming factors of the original human value. Another example is self-determination. Albeit "humanly" universal, self-determination has been for some time, in the practice of the United Nations if not in the law (*supra*, Chap. V), the self-determination of *colonial* peoples, a limitation hardly conceivable within a national society. The deformation was obviously due to the weight, at inter-State level, of factors such as: the interest of all States (including those which had just exercised the "right" of self-determination) to the preservation of their territorial integrity, the interest of all States—especially but not only despotic States—in averting trouble from their own people, the interest of States ruling over ethnic minorities not to be bothered by the claims of these, the interest of colonial powers not to make matters too difficult for totalitarian governments in (hoped) return for a moderation of the latter's anti-colonialism, etc. Another example is the lack of coincidence, between the law of nations on the one side and many national legal systems on the other, with regard to the exemption of foreign States from jurisdiction. Here again, whatever the further developments of the relevant international rules may be, the human value in question—the exigency that any person be entitled to judicial remedy against any other physical or juridical person, including the State—asserts itself in different measures and manners within its natural, inter-individual environment on one side and at inter-State level on the other.

It seems clear what the "plight" of human values is in the law of the so-called "society of States". For human values to acquire the sanction of international legal rules, principles or (legal) policies, human values must cross, so to speak, a double threshold. One is the threshold represented by the transposal from inter-individual relations to the inter-State *milieu*. The other is the threshold marking the passage from international fact to international law. Both thresholds are *additional* to the threshold that the value in question has crossed or must still cross in order to obtain protection within the legal system of one or more *national* societies.<sup>65</sup>

<sup>64</sup> *L'individuo* first paragraph. By human values we understand those values—moral, cultural, political, ideological—which are expressed by national societies, by mankind as a whole or by given portions of the universal society, including those values which prevail in one or any number of given national communities as expressions of the régimes in force and as supporting or conditioning factors of such régimes.

<sup>65</sup> The indirect nature of the process through which human values acquire an *international* legal value—through

127. The coexistence of more or less independent groups within a non-integrated or a scarcely integrated society—and the consequent growth of inter-group rules distinct and separate from the inter-individual rules operating within each group (and perhaps in limited “areas” of relationships within the whole society)—is not without precedent. The relations among Greek City-States are just one example.<sup>66</sup>

In such instances, however, inter-group relations and rules appear, in retrospect, to have been either chased out of existence altogether, or reduced to marginal rules, by the merging of the coexisting groups into a community embracing the individual members of the groups themselves under a legal order of the whole society.

Be that as it may of precedents, the inter-group rules we see in operation among States seem to have acquired a relatively high degree of stability. The factors of fragmentation of the universal society into a number of separate political communities have consolidated through the centuries, thanks to their operation during the long period which has now elapsed since the time of the *Respublica Christiana*. Inter-group law—the law of nations—has thus established itself very firmly in the space left over by that *Respublica*.

Indeed, the comparatively high degree of stability acquired by the inter-State system, and consequently by international law (compared to other instances of inter-group rules), does not make international law any less inherently precarious as compared to inter-individual law. However firmly established, and however long it may have to last as an inter-State legal system, international law is inherently precarious just the same in that it is the expression of the historical fact of the coexistence of States as sovereign entities, outside of an inter-individual order of mankind. As such, international law is bound, for its prosperity, to the fortunes of that factual situation which is described by the political scientist as the *inter-State system*. As explained in the following paragraph, such a system is not conceivable as a “society” of States in any literal sense but only as a form historically assumed by the universal society and not susceptible—unlike, for instance, a society of men—to be viewed *sub specie aeternitatis*.

128. Indeed, the *milieu*—the *humus* and the domain—of the law of nations can be properly described neither as the *universal society* of men nor as a “society” of *States*. That it is not the law of the universal society has been (hopefully) explained. But the *milieu* of international law does not seem to be the problematic “society” of States either.

As just pointed out, a “society” of States is really unthinkable, except as a kind of monstrous science-fictional group of superhuman collective bodies. To conceive the body of the rules of inter-State conduct—the law of nations—as the legal order (*ordinamento*) of a “society” of States would imply that such a society possess the feature of permanence. But such permanence is reconcilable neither with the historical experience prior to the establishment of sovereign entities (*seigneurs*, *civitates*, *regna superiorem non recognoscentes*) nor with the possibility, however plausible, that the universal society evolve towards more integrated forms, within which a “society” of States and a body of *sui generis* rules of inter-State conduct would be unthinkable.

The conception of the *milieu* of international law as a “society” of States in any literal sense presents the further logical disadvantage of not making any room for the idea—if not

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the medium of *States*’ attitudes and behaviours—confirms the distinction between the sources of international law and the sources of interindividual (notably national) law (*infra*, Section 7). This applies to custom as well as to treaties and other sources of voluntary law (*infra*, paras. 161 ff.). *Contra*, in Italy, Barile, *Diritto internazionale e diritto interno*, 1957, *passim*.

<sup>66</sup> *A la limite*, one finds similar phenomena within integrated societies themselves, whenever political or ethnic groups, or local communities, get to face each other in a situation where national institutions are lacking in effectiveness.

the reality—of those transitional phenomena or developments, without which one can hardly envisage the progress of mankind—however imperceptible—towards a state of less marked disintegration. It is not conceivable that such a progress could only be achieved by the sudden collapse of existing political communities and an equally sudden appearance, by magic, of the legal community of mankind. It is more plausible to envisage, as a *futurable*, a period of transition marked by phases of evolution, *stasis* and involution. During such a period it is conceivable that there develop “des formations normatives qui ne sont ni purement étatiques ni simplement interétatiques. Nous songeons à ce ‘droit privé commun’ des peuples mentionné plus haut,<sup>67</sup> et à certains aspects du ‘droit interne’ des organisations internationales” with which we shall deal further on.<sup>68</sup> Whatever the *present* “location” of such phenomena may be—outside of international law proper—the only *milieu* to which they may *ultimately* belong is that universal society of men which for the time being seems to us not to possess the features of the alleged legal community of mankind.

Reverting to the present, if the *milieu* of international law is neither the universal society of men nor a problematic “society” of States, one does not escape the conclusion that it is the coexistence or *convivenza* of States.<sup>69</sup> More than a matter of *society*—international *society* in a wide sense or international *society* in a narrow sense<sup>70</sup>—it is a matter of a certain *kind of relations* among a certain *kind of entities* as these emerge—as giants, in a way—against, or above, the distant background represented by the universal society of men.

129. Reverting once more to the French language, “la caractérisation du droit international par rapport aux autres phénomènes juridiques ne se réduit donc ni dans les termes monistes ni dans les termes dualistes ou pluralistes courants.

Pour les monistes, il s’agirait d’une simple différence de degré (en considérant l’alternative de la primauté du droit des gens), combinée avec un rapport juridique de complémentarité, entre droit international et droit interne. Ceci est inexact justement à cause du défaut d’intégration de la société universelle, du manque de conditionnement des communautés étatiques par un droit de la société humaine totale (ou de ses régions), et de la nature spéciale—and notamment différenciée par rapport au droit interindividuel—que les règles interétatiques acquièrent à cause de la façon dont les Etats se présentent les uns *vis-à-vis* des autres: c’est à dire au sein de la société universelle totale, mais sans être les instruments juridiques de celle-ci.

Pour les dualistes-pluralistes, il y a l’ordre de l’Etat ou les ordres des différents Etats d’un côté, et le droit de la société des Etats de l’autre. Ceci est beaucoup plus proche de la situation réelle que ne le sont les doctrines de Scelle ou Kelsen: mais on ne tient pas suffisamment compte du caractère composé des Etats, de la difficulté d’isoler une société d’Etats comme phénomène permanent au sein de la société humaine universelle, et de l’impossibilité de placer dans le cadre d’un dualisme aussi rigide les phénomènes juridiques internationaux—quelle que soit leur importance actuelle—qui ne se laissent ranger ni dans le cadre du droit interne de tel ou tel Etat, ni dans le cadre du droit interétatique.

A la place du dualisme ou pluralisme un peu borné de la fin du XIX siècle nous envisageons un dualisme entre deux espèces de phénomènes juridiques se déroulant au sein de la société humaine universelle. Ces deux “espèces de droit” correspondent au droit interindividuel d’une part, et au droit entre les Etats en tant que puissances d’autre part.

Cette distinction du droit international des autres phénomènes juridiques est plus précise, plus complète et en même temps plus souple que la distinction courante chez les dualistes.

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<sup>67</sup> *Supra*, para. 123.

<sup>68</sup> *Infra*, paras. 141 ff.

<sup>69</sup> “Convivenza” means perhaps more, in our language, than just coexistence.

<sup>70</sup> This distinction is a very familiar one.

Elle est plus *précise*, car le droit des gens se dégage plus clairement de l'ensemble des autres phénomènes juridiques et assume une physionomie plus conforme aux caractères qui, dans la réalité internationale, le distinguent du droit interindividuel dans ses multiples manifestations. La distinction découle, pour ainsi dire, de la nature et de la structure spécifique du phénomène normatif international et des facteurs qui le conditionnent plutôt que de son rapport avec une ‘société d’Etats’ ou ‘société de sociétés’ problématique et sommairement définie.

La distinction est aussi plus *complète*, car elle oppose, pour ainsi dire, au droit des gens, le droit *interindividuel* tout entier dans ses différentes manifestations et ses différents systèmes, plutôt qu’au droit étatique *interne* seulement. A différence de la doctrine moniste qui ‘anticipe’ le droit de l’Etat universel en nous présentant comme déjà en vigueur un ordre juridique unique et décentralisé de l’humanité dont le droit international serait l’échelon suprême, et à différence de la doctrine dualiste qui, dans un certain sens, envisage l’état actuel de désintégration juridique *sub specie aeternitatis*, en nous présentant, à côté d’une série de sociétés étatiques, une ‘société des Etats’, chacune avec son ordre juridique, nous estimons plus conforme à la réalité actuelle, et aux possibilités d’évolution en même temps, de concevoir *une société non intégrée*, dans laquelle coexistent, *chacun à sa place*, d’une part les ordres étatiques plus ou moins fermés et les formations précaires et embryonnaires du droit interindividuel non-étatique,<sup>71</sup> et de l’autre part un corps de règles interétatiques réglementant la coexistence des Etats comme entités collectives souveraines, c’est-à-dire non conditionnées de l’intérieur, notamment dans leur composante interindividuelle, par un ordre juridique de la société humaine totale.<sup>72</sup>

La distinction est finalement plus *souple* dans le sens qu’elle s’adapte mieux aux possibilités futures, qu’il s’agisse des possibilités annoncées de loin par l’organisation internationale,<sup>73</sup> ou bien des possibilités moins ‘alléchantes’ d’une intégration universelle réalisée par la voie imperialiste, adoucie peut-être par des processus d’intégration régionale à base démocratique. Cette souplesse dépend du fait que, tout en maintenant ce caractère interétatique que les monistes nient ou atténuent, le droit des gens n’est pas lié d’une façon absolue à cette ‘société donnée’ des Etats qui est à la base de la conception dualiste ou pluraliste traditionnelle.

Le droit international est lié en somme à un certain *pattern* de relations—les relations entre les Etats souverains et autres entités similaires—se déroulant, à côté des relations interindividuelles (bien que non conditionnées juridiquement par celles-ci), au sein de l’unique société humaine universelle naturelle. Au fur et à mesure que cette société subit une évolution ou une involution (du point de vue, bien entendu, d’un processus d’intégration progressive accepté par hypothèse comme souhaitable), le domaine du droit international, en tant que *jus inter potestates*, se rétrécit ou s’élargit”.<sup>74</sup>

<sup>71</sup> *Infra*, paras. 141 ff., especially 146–147.

<sup>72</sup> Ce que les dualistes expliquent par l’idée de la société internationale distincte, s’explique mieux, à notre avis, par la coexistence, dans la même société, de phénomènes normatifs qui répondent à des *raisons d’être* différentes. Ce que les monistes expliquent par l’idée de décentralisation et imperfection de l’ordre universel s’explique mieux, à notre avis, par l’inexistence d’un droit public universel des hommes et l’existence présente, à sa place, de rapports juridiques *sui generis* entre les groupes souverains dans lesquels l’humanité apparaît, malgré tout, toujours décidément et nettement fragmentée. See now *L’Etat*, pp. 22 ff.

<sup>73</sup> *Infra*, paras. 140–147.

<sup>74</sup> “Moins la société universelle est intégrée plus le droit des gens l’emporte sur ce lent développement de la communauté universelle des hommes en communauté juridique ‘totale’ que, à tort ou à raison, nous estimons souhaitable. Plus la société universelle s’intégrerait, et moins le droit des gens trouverait ce vide de droit interindividuel (au niveau des rapports interétatiques) et moins il aurait de raison d’être”. C’est du reste ce qui se passe dans les processus régionaux de démembrement impérial et d’intégration fédérale (paras. 143–145). L’avantage par rapport à la schématisation moniste, aussi bien que par rapport à la construction (plus réaliste) de l’école dualiste, sera plus clair, du reste, lorsque nous discuterons le problème juridique central—le problème de

130. How different this setting is from the concept of the law of nations (described in the preceding Section) as a decentralised constitutional law of mankind would be too long to tell. There is not a single problem of international law among those affected by that concept,<sup>75</sup> which is not affected by, and does not affect in turn, the concept put forward in the present section.<sup>76</sup>

To put it in the shortest terms, and without fear of doing wrong to the English language, we shall confine ourselves here to Holland's statement: "The Law of Nations is but private law 'writ large'. It is an application to political communities of those legal ideas which were originally applied to the relations of individuals. Its leading distinctions are therefore naturally those with which private law has long ago rendered us familiar".<sup>77</sup>

May we add that only thus can be explained the features by which international law differs from municipal law in so many respects: and it is because of such features that international law is "less of a law" than national law.<sup>78</sup> No doubt, this is an obvious fact. But the "constitutional" theory fails to supply a good explanation. It does actually worse. It maintains that international law—after developing for centuries as the supreme echelon of a universal *public* order allegedly *embracing* and conditioning the most developed and *sophisticated* national legal systems—is a *primitive* law.

#### *Section 4. The Lack of Integration of the Universal Society and the Nature of International Organisation*

131. Moving now to organisation, the idea that the structures of States themselves are part of an organisation of international society "lascia il tempo che trova" in so far as the law of nations is concerned.

*Dédoublement fonctionnel*—undoubtedly imaginative as a notion—conceals the state of the matter rather than revealing it. In addition, it is not in conformity with the evidence emerging from the analysis of the sources of international law. Custom is a product of inter-States relations. In its "making", States appear not as "intermediate" institutions or as representatives or trustees of mankind. They appear *qua* States, more precisely *qua* powers.<sup>78a</sup>

One need not emphasise the overwhelming weight of "raisons des Etats" in that respect, as distinguished from the weight of human values.<sup>79</sup> Evidence of custom is sought, by universal admission, in the conduct and attitudes of States' organs. In so far an influence of individuals is felt as it is channelled—by the ways and means afforded by the *national* law of *given* (not very numerous) States—through official bodies: and it need hardly be stressed that in so far as private parties themselves exert an *influence* on the international custom-making behaviours and attitudes of States, it is mostly addressed to the pursuit of *national* objectives.<sup>80</sup>

The absence of *dédoublement* is even more obvious in the treaty-making process, where

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"localisation juridique"—pour ainsi dire—de *l'organisation internationale*. Celle-ci ne se situe d'une façon satisfaisante *ni* dans le cadre du droit public universel des monistes, *ni* dans le cadre de la "société des Etats" des dualistes (paras. 138–140, 146–147 (compared to paras. 116–120)). Further developments in *L'Etat*, pp. 14–22.

<sup>75</sup> *Supra*, para. 116 and footnotes thereunder.

<sup>76</sup> We refer to the topics listed in para. 116, *supra*, and now developed in *L'Etat*. That list is anything but exhaustive. The relevant literature is cited by *renvoi* in footnotes 15–27.

<sup>77</sup> Holland, T. E., *Studies in International Law*, 1898, at p. 152.

<sup>78</sup> An explicit acceptance of this position is in Forlati Picchio, Laura, *La Sanzione* etc., p. 30. Further Developments in *L'Etat*, pp. 347 ff., esp. 357–360.

<sup>78a</sup> *L'Etat*, pp. 283–299 and *passim*.

<sup>79</sup> *Supra*, para. 126.

<sup>80</sup> *Diritto internazionale*, at pp. 37–38. Also *infra*, paras. 161 ff. and *L'Etat*, 379 ff.

the constitutional (inter-individual) law of each State clearly operates separately from the law of nations: and the latter is concerned with the exigencies of inter-State relations rather than the prerogatives of parliaments or constituencies.<sup>81</sup> Of *dédoulement* there is really no international legal trace.

At the level of customary (general) international law, one would seek what for other societies is described as “original” organisation. Organisation, however, meets very serious obstacles in the non-inter-individual composition of the inter-State milieu and in the natural resistance of States to subordination.<sup>82</sup>

Of course, “authority” manifests itself, in the inter-State system, in the form of hegemony. It does not seem, however, that hegemony attains a juridical connotation under general international law to the point that one could refer to it as “original” organisation comparable in any way to the “original” organisation within a national society. The obstacle seems to reside not only in the contrast of any hegemonic situation with the equality of States or, better, with that relative balance which is typical of international relations,<sup>83</sup> but also in the precarious nature of the hegemonic relationship.<sup>84</sup> This does not exclude, of course, the *de facto* weight of the great powers, principally in the formation of customary law. Conventional “legalisation of hegemony”<sup>85</sup> within international organisations will be considered at a further stage.<sup>86</sup>

The only constitutional rule of the law of nations, the fundamental rule of “organisation” of the society of States, seems thus to be, in addition to the factual equality of members, their exemption from superior authority. The basic functions of law-making, law-determining and enforcement, are *not* organised. Decentralisation is not the right term to describe the *fact* that those functions remain in the hands of States as the *private* members of the international *milieu*. Decentralisation presupposes the existence of some centre, actual or potential. But a centre is simply absent. The idea of decentralisation is related to the false concept of the *primitiveness* of the law of nations. The law of nations is far more appropriately described as private law writ large, lacking a public law and lacking a constitution in a substantive sense.<sup>87</sup>

That organisation is not inherent in the international legal system is a point of great importance not only for the general theory of conventional organisations and their “precariousness”<sup>88</sup> but also for specific issues such as the relationship between a dissolved organisation and a new one.<sup>89</sup>

It is indeed within the framework of an inorganic inter-State system that the general theory of international organisations must find its place. It is therefore within that framework that we must verify the admissibility of the municipal law model as the pattern upon which international organisations are built.

132. The model of the municipal corporate body is decidedly a tempting one.

Just as a group of subjects of national law can move from a stage of inorganic to a stage

<sup>81</sup> *Gli enti*, pp. 324 ff. Essentially in agreement Ferrari Bravo, *Diritto internazionale e diritto interno nella conclusione dei trattati*. Hans Blix’s book on *Treaty-making* substantially corroborates the view that international and national evaluations proceed separately.

<sup>82</sup> Carlston, *Law and Organisation*, at p. 60.

<sup>83</sup> Mosca, *Equilibrio delle forze e struttura della società politica internazionale*, “La Comunità internazionale”, XXVII (1972), pp. 3 ff.

<sup>84</sup> *Rapporti contrattuali*, pp. 138–141.

<sup>85</sup> Oppenheim’s *International Law*, I (Peace), Sixth edition (1947), pp. 244 ff., and Triepel, *L’Egemonia* (Italian transi.) pp. 216 ff.

<sup>86</sup> *Infra*, para. 147.

<sup>87</sup> That international law is a *law without a constitution* is recognised by Zimmern, *The League of Nations and the Rule of Law*, London, 1936, pp. 98 ff.

