

## Follow-Up of United Nations Resolutions

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# Follow-Up of United Nations Resolutions

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## Introduction

Thousands of resolutions have been adopted by the General Assembly of the United Nations. If one adds those of the Security Council and the ECOSOC, as well as all others adopted by various subsidiary bodies of the principal organs of the United Nations, the number would be very large. It is natural, therefore, that this relatively new instrument gives rise to a great deal of discussion, not only because its use is numerically impressive but also because it is in many cases legally important. While it is generally accepted that resolutions of the United Nations organs do not, except in some limited contexts, bind states in the same manner as other established “sources” of international law, such as custom or treaties, they have always intrigued international lawyers. At the beginning, lawyers tried to analyze this new instrument by a deductive method, positing a theoretical explanation based on the constitutive instrument of the international organization from which the resolution emanates.<sup>1</sup> While a number of serious investigations were made during this initial stage of inquiry, the discussions remained, more or less, on the theoretical level.

In the sixties and, particularly in the mid-seventies, the debate on resolutions flourished; many scholarly efforts were devoted, both on the theoretical and the practical levels, to investigating the legal significance of resolutions. Backed up by the substantial volume of this new instrument and by optimism about the possible creation of a new source of international law, many authors treated the subject with a certain degree of enthusiasm. This trend reached its peak by the end of the seventies. We find ourselves now in a period in which discussion of this “new” instrument has reached a certain saturation point. A more cautious and realistic attitude has been taken by commentators in viewing the role played by resolutions. This does not mean that pessimism is prevailing. Discussion of the subject has reached the stage where one can no longer describe the instrument in a few words either assigning it as a source of international law or simply dismissing it as a paper without legal value. The nature of the resolution has become multifold, its functions diverse, and the specific importance of each

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1 E.g. KELSEN, Hans. *The law of the United Nations*, London, Stevens, 1950.

resolution has become dependent on various factors. No serious work on the sources of international law can be written without reference to resolutions of international organizations.<sup>2</sup> In fact, the Institute of International Law has entrusted its Thirteenth Commission with the study of "The elaboration of general multilateral conventions of non-contractual instruments having a normative function or objective" and the Institute eventually adopted, in its Cairo Session in 1987, a resolution on the "Resolutions of the General Assembly of the United Nations" with 26 conclusions.<sup>3</sup>

Resolutions are also increasingly used by States.<sup>4</sup> The practitioners - in other words, delegate to various international organizations as well as the staff of the secretariats of these organizations - are facing them every day. If these people stopped working to inquire about the legal significance of resolutions, a great part of the functions of international organizations would be paralyzed. Why should member states take so many hours and days in discussing and drafting a resolution if they do not consider it legally relevant? Why do some states make reservations on the adoption of a resolution if it lacks legal relevance? The opinion that resolutions "are as numerous as they are ineffective" and that "they remain on paper since they lack any sanction" cannot be supported.<sup>5</sup> Resolutions of the United Nations organs should be regarded as the result of deliberations in an international forum composed of nearly all states of the world, deliberations which seek to produce new standards of behaviour in international relations. In this sense, some resolutions might appear as if they are "departure from existing law".<sup>6</sup> Sometimes, in fact, they properly are, for

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2 For instance, VAN HOOFF, G.J.H. *Rethinking the sources of international law*, Deventer, Kluwer, 1983. VIRALLY, Michel. *Cours général du droit international public*, RC 1983-V. CARREAU, Dominique. *Droit international*, Paris, Pedone, 1986. It is interesting to note in this recent work that the author classifies sources of international law according to "written" and "non-written" laws thereby enabling resolutions of the international organizations to be integrated into the discussion of the international legal system. NGUYEN, Quoc Dinh, DAILLIER, Patrick, PELLET, Alain. *Droit international public*, 3<sup>me</sup> ed. Paris, LGDJ, pp. 345-351.

3 *Annuaire IDI*, vol.57, part II, (1977), pp.102-103.; Preliminary Expose Provisional Report and Definitive Report by Krzysztof Skubiszewski: *Annuaire IDI*, vol.61, Part I (1985), p.29 et seq.; Resolution of the Institute on "Resolutions of the General Assembly of the United Nations", adopted at its Cairo Session, 17 September 1987, (*Annuaire IDI*, vol.62, Part II, (1988) pp.274-289.