<sup>88</sup> *Infra*, para. 139; *Rapporti contrattuali*, at p. 148, *Diritto internazionale* at pp. 246, 249–251. *Contra Ago, Considerazioni su alcuni sviluppi*, at pp. 532–533.

<sup>89</sup> *Infra*, para. 139.

of organic relations—from *relationnel* to *organisationnel*—by means of a contract, any group of States would seem to be able to do the same by a treaty. In both instances the theoretical feasibility would seem to be corroborated by results.

Just as the *pactum societatis* among individuals brings about the existence of an entity which was not there before, the treaty seems to bring about the existence of a new international entity. And just as the entity set up by the group of individuals acquires a legal personality distinct from the personality of the members of the association, the entity set up on the basis of the treaty acquires its own international personality, distinct from the personality of the member States. One would be tempted to add that in this creative process international persons are even more at ease, so to speak, than the subjects of national law. Unlike municipal law transactions, international agreements are unhampered or less hampered by limitations of object.<sup>90</sup> By treaty, States are at liberty not only to establish any degree of intensity of co-operation in any field, but also to provide—*à la limite*—for the establishment of an organisation the creation of which would bring about the extinction of the States themselves as separate international persons.<sup>91</sup>

The municipal analogy, however, is more apparent than real. Of course, the constituent treaty helps bring about the existence of a new entity; and it is very likely that such an entity acquires an international personality. It is highly questionable, however, whether the municipal model really materialises, either with regard to the entity's *essence* or with regard to the *nature* of the entity's *personality*. Except for the brief summary which follows—and a number of substantial variations—we must refer again, reluctantly, to old works of ours.

133. Within a national legal system, the creation of organisations other than the original organisation—namely, the creation of a legal organisation other than the all-embracing organisation of the State—is not only subject to the *control* of the law of the whole society, but can only be attained by a certain *participation* of the legal order of the whole society.

That public organisations come into being by some constituent, legislative or administrative action is uncontroversial. Mention has been made of the “enabling act” of Congress, by which a new State can be set up within the Union (Art. IV, sec. 3, n. 1 of the United States Constitution). Another instance is Article 131 of the Italian Constitution of 1948 setting up Regions. One may add the innumerable statutes setting up provinces, counties or municipalities within any national community. The organisation of public bodies obviously emanates from the “objective” law of the whole society. It is not just a matter of agreement among the members of the respective constituencies. It is a matter of *octroi*.

Notwithstanding the appearances to the contrary, the situation is not any different with regard to private organisations. It is true that private companies come into being as a “result” of some transaction between individuals. But it would be superficial to assume that the parties in the constituent instrument operate merely on the basis of a general *pacta sunt servanda* rule (as a part of the national system in question). Whatever the role of the founding parties, the organisation is really set up by virtue of specific, substantive, rules of the legal order of the whole community. In so far do the parties attain the result of setting up the body, of defining in a legally binding manner the body's activities, and of conferring powers, functions and responsibilities upon the body's agents with binding effects for the members and for all concerned—in so far, in other words, do the parties manage to set up an organisation in a proper sense—as one or more rules of the whole society's legal order *provide* for such effect to be attainable by the transaction. The private act is not in itself the legal cause of organisation. It is just the condition, however essential, for the organisation to come into being by virtue of enabling provisions of the community's legal system. It is again,

<sup>90</sup> *Infra*, Section 7, para. 164 and *supra*, para. 110 (with footnote 18 thereunder).

<sup>91</sup> Examples *infra*, paras. 143–144.

in good substance, a matter of charter *octroyée*.

This seems to be the case for both the collective entity's establishment *and* its distinct personality. The two aspects—of which organisation is the most important—really constitute, whenever the organisation is personified (as is not always the case), closely related phenomena or “legal effects”. The scope of the entity's distinct legal personality—a functional personality as opposed to the . . . natural personality of human beings—coincides with the aims and purposes of the organisation and its *compétences*.

It is now our submission that for at least two sets of reasons the municipal law model fails to materialise in international law either with regard to the nature of the (undoubtedly existing) entity, or with regard to the nature of its undeniable personality. One set of reasons is that the existence of the collective entity in the municipal sense and the existence of a functional personality (again in the municipal sense) seem to be both unnecessary for the concrete and effective operation of international organs to take place and be legally justified. There are simpler explanations. The second set of reasons is that the international collective entity and its functional personality (in the municipal sense) are both implausible as “effects” of a mere inter-State compact. In any case, neither “effect” is convincingly demonstrated by the doctrine. The latter confines itself to relying blindly upon the municipal model.

134. The activities of international organisations fall into one or the other of two classes: *international activities* in a narrow sense and *vicarious State activities*.<sup>92</sup>

The international activity of international organs consists of enactments which are meant, in terms of the governing agreement, to condition more or less intensely the conduct or position of the States concerned (as a matter of compliance with an obligation or an exhortation), the States' organs or subjects being involved in the measure in which the international enactment is normatively and/or administratively followed through by the States themselves. Enactments of this kind are the recommendations and decisions of political bodies, the awards of arbitral tribunals and the judgments of the Permanent and International Court of Justice.

The other important class (quite different from the activities considered so far) are the activities usually known as “operational” or “supranational”, and that could more significantly be labelled, in our opinion, as vicarious activities—internal or external—of States. This class of activities consists of operations intended by the constituent treaty to supersede operations otherwise carried out by exclusively national organs. This is the case with the most typical among the activities of River Commissions since the last century, of the Head of two States in *union réelle*, of the legislative Assembly of the City of Tangiers, of Mixed Arbitral Tribunals, of the Bureau international de Berne pour la propriété industrielle. In the same category fall the most crucial among the activities of the institutions of the three European Communities (ECSC, EEC, EAEC).<sup>93</sup>

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<sup>92</sup> *Diritto internazionale*, paras. 72, 76 and 85 especially.

<sup>93</sup> Common features of the activities of this class are that while intended to “determine” or “produce” effects equivalent to those attached to the activity of ordinary, autochthonous State organs, they differ from the activities of such organs in that:

(i) they are carried out by non-autochthonous, or not entirely autochthonous organs established and operating pursuant to, and in compliance with, international rules ordinarily (but not necessarily or exclusively) conventional; and  
(ii) they are intended to determine automatic legal effects—simultaneously or severally—in the municipal legal systems of the States involved, adapted to the international rules embodied in the “constituent” treaty and/or developed by custom or otherwise.

The essential point, however, is that the constitutive instrument is so conceived—expressly or implicitly—as to bind the State or States involved to attach to the international organ's acts the same effects as—or effects equivalent to—those of the activity of municipal organs. I say *one* or more States because an international organ of the kind under consideration may well operate on behalf of a single State or similar entity. In addition to the

By a very rough approximation it could be said that while “international activities in a narrow sense” are typical of international organisations, vicarious (internal or external) State-activities” of international organs are typical of *supranational* institutions. Experience shows, however, that there is hardly an organisation which operates only in the former capacity or the latter. The majority of international organisations operate in one *and* the other capacity, although in most cases one or the other capacity prevails.<sup>94</sup>

If one now considers the activities in question—as carried out, in particular, by United Nations organs—it does not seem that their international legal effects presuppose or imply so much, in terms of new legal structures, as the “constitutional” theories of international organisation seem to envisage. In particular, those activities and their international effects presuppose, or imply, neither:

1. that they emanate from a collectivity or community of international law *embracing* the Member States and/or their peoples in any sense qualitatively similar to the sense in which a collective body or subdivision of municipal law, private or public, embraces its members;<sup>94a</sup> nor

2. that such an entity exercises its statutory<sup>95</sup> activity *vis-à-vis* the States (or their organs and subjects) as a personified corporate body in the sense in which the said municipal collective bodies or subdivisions may be so personified.

These two points are considered separately in the following paragraphs 135–136 (point a) and 137 (point b). The discussion will resume in paragraph 138.

### 135. The all-embracing entity or community is quite superfluous either for the

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case of Tangier’s Legislative Assembly, this is the case of some of the organs of the City of Danzig and of the institutions which were envisaged for the Free Territory of Trieste. The activities at present in question also include a wide range of “operational” activities permanently or occasionally carried out by universal international organs. This is the case of IBRD and of the World Fund and other organisations (IRO, UNRWA, CIME, etc.), including the United Nations when it carries out certain kinds of “field” activities (UNEF, ONUC).

Considering that our main (albeit not exclusive) interest lies, for the present purposes, in the *international* activities of international organs, we shall not dwell extensively on these examples. However, it is perhaps worth emphasising, with regard to the institutions of the three European Communities, that the activity now referred to in the text is that activity which affects *directly* the internal social reality of member States. The common institutions operate with immediate effect towards physical and juridical persons of municipal law and *vis-à-vis* the member States themselves as juristic persons within the same law. The European institutions thus perform—in addition to not infrequent *international* activities in a narrow sense, in relation to which States appear purely as international persons (*Diritto internazionale*, para. 73 (pp. 204 ff.))—municipal activities of an internal and in some cases external character (*ibidem*, paras. 72 (pp. 202–204), 74 (206–208), 76 (209–211), 85 (237–240) and pp. 246, 262)). Examples of external State activity of the European institutions are the powers of those institutions which concern the conclusion of agreements with third States (e.g., Arts. 101–106 of the Euratom Treaty).

<sup>94</sup> The idea that organisations qualify as international or supra-national (viz. operational) is obviously incorrect (*Diritto internazionale*, pp. 206–208). In addition to disregarding the fact that even the United Nations and the Specialised Agencies carry out some operational activities, such a rigid classification presents the (even more serious) shortcoming of endorsing the concept of international institutions as inter-State corporate bodies: a seemingly innocent concept which from our viewpoint—as we tried to show above—involves a high degree of deformation of the phenomenon of international organisation (*infra*, paras. 133 ff.).

<sup>94a</sup> This is the general, universal, assumption. See the works by Kelsen, Verdross, Scelle, Guggenheim, Kunz and Kopelmanns, cited in footnote 40 of *Rapporti Contrattuali* (at pp. 33–34); and the works by Perassi, Anzilotti, Ago, Morelli, Ottolenghi, Breschi, Romano, Scerni, Florio, Baldoni, Udina cited *ibidem*, footnote 41, pp. 34–35.

On Anzilotti’s position, however, see *Diritto internazionale*, at p. 256, footnote.

The doctrine *subsequent* to the above works takes even more advanced “constitutionalistic” positions: and increasingly so, especially since the end of the Second World War.

<sup>95</sup> Or otherwise “legitimate”.

performance, by international organs, of international activities *stricto sensu*, or for the performance by them of vicarious State activities (or “operational activities”).

Whether binding or hortatory, the enactments emanating from an organ like the General Assembly or the Security Council do not reveal the presence of such an entity or community any more than the binding awards and judgments of an *ad hoc* arbitral tribunal reveal any such presence. The futility of the arbitrary—and confusing—notion of an underlying collective entity or community appears plainly if one starts from the very clear situation obtaining in the various types of arbitration.

Whether the arbitral award emanates from an *ad hoc* tribunal composed of private parties, as is mostly the case, or from a State or Head of State, its binding character derives not from an authority exercised over the parties by the tribunal or by the “arbitrating” State or Head of State *on behalf* of any *collectivity* or *community*. It follows simply from the obligation undertaken by the parties toward each other to abide by the decision. It follows from a contract.

If such is the case, one fails to see in what sense is the situation any different where, *coeteris paribus*, the place of the arbitral tribunal or of the third State or Head of State is taken by a permanent organ established by a *multilateral* instrument such as the Statute of the International Court of Justice or its predecessor. The permanent character of the organ is obviously not decisive.<sup>96</sup> The multilateral character of the establishing treaty is not relevant either.<sup>97</sup> Treaties, as international agreements in general, are all equal sources of rules or of rights and obligations. A multilateral treaty like the Court’s Statute is not “more equal” than other treaties.<sup>98–99</sup>

A good piece of evidence of the futility of the idea of the presence of a collectivity or community in any case, including the case of United Nations organs, is the frequent reference—typical of the “constitutional” theorists of international law—to a “judicial community”, allegedly established by the Statute of the Permanent Court and restored by the Statute of the International Court.<sup>100</sup> The expression is of course unobjectionable in so far as it is used only as a term of convenience, in order to avoid repeating the phrase “States parties to the Statute of the Court” too often. It is nonetheless misleading, especially when it is used within otherwise magniloquent contexts. If not the lawyer, at least the layman may well be led astray by the idea that the States participating in the Court’s Statute are part of a *judicial community*. He may be led to assume that those States have done all that may be necessary in order to fill in the gap represented, in the international system, by the lack of institutionalisation of the judicial function. Whatever the layman’s reaction may be, the idea of a judicial community is not reconcilable with the fact that the International Court’s competence, albeit abstractly envisaged in the organ’s multilateral statute (Art. 36, etc.), is really *created* by other instruments, namely by the bilateral or multilateral agreements referred to in Article 36.1 or by the declarations envisaged in Article 36.2–5 of the Court’s Statute.<sup>101</sup>

<sup>96</sup> Naturally, the factual continuity of the organ makes some difference. It affords continuity of action, establishment of precedent and building up of tradition. Elements such as these, however, do not imply yet any structural, institutional modifications of the inter-State system. Arbitral precedents were and are not less authoritative than the Court’s precedents.

<sup>97</sup> *Rapporti contrattuali*, at pp. 65 ff. The significance of majority is also discussed there (at pp. 62–65) and *infra*, paras. 140 ff., 147, 166.

<sup>98–99</sup> *Infra*, Section 7 (para. 163).

<sup>100</sup> Kelsen, *The Law of the United Nations*, pp. 79–83, 130–135, 489 ff.

<sup>101</sup> Another relevant and related issue is whether the International Court is an organ of the United Nations just in a formal sense (as would follow from some of the statements contained in the Charter and in the Court’s Statute) or *really* the “judicial arm” of the organisation. Leo Gross, *The International Court*, etc., pp. 320 ff., 422 ff., seems to be inclined to some doubt.

If the situation is not altered by the organ's permanent character, it remains to be seen whether it is altered by the fact that the organ is one of a number of organs set up or referred to in a single "constituent treaty". We believe it is not. The question whether such a treaty creates a collectivity or community (possibly with authority) is a question concerning the relationship between the international organ on one side and the member States on the other. It is not a question of relationship between the organs. Whether an organisation is mono-organic or pluri-organic may mean much for its efficiency but it does not really make any difference to the problem under discussion.

It may thus be reasonably concluded, on the first score, that just as there is no need or evidence of a collectivity or community—of mankind, of a fraction of mankind, or of given States—underlying an arbitral award or a Court judgment for such enactment to perform its binding function, there is no need or evidence of such a collectivity or community behind an Assembly deliberation under Article 17.2 of the Charter or a Security Council deliberation under Article 39, 41 or 42 for either deliberation to produce its statutory effects. This applies *a fortiori* to the recommendations of political bodies, or to the decisions or recommendations of the organs of a technical or administrative union.

Similar considerations apply to River Commissions and to the European Communities. The regulation and administration of a river by an international commission does not require, whatever the intensity and extent of the commission's powers *vis-à-vis* the persons under the jurisdiction of the States concerned, the establishment of a legal community among the peoples of those States. Indeed, no one ever spoke of "communities" with reference to River Commissions. The term community has been adopted for the ECSC, the EEC and Euratom, obviously in view of an envisaged *development* in European integration. However, in so far as the present state of affairs is concerned, it is, in law, clearly a matter of *uniform* rules administered, determined and, in a measure, created, by *common* organs of the States involved.<sup>102</sup> That is far more than General de Gaulle's *traités de commerce*. But the addition of the community concept as a matter of existing law is tantamount to equalling an engagement to a marriage: which remains a different kind of legal transaction whatever the feelings of the *fiancés*. Far from harming the cause of European integration, the avoidance—at the *technical*, legal level—of a grandiloquent term which may well be appropriate in different contexts, would *serve* that cause. It certainly does not help that lawyers describe as actually existing something which is not there yet.

### 136. We must now turn to the implausibility of the creation of a community.

The point of departure is that the constituent treaty is not a legal instrument of the international community of men designed to alter the system's structure by delegating to other entities some of the functions allegedly exercised by States as "organs" of a universal community. The inter-State compact involves really, given the nature of the described framework, neither the universal society as a whole nor the peoples of the constituent States.<sup>103</sup> Within the framework of a law of nations understood as the law of the relations among political units constituted in fact and coexisting as equals within the universal society of men but outside of an inter-individual legal order "of the whole" expressed by that society, any organisation set up by inter-State compact bears within itself—whatever its current merits or shortcomings, and whatever the occasional causes of success or failure—an

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That technically the Court is not really an organ of the United Nations is maintained by Morelli, *Nozioni*, at p. 377; and by us, *Corte Internazionale di Giustizia, Enciclopedia del Diritto*, Vol. X (1962), pp. 1037 ff., at pp. 1047–1048.

<sup>102</sup> *Diritto Internazionale*, especially at pp. 238–239. The idea of common organs with regard to the European institutions is also favoured by Balladore Pallieri, *Diritto internazionale pubblico*, 1962, pp. 540–541.

<sup>103</sup> Footnote 31 above.

“original flaw”, inherent in the very nature of the transaction which is at the basis of its existence: the inter-State compact. And the inter-State compact creating international organs is a far less sophisticated phenomenon than the “constitutionalists” seem to believe it to be. It is only a pact among sovereigns.

Be that as it may of the compact’s inherent nature, the purposes, the intentions of the contracting sovereigns are pretty clear. First, the constituent States participate in the compact *on their own—at least* in so far as international law is concerned—and not on behalf of an international community of all, or some, peoples.<sup>104</sup> Secondly—and except of course in the extreme hypotheses of *deditio* or federal integration discussed further (paras. 143–144)—the constituent States clearly intend to *stay*. Furthermore, however strictly bound by the compact and to whatever, States intend to stay *in the same condition*. They do not intend to assume, once the compact will be in force, that capacity which is typical of the member States of a federation (namely, the capacity of partial communities within a larger one, or, which is the same, the quality of juristic persons or *provinciae*). They intend to remain what they were prior to the compact.<sup>105</sup>

In brief, States and their peoples seem to remain in their respective places, and in the condition in which they respectively were before the operation. Which does not make the operation any less real or vital, of course, for what it is.

137. The municipal corporate body model does not seem to function any better with regard to that (secondary) aspect of the matter which is the international personality of the supposed “collectivity” or “community”. Here again the *idolum* of the municipal model is very misleading.

The international personality of an organisation would seem to be important not only in order to ensure the entity’s existence and independence. International personality is not infrequently mentioned, in the practice and the literature, among the titles or signs that the organisation is endowed, *inter alia*, with normative or otherwise authoritative functions. For example, it was reported to the President of the United States in 1945 that Article 104 dealt not with what is called the “international personality” of the Organisation because “the Committee which discussed this matter<sup>106–108</sup> was anxious to avoid any implication that the

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<sup>104</sup> *La questione cinese*, pp. 91 ff.

<sup>105</sup> This shows that the acceptance or refusal of the concept of States as *provinciae* of the international community, or *organs* of international law, is more than just a technicality.

In the theory of international organisation the assumption of States as legal subdivisions or *organs* of the law of nations implies nothing less than a refusal to take account of the obvious fact that States—to put it with Dupuy, R. J., *L’Organisation internationale*, etc., “préexistent à l’organisation comme les individus préexistent à la nation”. Indeed, to assume States as institutions of the legal community of mankind constituting just another form of that community’s organisation following the *Respublica Christiana* phase, is to shut one’s eyes to the crucial aspect of international organisation represented by that “sociological unity”, so to speak, which is proper to each State and which proves hard to penetrate by external rules and so hard to condition by the operation of external bodies. It should be more fully realised, vice versa, that the *ultimate problem*, to use Lorimer’s terms, is the “reduction” of States from the condition of powers, which is the condition of any State within the international system, to that radically different condition of *legal subdivisions or institutions* of a universal, or regional, society: a condition in which the contemporary States are definitely not. To assume that such condition has already materialised—or, worse, has always existed since prior to Westphalia—means to alter the terms of the twentieth-century problem, or to deny its existence, altogether.