4 SCHACHTER, Oscar. "General course", *RC* 1982-V, p.110.

5 ROBINSON, Jacob. "Metamorphosis of the United Nations", *RC* 1958-II, p.520.

6 CHENG, Bin. "International law in the United Nations", *Yearbook of World Affairs*, 1954, p.195.

the United Nations is an institution which aims at achieving peace and development through international cooperation and it is not a machinery to safeguard and apply existing international legal norms, some of which no longer reflect the real needs of the international society.

The purpose of the present study is to summarize the ideas of various schools of thought on the legal significance of resolutions adopted in the United Nations and to present an approach with which we can best situate the United Nations resolutions in the global framework of international law.

It has been developed out of the belief that any attempt at a general theory on resolutions would run into an impasse in the contemporary context of international law.

N.B.

The word "United Nations resolution" may be puzzling for some readers. However, it is frequently used in the present study for convenience sake. It indicates resolutions adopted by various organs of the United Nations without specifying the organs which adopt them. In many cases it means General Assembly resolution. But it is not limited to it. This generalized usage of the word is for the purpose of, *inter alia*, distinguishing it from other resolutions emanating from, for instance, decision-making bodies of specialized agencies and, at the same time, for not limiting it to resolutions adopted by a particular organ of the United Nations.

## **I . Resolutions Adopted by the Organs of the United Nations: Their Relevance to International Law**

### **1. Types of Resolutions Treated in This Study**

"Resolution" is a generic term designating all decisions taken by the deliberative organs of the United Nations. It is, therefore, necessary to classify them in order to delimit the scope of the present inquiry.

Resolutions can be broadly divided into two large categories, according to the classical distinction between "binding" and "nonbinding" instruments.<sup>1</sup>

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<sup>1</sup> For instance, SCHWEBEL, Stephen M. "The effect of resolutions of the U.N. General Assembly on customary international law", *PASIL* 1979, p.301 et seq. Other categorizations are also possible, e.g. according to the subject matter (CASTANEDA, Jorge. *Legal effects of United Nations resolution*, N.Y. Columbia U.P., 1969) or according to the importance of the content (ASAMOAH, Obed Y. *The legal significance of the declarations of the General Assembly of the United Nations*, the Hague, Nijhoff, 1966) See also the categorization by the Institute of International Law, Resolution of 17 September 1987, Conclusion 3 (Types of resolutions), Conclusion 4 (Law-declaring resolutions), Conclusion 5 (Law-developing resolutions). *Annuaire IDI*, vol.62, Part II (1988); Preliminary Expose by SKUBISZEWSKI, Krzysztof., *Annuaire IDI*, vol.61, Part I (1985), pp.59-73.

Organizational decisions or “housekeeping resolutions” as they have been called by several authors<sup>2</sup> and certain decisions of the Security Council<sup>3</sup> are included in the category of “binding” resolutions. Another group of resolutions can be inserted into the same category despite the fact that there is no clear provision in the Charter to this effect. These are resolutions emanating from a superior organ and addressed to a lower organ in the hierarchical structure of the United Nations system. They are binding on the lower organs because the hierarchical order of the Charter otherwise loses its meaning.<sup>4</sup> Such resolutions play the role of service instructions which we find in the context of a national administration, and it is hence correct to perceive them as the service instructions of an international administration.<sup>5</sup>

Many writers refer to the fact that certain resolutions are the source of obligation because the obligatory character of the resolutions is conferred upon them beforehand by special agreement.<sup>6</sup> This way of putting the matter can be misleading because the source of obligation is to be found in the previous agreements rather than in the resolutions themselves. The resolutions could have been replaced by any other instrument or even, for instance, by tossing a coin.

All other decisions which do not fall under any of the species mentioned above are not formally binding; they are those which are addressed to member-states or international bodies asking for the adoption of certain attitudes on the part of the addressees. They are the resolutions treated in this study. The concept of recommendation is sometimes used to make the connotation of these resolutions clearer and more specific. While it describes the basic characteristics of such resolutions to a great extent, it does not cover all the resolutions we are dealing with. For there are instruments, such as the Universal Declaration

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2 GARIBALDI, Oscar M. “The legal status of General Assembly resolutions: some conceptual observations”, *PASIL*, 1979, p.325; MENDELSON, Maurice. “The legal character of General Assembly resolutions: some consideration of principle”, in Hossain ed *Legal aspects of the New International Economic Order*, London, Pinter, 1980, p.96.