We were relieved to find that we are less isolated, in trying to make this point as strongly as necessary (since 1950), when we recently came across René Jean Dupuy’s *L’Organisation internationale*. See especially, in that study, pp. 635–636.

<sup>106–108</sup> *Viz.* the Belgian proposal that the Charter specify “that the organisation . . . possesses international status, together with the rights this involves” (United Nations Conference on International Organization, Doc. 2 G/7 (k) (1), in UNCIO Documents, Vol. 3, p. 343).

United Nations will be in any sense a super-State".<sup>109</sup> (A super-State might want, *inter alia*, to legislate.) The ghost of the super-State appears again—in less frightening attire—in the quoted opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (1949). In concluding that the organisation was an international person the Court felt it not superfluous to add that “that was not the same thing as saying that it is a State, which it certainly is not . . . Still less is it the same thing as saying that it is a ‘super-State’, whatever that expression may mean”.<sup>110</sup> A relationship between the international personality of the United Nations and the organisation’s functions is also emphasised by the Court, in that same opinion, regardless of any “State” or “super-State” analogy.<sup>111</sup>

Although there is no doubt in our mind that the United Nations is endowed with international personality,<sup>112</sup> the matter should be more carefully considered with regard to the source, the nature and the implications of such personality.

The international personality of the United Nations derives, in our opinion,<sup>113</sup> from the same rules or principles<sup>114</sup> which determine the legal personality of any other international person, be it a State, an insurgent party, a government in exile or the Holy See.<sup>115</sup> Indeed, it can hardly be questioned that the United Nations in fact exists as an entity materially able—in certain matters—to act and to manifest a will in such condition of independence as to distinguish itself from any other international person, in a manner not dissimilar from that in which a small State or the Holy See so distinguishes itself. Matters in which the United Nations reveals such a material capacity, and the corresponding legal personality, are the ability to contract with regard to *sûtre* and privileges and immunities, the rights and duties connected with diplomatic relations, the rights and duties connected with the treatment by States of members of United Nations staff, the right to reparation for injuries suffered by members of such staff, immunity from jurisdiction. Capacity to contract will obviously be instrumental, in its turn, to the acquisition by agreement of further rights and duties within the sphere of the direct, material activity of the organisation.

However, the personality of the United Nations is not a legal effect of the constituent instrument. Of course, such an instrument has a role, in that it is by carrying out the provisions of the Charter that the organs have been set up and exist. This role, however, is not *direct* in the sense in which one can say that an *acte de fondation* or *association*, or some other such transaction, is at the root of the legal personality of a juristic person.<sup>116</sup> It is not direct either in the sense in which a piece of legislation is even more fully the source of the existence and personality of a “province”, a “region”, a *département* or a corporation in the public or private law of Italy.<sup>117</sup>

The international treaty is the legal basis for the organisation in fact to be materially constituted. Personality will derive, for the real entity thus established, from general international law in the measure in which the created entity satisfies the factual conditions the presence of which is required for the international personality of *any* other entity. We

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<sup>109</sup> *Report to the President on the Results of the San Francisco Conference*, etc., 26 June 1945, Department of State Publication 2349, Conference Series 71, pp. 157 and 158.

<sup>110</sup> *ICJ Reports 1949*, at p. 179.

<sup>111</sup> We refer to the long list of functions mentioned by the Court (*ICJ Reports 1949*, at pp. 78–79). A connection between the powers of the United Nations and international personality seems to be assumed also by Sir Gerald Fitzmaurice, passage quoted *infra*, footnote 126.

<sup>112</sup> *Rapporti contrattuali*, p. 130 ff.

<sup>113</sup> *Ibidem*.

<sup>114</sup> *Gli enti*, pp. 10 ff.; *Diritto internazionale*, pp. 9–13.

<sup>115</sup> *Rapporti contrattuali*, pp. 131–137.

<sup>116</sup> See, however, *supra*, para. 133.

<sup>117</sup> *Ibidem*.

disagree, in this, with the relevant part of the Court's opinion.<sup>118</sup> It is precisely on the basis of the factual existence of its apparatus and on the strength of general international law that the United Nations has become an international person. The international personality of the United Nations does not derive from the Charter more than the personality of a State or of a Free City derives from the multilateral treaty providing for the State's or City's establishment.<sup>119</sup>

The affirmative conclusion with respect to the international personality of the United Nations must be qualified, however, not only with regard to its *source* but also with regard to its *nature*.

Indeed, to say that the United Nations is a person on the strength of (general) international law does not imply that the organisation is endowed with a *functional* personality: not with that *kind* of functional personality, at least, which is typical of public and private bodies of municipal law (and of the State itself under the same law).

We must register again a disagreement with the motivation of the International Court of Justice in the *Reparation* Opinion. The organisation's personality exists under general international law as a primary personality, quite similar, we insist, to the personality of a State or of the Holy See. As such, that personality manifests itself only in the sphere of *droit relationnel*. In itself, it does not seem to imply any supra-ordination of the organisation to the member States. The belief that the treaty brings about *per se* the compound effect of legal personality and legal authority or power is, once again, a consequence of the unwarranted municipal law analogy.<sup>120</sup>

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<sup>118</sup> We are unable to concur, in particular, with the Court's dictum that "fifty States, representing the vast majority of the members of the international community had the *power, in conformity with international law, to bring into being* an entity *possessing* objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims" (*ICJ Reports 1949*, at p. 185—italics added).

To be sure, the United Nations is able, under general international law, to bring international claims of the kind of the one which was in question before the Court. It has even further capacities.

It is not demonstrated, however, and the Court has not attempted to demonstrate—that there exists any *rule* of general international law under which any number of States, be they 5, 15 or 50, are legally *empowered* to create a *juristic person* of objective validity, namely constituting *ipso facto* and *erga omnes* a person in the law. *Contra* (in *critique* to *Rapporti contrattuali*, at pp. 73–77 and 130 ff.) Balladore Pallieri, "La personalità delle organizzazioni internazionali", in *Diritto internazionale*, ISPI, Milano, 1960, pp. 230–255; and *Saggi sulle organizzazioni internazionali*, ISPI, 1961. In the absence of such a rule, the constituent treaty remains *res inter alios*. In so far would the *dictum* of the Court be acceptable as it were—as it can be—understood in the sense that the Court only meant to say, really, that States are legally *free* to create jointly (within or without the framework of a formal instrument or agreement) an entity which, once come into being, may meet the conditions generally required by objective international law in the entities to which it addresses itself. Were it so read, the Court's *dictum* would be, in our view, perfectly correct *for the same reason* for, and in the same *sense* in, which any State or group of States can help create, for example, a State, a free city or a free territory. Also in such a case it will be for *general* international law to provide the entity *in fact* set up with legal personality.

<sup>119</sup> *Diritto internazionale*, pp. 262–268.

<sup>120</sup> Indeed, our reservations with regard to the *prima facie* meaning of the earlier quoted *dictum* of the Court's are motivated not only nor so much by the difficulty (or impossibility) of drawing an objective international personality from an instrument *per se* unsuitable to determine *erga omnes* effects (*infra*, Section 7). Another reason—a reason of the greatest relevance in the present context—is that the Court's excessive reliance upon the constitutive treaty for the founding of the personality of the organisation is coupled with the assumption by the same Court that by way of consequence the functions and powers of the organisation are somehow *related* to its international personality, in the sense that the international personality "sums up" so to speak, or "combines" with the constituent treaty's provisions concerning the organisation's *functions*: which would warrant the conclusion that the organisation becomes entrusted with those functions, and as such *supra-ordained* to the member States, *by virtue*—or *also* *by virtue*—of a legal personality, deriving perhaps from the treaty alone, or from the treaty *plus* general international law.

As recalled in the text (para. 133), this is what happens really *in municipal law*, where the legal personality

Also in respect of personality, therefore, the position of the United Nations does not differ from the position of an arbitral tribunal or an arbitrating State. If there is no personality otherwise, as is most probably the case with the arbitral tribunal, the lack of that quality has no (negative) relevance with regard to the binding character of the award. This character follows from the agreement between the States in dispute *inter sese*, as the source of a legal relationship not involving any power or right of the tribunal with regard to compliance. Conversely, the presence of international personality in the case of the arbitrating State does not alter the situation in an opposite, positive sense. The third State which proceeds to an indication of binding terms of settlement of the dispute does so exactly in the same capacity as the non-personified tribunal. That State has no more claim to the parties' compliance than the tribunal has.

Similarly, the possession of international personality, while useful for other purposes, does not significantly affect, *vis-à-vis* the member States, the position of the United Nations. Of course, international personality allows the organisation to participate in legal relationships which are essential for its actual existence and operation (*siege*, privileges and immunities, communications, active and passive legation, protection of staff, claims for damages, agreements). In turn, this will affect the organisation's functioning indirectly. In so far, however, as the functioning *per se* is concerned, the organisation does not operate as a *person* in legal authority more than the arbitral tribunal and the arbitrating State do so.<sup>121</sup> Although endowed with international personality for the purposes of its *primary* activities, the United Nations has no such international personality under the Charter as an inter-State compact. That compact creates rights and obligations for the contracting States, not for the organisation.

The international personality of the United Nations is thus not really *functional* in the sense in which the personality of municipal corporations is such. This means, *inter alia*, that behind the obligations incumbent upon each member of the United Nations there is not the

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of private and public corporations is connected—within the sphere of the entity's competence—with the supordination of the latter to the members and is granted, together with everything else, by the “objective law” (see also *infra*, Section 7 and *Rapporti contrattuali*, p. 131 f.). Based as it is again on the municipal law analogy, the prevailing doctrine transposes into the theory of international organisation, a notion which is extraneous to it.

The Court did the same in the cited opinion. The “functional” nature of the international personality of the United Nations seems to be implied in some of the International Court’s ambiguous *dicta* of page 179 of the *Reparation* Opinion, notably in the three sentences of the first paragraph of that page and especially in the statement: “It must be acknowledged that its Members, by entrusting certain functions to it with the attendant duties and responsibilities, have *clothed it with the competence* required to enable those functions to be effectively discharged.”

In so far as the *primary* personality was concerned, there was hardly the need to clothe an entity with “competence”. It is always the constitutional connotation that comes out, with neither cause nor purpose. In the *Reparation* case no *constitutional* question of *competence* was involved. There was just the simple issue whether an entity operating in a tendentially universal interest of States possessed, in particular, the right to protect its existence and efficiency, the right of diplomatic protection of its staff and the right to pursue a claim for damages at international level. These were purely matters of *droit relationnel*, with regard to which it would have been elementary for the Court to declare that the United Nations could not be—under the *general* law of nations—in a condition dissimilar from that in which any State, great or small, or any government in exile or the Holy See, finds itself with regard to damage wrongly suffered by one of its subjects or agents.

<sup>121</sup> Of course this has nothing to do with—and does not exclude—the legal personality of the organisation in its own internal system and in the legal system of any member State, notably in the legal systems of *Etats de siège*. See *Diritto Internazionale*, etc., at pp. 252–255.

This personality comes into play, for example, for the purposes of the organisation's relations with its employees—international or local—and (in so far as the legal systems of States are concerned) with any other person, physical or juridical, subject to the applicable municipal law. Cf. Jenks, *The Proper Law of International Organisations*, *passim*.

organisation as the *agent* of the allegedly organised international community. There is the “authority” of international law, and, behind that, the “authority” of the other member States, namely of the other parties to the compact. The legal authority involved in the very exercise of the organisation’s functions is just the “impersonal” legal authority of *treaty obligations* and the “personal” legal authority of the State or States which in each case—directly or through the organ—are entitled to the correlative right.

138. It is thus plain that the organs of the United Nations are neither the legal representatives of a community or society composed of the peoples of member States or of States themselves,<sup>122</sup> nor the legal sharers with States of any international governmental functions.

As other international bodies, the organs of the United Nations carry out either international activities in a narrow sense or, far less frequently, vicarious State activities, as distinguished earlier (in para. 134). In the first capacity, United Nations organs operate, *vis-à-vis* States, as another kind of *instruments*, in addition to ordinary diplomatic organs and ordinary arbitral tribunals, of essentially unaltered egalitarian relations among the States themselves.<sup>123</sup> In the second case, United Nations organs operate (as well as the so-called supranational institutions) *vis-à-vis* the subjects of States, or *vis-à-vis* States’ subordinate organs (and even *vis-à-vis* the States themselves as juristic persons of municipal law) as common institutions of the States involved, so empowered to function by virtue of the national legal systems of those States in so far as they are “adapted”.<sup>124</sup>

Once the *idola* of the collectivity or community and of its functional personification are set aside, it appears plainly that in setting up an international organisation States *do* organise something but not what a number of international lawyers seem to be inclined to believe.

In setting up an international organisation States do not organise the world or a world’s region. States organise *neither* the universal society of men (or the regional society composed of their peoples), nor the so-called “society of States”.

Prior to, or outside of, international organisation, States deal with each other bilaterally, through *ordinary* diplomatic organs, and multi-laterally, through *occasional* diplomatic conferences. By setting up the United Nations and similar institutions, States have institutionalised the conference as a means of diplomacy. However impressive it may appear and however useful and even indispensable it has quite obviously become, this institutionalisation—familiar to any student of international relations as the system of, precisely, “Permanent Conferences” or “Multilateral Diplomacy”—has little to do, and is absolutely incomparable with, the institutionalisation of the *international society* or community of men or of a *society or community of States*. The purposes pursued and achieved are obviously far more modest.

In envisaging the accomplishment, by international organs, of what earlier we called *international activity in a narrow sense*, States organise *their relations in a different way*, while continuing to co-exist as entities *superiorem non recognoscentes*. States have just found, in international organisations, a new *method*, a new material way of dealing among themselves—generally or with regard to given matters—while not only surviving as sovereign entities (with no real superior) but remaining merely juxtaposed as they were

<sup>122</sup> For the impropriety of the term “Société” as opposed to “League” to indicate the League of Nations, see Fleicher, *Analyse juridique du Pacte de la Société des Nations*, Paris, 1922, pp. 110 ff., especially pp. 115–117.

<sup>123</sup> This is perhaps the meaning, otherwise ambiguous, of the term “mechanism” by which Sir Percy Spender designates an international organ in his separate opinion in the *Certain Expenses of the United Nations* case (*ICJ Reports* 1962, pp. 192–197). Unless qualified as in the text that term could equally apply to an institution or a corporate body or community, including an institution of a federal government. In a sense, these are also mechanisms.

<sup>124</sup> *Supra*, para. 134.

before.

Secondly, by providing for the accomplishment, by the same or other international organs, of *operational activities*, States organise *their own governmental functions in a different way*. Through the operational action of international organs, in other words, States organise themselves *differently* but always as sovereign States. They deal in a different manner—namely through *common* organs or institutions—with some of their internal and/or external affairs, such affairs remaining *their own* even where the common organs operate directly *vis-à-vis* their autochthonous organs or their subjects.<sup>125</sup>

In either case, the structure of the international legal system does not seem to be altered. It is certainly not altered, by any means, as it *would* be altered if the “constitutional” concept of international organisations were a correct description of the real state of affairs.

139. In believing that the United Nations cannot be viewed, legally or sociologically, as the organisation of the universal community of men, or of the community of States, we are beyond the position taken recently by Judge Sir Gerald Fitzmaurice when he rejected the “Organised World (or International) Community Argument” as a possible foundation of the legal continuity between the League of Nations and the United Nations. We must say that together with Dupuy’s study quoted earlier, Judge Sir Gerald Fitzmaurice’s *dictum* is of great comfort to us after more than 20 years of . . . solitude.<sup>126</sup> We believe, however, that, as well as the former writer, Sir Gerald himself stops short of the target.

If it is illusory—as it is—to believe in the notion of an “organised international community”, it is not less illusory to believe, as also Sir Gerald Fitzmaurice, together with the constitutionalists, seems to believe, that the League, and now the United Nations, *does* constitute an *organisation of the international community*.

In the words of the distinguished Judge, “In the days of the League there was not (*a*) the organised world community, (*b*) the League. There was simply the League, apart from which no organised world community would have existed”.<sup>126a</sup> This seems to us to imply that the League (and now the United Nations) could be conceived as the otherwise non-existent organisation.

In our view, the “separate juridical entity with a personality over and above” is not only absent, as pointed out by the learned Judge, in the international community at large. It is not really to be found either in the League or in the United Nations. Just as the (allegedly organised) international community cannot—inorganic as it is—be thought of “as a sort of permanent separate residual source or repository of powers and functions, which are reabsorbed on the extinction of one international organisation, and then automatically and without special arrangement, given out to, or taken over by, a new one”, the League or the United Nations cannot be envisaged in that same manner either, “*per la contraddizion ehe nol consente*”, namely for the reasons set forth in the preceding paragraphs.

In other words, the “Organised World Community Argument” that Judge Sir Gerald Fitzmaurice rightly rejects is at the root of more than just the theory of the automatic succession of the United Nations (to the League) as a new structure of that “organised

<sup>125</sup> Or the States themselves as persons of municipal law.

<sup>126</sup> We refer to Sir Gerald Fitzmaurice’s dissenting opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *ICJ Reports 1971*, pp. 220–322, notably at 241–242.

May we add that all along since 1950 we had often wondered whether the notion of international law and organisation that we entertained was not the fantastic product of a distorted mind of ours. From Sir Gerald’s remarks on the “Organised World (or International) Community Argument” we draw the impression that a problem may be there, after all. But the ultimate roots, we are afraid, are in the *social basis* of international law and in the whole *concept* of the law of nations.

<sup>126a</sup> Cited *ICJ Reports 1971*, at p. 241.

community” taking the place of the old one. That very argument is at the basis of the whole theory of the United Nations, or the League or any other international union of general or special competence, as an “organisation of the world community”. Indeed, were an organised—or not organised—legal community of mankind<sup>127</sup> really existent, it would be an adequate basis for both the conception of the United Nations and the League as that community’s structure and the automatic succession of the United Nations to the League. The reason is that in so far could an inter-State compact like the Charter create a “juridical entity with a personality over and above” as the contracting States—those of 1945 and those which came in later—had been acting in the juridical capacity of organs of a universal legal community of mankind conceivable “as a sort of permanent . . . source or repository of powers and functions”: precisely what the constitutionalists believe the international community to be, and we do not.<sup>128</sup>

Or course: the peoples—had they been really involved—could have created the juridical entity “over and above” the States. But the States themselves could not do so.<sup>129</sup> That States did not do so is confirmed by the definition of the United Nations given by the most ardent and highly inspired among those who have served the organisation so far: “The record of the United Nations is determined by the sum total of the policies of its Member countries in relation to each other and the aims of the Charter. Thus the United Nations is not an institution set apart from and above the governments, and to be judged as such. It offers a meeting place, and a moral impetus, an institutional framework for the co-operation of these Governments in programs of common benefit”.<sup>130</sup>

It is in this sense that we understand international organisations not to alter the typical structure of the inter-State system and to remain essentially precarious phenomena.<sup>130a</sup>

140. It is an elementary notion of jurisprudence that in any legal system one can distinguish normative phenomena according to whether they belong to the realm of the “law of relations” or to the realm of the “law of organisation”. This is the distinction—obviously not an absolute one—indicated in the Italian doctrine in terms of *norme di relazioni intersoggettive* and *norme di organizzazione* and by Hart in terms of primary and secondary rules. Dupuy puts it in terms of *droit relationnel* and *droit de l’organisation*. Droit relationnel includes, within a municipal legal system, the rules, mostly substantive, setting out—in abstract or concrete terms—rights-duties for, or legal situations between, the ordinary members of the society as relatively equal law subjects. Organisational rules, or the law of organisation, include, in municipal law, the State’s constitution and public law in general and

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<sup>127</sup> Or of the so-called “society” of States (*supra*, paras. 121 ff., 128).

<sup>128</sup> *Supra, ibidem* and paras. 114 ff.

<sup>129</sup> After noting that in the absence of any legal successorship of the United Nations to the League the theory of the Organised International Community can be seen for what it is: “an expedient”, Judge Sir Gerald Fitzmaurice continues: “for it is quite certain that none of the States that, as mandatories, assumed obligations to report to the League Council could for one moment have supposed that they were thereby assuming an open-ended obligation to report for all time and to whatever organ should be deemed, at any given moment, to represent a notional and hypothetical organized world community, and regardless of how such a community might be constituted or might function” (*ICI Reports 1971*, at p. 242). This is very close to what we meant when we wrote that international organisations, based as they are on an inter-State compact concluded outside of the framework of a legal community of mankind, are inherently precarious (*Rapporti contrattuali, passim*, especially at pp. 148–149). *Contra*: Ago *Considerazioni su alcuni sviluppi*, etc., at p. 532.

<sup>130</sup> Dag Hammarskjöld, United Nations Press Release SG/406 of 17 November 1954. This is a correct definition of the United Nations as something other than what the constitutionalists believe it to be. However, that “The United Nations, in its aims, is the response of the Member countries to historical necessity” is true, in our opinion, only in part, and for the “aims” as abstractly formulated. It seems not true—considering what the “historical necessity” was and is—for the means deployed in law and in fact for the pursuit of those aims.

<sup>130a</sup> *Supra*, para. 131 and footnote 88.

those aspects of the charters or “statutes” of private corporations and public entities other than the State itself which deal with the organisation (internal) of such corporations and entities.<sup>131</sup>

Although theoretically transposable into the realm of international law, the distinction is in practice inapplicable in this domain, properly understood as the *domain of inter-State relations*. It is inapplicable because one type of rules—organisational rules—are absent. One could say perhaps that such rules are present, at the inter-State level, only in so far as they sanction precisely those negative elements (or structural gaps) which characterise the coexistence among States as a coexistence of equals, all exempt from the authority of a superior. International law belongs, *à la rigueur*, and subject only to small provisos, to the law of relations. Holland’s intuition is still the most correct one.<sup>132</sup>

It is in this sense, to put it in another way, that notwithstanding the presence of “institutions” or organs of various kinds, the relations among States remain *inorganic*. The *organic element*, we shall see, is present in those institutions: but not in the relations of the members *inter sese* and with the “institution”.

141. Organisation in a proper sense is of course to be found within the *inner structures* of international institutions and in the inner functioning of those structures.

We now refer to the organisations of individuals operating as the instrumentalities of inter-State charters—Assemblies, Conferences, Commissions, Councils, Secretariats, Bureaus and Offices—and to the rules governing the inner functioning of such bodies. Here we find organisation in a proper sense, hierarchy. We find, to a degree, the law-making function, the judicial function and the executive function.<sup>133</sup> It is important to note that the addressees of these organised functions are not only the members of the staff and of the Assemblies and Councils. Whenever the intergovernmental institution performs operative functions (River Commissions, International Refugee Organisation, United Nations forces, European institutions), the effects of their normative, administrative and judicial action extend down *into* the body politic of sovereign States—with the help of each *national* legal

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<sup>131</sup> It would be too easy for the critic to take issue with the above- mentioned distinction—obviously relative—with the argument that it is not an absolute distinction. One would overlook, in so arguing, that we are discussing precisely organisation in international law. Also “organisation” is a relative concept: but this does not seem to induce any particular caution in the scholars who profess such theories as: the theory of the State as an “organ” of the international community; the theory of the international community as an “organised international community”; the theory of the League or the United Nations as the constitutional structure of that community: and to present under a constitutional light” all the issues and phenomena listed above, paragraphs 116 and 130.

<sup>132</sup> *Supra*, para. 130. On the concept of *organisational rules*, better now *L’Etat*, pp. 348 f., 351, 361. The argument of the hypothetical critic referred to in the preceding note would resemble, if applied to this point, the reasoning opposed to us by Marmo, “Il diritto internazionale e la distinzione fra diritto pubblico e privato”, *Comunicazioni e Studi*, VIII (1956), pp. 185 ff. The essence of Marmo’s reasoning was that since the distinction between public and private law is not transposable into the law of nations, this law is bound to consist . . . exclusively of *public* law, particularly with regard to international organisations.

<sup>133</sup> The peculiarity of these rules as compared to the inter-State rules of treaties establishing international organizations—a peculiarity now most obvious in the European economic communities (EEC, ECSC and Euratom)—is stressed in *Rapporti contrattuali*, pp. 97 ff., especially pp. 123–158. For a more restricted application of the distinction see, in the Italian doctrine, Scerni, *Saggio sulla natura giuridica delle norme emanate dagli organi creati con atti internazionali*, Genova, 1930; Morelli, “L’Istituto internazionale di agricoltura e la giurisdizione italiana”, *Foro italiano*, 1931, I, 1427; Monaco, “I regolamenti interni degli enti internazionali”, in *Jus gentium*, I, 1938, p. 52 ff.

These authors, however, do not stress adequately, in my opinion, the difference between the inter-individual rules of *international institutions* and the regulations of *collective bodies* of municipal law. The difference between the two is precisely the reflection of the difference between the present universal society and a legally integrated society. On Quadri’s views see the following footnote.

system—to attain the individual subjects of States or the individual inhabitants of territories.

The mechanisms of the various organisations at present in existence and the rules governing their internal operation thus appear as a constellation of interindividual institutions of varying weight and proportions, constituting as many “embryos” of the scattered elements of the texture that *may* some day become the constitutional apparatus of the legal community of mankind.<sup>134</sup>

However, the internal systems of international institutions are very far from attaining such a stage. First, they are a variety of scattered, only relatively connected centres, hardly recognisable as a continuous system, even among themselves. Secondly—this is most essential—the degree of legal disintegration of the universal society is so high and State sovereignties and allegiance so absorbing, that it would be very hard to find any continuity of texture between each one of these systems and that ultimate “social basis” of a universal public law that should naturally be the universal society of men (or any portion thereof).

It follows—as explained in the subsequent paragraphs—that the existence and operation of the mechanisms in question does not alter, in spite of the presence of hierarchy and organisation *inside them*, the condition of non-dependence which States enjoy (as *superiorem non recognoscentes*) under the law of nations. Hierarchy does not extend outside the internal order of the organ *or* beyond the municipal orders of the States involved in the organ’s vicarious (operational) activity.

142. Two different legal textures are discernible within international organisation in a wide sense. On the one hand are the inter-individual legal textures operating within the various mechanisms and—in the case of vicarious activities—within municipal legal systems as adapted. On the other hand are the inter-State rules of the constituent treaty. Between the two—between the *organic* on one side and the *relationnel* on the other—there is no real continuity.

If one drew up a chart of the legal phenomena taking place within the universal society, these two sets of normative elements—the inter-State element and the multiple inter-individual systems—would have to be indicated by lines of different colours: and the inter-State rules would have to be drawn in the *same* colour in which they were drawn *prior* to the creation of international organisations.

For the mechanisms of international institutions to become organs of the legal community of mankind, and thus rise *above* the States—it is not only necessary that they become *one* system among themselves. It would be necessary that (by a democratic or nondemocratic process) the body-politics of States, *including* their peoples, find themselves bound up, together with the international organs’ structures, into a continuous legal texture within which States would be conditioned *from within* in the sense in which a State’s subdivisions are so conditioned by municipal law. This process would be roughly the reverse of what may, supposedly, have happened when the inter-State system took over, at inter-State level, as an *original* formation (*supra*, para 124).

Until that reverse process took place the inter-State legal “order” seems bound to preserve its inorganic structure just as the inter-State political system persists as such. Inter-State rules,

<sup>134</sup> Quadri seems now to share this view (*Diritto internazionale pubblico*, Palermo, 1960, p. 187 f. and 356 ff.) put forward in *Rapporti contrattuali*, p. 142 ff. and accepted also (with reservations) by Ago, *Considerazioni su alcuni sviluppi*; and by Oddini, *Elementi*, etc., especially at p. 408. Quadri, however, also refers to the internal systems of international organisations as “trasformazioni” of international law: a definition which presupposes again a “constitutional” conception of international law. See also, as regard Quadri’s ideas, his quoted review of *Rapporti contrattuali*, in *La comunità internazionale*, 1952, at p. 180.

Among constitutional lawyers the distinction is accepted by Mazziotti, *Il progetto di Statuto della Comunità politica europea* (Arch. Giur. Filippo Serafini, CXLIV, fasc. 1°–2° (XVI, serie VI), fasc. 1°–2°, 1953, *passim*).

and the *ratio* of such rules, seem bound to prevail, in international organisation, over any formations of inter-individual rules, just as the relations among States and States values prevail, in the political and economic sphere, over the relations among individuals or peoples across national frontiers.<sup>135</sup>

The organic-institutional element does not set itself *over and above* the *relationnel-contractual* element. Among the member States the agreement (and custom of course) remains *in control*, so to speak, of the organic element. It is the reverse, in a way, of what happens with the organic element in any national society as a whole or in its subdivisions.

143. The distinction and separation between the inter-individüäl element and the inter-State element of international organisation are manifest in all the integrative and disintegrative processes of human communities.

(i) The simplest form of integration between political communities, analysed by Anzilotti at the beginning of the century *à propos* of the deditio of the Congo to Belgium, is consensual incorporation. It was plain in that case that the *pactum deditiois* of one State to the other did not produce directly the subjection of the annexed A to the annexing B. The treaty creates A's obligation to do what is necessary for the annexation to take place and B's right to the initiation and completion of the process in the manner set forth in the *pactum*. The legal subordination of A to B and, conversely, B's supra-ordination will take place—as long as the treaty's clauses are complied with by *passage des pouvoirs*, within the sphere of the municipal law of B, the annexing State. This occurs, precisely, through the gradual withdrawal of A's organs and legal order and the simultaneous “take over” on the part of B's, until A's legal order is extinguished or totally absorbed within B's legal order. However unequal the *pactum deditiois* obviously is, there is thus not one moment—prior to, or in the course of, the process—in which a condition of supra-sub-ordination is discernible between the two States as a matter of international law.

Although the process leads to such a *perfect* union between A and B, that the former merges into the latter, the organisation consists not, from the legal standpoint, of the rules of the deditio treaty. It consists only of rules of municipal law. There are, plainly, on the one hand international legal rules and situations of a *merely contractual, inorganic*, nature. On the other hand, there are inter-individual (municipal) legal rules and situations of an *organisational* nature. However closely related the two sets of elements are normatively distinct. If A does not comply with the obligations assumed by treaty, B has an international claim. But the organisation process will not start or continue unless A complies under pressure or B proceeds to a forcible annexation. In any case, the *pactum deditiois* is so far from being the “source” of the resulting organised fabric that it does not survive the completion of the process.<sup>136</sup>

(ii) While consensual incorporation is a rare occurrence, the so-called “protectorate union” is less rare. And here again, it is not the protectorate treaty that *subjects* the people or the organs of the *protégé* State.

The treaty binds the protected State to accept the protector's interference or the take over of certain powers by the latter's organs and to co-operate to that effect. From compliance

<sup>135</sup> This is, *inter alia*, why we believe it to be arbitrary to qualify the Charter of the United Nations as a “constitution” (*Rapporti contrattuali*, at pp. 138 ff.; and *La questione cinese*, pp. 91–94). We find further reasons of doubt in the thoughts of Ross, “Power Politics and the Ideology of the United Nations”, in *Nordisk Tidsskrift for International Ret (Acta Scandinavica Juris Gentium)*, 1952, pp. 33 ff.

<sup>136</sup> Part of the treaty's content may of course go on performing a normative function within the body-politic of the annexing State to the point of legitimising legal claims on the part of the annexed people (as may have been the case for some aspects of the *Cayuga Indians* claims). Such a function it may perform, however, in so far as its clauses become part of the annexing system, namely, by virtue of a more substantial sanction than the *pacta sunt servanda* and under the safeguard of more effective law-applying and law-enforcing procedures.

there will ensue, of course, various forms of organisation between the two States. But the organisation, and the rules thereof, will exist as such in the legal systems of the States involved. The international treaty remains an inorganic transaction.

It will be noted that the distinction is in this case more significant. Unless the protectorate developed into an annexation, in which case the process would be quite similar to consensual annexation, the protectorate relationship implies as a rule the survival of a measure of international personality with the protected State. On one hand, the relevant organisational rules will be present within the municipal systems of *both* States involved, namely the protecting State's and the *protégé*'s (while in the case of annexation organisational rules will only exist, ultimately, in the annexing State's legal system). On the other hand, the inter-State contract will survive the establishment of the organisation.

144. Of even greater interest—because it is more complex, often more gradual, and multilateral—is the process leading from simple alliance to organic alliance and to confederation. The international treaty's content, in terms of obligations (and rights) of the—respectively—allied, organically allied or confederate States, will vary quite substantially every time the relationship moves from one phase to the next (eventually to a federation).

But the treaty (of alliance or confederation) will always remain, even when it provides for the establishment and operation of common forces or international organs, a pact among equals in the sense in which any treaty is such. The organic element develops at inter-individual level within the integrated armed forces and within the confederal councils and auxiliary organs: and it will develop further, possibly, within the federal system.

The clearest illustration of the dichotomy in question is the coexistence of quasi-international relations on the one hand and constitutional rules and processes on the other, during that “critical period” of the development of the United States of America which elapsed between the First Continental Congress of 1774 and the coming into force of the federal Constitution.<sup>137</sup> Originally set up as overseas subdivisions or corporations of the English Kingdom, those colonies acquired at one time a condition which can approximately be described as one of statehood and international personality. That status was reflected both in the relationship of the communities *inter se* and in the relationship of each community with outside entities: but mainly among the Thirteen *inter se*, especially during the Second Continental Congress and after the beginning of the war against the mother country. Salient manifestations of that *status* were the participation in the pact of “Association” which emerged from the First Congress and the participation in the Second Congress and in the “Articles of Confederation” of 1781.

Entwined with the international relations and transactions among the thirteen governments one also perceives, however, as from 1774 or earlier, the development of the inter-individual system which was to become the federal constitution of 1789. The beginnings of this process, which was nothing less than the initial phase of the constitutional law of the American nation, were the internal regulations of the First Congress and rules governing its relations with and among the Congress’ employees. Notwithstanding the limitation of the powers of that Congress to *advice* and *recommendation* addressed to the associated governments, there have certainly been, in addition, manifestations of direct authority of the Congress over the individual subjects and agents of the 13 communities. Further on, the Second Congress was to acquire even more important functions—within the inter-individual fabric of which it was the core—by exercising direct control over the armed contingents supplied by the states, by conferring on George Washington the supreme command in the war of independence, by using the moneys contributed by the states, by regulating the use and discipline of the armed forces. One witnesses a series of acts of

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<sup>137</sup> *Rapporti contrattuali*, pp. 105–114.

“supremacy” which—whether provided for or not by the initial Association or by the Articles of Confederation—testify to the existence of a juridical structure which consisted *not* of the relations among the associated communities *qua* international persons but of something different.

One perceives, in other words, two distinct sets of normative phenomena. On the one hand there were the egalitarian relations among the 13 states, as governed by the “Association” or the “Articles”, integrated presumably by improvised usage. This phenomenon was to last until the time when the national authority took over—formally or informally—sufficient power to annihilate the independence of the 13 communities’ governments. On the other hand there was an inter-individual legal fabric, initially not exceeding in size the small proportions of the First Congress, its promoters and its entourage, but embracing at the end all the peoples of the 13 communities as one people. Within the latter edifice, the legal orders of the 13 *sovereign communities*, originally existing *per se* as presupposed, *factual* orders from the viewpoint of international law—in particular from the viewpoint of such inter-State compacts as the “Association” or the “Articles of Confederation”—came gradually to be the *dependent* juristic orders of 13 *constitutional subdivisions* of the emerging legal system of the whole American nation. From sovereign bodies the 13 communities turned at that point into as many *provinciae* of the federation.

It seems clear, however, that the two sets of phenomena—one in *crescendo* and the other in *diminuendo*—were juridically discontinuous notwithstanding their historical interaction and notwithstanding the fact that the institutional fabric developed partly in compliance with the inter-State association. The growth of the public law of the American nation—a growth which in part preceded, as a “spontaneous” growth, the entry into force of the federal Constitution—was, in legal terms, neither the inter-State compact *per se* nor a direct development thereof. The impact of the treaty actually decreased as long as the national fabric grew. The political and legal integration of the 13 peoples into one nation and under *one*, however decentralised, legal system, has proceeded actually *à l’ombre du pacte mais contre le pacte en même temps*. Indeed, the inter-individual institution could only develop on the basis of the cultural, social and economic conditions of “American” integration, and from a human endeavour consisting partly, of course, of acts of compliance by the governments with the inter-State compacts but partly of deeds unforeseen by the compacts’ rules and unrelated therewith.<sup>138</sup>

At no time has there existed an international legal organisation legally composed of the 13 states or their peoples. The Congress—First and Second—was on the one hand an international organ which the Thirteen were committed towards each other to maintain and with the deliberations of which they were bound towards each other, in a measure, to comply. On the other hand the same Congress was the embryo of the interindividual institution. It was neither a corporate body composed of the 13 states nor, yet, the corporate body of the American people.

145. These indications are endorsed by the results attained through the analysis of the opposite process observable when from the stage of a unitary or imperial structure, a human society moves to the stage in which it is split into a number of separate political units. We refer to that process by which a human society moves from the stage where it corresponds to a single international person to a stage where it corresponds to two or more such persons. The organisation of the total society existing at the outset obviously disappears, inorganic relations supervening between the resulting political formations. But this follows neither from a mere decentralisation of the original inter-individual system, nor, vice-versa, from a process

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<sup>138</sup> A critique of the “constitutionalists” view with regard to the formation of the American federal State is developed in *Rapporti contrattuali*, loc. cit.; and *Diritto internazionale*, 231–232 (footnote 1 at p. 231).

of decentralisation of an international system supposedly applicable as amongst the original subdivisions of the total society.

It is not merely a matter of decentralisation of the original legal system (unitary State or empire) because among the resulting independent communities there will apply, once the process has attained an advanced stage, no more, or not only, an inter-individual public law but only, or also, international legal rules that played no direct role before, or played a different role.<sup>139</sup> It is not a matter of decentralisation of international law, or of a “portion” thereof, in that the relations among the (now independent or quasi-independent) component communities of the whole society were not governed by international law at all or were so governed by it in a different sense.<sup>140</sup> There will actually have been two more or less simultaneous, inversely proportional processes, corresponding to the reverses of the processes identified in annexation and federal integration.<sup>141</sup>

Very instructive, for example, is in this respect the history of the British Empire.<sup>142</sup> In the course of the process which has brought about the present situation, the imperial-constitutional law in diminution and the rules of international law which gradually superseded it (in the regulation of Commonwealth relations) have never been parts, really, of *one* legal texture. It has been neither a matter merely of decentralisation of imperial law nor a matter merely of decentralisation of an international association of States; nor was it really, in spite of the uniqueness of the entity, a matter of decentralisation of *a sui generis* system. The historical-normative process is a more complex one. Until a certain stage there was, of course, a decentralisation process of an imperial system, such process consisting of the growing constitutional autonomy of the dependencies *within* the system itself. However, starting from the time when any one of the dependencies achieved statehood and a measure of international personality *vis-à-vis* the mother country (and at least other dependencies), the process became clearly dual. On one hand one witnesses an increasing impact of *international* rules on the “external” relations of the dependencies (by now Dominions) *inter se* and with the outside world. On the other hand there is a progressive reduction of the *emprise* of the constitutional law of Britain over the Dominions.