3 The Charter does not stipulate in a clear way in which cases a decision of the Security Council becomes binding in terms of Article 25. It must, therefore, be determined by the context.

4 VIRALLY, Michel. “Valeur juridique des recommandations des organisations internationales”, *AFDI*, 1956, p.72.

5 Id.

6 e.g. CASTANEDA, op. cit. pp.139-149, DI QUAL, Lino. *Les effets des résolutions des Nations unies*, Paris, LGDJ, 1967, pp.124-129. VIRALLY, Michel. *ibid.* *AFDI*, 1956, p.85 p.91.

of Human Rights which is not recommendatory in its provisions. They purport to be principle setting instruments and not all the provisions aim at inviting member states to take some specific action. We have also a new type of resolution which can be placed somewhere between the principle setting and recommendatory resolutions. This is the instrument called "code of conduct", such as the Code of Conduct on the Transfer of Technology or the Code of Conduct on Transnational Corporations being drafted within the framework of UNCTAD and ECOSOC, respectively. A Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("RBP Code") has been adopted as a General Assembly resolution in 1980.<sup>7</sup> United Nations Guidelines for Consumer Protection was adopted by the General Assembly in 1985.<sup>8</sup> These instruments are new vehicles which are often employed in the formulation of normative rules that have a bearing on the principles of the international law of development and which purport to be something more than a set of recommendations.

According to the legal bindingness test, all those resolutions are mere expressions of the wishes of the organ or proclamations of certain general orientations of organizational policy, which have only moral effects on the addressees. Even if a resolution is adopted by an overwhelming majority or a unanimous vote, the resolution as such does not gain any additional formal legal significance.<sup>9</sup> They are, therefore, not as such the source of obligation.

However, this is a very simplistic way of viewing things. Even the most superfluous reflection on the matter quickly reaches insuperable complications about the legal implications of resolutions. Many writers have tried to explain the "bindingness" of "non binding" resolutions. In other words, a large number of discussions have been held concerning the legal importance of those resolutions which are, strictly speaking, simple recommendations without a legally binding force, yet occupying an important place in the international legal system. At the risk of being some what repetitive, the present author does feel obliged to recapitulate some of the representative theories<sup>10</sup> on the legal importance of

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7 GA Res. 35/63.

8 GA Res. 39/248.

9 GOLSONG, Heribert. "Das Problem der Rechtsetzung durch internationale Organisationen", *Bericht der deutschen Gesellschaft für Völkerrecht*, 1971, p.48.

10 F.g. SKUBISZEWSKI, Krzysztof, at the Institute of International Law at its Helsinki Session, "The elaboration of general multilateral conventions and of non-contractual instru-

those “non-binding” resolutions in order to present a clearer view.

## 2. Representative Opinions as Regards the Legal Character of United Nations Resolutions

### (1) Resolutions having only political<sup>11</sup> or moral effects

Several authors tend to minimize the legal importance of resolutions.<sup>12</sup> Their arguments are not incorrect, as such, but they are incomplete on two points. First, they discuss the legal character and effects of resolutions, but draw conclusions only on the basis of their legal bindingness (i.e. their legally binding effect). Legal character and legal bindingness, however, are not the same thing. As an author has rightly observed, the binding nature of resolutions is only one aspect of the legal effect and one must distinguish the binding nature

ments having a normative function or objective”, Provisional Report, *Annuaire IDI*, Vol.61. Part I (1984), pp.85-241.

11 The word “political” does not necessarily rule out a legal implication when it is used in a proper context. See *Rapport définitif* by VIRALLY, Michel. “La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus”, *Annuaire IDI*, Vol.60, Part I (1983), Session of Cambridge, p.341 et seq.

12 ARANGIO-RUIZ, Gaetano., in his thorough study on the legal nature of United Nations resolutions, taking the Declaration on the Principles of Friendly Relations and Cooperation as an analyzing subject, is of the opinion that: “In any cases other than these which — expressly or implicitly — the Assembly is endowed with a power of binding enactment it can only deliberate without binding effect . . . . This is based on the literal, logical-systematic, historical and comparative interpretation of the Charter.” “The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations.”, *RC* 1972-III, p.445.