There is thus at no time such a thing as an inter-State-international system undergoing decentralisation or dissolution. It is the *constitutional* system that “contracts”, leaving increasingly large space for international legal rules to come into play. The constitutional ties which at any time survive, as some still do, would properly be described neither as an international organisation among the political units involved nor as a *sui generis* organisation (however *unique*, we repeat, the features of the Commonwealth may be). The residual ties belong to the . . . residual constitutional order. This juridical *residuum* coexists with the rules of international law, and operates side by side with the latter, but is not bound up with them into one system.

A not dissimilar discontinuity is perceptible between the rules of municipal law granting independence to a colony and the international rules entering into play, as soon as independence is accomplished, to govern the novel kind of relationship thus established between former colony and mother country (and of course the relations of the former colony with third States). The Philippines and Rhodesia have achieved independence following legislative enactments of the United States Congress and the British Parliament, respectively. In both cases, however, although municipal legal rules must have governed in a measure the

<sup>139</sup> *Diritto internazionale*, footnotes 1 and 2 at p. 232.

<sup>140</sup> *Ibidem*.

<sup>141</sup> *Ibidem*.

<sup>142</sup> Fawcett, *The British Commonwealth in International Law*, especially where he describes a “reception” of international law in the Commonwealth (16–73), a “divisibility” of the Crown (79–83), an international personality in a narrow sense (of Commonwealth countries) (88 ff.) and other features.

*passage des pouvoirs*, namely the withdrawal of the mother country's colonial organs and the cessation of force, in the dependency, of the "parent" legal system, the access of the new political unit to independence and its *accueil* into the coexistence of States<sup>143</sup> is a factual occurrence from the viewpoint of both the law of the mother country and international law.<sup>144</sup>

146. Turning back to integrative processes, it is plain that whenever organisation has been achieved between two or more States on the basis of a previous or concomitant international agreement, that organisation has developed—in compliance with the treaty or in violation thereof—as a matter of national, inter-individual law. None of the phases of the process heading towards integration indicates really the presence of organisational phenomena within international law. Until the States involved maintain a minimum of international personality, their relations are governed by a law of nations fundamentally unaltered in its structure: and once the process is completed, international law is chased out of existence in so far as the relations among the constituent units are concerned. At international law level one only witnesses the usual pattern: a contract contemplating the conduct of States *inter sese*, susceptible as such only to contribute to the integration process through compliance on the part of States.

The terms of the phenomenon are distorted by the "constitutional" theories. Sociologically and legally, if a given society is at one moment in such a state of disintegration as to allow the consolidation of inter-group relations and rules side by side with the internal orders of the groups, the fact that the same society appears later under an integrated and organised "shape" does not mean that inter-group rules "evolved" into inter-individual rules. The resulting order of the community is not a "more developed" stage of the "old" inter-group system.

The transition from a system of equal sovereign groups to a stage of hierarchical organisation is not a matter of supra and subordination of the groups one to the other, or simply of supra-ordinating some individuals to groups while maintaining the sovereignty of these.<sup>145</sup> It is a matter of supra or sub-ordination of men to other men in the total society. As a distinguished scholar put it with reference to certain problems of Roman law,<sup>145a</sup> the organisation of "State justice", for example, is not the result of the evolution of group justice. "So-called group justice is revenge, a source of disorder. State justice is real justice and a source of social order . . . It is not the justice of the group that evolves into State justice, but man, adopting a *critical attitude* to a given situation, who mentally overcomes that stage and puts the new system into being."

I should say more. As long as groups exist as closed units, men of goodwill can overcome the stage of "primitive" justice (self-help, retorsion, reprisals, collective responsibility) only within the single groups. They could not do so, even if their moral attitude so suggested, within the total society, until this society remains subdivided into separate political units. The lack of integration, the lack of the continuous texture of the social and legal system, would

<sup>143</sup> *Supra*, paras. 121–123.

<sup>144</sup> If in the case of the Philippines, where everything went smoothly, the discontinuity may escape *prima facie* observation, it is manifest in the case of Rhodesia. The refusal of the local Government to comply with conditions set by London to the *octroi* of independence has caused the "detachment" to become a unilateral act: notwithstanding the illegality of which—from the point of view of the mother country's legal order—factual independence and consequent international personality have come about just the same and also *vis-à-vis* the mother country.

On the independence and statehood of Indonesia and Somalia, *Diritto internazionale*, at pp. 234–235 and footnote 1 at 235.

<sup>145</sup> Interesting thoughts, in this respect, in Robinson's *Metamorphosis*, etc., Chaps. II and III, with regard to the capacity of the Security Council Members to act as representatives of the International Community or of the United Nations membership.

<sup>145a</sup> Voci, P., *Studi in onore di Vincenzo Arangio-Ruiz*, Vol. I, 1953, at p. 112.

make their action hardly felt if not impossible at inter-group level. The very idea underlying their action implies the *rejection* of the groups as such and of the exclusive, supreme allegiance demanded by each group. The overcoming of the stage of self-help, within the whole society, will take place when the single members of the various groups face each other *without* the mediation of the groups. Until such an event takes place, the attainment of the perfect or less imperfect community will be achieved only group by group. In inter-group relations, the most just amongst men are bound to give way sooner or later to the hard “law” of inter-group justice.

147. Notwithstanding their human composition, notwithstanding the inherence of organisation in their fabrics and notwithstanding the promise they represent for the future, international organs appear thus to be placed by the will of governments, even when they are allowed to address themselves directly to individuals other than their staff, in a state, so to speak, of *suspension*, *vis-à-vis* the universal society. They are situated, in a way, over and above that society, or given portions thereof. But they do not, legally speaking, reach a human basis larger than their staff except in so far as they occasionally do so through the intermediary of national legal orders.<sup>146</sup> Given such a state of suspension, and because of it, international organs are situated *not* over and above the member States.

One can perhaps visualise more distinctly, by contrast, the nature and length of the *saltus*, legal and sociological, involved in the current misuse (in the wake of the “constitutional” conception of international law) of the municipal or corporate model. Deliberately or not, the concept ultimately arrived at—in spite of the most emphatic statements of anti formalistic intent—is a purely nominal combination of the magnitude of the contractual inter-State element, decidedly prevailing at large, with the comparatively infinitesimal constitutional element which prevails inside the organ’s mechanisms, the latter element mysteriously transmitting its constitutional character to the inter-State compact. It is from a combination of that kind that originates, under the omnipresent inspiration of the conception of international law as the legal community of mankind, the idea that the constituent treaties are constitutions.

A characteristic example of this trend of thought is the frequent confusion between the “authority at large” exercised by Great or big powers in the *milieu* of States by virtue of their hegemonic position, with the privileged status that the same powers enjoy, for example, within the conventional structure of a voluntary organisation:<sup>147</sup> a thought that leads to the corollary that the greater weight exercised by the powers through the voting privilege becomes, thanks to its institutionalisation within a charter, authority of the organisation. One is obviously deceived by the most superficial appearances if one mistook the authority at large of the European powers in the XIXth century for the authority of a personified “Concert of Europe” (or of a personified series of Congresses at which those powers consulted) or if one mistook the contemporary hegemonies (or hegemony) of the United States and the USSR for an *organic authority* of the Security Council.

It is perhaps worth pointing out that the more one is aware of the sociological factors which condition the growth of the rule of law, the more one should be aware of the distinction between the inter-individual element and the international element of international organisation. One thing is the synthesis to be ultimately effected between the two elements, another thing is to treat them indiscriminately as part of one and the same legal fabric.

Organisation seems to remain, in the international society, a “quarry” even more

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<sup>146</sup> Not occasional but institutional and permanent is of course the “human reach” of the European institutions *in so far as* they operate “supranational”. Even in this exceptional case, however, the role of the legal orders of member States is *decisive*.

<sup>147</sup> *Diritto internazionale*, pp. 243–244, and further references therein.

“elusive” than obligation.<sup>148</sup> *A fortiori* one must spread the net wide enough. But one must not cede too easily to temptations. One must not spread the net so wide as to fill the net with so much *internal* organisation—of States themselves or of international bodies—as to obtain a catch which has little or not enough to do with international organisation. If one is unable to resist that temptation, one should be sensible enough to avoid, in assessing the catch, to mistake the small game for the big.

The current literature on international organisation seems precisely to give in to such temptations. The majority of scholars tend either to magnify features of inter-State organisation which are indeed very small, or to take organisational phenomena of municipal law for revolutionary developments of the law of nations. The first tendency is revealed in the theories of divided sovereignty and federal analogy, which are discussed in the next section.<sup>148a</sup> The second tendency is manifest in the presentation of the institutions of European integration, and other infrequent “supra-national” developments as elements of change, or changing structures of international law and society.

Would the scholars who include so easily European supranationalism in the great innovations of the international law of our time include as easily the birth of the United States federation among the *innovations of the law of nations* of the XVIIIth century? Considering that the number of years which have elapsed since the establishment of the European institutions is now about as high as the number of years of the critical period of the American Union, those scholars should also admit, in view of the slow pace of European integration, that the law of nations of the XXth century has moved backwards relative to the law of nations of the late XVIIIth century.

#### *Section 5. The Alleged Federal Analogy and the Concept of “Divided Sovereignty” in the Theory of International Organisation*

148. *Sic transit*, in our view, the introduction of “federal analogies” into the theory of international organisation. And *sic transit*, in particular, the theory of “sovereignty divided” under international law between member States or their organs on one side and international organs on the other.

To begin with the federal analogy, the most authoritative sponsor of which seems to be Wilfred Jenks,<sup>149</sup> the situation which is typical of federal law is missing, in international organisation, both at organ-State relationship *and* at organ-peoples relationship.

In the organ-State relationship, while the federal government faces a juristic entity legally and effectively penetrated by its law and its organs, the international organ and its law face each State as a political unit—the sovereign entity—to the action of whose organs it is in law and in fact unable by itself to substitute its own action. In the organ-peoples relationship the reverse occurs. While the federal State reaches the subjects of the member State by its own, legal and effective, strength, the international organ reaches the member States’ subjects only through the intermediary of the legal system of each Member State, such legal system being not by international law directly conditioned from within.<sup>150</sup> Thus, while in the international

<sup>148</sup> Cf. Schachter, quoted *supra*, para. 5.

<sup>148a</sup> It is precisely the federal analogy that prevents Kelsen from seeing *all* the difference between the Charter of the United Nations and a constitution. Quite curiously, Kelsen (*The Law of the United Nations*, at pp. 6–7) sees very well that the reference to the peoples in the Charter’s Preamble is a fiction. However, according to him, it would be, it seems, *as much* a fiction as the similar statement in the United States Constitution. From our viewpoint the two situations are hardly comparable.

<sup>149</sup> Quoted *supra*, para. 120.

<sup>150</sup> *Supra*, paras. 121 ff.

The “human” basis escapes the (direct) reach of the international organ for reasons which a lawyer could perhaps indicate as follows. *First*, the human basis is out of *legal* reach because the rules under which the organ

organ-State relationship the federal model does not materialise because the State *is* within the reach of international law but its constituency *is not*, in the international organ-people relationship, the model does not materialise because the State's constituency is reached by the international organ only through the *medium* of the State's legal system.

In the first case the international organ hardly manages the State because it does not reach directly the State's constituency. In the second case the international organ hardly manages the State's subjects because it does not control the State's legal order directly.

Penetrating as it does the member State's bodies-politics, the federal State is enabled, in law and in fact, to set the members of the whole society—*its* constituency—against any recalcitrant member State or group of States. Ultimately, it can do so against all the member States. Each member State's conduct is in fact controlled from inside thanks to the *primary* allegiance, factual and legal, to the federal (national) order on the part of its own subjects. The international organ, on the contrary, with no chance of (or legal claim to) a direct allegiance from the member States' subjects, can do little, if anything, of the kind.

This is significant from the point of view of the effectiveness of the international organ. It is the lack of control of the ultimate human basis, it is the absence of those peoples boastfully declared to be present in the Charter's Preamble, that makes the organ impotent *vis-à-vis* the States. It is this predicament—the organ's state of *suspension*—that makes the development of the organ's power so problematic. Under the constitutional theory, according to which States are juristic persons incorporated into the organisation together with their peoples, the failure of collective security, or any other failure of international organisation, is a legal and sociological mystery.

149. Similar considerations apply to the theory of the division of sovereignty between States and international organs.

After stating, *à propos* of public policy in international organisation, that “It is not the concept of sovereignty which tells us what obligations, rules and devices the law may create, but the obligations, rules and devices recognised by the law which tell us how the law interprets and applies the concept of sovereignty”—a statement with the first part of which we would take little issue—Jenks maintains, in his splendid enthusiasm and in agreement with Lauterpacht, that “Sovereignty, moreover, is not absolute but divisible”.<sup>151</sup> According to Jenks this conception, “inconceivable to the dogmatic school of thought which regarded the essence of sovereignty as being its absolute quality”, has been “made familiar by the constitutional theory of federalism”. According to Jenks himself this “constitutional theory”

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is set up and operates are part of an inter-State compact (in which, and for the purpose of which, States participate in their typical capacity of given, factual entities). *Secondly*, the constituent States take good care so to limit the organ's “functions”, or so to reserve their own sovereignty (or domestic jurisdiction), as to keep the international organ “off”—or out of reach of—their constituencies (footnote 158, below).

States are not unaware of the fact that—however extended and substantial the limitations of their freedom may be—their sovereignty will be safe until they manage to preserve the ultimate, exclusive relationship with, or control of, their subjects.

Of course States go so far, with certain River Commissions and with the institutions of European integration, as to permit an international organ to carry out the kind of operations earlier referred to as *vicarious State activities* *vis-à-vis* their own subjects. But they do so, *in international law*, while carefully keeping in their hands the control of those decisive “buttons” which are the “adaptation processes” of their respective legal systems.

Similar considerations apply to the *territorial basis* of the international organ. From the territorial as well as the personal point of view international organs are in a position even more precarious than, for instance, the Holy See. As a substitute for the exclusive human basis with which States are provided, the Holy See “enjoys” the allegiance of the faithful, just as it “enjoys” the minuscule territory of the Vatican City as a modest *Ersatz* for the territory of the old Papal States.

<sup>151</sup> For both authors see Jenks, *The Prospects for International Adjudication*, cited above, pp. 497–500, especially at p. 499, and quotations of Lauterpacht, *ibidem*.

underlies a number of decisions of the International Court.

This view (discussed here as one of the most significant among many similar positions of the “constitutionalists”) is based on a conception of sovereignty that Jenks himself would probably be unable to apply consistently within the realm of international law.

Of course, as a matter of law, sovereignty is quite divisible in so far as *internal* sovereignty is concerned, namely legitimate power within, or over, a human community. Such is the case, for instance, of federal systems, where the essential governmental functions are legally apportioned by the constitution between federal organs and member States’ organs. *A fortiori* are such or similar sovereign functions apportionable within the law of a unitary State, in the measure in which policies of decentralisation prevail.<sup>152</sup>

But for State sovereignty in the external sense it is another matter. Sovereignty external is independence, and independence is not the result of an *octroi* on the part of international law. The notion that external sovereignty is a legal quality granted to a State by the law of nations is a purely logical deduction from the theory according to which international law governs somehow, on the basis of the alleged rule of effective power or effective organisation, the creation, the modification and the dissolution of its “corporate” subjects in the same sense (qualitatively) in which the corresponding vicissitudes of a corporation of municipal law are governed by the latter.<sup>153</sup> On the contrary, since States are not legal creatures of international law,<sup>154</sup> sovereignty is not something they receive from the law of nations. It follows that sovereignty in the external sense is not divisible, as a matter of international law, between member States and international organs.

This is not because of any special regard being due to the majesty of the State *qua* international person. Nor is it, really, because States cannot be bound against their will.<sup>155</sup> It is because sovereignty in the external sense is a fact, just as the State is a fact, as shown earlier, for the law of nations.<sup>155a</sup>

It is of course another thing to say that sovereignty external is *in fact* a relative quality or status, and in that sense divisible. The hegemonic relationship is an example.

It is also another thing to say that international law is concerned, in a measure, with the safeguard of the sovereignty of States. For example, by condemning as illegal the use of force against the territorial integrity and the political independence of States, the United Nations Charter protects the physical existence and the independence of States—and thus their sovereignty as a material quality. Clearly, such a protection does not turn the *factual* condition of sovereign into a legal quality *octroyée* by international law. *A fortiori* that same protection does not turn the legislative, judicial and administrative activities of each State—*legal* functions from the point of view of its own internal law but merely factual activities from the point of view of the law of nations—into legal functions delegated by international law.

150. Indeed, the sovereignty of States is not what international law restricts when it sets forth obligations, just as it is not what it widens when it sets forth rights. International obligations only restrict the *freedom* of States. The rules imposing obligations upon States with regard to the use of the seas or of the air space above the high seas, with regard to outer space, with regard to the territory of other States, or with regard to the subjects of other States or to the State’s own subjects, do not really restrict sovereignties. Similarly, the rules under which States have accepted to submit one or more disputes to the International Court or to an arbitral tribunal do not restrict the sovereignty of the States concerned. Nor is the sovereignty

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<sup>152</sup> An example is to be found in Articles 131 ff. of the Constitution of Italy.

<sup>153</sup> *Supra*, paras. 115, 121–123 (compared with 133).

<sup>154</sup> *Supra*, para. 123.

<sup>155</sup> Oppenheim’s *International Law*, Vol. I (*Peace*), 6th ed., 1947, pp. 116 ff., especially at pp. 118–120.

<sup>155a</sup> *Supra*, paras. 121–123.

of such States restricted by the enactment of the (binding) judgment or award. It is the same with Article 17.2 of the Charter and with the Assembly's decisions apportioning contributions. They are all matters of legal obligation, namely of limitation of freedom.

Even in the instance of European integration—an extreme case—the sense in which member States are bound by the relevant treaties is not properly rendered, however high the degree to which States are bound by those treaties, in terms of limitations of sovereignty or in terms of sovereignty “divided by international law”. It is not a matter of apportionment of powers between member States and the common institutions *in international law*. If in nothing else, such an “explanation” finds an obstacle in the fact that in so far anything follows from the European institutions’ enactments *vis-à-vis* the subjects and the organs of the member States, as the respective legal systems of the latter lend their legal arm—a *sovereign* arm—to the common institution. It has been seen earlier that it is more realistic and prudent, and not necessarily detrimental to the development of the communities, to indicate the international legal situation of the member States in terms of limitations of *freedom*, albeit limitations of such *envergure* as to impose upon those States the obligation to graft into their respective systems the communities’ institutions themselves, the rules under which they operate, and the regulations, decisions and judgments they enact.<sup>156</sup> A discourse in terms of sovereignty would only be appropriate, from our viewpoint, with regard to the apportionment of *compétences étatiques*, within the “adapted” legal system of each member State, as between the autochthonous organs of such State and the communities’ institutions.

151. Whatever the degree of cogency of what has been stated so far—and we fully concede that legal concepts are conventional—the equation of international obligations and limitations of sovereignty is not viable, whatever the historical origin of the concept of sovereignty may have been, if one considers the prevalent notion of international law as a body of rules governing primarily, if not solely, the relations between sovereign entities. It is contradictory to consider international law as a body of rules of that kind—a body of rules governing the relations between States in so far as they are sovereign—and maintain at the same time that any limitation of a State’s freedom amounts to a restriction of sovereignty.

The distinction between a varying degree of freedom-obligation on the one side and legally not divisible sovereignty on the other appears to fit perfectly with the *relativity* of legal phenomena. Limitation of freedom (as delimitation of competence) is only conceivable as the product of legal rules. Sovereignty external being a matter of factual independence, limitations of sovereignty are not conceivable as susceptible of normative action by a body of rules dealing, whatever their object, with States *qua* independent entities. For international law, in any case, the distinction is essential, because only by being endowed with sovereignty in the sense of factual independence is a State an international person. States endowed with derivative sovereignties, as the member States of a federation, are simply not international persons. The possibility for international rules to condition the conduct of States by limitations of freedom, viz. by obligation—whether the obligation’s object is their external *or* internal activity—only exists in so far as the State is sovereign in fact. Once a State became sovereign *in law* (limited sovereignty) the international rule would simply become inoperative with regard to that State. The concept of sovereignty limited by the law of nations seems to be just another *mystère* of the theory of international law as a constitutional law.

In the above-quoted passage Jenks refers—from our viewpoint—to different things. One is the sovereignty of the “State in the sense of international law”. The other is a concept of sovereignty which, precisely because it is part of the “constitutional theory of federalism”—to put it with Jenks himself—is alien to international law.

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<sup>156</sup> *Diritto internazionale*, at pp. 238–240.

152. Apart from any question of nomenclature, this is, with respect, *not* a dogma but a reality which is clearly perceptible in the day-to-day practice of international relations.<sup>157</sup> Factual independence is the precondition of international relations. A *fortiori* we are unable to see in what sense the sovereignty of the State—as an international person—is, in the words of Lauterpacht, “no more than a bundle of rights”. Such a bundle—of rights or *compétences*—it undoubtedly is—again—for States under a federal constitution.

Domestic jurisdiction could be perhaps a more appropriate concept than sovereignty or “bundle of rights”. The notion of “domestic jurisdiction”, usually applied by international lawyers to the realm of *freedom*—with regard to which, as everybody knows, it makes little sense—might make perhaps a little more sense, in theory, if it were understood to mean sovereignty. It would thus mean the exclusion in principle of any *substitutive* or *direct* action on the part of an international organ *vis-à-vis* the subjects, and/or in the territory, of a State. This might actually make Article 2.7 of the Charter at least theoretically less futile.<sup>158</sup>

Reverting to our discussion, once the matter is dimensioned in terms of limitations of freedom, it is plain that Jenks rightly claims that sovereignty (in terms of limitations of freedom) should not be thrown “into the balance as an argument for or against the existence or validity of an alleged rule of customary international law”. Of course not, and especially so if one realises that *vis-à-vis* the rule of international law—whether operating between two or more States or between one or more States and an international organisation—sovereignty is *not* directly in jeopardy except in the theories of the constitutionalists.

There remain the Court decisions quoted by Jenks<sup>159</sup> and underlying which there would be, according to Jenks, a conception of sovereignty divisible by international law. In the 1950 Opinion on the *International Status of South-West Africa*—apart from the fact that the

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<sup>157</sup> On the concept of the indivisible sovereignty see especially Morgenthau, H. J., “The problem of Sovereignty Reconsidered”, in *Essays on International Law*, Columbia Law Review, New York, 1965, pp. 332–363. Morgenthau goes perhaps too far at p. 358. For an accurate study of the literature, van Kleffens, “Sovereignty in International Law”, in *Hague Rec.* 82 (1953–II), *passim*.

<sup>158</sup> This calls for an explanation, necessarily brief, any further developments to be left for the future (see, however, *L'Etat*, pp. 367–372). Confronted with the practical meaninglessness of “domestic jurisdiction” as commonly understood, we wonder at times whether what States were preoccupied about at the time when they established organisations of *general competence* such as the League and the United Nations, may not have been not really the danger that the organisation may want simply to *concern* itself with matters “domestic”. In the sense commonly attributed to it (and much debated) that adjective can hardly mean anything within the framework of instruments envisaging a very wide, if not unlimited, scope for the organisation’s *concerns*. The more so within the framework of a body of rules like the law of nations, unrestricted in their turn by limitations of object (*supra*, paras. 110, 132 and *infra*, para. 164).

It might be reasonable to assume, therefore, that in the minds of its inventors that reservation may have rather been meant—for example in the Charter—to prevent that kind of *direct interference* on the part of the organisation (in any matters except those covered by Chapter VII), which would be more likely to become a threat to the more specific and vital interest of States (as compared to the mere freedom from obligation) to maintain the *exclusivity of their relationship with their subjects and agents*. Such a direct interference—namely *intervention* in the sense of “field operation”—might well have appeared, to the minds of the Founding Fathers, as the kind of function that could turn the organisation into the abhorred Super-State.

That this might have been the real preoccupation, especially with the United States Government (used to the practice of federal invasion of the “domain” of the member States), might perhaps be confirmed precisely by the fact that the only occasions excepted from the domestic jurisdiction reservation are those (supposedly paramount at least in 1945) directly related to the maintenance of international peace and security: occasions, it will be noted, which represent in fact the only Charter-envisioned instance of a United Nations *operational* activity in the sense explained *supra*, paras. 134, 138, *passim*.

However, even if an interpretation of domestic jurisdiction in terms of a reservation of sovereignty in our (narrow) sense were acceptable, the usefulness of the clause would remain small indeed (as practice shows anyway). In so far as the State *de facto* maintains exclusive “control” of its subjects and territory, there is but little that the organisation can *in fact* do “operationally”: except of course with the State’s consent.

<sup>159</sup> At p. 499.

question was not of sovereignty as of *territorial* sovereignty—the Court did not decide anything incompatible with the full sovereignty (territorial or personal) of South Africa. It merely—and rightly—found that South Africa, far from free to do what it pleased in Namibia, was under obligations concerning the administration and the ultimate fate of that territory.<sup>160</sup> Together with some prudent lip-service to the theory that the Mandate does not imply the territorial sovereignty of the Mandatory over the territory, we find in that Opinion<sup>161</sup> not little support for our perspective. We refer particularly to the Court's statement that “In accordance with these (of the Mandate) terms, the Union of South Africa was to have full power of administration and legislation over the territory as an integral part of the Union . . . On the other hand, the Mandatory was to observe a number of obligations (viz. limitations of *freedom*) and the Council of the League was to supervise the administration and see to it that these obligations (viz. limitations of *freedom*) were fulfilled”. The Court's theory hinges plainly upon three elements, namely: (i) acquisition by South Africa of (territorial) sovereignty over the territory (1919); (ii) international legal limitations—by means of South Africa's *contractual obligations*—of the *freedom* of administration of the territory that otherwise would follow from unqualified acquisition; (iii) control by the Council over the fulfilment by South Africa of such obligations through discussion of South Africa's annual reports.

That on the latter element—let alone the other two—one could build up a hypothesis of “sovereignty divided” seems rather implausible. The mild form of the control open to the Council is perfectly compatible, on the contrary, with an understanding of the international rules (the compliance with which was to be ensured) as rules restricting the *freedom* of a State whose sovereignty had remained *intact*. The Council-South Africa relationship was envisaged so little as a *constitutional* or *federal* relationship that the Court determined the core of the mandate's legal content to consist of obligations of the mandatory conceived as obligations towards the Members of the League.<sup>162</sup> So much so that “since their (those obligations') fulfillment did not depend on the existence of the League of Nations, they could not be brought to an end merely because its supervisory organ ceased to exist”.<sup>163</sup> It is only by words, therefore, that the Court excluded that sovereignty (territorial) belonged—and entirely—to South Africa. The Court could not reasonably consider sovereignty (territorial) to be vested in that League, the cessation of which was envisaged by the Court itself as irrelevant to the substantive legal régime of the territory.<sup>164</sup> And it could not consider the sovereignty (territorial) to belong totally or in part to League Members, whose legal position with regard to the mandate was clearly described by the Court not as co-sovereignty but in terms of the rights correlative to South African international obligations: which rights presupposed South African sovereignty territorial and sovereignty *tout court*.<sup>165</sup>

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<sup>160</sup> This is a far simpler explanation than the “limitation of sovereignty” (let alone “division of sovereignty”—but with whom?). It goes without saying that forfeiture of title to the control of the territory is conceivable under a theory of limitation of freedom as well as within the conception of divided sovereignty.

<sup>161</sup> *ICJ Reports* 1950, pp. 132–133.

<sup>162</sup> It is perhaps worth mentioning that no-one has thought of considering the sovereignty over colonial territories as “divided” with the United Nations as an effect of the entry into force of the Charter provisions of Chapter XI concerning the obligation to report on the administration of those territories.

<sup>163</sup> *ICJ Reports*, quoted pages (notably p. 132).

<sup>164</sup> See the Court's reply to question (a), at p. 143: “The Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant . . . and in the Mandate for South West Africa”.

<sup>165</sup> There is of course, in Jenks' vision, some ambiguity between territorial sovereignty and sovereignty *tout court*. Surely that distinguished scholar would not consider, for example, that the acquisition by two or more States of a *condominium* over a territory would bring about a restriction of their (for us *inherent*) quality of sovereign entities.

This is a further example of the implications of the “constitutional” conception of the law of nations, partly listed *supra*, paras. 116 and 130.

One does not see any question either of a “fragmentation of sovereignty” in the case *Effect of Awards of Compensation made by the UN Administrative Tribunal*.<sup>166</sup> If sovereignty comes into play in this case it is the sovereignty of the United Nations *vis-à-vis* one of its officials. This is, hopefully, a matter of *undivided* sovereignty of the international institution; and as the sovereignty of a State it obviously does not exclude that the organisation’s competent organs be so subject to the rule of law within the organisation’s internal legal order as to have “no alternative but to honour obligations incurred by the United Nations”.

Similar considerations as in the previous case apply in the cases of *Interpretation of the Statute of Memel* (1932)<sup>167</sup> and *Lighthouses in Crete and Santos* (1937).<sup>168</sup>

If such is the state of the matter, there is reason to wonder whether in an era of exacerbated nationalism as the one in which we live, it is conducive to the development of the rule of law to terrorise States by threatening their sovereignty at every step. It is also because of contradictory notions of sovereignty such as these that one often finds the acceptance of the jurisdiction of the ICJ or arbitral tribunals described as a limitation of sovereignty.<sup>169</sup> And it is perhaps because of the same ambiguity that some delegates felt it useful or necessary to state, in the formulation of the principle of peaceful settlement in the Friendly Relations Declaration, that “Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality” (*supra*, paragraph 62).

#### *Section 6. The Theory of International Organisation and the General Criteria of Interpretation of Constituent Instruments (a Few Remarks)*

153. What has been said so far must be kept in mind, in our view, in the interpretation of the instruments setting up international organisations. We refer in particular to the *manner* in which it is often made use, for the purpose of such interpretation, of criteria of evolutive interpretation such as “implied powers”, “effectiveness”, “teleological”, and “subsequent practice of the organs *qua* organs”.

There is no doubt—we would wish not to be misunderstood—that the constituent instruments of international organisations *must* be understood and applied in such a manner as to put to *full* use *all* the criteria and doctrines which the practice of international law has developed with regard to legal interpretation, including those criteria and doctrines which are the most *éloignés*, in terms of result, from what is known as literal interpretation. In particular, the instruments in question are subject not only to criteria and doctrines of so-called “strict” interpretation (which is but one of the methods of interpretation *tout court*) but also to criteria and doctrines of evolutive interpretation.

In this belief we are comforted by the theory, defended in the preceding paragraph, that international organisation is not incompatible with the sovereignty of member States. It plainly follows from that theory that there is no foundation to the doctrine according to which the constituent instruments should be interpreted more strictly than other treaties for the reason that limitations of sovereignty are not to be presumed or deduced by way of “wide” interpretation.

In our submission, whether a treaty envisages or not the creation and activities of one or more international organs, its rules set forth situations of obligation and right and no more, all such rules and situations being subject to all the means of interpretation reasonably justified.

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<sup>166</sup> *ICJ Reports 1954*.

<sup>167</sup> Permanent Court of International Justice (PCIJ), *Series A/B*, No. 49.

<sup>168</sup> *PCIJ, Series A/B*, No. 71.

<sup>169</sup> See for instance Oppenheim’s *International Law*, I (Peace), 1947, at pp. 119–120; and Lauterpacht, Sir Hersch, *The Development of International Law by the International Court*, pp. 297 ff., especially 332–333.

The methods of interpretation applicable to the constituent instruments will thus naturally include not just methods based upon the letter of the instrument's provisions, upon "logic" and "system", upon "intention" and *travaux préparatoires*, but also methods based upon the *implications* of the provisions, upon their *effectiveness*, upon *subsequent practice* of the parties, or upon legal *policy* or *public policy*.<sup>170</sup>

Considering that all such criteria are equally valid for the interpretation of any element of an organisation's law, they apply to both the inter-State rules of that law and to the *interna corporis*. The latter include, in their turn, not only the rules of procedure of collective bodies, whether composed of individuals in a personal capacity or of governmental delegates, but also the staff regulations of Secretariats and Bureaux, and those further emanations of international organs which in the case of operational activities<sup>171</sup> reach down into the body-politics of States.

154. It should be realised, on the other hand, at least in so far as inter-State rules are concerned, that the contractual element remains fundamental. The object of interpretation is an inter-State compact, not a constitution.

The perception of this is obscured by two *idola* involving respectively the object and the method of interpretation. First, one exchanges the general meaning of the terms "constituent" or "constitutional" as applied to treaties establishing international institutions, with the *technical* meaning that the same term acquires in the practice of the law of the constitution of a national community. A treaty seems thus to turn into a constitution by a *jeu de mots*. Once this qualitative *saltus* is accomplished, one seems to assume that any instance of recourse to wide treaty interpretation in relation to a constituent instrument (implied meaning, effectiveness, subsequent practice) is an instance of constitutional interpretation. The vicious circle is obvious.

Some writers seem to assume, for example, that in its Opinion in the *Reparations* case the International Court applied the United States Supreme Court doctrine of implied powers. Conceding, as we would not concede, that the Court was right in basing the personality of the United Nations upon the Charter rather than general international law,<sup>172</sup> there is no indication that the Court relied, *in good substance*, on more than an *implied* provision of the Charter considered as a *treaty*.

In alleged reaction to formalism one falls into nominalism. One overlooks that not all that is found *in* or *under* an international constituent instrument is constitutional<sup>173</sup> and that probably, as shown in paragraphs 134–152, there is more constitutional law under—but really outside of—the constituent treaty than in it. One does not seem to realise, in particular, that the relationship between the international organ and member States differs radically from the relationship between the federal government and the member States of the federation.<sup>174</sup> And one forgets that the interpreter is not confronted, in international organisation, with a legal apportionment of sovereignty between the international organ and the member States.<sup>175</sup>

155. From the viewpoint of interpretation, the international situation compares with the federal situation on features such as the following:

(i) in the case of the federal system, the general inherence of organisation in the society, as in every human society, combines with the general supra-ordination of the federal

<sup>170</sup> The latter, however, understood as *supra*, para. 105.

<sup>171</sup> *Supra*, paras. 134, 138.

<sup>172</sup> In the sense explained *supra*, para. 137.

<sup>173</sup> *Supra*, paras. 135, 136.

<sup>174</sup> *Supra*, para. 138.

<sup>175</sup> *Supra*, paras. 149–152.

government to the member States and to the nation as a whole. The compound effect is likely to be the presumption, by the interpreting or law determining organ, that at least the most vital needs of the human society involved (and the new exigencies created by progress) are *virtually covered* in some measure by powers of the central government. In the international system, the noted general absence of organisation and the noted lack of an ordination of the international organ “over and above” States or their constituencies—the condition of what we called *suspension* (para. 147) of the international organ—place the interpreter before a diametrically opposed situation. The *general* presumption is at least more likely to be in the sense of the inexistence than the existence of *international* powers or functions not envisaged (at least by implication) in the constituent treaty. And this, as experience well shows, even where the most vital interest of peace and security is involved;

(ii) the federal system is characterised by the supra-ordination—to the member States and to the whole national society—not only of the central organs whose powers are involved *but also* of the *judicial* or other organ which is entrusted with the settlement of the issue of evolutive interpretation or law determination. As noted earlier, this is not the case in international law, in spite of the existence of a permanent judicial body;<sup>176</sup>

(iii) the powers at issue, as any other powers within the federal system, ultimately derive from the legal order of the whole human society. They already exist *vis-à-vis* the federal government’s social basis, namely *vis-à-vis* the peoples of the member States as one people. The issue with regard to which any criteria of evolutive interpretation may apply will be mostly one of apportionment of powers as between the federal government on one side and member States’ governments on the other side. It is a matter of *distribution* rather than *creation* of powers: two different questions altogether (*supra*, paras. 116–120, 131 ff., 148). The situation is far from similar in an international organisation where: (a) any powers only derive from the inter-State compact, the human society being absent;<sup>177</sup> and, (b) it is not a question of the apportioning of governmental functions, within a universal community of mankind, between the international organ on one side and the member States on another side; it is rather a question of existence or inexistence of obligations of the member States *inter se*;

(iv) in any federal system the central organ is naturally enabled to build up its power not only in view of factors (i)–(iii) above but also by seeking support and legitimisation within the whole human constituency. This can be “set against”, so to speak, the member States. Little or nothing of the kind is possible in international organisation, where the absence of the peoples—let alone one people—leaves the organ to face the member States alone, and in any case without the help of that human “target audience”—to use another of Oscar Schachter’s expressions—which in the federal system represents the decisive factor for the successful assertion of a federal organ’s evolutive interpretation or legal policy. Here appears, in all its magnitude, that predicament of the international organ which is the state of *suspension* mentioned earlier.<sup>178</sup>

156. While unable to build up a direct, ultimate authority of its own *vis-à-vis* the human element consisting of the peoples of member States—and thus unable to “condition” the member States from within their constituencies—the international organ does not lack entirely the possibility of building up *some* authority *vis-à-vis* the member States. It may perhaps be added that the more the membership of the organisation increases in number and variety—as has fortunately been the case in the first quarter-century of the United Nations—the greater would seem to be the chances for the organ to build up power.

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<sup>176</sup> *Supra*, para. 106.

<sup>177</sup> *Supra*, para. 148.

<sup>178</sup> *Supra*, para. 147.

But this is not, however important, a qualitative *saltus* structurally. The novelty consisting of the presence in the organisation of scores of newly independent States affects in a measure the *contents* of the international system, and it is to be hoped that it will do so even more in the future. It does not seem really to affect (as noted in Chapter V of the text) the inter-State *structure* as described; and this is particularly important with regard to the alleged legislative role of the Assembly of the United Nations.

The fact that the unprecedented increase in the number of international persons has not brought about any *structural* modification seems to make the development of United Nations powers by way of evolutive interpretation, if not totally impossible, incomparably more difficult than the development of the powers of a federation. The assessment of the *measure* of the difference—obviously a sociological matter—escapes any competence of ours. We can feel, however, that it is an immense difference. It is so literally immense that it seems simply arbitrary to apply indiscriminately and automatically, to the Charter of the United Nations, the criteria of evolutive interpretation *as they are applied to constitutions rather than treaties*. It must be remembered that over any issue of evolutive interpretation of a constituent treaty of an international organisation, there will always be, ultimately, only *States* or groups of States facing each other behind the conflicting interpretations *without* the mediating influence of a human constituency. And “sovereign States . . . will not be commanded if they cannot be persuaded”.<sup>179</sup>

Inspired by the “prudence” suggested by Leo Gross and Shabtai Rosenne we would say that in the interpretation of constituent instruments one must distinguish—notwithstanding the high degree of temptation created by adjectives and nouns and by the natural wish of any man of good will to see less anarchy in international affairs—the realms of *relationnel* and *institutionnel*. This distinction is based on the noted dichotomy between the inter-State element and the inter-individual element in the law of international organisations. In so far as concerns the (predominant) inter-State element, clearly *relationnel*,<sup>180</sup> it seems to us that the criteria of evolutive interpretation should be applied as they applied to ordinary treaties. Where *interna corporis* are concerned, or the inter-individual element in general, it seems more appropriate to admit evolutive interpretation on the basis—circumstances permitting—of the constitutional or federal model.