GROSS, Leo, maintains: “The significance of the resolutions of the Assembly is principally political.” “The significance of the role of law”, *I.O.*, 1965, p.556.

ROBINSON, Jacob, asserts: “The United Nations is competent to adopt binding resolutions on its membership, procedure, staff, and the like, but not on elaborations of purposes and principles”, *I.O.*, 1965, p.520.

SCHWARZENBERGER, Georg, says: “Whatever political or moral force such recommendations of the General Assembly may claim, they are not legally binding.” *A manual of international law*, 5th ed. London, Stevens, 1967, p.289.

SCHWEBEL, Stephen M, maintains: General Assembly resolutions, however often repeated, are insufficient elements of state practice of themselves to establish international legal obligations. “*PASIL*”, 1979, p.302.

WEIL, Prosper, who believes to see a “pathological phenomenon of international normativity” says: “normative force cannot be attributed to resolutions without overriding the distinction between *lex lata* and *lex ferenda*.” *AJIL*, 1983, Vol.77, p.417. (Weil’s citation of Virally’s article “A propos de la *lex ferenda*”, *Mélanges offerts à Paul Reuter: le droit international: unité et diversité*, Paris, Pedone, 1981, p.519, in this context is misleading because Virally’s position vis-a vis the normative function of resolutions is much more *nuancé* than weil’s interpretation.)



and the legal effects of resolutions.<sup>13</sup> When one establishes the legal character by an investigation of legal bindingness, it can be said that the answer is already implied in the question. Secondly, they end the discussion at that point concluding that the resolutions are not legally binding. It is, therefore, not possible to develop the argument and point out the important elements implied in the resolutions which enhance the development of international law. Contemporary international law is a stage of "infinite variety"<sup>14</sup> and the tendency "towards relative normativity"<sup>15</sup> should not necessarily be deplored.

(2) The relevance of resolutions to treaty law

(a) Elements of consent in resolutions

Except for limited cases in which the General Assembly drafts an international instrument with a view to adopting a treaty, the decision (resolution)-making procedures followed at the General Assembly do not fulfil the necessary requirements of the "treaty-making" process. Delegates at the General Assembly, moreover, have no intention and no legal competence to negotiate a treaty. They may even be consciously aware that by adopting a resolution they are not committing their respective countries to be legally bound by the outcome.<sup>16</sup>

Some elements of consent can nevertheless be found in resolutions, as pointed out by several authors.<sup>17</sup> It is not appropriate, however, to put too much stress on this element because a resolution is not a treaty in its form and

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13 ASAMOAH, Obed Y. "The legal effect of resolutions of the General Assembly", *Col. J.T.L.*, 1965, p.214.

14 BAXTER, Richard R. "International law in 'her infinite variety'", *ICLR*, Vol.29, p.549 et seq.

15 WEIL, Prosper Ibid. (AJIL)

16 SCHWEBEL, Stephen M. *ibid.* (PASIL)

17 In his argument on the possibility of an "instant custom", CHENG, Bin, seems to find elements of consent in certain resolutions of the General Assembly. "United Nations resolutions on outer space: 'instant customary law'?", *Ind J.I.L.*, 1965, p.37. Although he is suggesting the establishment of a customary law in an instant way, this should rather be regarded as an informal way of agreeing on certain matters.

LACHS, Manfred, also appears to put emphasis on the element of consent in viewing the legal importance of certain limited resolutions. "Some reflections on substance and form in international law", Friedmann, Henkin, Lissitzyn eds. *Essays in honour of Philip C. Jessup, Transnational law in a changing society*, N.Y. Columbia U.P., 1972, pp.105-107.

So does DE VISSCHER, Paul, who characterizes the Declaration of legal principles governing the activities of states in the exploration and use of outer space (Res. 1962 (XVIII)) of 1963 as a "resolution-accord" "Observations sur les résolutions déclaratives de droit adoptées au sein de l'Assemblée générale des Nations unies", *Festschrift für Rudolf Bindschedler*, Bern, Stampfli, p.181.

it is form that counts most in treaty making.<sup>18</sup>

(b) Authentic interpretation

More acceptable than the agreement theory is the point of view whereby certain United Nations are regarded as authentic interpretation of the constitutive instrument, that is the Charter. Strictly speaking, the General Assembly is not vested with the power to interpret the Charter authoritatively.<sup>19</sup> However, the matter is not that simple. At the San Francisco Conference, the Legal Committee maintained that "In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions."<sup>20</sup> The situation here is nothing different from the application of municipal norms by competent administrative organs in a country. The Committee further went on to state "It is to be understood, of course, that if an interpretation made by an organ . . . is not generally acceptable, it will be without binding force."<sup>21</sup> This statement of the Committee provides the basic argument for those who assert that the General Assembly can make authentic interpretation when it is generally

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18 CONFORTI, Benedetto, tries to see elements of consent on resolutions by approaching the problem through an inquiry into the effects of resolutions. He says: "Les résolutions de l'Assemblée générale et du Conseil de sécurité . . . peuvent aussi être considérées dans certaines limites et dans certaines circonstances, comme des accords entre états." "Le rôle des l'accord dans le système des Nations unies", *Rc* 1974-II, p.271. This argument is convenient to explain the binding character of resolutions which establish or appropriate certain functions for organs that are not originally equipped with those functions: pouvoirs qui ne sont pas prévus dans la Charte, ou qui suspendent, relativement à des matières, l'exercice des pouvoirs propres à l'Organisation." (ibid) To demonstrate the first situation, he mentions the United Nations decision in 1946 to take over the non-political activities previously performed by the League of Nations. As for the second situation, he indicates the resolutions in 1965 which exempted from the first part of Article 19 those members in arrears in the payment of their financial contributions. (Ibid. p.260) But this argument is only valid in those two cases, both on constitutional issues which constitute "subsequent practice" of the Organization and which deal with jurisdiction of organs. An intent of the parties to a treaty can analogously be applied here. This argument can, however, not be generalised. Otherwise, it may result in an awkward situation, as CONFORTI reached: his conclusion that an organizational decision, such as establishment of a subsidiary organ, is not binding upon member states who have not consented to the resolution (ibid. p.276) is not acceptable in theory nor in practice.

19 VERDROSS, Alfred. "Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?", *Zaö RV*, 1966, p.695. SCHWELB, Egon, includes the following items in the category of resolutions of the General Assembly in which it exercises a "highly authoritative interpretation": problems concerning domestic jurisdiction (Article 2-7), threat of use of force (Art. 2-4), self-defence (Art. 51), human rights (Arts. 1-3, 13, 55, 56, 62) and self-determination (Arts. 1-2, 55). "Neue Etappen der Fortentwicklung des Völkerrechts durch die Vereinten Nationen", *AV*, Vol.13, 1966, p.48.

20 *UNCIO*, Vol.13, p.709, Doc. 933 (IV/2/42/2)), June 12, 1945.

21 Ibid. p.710.

acceptable.<sup>22</sup>

While some characteristics of authentic interpretation can be conferred to a few resolutions under certain limited conditions, those resolutions can be qualified as “highly authentic” but they are not authentic interpretations as such.

(3) The relevance of resolutions to customary law

One of the most difficult questions in the theory of custom is to determine where a simple usage assumes the character of a legal rule. This difficulty is also apparent in the discussion about the custom-creating function of resolutions. Nevertheless, it has often been asserted that when the same principles are steadily repeated in the resolutions, they constitute a strong proof of the existence of customary international law.<sup>23</sup> Not all of the often cited resolutions fall into this category, but resolutions such as the Universal Declaration of Human Rights, or the Declaration on the Granting of Independence to Colonial Countries and Peoples do appear “to have attained, or at least progressed well down the road toward attaining the status of accepted principles of international law.”<sup>24</sup> Simple recitation or repetition, as such, does not create law, but it does accelerate the formation of customary rules,<sup>25</sup> though it might, however, be too much to say, as does Judge Tanaka, that the repetition of certain resolutions concerning the interpretation of the Charter “can be characterized as evidence of the international custom referred to in Article 38-1-b (of the ICJ Statute)”.<sup>26</sup>