This means the evolutive interpretation of the international organ’s tasks and powers *vis-à-vis* the member States is, to say the least, more problematic, technically and politically, than it is generally deemed to be.<sup>181</sup>

157. The matter is particularly delicate when one reaches those stages of evolutive interpretation which are closest to the creation of new rules. We refer particularly but not only to the doctrine of the “subsequent practice of organs”.

The tenets of the “constitutional” doctrine with regard to subsequent conduct are easily summed up. Ultimate *domina* of the rules of international law is the “universal community” in the constitutional sense (*supra*, Section 2). Until very recently, the channel through which the will of that community manifested itself was practically States alone, conceived as organs of that community. It was natural, in such a situation, that only the subsequent conduct of States was relevant as a supervening element for the interpretation of legal instruments. But since the development of international organisations—especially of world institutions like the

<sup>179</sup> Leo Gross, *Expenses of the United Nations*, etc., at p. 35.

<sup>180</sup> *Supra*, para. 140.

<sup>181</sup> One risk involved in the application of facile constitutional analogies in Charter interpretation is that while “getting away” with the interpretation one weakens the treaty’s effectiveness or determines a crisis with regard to part of the membership. Another risk is that of making the organisation lose face *vis-à-vis* the member States and *vis-à-vis* public opinion. Especially in view of what followed, the *Certain Expenses* Opinion may well be one such instance.

United Nations—the subsequent conduct of States would now be integrated in, and eventually absorbed or superseded by, the practice of the institutions themselves.

This would be in perfect analogy with the experience of the constitutional institutions of municipal legal systems. Once international institutions have joined States as the *further organs* of the international community, once they have started exercising community functions, they naturally participate—it is claimed—in the transactions of States as *condomini* thereof, on behalf, naturally, of the ambiguously conceived universal community.<sup>182</sup> The very fact that they are *international* institutions would entitle them naturally to exercise, in the evolution of the system, a heavier weight than States themselves. Once the centralising trend has been set into motion, international organisations should naturally “overcome” the member States as more direct emanations of international law.

In a similar spirit should be applied, according to the constitutionalists, the doctrines of implied powers and effectiveness.

Based as it is on theories and analogies discussed in the preceding section, this doctrine is unacceptable. Furthermore, it is politically dangerous both *de lege lata*—for the crises it may determine—and *de lege ferenda*—for the illusions it would nourish.

158. There is, of course, no doubt that the doctrine of the subsequent practice in the evolutive interpretation and modification of treaties extends to the treaties governing the establishment and the functioning of international organisations.<sup>183</sup> It is far from clear, however, to what *extent* it is justified to speak, for the purposes of the doctrine of subsequent practice, of a subsequent practice *of the organ* as distinct from the subsequent practice of the member States.

(i) As well as a State, an organ (or organisation) is of course perfectly conceivable as a *dominus interpretandi negotii* with regard to the interpretation of contractual instruments entered into *by it* (organ or organisation). In the interpretation of such instruments as *accords de siège* account will have to be taken, not so much of the subsequent direct conduct or attitudes of member States as of the subsequent conduct or attitudes of the organ as such. The organisation appears, in matters such as these, in its relation to its host, in the capacity of a primary international person, side by side with States. This is a consequence of the fact that all the member States have an interest in the organisation’s independence from any State, and particularly from the host State.

(ii) Another area in which the international organisation appears to be among the *domini*—and perhaps as the most important *domina*—are the *interna corporis* in a wide sense, namely, staff regulations, organisation of the Secretariat, interorganic relations. In matters such as these the organisation obviously functions, as noted, in a manner not dissimilar from a national or federal structure. It is natural to expect, for example, that the United Nations Secretariat’s practice (subsequent, it will be noted, to the adoption of the *internal rules* rather than to the *constituent instrument*) should be one of the most decisive

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<sup>182</sup> *Supra*, paras. 114 ff.

<sup>183</sup> Authoritative elements are Article 5 and Article 31.3 (b) of the Vienna Convention on the Law of Treaties.

The *ratio* of the “subsequent conduct” rule is, in our opinion, more than the question of “evidence” Sir Percy Spender seems to believe it to be in his opinion on the *Certain Expenses* case (*ICJ Reports 1962*, at p. 190). The legal possibility for the parties to understand their compact as they please derives from the very same rule under which they were legally enabled to enter the compact. The parties to an agreement are and remain—in the supposed absence of *ius cogens* to the contrary—the transaction’s exclusive and absolute *domini*. Since they have created the rules out of nothing—except of course for the vital enabling rule—they are the masters of the existence, of the survival, of the duration of the treaty’s rules and of any rights and duties deriving therefrom. That they are also the *domini* of the treaty’s meaning follows as a matter of course. The only condition is that they agree, and this condition is obviously susceptible of variations with which the lawyer is familiar. At *this* point the matter becomes one of evidence.

factors in a judgment of the Administrative Tribunal involving an evolutive application of staff or organisational regulations to the personal and functional status of a member of the staff. Even then, however, the organisation's position will be subject, in a measure, to the ultimate control of the conformity of the Secretariat's conduct to the inter-State constituent instrument and to the prevalent attitudes of the member States with regard thereto (here below, under (iv)).

(iii) Similar considerations would apply, in a measure, to the subsequent practice of an organisation concerning "operational" activities (or vicarious State activities) of the organisation itself.<sup>184</sup> Subject to relevant agreements with the host State or States, this may be the case, for example, of the practice of the United Nations which developed the rules governing the use of United Nations emergency or police forces in the territory of the host States and *vis-à-vis* that State's population and organs. Subject to the ultimate control of the member States, the *domini* of the relevant treaties, the same can be said with regard to the subsequent practice of European institutions. Within the framework of the vicarious State activities that it performs, the Commission of the European Communities obviously sets precedents which represent subsequent practice of the organ (*qua* organ) in a sense very similar to the sense in which the action of a federal or national department represents subsequent practice. There remains to be seen, of course, how far the last word with regard to the consecration or rejection of any practices of the Commission's raising issues of evolutive interpretation will really rest with the Court of Justice of the Communities and how far the will of the member States will be such a last word. One can perhaps say that the last word will be with the Court at least until the issue does not determine a major crisis between the Community and one or more member States.

(iv) Be that as it may of the specific cases in which an international organ appears in the capacity of *dominus*, or *condorminus* for the purposes of subsequent practice, it seems that whenever such an organ is operating *vis-à-vis* the member States as international persons—whenever, in other words, the organ is performing what was referred to earlier as an *international activity* in a narrow sense—there is hardly room for a subsequent conduct of the organ *qua* organ, distinct from the conduct of States themselves.

The organ is not a party to the basic agreement. Plainly, it has no *dominium* upon the transaction or upon the transaction's vicissitudes. The organ's conduct—or practice—is not even "subsequent" in the sense in which conduct is to be subsequent under the subsequent conduct doctrine. The organ was not there when the "Fathers" concluded the founding compact.<sup>185–186</sup> The organ is, for the purposes of the subsequent conduct doctrine, a third party, in law and in fact incapable, so to speak, of a *subsequent* conduct.<sup>187</sup>

The situation would be of course a different one if the organ involved were part of the structure of a super-State. Were such the case, the organ would be *dominus* or the most

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<sup>184</sup> We refer to the activities discussed *supra*, paras. 134, 138.

<sup>185–186</sup> The distinction may be so difficult as to raise the doubt that there is any such thing as a practice of the organ, *qua* organ, in the activities now under consideration in the text. See, *inter alios*, Hexner, E. P., "Teleological Interpretation of Basic Instruments of Public International Organizations", in *Law, State and International Legal Order* (Essays in Honor of Hans Kelsen), Tennessee University Press, pp. 120 ff. at pp. 133–134.

<sup>187</sup> To be sure, the organ is conceivable as an international person (*supra*, para. 137). Being, however, neither one of the international persons which participated in the basic agreement, nor a Super-State, the organ is not entitled to act, under any circumstances, as one of the *domini pacti*, unless one operated under the theory that it represents the "will" of the international community. *Dominus* the organ will be only of those relations, transactions and situations in which the organ itself appears in the above-noted primary person capacity (*supra*, cited paragraph). The organ's practice, therefore, including the inherent interpretative aspects of such a practice, while no doubt of importance as part of the *parties* subsequent conduct, is of no consequence—for the purposes of the doctrine under discussion—for the organ's subsequent conduct.

important among the *condomini*.<sup>188</sup> But international organisation, as was recognised by the

<sup>188</sup> Within a *constitutional* framework it would be natural to think as Justice Holmes thought in *Missouri v. Holland*: passage quoted *supra*, para. 120. But the Charter—and we do not in the least intend to diminish its value by this—is an entirely different matter. *Contra Jenks, The Prospects*, at p. 488, according to whom “this (Judge Holmes’) general principle is no less applicable to the Charter . . . than to the Constitution of the United States”. That it is another matter is well recognised by Gross, *The International Court*, etc., at pp. 401–403, especially 403 (quoted *supra*, footnote 39). As it was shown earlier, the Charter is the inter-State compact, not the Constitution of a Super-State. In and by the Charter the member States have retained their sovereignty and—with and by it—their international personality. The United Nations is a *being*: but it is just an *instrument* of inter-States relations rather than an *organism*. Organisms are the States themselves, severally considered.

According to Jenks, both Courts have accepted the constitutional (federal) doctrine in a number of cases. The present Court would have accepted that doctrine in its treatment of the *Certain Expenses* case on the basis of the notion of implied powers (and effectiveness) as developed in a process reaching back to the Permanent Court’s Advisory Opinion of 1922 on *Competence of the International Labour Organisation in respect of Conditions of Agricultural Labour* (Jenks, quoted work, pp. 461 ff. and 482–495).

Gordon also concludes his study “The World Court and the Interpretation of Constitutive Treaties, Some observations on the development of an international Constitutional Law”, *American Journal of International Law*, 59 (1965), pp. 794 ff., esp. 826 ff., and 833) in the sense that in the jurisprudence of the Court there is a “shift of emphasis from treaty law to constitutional law”.

Rosenne, in his turn “Is the Constitution of an International Organisation an International Treaty? Reflections on the Codification of the Law of Treaties”, in *Comunicazioni e studi dell’Istituto di Diritto internaz. e straniero dell’Università di Milano*, XII (1966), pp. 23–89, especially 85 ff.; also “La Cour Internationale de Justice en 1962”, *Revue générale de Droit international public*, 1963, pp. 60–62 of *tirage à part*), concludes his analysis in the sense that the “*question whether the constitution of an international organization is itself an international treaty does not permit of an unqualified answer*” (at p. 86); that “the law governing the constituent instruments of international organisations is developing along lines peculiar and appropriate to those instruments and to them alone, *without more than a superficial similarity with the law of treaties*” (at p. 88); and that since “the application of those instruments” is *dominated by the institutional element provided by the Organization*, an element entirely missing for bilateral and multilateral treaties . . ., it is deceptive to see in diplomatic and legal incidents concerning the constitutive instruments ‘precedents’ for the general law of treaties and *vice versa*” (at p. 88). Rosenne finally suggests that the International Law Commission would be well advised if it adopted, in dealing with the law of treaties and the law of constituent instruments, the old maxim *bene iudicat quis bene distinguit* (pp. 88–89). Italics in the quoted phrases are added.

We are inclined to believe that the practice of the Court is on the whole, if not nearer to a contractual conception of constitutive instruments, at least pretty well balanced between the two extremes represented by the conceptions of such instruments as inter-State compacts and constitutions, respectively. Although this is not the place to discuss the question to the extent and in the depth that would be necessary, one cannot but feel that there is an excess of doctrinal emphasis upon the constitutional element. Indeed, Gordon’s conclusion is more dubitative than it appears from the sentence quoted. Gordon himself admits, after all, that the Court is not openly reverting to the constitutional trend. The Court “says” at least, according to Gordon, that what it does is “finding the *meaning of words* as they were intended” (which is perhaps much too little for the interpretation of any treaty, let alone a multilateral treaty of quasi-universal participation). In Gordon’s own words: “The answers, to the extent that one study can be said to provide answers, are that there is a palpable difference between that which we see the Court doing and that which it says it is doing and, as a result, that its criteria appear to be increasingly unsatisfactory. What the Court says it is doing is finding the meaning of words as they were intended by contracting parties, what we see the Court doing is relating constitutional language to the welfare of viable international institutions, knowing that this welfare may be quite independent of the thoughts of the contracting parties” (p. 855). This would be usefully compared with Gordon’s comments on “intention” at pp. 827 and 832. Anyway, the cases quoted by Jenks are far from showing any decided committal of the Court to the constitutional approach: and that distinguished author’s insistence on an analogy between the Charter and the Constitution of the United States is, with respect, more than ill-founded, temerarious. It has been observed that “the United Nations is not like the United States even in its infancy”, and we have tried to explain that the difference is a *qualitative* one.

It is also interesting to note, in Rosenne (*Is the Constitution*, etc.) that three of the International Law Commission’s Special Rapporteurs on the law of treaties “have recognized the element of treaty in the creation of an international organization, and indeed have made statements which, by themselves, may be regarded as adopting the traditionalist approach” (at p. 39). Those three rapporteurs were Brierly (First Report, article 2 (b)), Lauterpacht (First Report, article 1, note 2), Fitzmaurice (First Report, article 1). It is significant that only Sir Humphrey Waldock, of whom we have mentioned (*supra*, para. 115 and footnote 11) the “constitutionalistic”

International Court of Justice in the quoted *Reparations* Opinion, is precisely not a Super-State.

159. It thus seems appropriate, as a tentative conclusion, to extend to the question of subsequent practice in international organisations the dichotomy between the two distinct elements found to be present in them. One should distinguish the contractual, inter-State, element and the institutional, inter-individual, element.

It is probably in the light of such a distinction—a contract or treaty “area” as opposed to a “constitutional area”—that doctrines such as subsequent practice of the organ *qua* organ, implied powers and effectiveness should be applied. Within the contract area there would be a strong “scientific” presumption in the sense that *only* the practice of States may be relevant as subsequent practice; it being understood, of course, that that practice also manifests itself within the organ.<sup>189</sup>

The relevance of this distinction for the development of a “legislative” role of the General Assembly through the practice of the Assembly itself is evident. In so far as the General Assembly operates within the realm of inter-individual law, development of a normative power by subsequent practice is perfectly conceivable. This would apply not only with regard to strictly internal affairs such as staff regulations and internal organisation, but also with regard to field operations, namely vicarious State activity, carried out, for example, on the strength of *ad hoc* agreements with the State or States in the territory of which the operations are to be carried out. The latter agreements, however, will represent in any case a decisive limit.

In so far as the General Assembly’s normative role manifests itself in the “outer” realm of the relations of States *inter se* or with the organisation, the possibilities of development are very scarce indeed. In this domain the States seem to remain practically in total control of legal development through the conventional law-making and law-determining processes.

### *Section 7. The Theory of International Organisation and the Normative Role of the General Assembly*

160. The concept of international law and organisation discussed in the preceding sections helps perhaps to look more clearly and realistically, from our viewpoint, of course, at the normative function in the international society and at the role of the Assembly, *de lege lata* or *de lege ferenda*, in that regard.<sup>190</sup>

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conception of the international system, dropped the treaty element of the constituent instrument (Rosenne, at p. 40, footnote 41).

As for Rosenne himself, he seems to put much water in his “constitutional” wine in the other paper quoted higher (in the present footnote). In that review of the Court’s *Certain Expenses* Opinion (in *Revue générale*, 1963), after noting that “La Cour s’appuie essentiellement et non sans insistence sur la pratique des organes visés” (however: “trouvant dans cette pratique la confirmation de conclusions atteintes par la voie du pur raisonnement”) (at p. 60 of the *tirage à part*), Rosenne warns that “Bien qu’une telle façon d’aborder le problème soit incontestablement séduisante, plusieurs juges, notamment Sir Percy Spender, ont formulé des avertissements significatifs contre l’assimilation de la pratique suivie par une organisation internationale à l’interprétation d’un traité . . . sur la base de la conduite subsequte des Parties à ce traité. Cette mise en garde est opportune. S’il ne convient pas de sous-estimer la pratique comme élément d’interprétation de la Constitution d’une Organisation internationale, il ne faut pas non plus la surestimer, car il y a fréquemment un élément inévitable d’opportunisme politique dans la constitution d’une majorité formelle au sein de l’Assemblée générale, milieu où le décompte d’un vote peut ne pas refléter pleinement une vue objective de la situation juridique” (at pp. 60–61).

<sup>189</sup> See Chap. II, paras. 24 ff., especially 26.

<sup>190</sup> We do not think that it is realistic—or prudent—to speak about a “crisis” of international law or of the theory of the sources of international law (as done, for example, by Virally, preface to Yemin’s book on *Legislative Powers in the United Nations and Specialised Agencies*, at pp. IX–XI).

In municipal law and in the general theory of law and State, the term legislation designates, as a rule, the creation of norms of a binding character enacted by an organ deliberately in order to regulate mainly, although not exclusively, the conduct of persons other than those concurring, as members of the organ, in the making of the norms (*heteronomy*). The same term is used to indicate the rules so enacted.

Generality or abstractness does not seem to be in our view an equally decisive feature of legislation. One need not recall the scholastic example of a statute providing for a pension in favour of the widow of a national hero to prove that an individual, concrete rule can be as much a part of legislation as an abstract rule of general application. The difference is obviously a merely quantitative one. The abstract or general rule envisages a virtually indefinite number of legal situations or relations (rights, obligations, *rapports juridiques*). The individual, concrete rule envisages one legal relationship (*rapport juridique*), namely one right-obligation relationship between given persons. In between, there is a multitude of degrees of abstractness or concreteness.

*Heteronomy* seems thus to be, together with the binding force of the rules produced, the most essential feature of legislation.<sup>191</sup>

Another way of putting it is to say that legislation as a process belongs essentially to the realm of the law of organisation rather than the realm of *droit relationnel*. It goes without saying that legislation is not to be identified, from our viewpoint, with law-making, a decidedly wider concept. Law-making includes, in addition to the legislative process, not only custom and judge-made and executive-made law but also contract-made law in so far as the contract operates as a regulatory act rather than just as an *acte condition*.<sup>192</sup>

The extension of such a term as legislation to the making of norms in international society in general, or to any particular form of such norm-making, is, in our view, not justified. It would be so justified under conditions that seem far from being fulfilled in the various instances in which the term is used. *Least of all* would it be justified with regard to the specific instance of General Assembly declaratory resolutions. *Interna corporis* seem to be the only exception (*infra*, para. 165).

161. One need hardly spend much time to demonstrate that neither of the two traditional law-making processes of international society presents such features that would justify its assumption under the concept of legislation in a proper, meaningful sense. A different view might be justified only if one reasoned, as not a few international lawyers like to do, within the framework of the conception of international law as the constitutional law of mankind.

Under that concept, not only the treaty but also custom would acquire a heteronomous connotation.

For treaties there is of course Scelle's theory of *dédoublement fonctionnel* of the States' organs, acting at one time as contracting parties and legislators. There is Kelsen's theory, quite similar, of the indirect inter-individual effects of treaties. There is the concept of the treaties as an inter-individual law-making device similar to the *contrat collectif (de travail)* opposed to us by Kunz.<sup>192a</sup> There is of course also the old but not entirely abandoned notion of *traités-loi* as opposed to *traités-contrat*.

For custom there is the particular connotation that customary rules, and the process through which they come into being, naturally acquire within the framework of a concept of international law as the constitutional or public law of mankind. Examples of such a connotation of custom are all the theories according to which international custom emanates from the conscience of mankind rather than the conscience of States or their rulers and

<sup>191</sup> Compare Hart, *The Concept of Law*, pp. 77–78.

<sup>192</sup> *Infra*, following paragraphs.

<sup>192a</sup> *Supra*, para. 117 (and footnote 31).

operates directly among human beings as the law of the universal society of men, prevailing as such, *on its own strength*, over the law of any national community.<sup>193</sup> In such a universal “light” (from the viewpoint of both the making and the destination of the rules), custom would also acquire a *heteronomous* nuance. States would be subject to rules of which they are neither the principal or the exclusive makers nor the principal or the exclusive addressees. Mankind, conceived as the social basis—the constituency—of the law of nations, would be the ultimate repository—the very “first” source—of the whole universal legal structure. The potentialities of this notion can be easily perceived if one recalls what has been said in this whole *Appendix*—notably in Sections 1 and 2 and particularly in paragraph 139.

162. A *critique* of the inter-individual conception of customary law is more than implicit in those parts of the present *Appendix* in which it is shown that the theory of international law as the public law of mankind has no foundation and that international law is inter-State law in its making, in its inspiration and in its destination.<sup>194</sup> That *critique* is also implicit, in the very first place, in the concept of the State in the sense of international law as a *primary person*.<sup>195</sup>

Custom would thus seem to remain, unlike legislation, within the realm of *droit relationnel*, in the sense that it is, to put it bluntly, a way to make law which far from *presupposing* authority or supra-ordination presupposes, on the very contrary, *non-subordination* of, and at least a relative *equality* among, the participants in the process. States *inter sese* are precisely in that kind of situation, especially if one looks at them as the primary persons we rightly or wrongly deem them to be.

It must be added, however, that while non-heteronomous at the stage of its making, custom does seem to possess, once made, especially when it is compared to treaty (agreement), an authoritative connotation. Stemming not *from* authority, custom *is*, it seems to us, in a way authority. This is perhaps more difficult to say or explain than to feel or guess: but it is probably related to the same factors that make custom a *unique* kind of source, similar, in some ways, to material sources but not quite a material source.<sup>195a</sup> It is a fact that custom possesses, whether because of the spontaneous nature of its “making” or because of the greater propinquity of the rules it “produces” to the necessities and the features of the inter-State *milieu*—or because of both reasons—a higher, more substantial and inherently fundamental, objective authority than the treaty.

This accounts perhaps not only for the fact that customary rules bind States which had no part in their “making” but also for the greater weight that customary law seems to carry.

This leaves us still far, however, from legislation. In the first place the authority of custom seems to manifest itself only *after* the rule has been “made”. In the second place the rule was not deliberately *posita* as is the case with statutory or contractual rules.

Curiously, the latter point seems to be—whether one is able to explain it or not—very important. There is no such thing as *deliberate* custom-making. For law-making to be deliberate, there must be available the *authority* of the law-maker in advance of the “making”, in which case one speaks of legislation, namely of the enactment of rules binding principally upon entities other than the maker or makers. If, on the other hand, there is no such authority, there will be just a contract, binding only upon the parties thereto, and itself authoritative only by virtue of a legislative or customary rule.

163. As regards the treaty or, more generally, the international agreement, it is precisely the pact or contract in its purest manifestation, distinct from those innumerable transactions

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<sup>193</sup> An example of such theories has been mentioned *supra*, in para. 126, footnote 65.

<sup>194</sup> *Supra*, paras. 125–126 ff.

<sup>195</sup> *Supra*, paras. 121–123. Our critique is now developed in *L'Etat*, pp. 372 ff., esp. 375, 379–385.

<sup>195a</sup> *Supra*, para. 24.

of municipal law which represent *actes conditions* of legal effects provided for by existing rules of objective (constitutional, legislative or customary) law.<sup>196</sup> *Pacta sunt servanda* and related rules are the equivalent, as in the relations among States, of the rule of modern legal systems on the strength of which *le contrat fait loi entre les parties*.<sup>197</sup>

This means that from the viewpoint of their normative force and *portée*, all treaties are qualitatively equal sources of rules and obligations regardless of whether they are labelled *traités-loi* or *traités-contrats*. Treaties setting forth rules of an abstract character, envisaging an indefinite number of “normative hypotheses” do not differ qualitatively from treaties setting forth one or more concrete, specific rules. In both cases, as noted for legislation, the difference is only quantitative in that it only concerns the number of legal relationships—or of obligation-right relationships—envisioned by the rule. Similarly quantitative is the difference between multilateral and bilateral treaties.<sup>198</sup>

Reverting to the question of international “legislation”, it seems clear that qualitatively speaking treaties remain, as contracts, within the realm of *droit relationnel*, whatever the quantitative variations in terms of number or degree of generality of the rules they carry, or in terms of number of addressees. Such variations affect the treaty’s *horizontal* scope, from the subjective viewpoint (*ratione personarum*) or from the objective (*ratione materiae*).

In the *vertical* sense nothing changes. The abstract-general treaty—the so-called *traité-loi*—is no more legislation than the concrete-individual treaty. And the same must be said about multilateral, general or even “universal” treaties as opposed to bilateral treaties.

164. The contractual, as such non-legislative, nature of international agreements accounts for the merits as well as the shortcomings of this law-making device.

Among the merits is the total or almost total absence of objective limits to the source’s regulatory function, the parties to an agreement being entitled to create therewith almost *any* rules of conduct, namely respective rights and obligations of almost any content also in derogation to any rule, more precisely *non cogens* rules, of customary law. An outstanding example of this feature, noted incidentally in paragraph 132, is the freedom of States in determining, in width and depth—subject to the problematic limit of *ius cogens*—the actual scope and ultimate ends of the constituent instrument of an international organisation. The parties’ autonomy is equally unlimited—subject to *ius cogens*—with regard to the object of any *other* transaction, be it the codification of the law of the sea or of treaties themselves, or just a commercial matter. This is the principal reason why—at a time when *ius cogens* was not so much in the picture—the enumeration of Article 38 of the Court’s Statute opens with agreements.

The shortcomings, in their turn, are but the reverse of that very merit of relative *omnipotence* which is the strictly *inter partes*, merely “obligational” effect of the international agreement. This is what we called, years ago, the *inherent* ineptitude of the inter-State agreement of the law of nations to determine *objective*, absolute, *erga omnes* legal situations or “effects”. The limitation could be said to consist, at it was also put at that time, in a general ineptitude of the international agreement to create what in the Italian doctrine, especially in private law, are called “*istituti*”, “*Istituto*”, not to be mistaken for institution, is roughly a set of rules of objective—legislative and/or constitutional—law governing a more or less strictly “typified” kind of human relationship. “*Istituti*” are, in national law, ownership, sale, marriage, filiation, succession, adoption, guardianship, partnership, civil

<sup>196</sup> *Rapporti Contrattuali*, pp. 15–27 (esp. 25) for agreements in general, and 42–57 (esp. 47–52) for international agreements. Add now *L’Etat*, pp. 373 ff.

<sup>197</sup> Quoted work, pp. 48 and 46–47. For the indication of different views, especially in the field of international organisation and personality, *ibidem*, pp. 38 ff. especially 40–42.

<sup>198</sup> *Ibidem*, pp. 26–28, 40, 46–47 and 48.

liability *et similia* (or even groupings thereof). The whole mass, so to speak, of *istituti* constitutes the legal system as *objectively* perceptible and distinguished from more ephemeral phenomena such as the legal relationships created between private parties on the exclusive basis of those agreements through which law subjects can “make law” as between themselves. To say that international agreements do not create “*istituti*” means precisely that they are inherently inapt to create anything but obligation-right situations between the parties. An example is a treaty envisaging a transfer of territory, which creates A’s obligation to “cede” and B’s right to “obtain” but is not really the legal source of the transfer of territorial sovereignty. The latter is an “effect” of customary law as *objective* law.

It is fundamentally because of the same ineptitude that it was stated earlier (in the present *Appendix*) that the inter-State compact is, so to speak, inherently unable to create an organisation (in the sense of authority) or to personify the organisation: things which it would be able to do if it were conceived as the “constitutionalists” seem to conceive it when they maintain, as the Court maintained, that the Charter created the organisation and the personality of the United Nations; or when they maintain that treaties create international rights and duties of individuals. The “constitutional” conception of international law involves in fact an objectivisation of the international treaty—and in that sense its promotion from a mere contract to the higher rank of legislation or quasi-legislation.<sup>199</sup>

What we meant by saying—to a rather deaf Italian school—that international agreements do not make objective law and do not create “*istituti*” is perhaps not very dissimilar from what Parry means by his remarks with regard to the “peripheral” character of the international treaty,<sup>200</sup> And perhaps what we both mean is pretty close to Judge Sir Gerald Fitzmaurice’s concept that the treaty makes obligation but not law.<sup>201</sup>

In our submission it is just a matter of the treaty’s *legal* or normative product being qualitatively *inferior* (to international custom and, comparatively speaking, to legislation in municipal law), whatever its object: including therefore constituent treaties and treaties of codification or progressive development. But it is a qualitative, not a quantitative feature, closely related to the essentially “private” nature of the law of nations.<sup>202</sup> It is the lack of that quality—heteronomy—which makes all the difference between the treaty on one side and municipal legislation and (perhaps) international custom on the other side.<sup>203</sup>

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<sup>199</sup> This is effected by the conceptual addition, to the fabric of international law, of the organised universal community situated *over and above* and qualifying inter-State agreements as legislative or quasi-legislative acts (*supra*, paras. 114 ff.). For organisations see especially paras. 117, 136.

<sup>200</sup> *The Sources and Evidences*, quoted above, pp. 34–35.

<sup>201</sup> Some Problems Regarding the Formal Sources”, etc., *Symbolae Verzijl*, 1958, pp. 153, 157.

<sup>202</sup> *Supra*, para. 130.

<sup>203</sup> Parry sounds to us essentially right when he observes, in the same work (at pp. 34–35), that while treaties help not decisively to have a fair idea of international law, a study of the code in a country of codified law gives a fair idea of the law of such a country. Of course. But this is a consequence of the *qualitative* difference between legislation, obtaining in France, Italy or Germany, and the *mere contract*, which is the instrument available in international law. It is not—as Parry seems inclined to believe—just the secondary difference between a codified system like the French or Italian and a non-codified one like international law and English law. If all the codes were burnt up in continental Europe and all those tremendous case-books were burnt in England, there would still be, on *both* sides of the Channel, the same quality of *heteronomous* law. From the viewpoint of the essential difference with treaty law, it matters little (however much it certainly matters for other purposes) whether that heteronomous law was mainly *Parliament* made or made by the King’s courts or, for the customary portion, created by the conscience of the people or otherwise.

The comparison should rather be made between the reading of treaties on one side (from which, be it said *obiter*, Parry and ourselves would of course draw plenty of material *indirectly essential* to get “a fair idea” of international law) and the reading of municipal law transactions (also very instructive in the same way) on the other side. One would probably find that *both* are peripheral, in French or Italian *and* in English or American law. The treaty, however, would probably be found to be *materially* less and *legally even more*, peripheral than municipal law transactions (*Rapporti contrattuali*, pp. 47 ff. especially 52, 53–54 and 55–57).

It need hardly be emphasised at this point that the international agreement does not turn from a contract into a piece of legislation simply because it formulates rules which the contracting States bind themselves to adopt within their legal systems. This is the case of uniform law conventions, of private international law conventions and similar instruments. Clearly, the treaties of this kind are legislative only from the point of view of the place that the rules they formulate will occupy within the legal systems of the contracting States. Legislative in the same sense are the International Labour Conventions. But the merely contractual nature of the international transaction is obvious.

165. Turning now to the rules enacted by international organisations, the most significant among the phenomena that are labelled or could theoretically be labelled “international” legislation include the regulations of certain River Commissions, the regulations and decisions of some of the institutions of the European Communities, regulations adopted by the International Civil Aviation Organisation, and some of the enactments of international organs carrying out operational activities in the territory of a State (Saar, ONUC, UNEF). These phenomena are the closest to legislation in that the rules enacted: (i) emanate from an organ acting authoritatively and (ii) address themselves materially to the very subjects the conduct of whom they are ultimately meant to govern.<sup>204</sup>

Even in such cases, however, an essential positive element of legislation is missing and a negative element is present. The missing element is the direct subjection of the ultimate addressees to the norm-making body. The negative element is the presence, between the addressees and the organ, of the diaphragm represented by the sovereignty of the State or States within the personal and territorial sphere of which the “legislation” is intended to operate.

Obviously, the missing link is created by one kind or another of more or less automatic “incorporation” of the norms in question into the legal system of the State or States involved. By virtue of this device the legal system or systems involved confer their sanction to the international rules<sup>205</sup> thus linking the enacting body to the norms’ addressees: and once the filling of the gap has, so to speak, completed the circuit, one would be tempted, *prima facie*, to recognise at last the presence of international legislation in a proper sense.

Considering, however, that the link is provided not by international law but by municipal law—and considering that the creation *and* preservation of the link is *conditio sine qua* of any legal validity and effectiveness of the internationally enacted norms for the addressees thereof—it seems more appropriate to speak of State legislation effected by an international organ, or of “common legislation” among a number of States rather than of *international* legislation *tout court*.

The organ is *international*. The content of the legislative enactment is *internationally* determined. But the legislative enactment *itself* is a *national* one. Its legal force, in so far as its ultimate, essential addressees are concerned, namely private parties and State organs,<sup>206</sup> derives from municipal law. Internationally the matter is covered by obligations of States *inter sese*. We are still, clearly, in so far as international law is concerned, within the realm of the *relationnel*, even if it is a *relationnel* envisaging the accomplishment of a (vicarious) State activity by the international organ.

It goes without saying that legislation is fully present instead (as noted *supra*, paras. 141 ff.) within the organisation’s *interna corporis* in a narrow sense. We refer to the staff

<sup>204</sup> On this class of the activities of international organs—namely, from our point of view, *vicarious States activity* (as distinguished from *international activity in a narrow sense*)—*supra*, paras. 134 and 138 of the present *Appendix*.

<sup>205</sup> Or, better, to the “internationally formulated” rules.

<sup>206</sup> And States themselves as persons in their own (national) law.

regulations and to the rules concerning the structure and operation of subordinate organs.

166. In so far as strictly inter-State decisions of international political bodies are concerned, the term international legislation would have such a small scope anyway that one wonders whether a discussion of its technical propriety is worth the trouble. For the sake of clarity, it better be said, however, that even within the sphere of General Assembly or Security Council binding *decisions* the term legislation, although for different reasons, is not quite appropriate either.

In the first place, legislation is a way of law-making legitimised in any society by *constitutional* rules. It is “inherent” in legislation that it ranks just below the constitution (written or unwritten) if not at the same level. The Assembly’s and Council’s binding decisions rank at most among the *tertiary* sources of international law after custom and convention. The authority behind Assembly decisions is just the inter-State compact, namely the *bare* contract we discussed earlier. It is not, for the reasons submitted, a constitution. As pointed out earlier, this makes the binding force of the organ’s decisions more a matter of reciprocal commitment of member States *inter sese* than a matter of subjection of each member State to the Assembly.

This applies to both General Assembly and Security Council decisions. In the latter case the inter-State relationship—the *inter sese* legal relationship which is stressed, for example, in Article 25—combines, as noted earlier, with the more or less weighty hegemonic position of the permanent members as a matter of *de facto* authority of the powers “at large”, distinct from an authority of the organisation.<sup>207</sup>

With regard to the Assembly it should be added in particular that that body, composed as it is of all member States with one vote each, has little of an organ suitable for the enactment of heteronomous rules addressed to the States themselves. The Assembly’s role still resembles, from this viewpoint, *in spite* of the abandonment, in 1945, of the League of Nations unanimity rule, more a diplomatic conference intended for consultation, *self-regulation* or *self-restraint* than a legislative body.<sup>208</sup>

Considering further the nature of the matters with regard to which the Assembly has a power of binding decision—most of which matters, whether substantive or procedural, are of rather marginal relevance—and considering also that the Assembly does remain, because of the contractual nature of the Charter, only an *instrument* of multilateral diplomacy in the sense described earlier,<sup>209</sup> the binding decisions themselves appear more like *specifications of existing obligations* than like sources of *new* legal rules or relationships. It is, in other words, more a matter of member States or a majority of member States’ specifying, through an instrumentality under their control, situations of right and obligation already assumed by all reciprocally (through their participation in the “social compact”) than a matter of the “instrument” exercising a legislative function. It would be really appropriate to speak about legislation only where the General Assembly’s binding decision power were *rattachable* to a rule higher than a mere contract—for example a customary rule—and extended to matters more decisive for the relations among States (and their peoples) and for the life and functions of the United Nations itself: two related requirements that are bound perhaps to materialise at one and the same time and in one with the development of the effective authority and the prestige of the Assembly. At present, the use of the term legislation to cover a situation so strikingly less advanced as the few instances of a binding enactment power of the General Assembly would be unconvincing and perhaps psychologically and politically misleading.

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<sup>207</sup> *Supra*, paras. 131, 147.

<sup>208</sup> A more suitable organ for “legislation” would of course, *prima facie* seem to be the Security Council (the normative role of which has proved, *hélas*, rather marginal), in that its membership is restricted.

<sup>209</sup> *Supra*, paras. 138–140 and 147.

Be it even as it may of decisions, it is utterly inappropriate to apply the term legislation to nothing more than just recommendations or declaratory resolutions of the General Assembly. In the light of the general theory of international law and organisation—and provided only that one is ready to take full account of the distinction (and of the respective roles and proportions) of the *organic* and the *relationnel* in the United Nations—it amounts, unless our “basic” English (for which we apologise) betrays us, to reading international law upside down. Far from corroborating the actual existence—or the *facilité* of establishment—of a legislative role of the United Nations, that theory corroborates, unless manipulated *à la façon des constitutionalistes*, and deformed by the *idola* of alleged municipal and federal models, the very opposite view. The idea of a normative power of the General Assembly as part of *lex lata*, or even as part of a *lex ferenda* awaiting us around the corner, appears to be deprived not only of a legal foundation in the so-called formal sense<sup>210</sup> but also of socio-historical, or socio-legal, foundation.

Specifications such as these may well appear to be superfluous to the well-advised reader. The confusion of language, however, reaches at times such peaks that even to repeat the obvious seems indispensable. All concerned must be reminded of the factors—historical, sociological and legal—by which the lack of a general normative power of the Assembly is determined. The lack of that power is not just the omission of something that had been there any time before, or perhaps the result of an oversight on the part of the Fathers of the Charter. The gap is constitutional in a sense far more substantial than just the legal sense of that word.

The gap is determined by the structure of the international system: a structure that appears to be still tremendously solid since its distant origins back in the Middle Ages. That structure is still there, intact, notwithstanding the existence of the United Nations and notwithstanding the so-called revolutionary novelties that the adoption of the Charter and other contemporary developments have brought about. To pretend that it is otherwise is, in our view, naif or hypocritical and in any case counterproductive.

*Omissis...*

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<sup>210</sup> *Supra*, Chap. I, especially paras. 17–18.