However, another theoretical obstacle has to be overcome before one can

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22 E.g. LACHS, Manfred.: “Since the declaration was adopted by a body representing all member-states and by the overwhelming majority, with not a single opponent, it should be considered as the will of the Organization as a whole . . . Under the circumstances, there seems to be no doubt that the interpretation given by the General Assembly is authoritative and binding.” “The law in and of the United Nations”, *Ind. J.I.L.*, 1961, p.439. He draws this conclusion from the fact that the use of Advisory Opinions of the ICJ for authentic interpretation is limited. (Ibid. p.440, footnote 37) The key in his argument is the standard of “overwhelming majority with not a single opponent.” One can perhaps add “number and nature of the abstentions and absences” (ENGEL, Salo. “Procedures for the *de facto* revision of the Charter”, *PASIL*, 1965, p.114) in order to make it more “authentic”. But even then, the argument remains insufficiently persuasive.

23 VERDROSS, Alfred. *Die Quellen des universellen Völkerrechts*, Freiburg, 1973, p.116; HAMBRO, Edvard. “Some notes on the development of the sources of international law”, *Scand.Studies in Law*, Vol.17 (1973), pp.88-92.

24 BLEICHER, Samuel. “The legal significance of recitation of General Assembly resolutions”, *AJIL*, 1969, p.477.

25 GOLSONG, *ibid.* p.33.

26 ICJ Rep. 1966, p.292.

recognize a rule of customary law in an often repeated resolution. This is the question regarding the two basic elements of custom, namely practice and *opinio juris*. Can the voting at the General Assembly or at other organs of the United Nations be regarded as state practice?<sup>27</sup> It is sometimes observed in international organizations that a state votes in favour just because the delegates know very well that the decision will not bind their governments.<sup>28</sup> Therefore, the voting in an international organization cannot be conceived as state practice in general, although it constitutes, with the votes of other participants, the practice of the organization.<sup>29</sup>

This is not to say that the practice of a state at an international organization has no relevance to customary law-making at all. For in a universal organization such as the United Nations which encompasses almost all states of the world, the will of the organization can sometimes be identified with that of the international community.<sup>30</sup> This is especially true when a resolution is adopted unanimously.<sup>31</sup> The recent United Nations practice is to adopt resolutions by consensus as much as possible. At least, it can be legitimately said that consensus or unanimity at the adoption of a resolution in the United Nations makes it easy to detect the existence of an *opinio juris*.<sup>32</sup>

Under the present Charter, there is no basis for attaching any special legal significance to unanimously adopted resolutions or resolutions which have

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27 The delegates of member-states who cast votes are official representatives with credentials, and to that extent there is no problem in acknowledging the legitimacy of votes cast by agents of respective states. The limitation on the legal significance of their voting derives from the fact that they have not been sent to the Organization with a view to drafting a particular international treaty. The elements which induce the delegates at an international organization to vote in favour or against may not necessarily be the same as those which come under consideration when a bilateral or multilateral treaty is drafted.

28 ARANGIO-RUIZ, loc. cit. p.457.

29 On the concept of a collective will, see ZOLLER, Elisabeth. "The 'corporate will' of the United Nations and the rights of the minority", *AJIL*, 1987, Vol.81-83, pp.610-634.

30 BULAJIC, Milan. "Legal aspects of a New International Economic Order", in Hossain ed. *Legal aspects of the New International Economic Order*, London, Pinter, 1980, p.64: "Sessions of the General Assembly provide better opportunities for a fuller participation and hence for producing texts which have the support of more states."; BOWETT, D.W., *The law of international institutions*, 4th ed., London, Stevens, 1982, p.42: "It would be this organ, which would reflect the extent to which the Organization had become truly universal and thus a 'world forum', an effective sounding-board for world opinion."

31 SCHACHTER, Oscar, sees a declaration of an "*opinio juris communis*" in a unanimously adopted resolution: "The crisis of legitimization in the United Nations", *Nordisk Tidsskrift for International Ret*, 1981, p.7.

32 GEISER, Hans-Jorg. "A new international economic order: Its impact on the evolution of international law", *Annals IUHEI*, 1978, p.7.

obtained the approval of contextually important states. As Virally has observed, there is no rule yet which might give a different legal value to unanimously adopted instruments: “l’adoption d’une déclaration par l’Assemblée générale unanime pourrait conférer une valeur de droit positif aux principes qu’elle formule, si une règle coutumière avait elle-même donné une telle autorité aux déclarations de l’Assemblée générale.”<sup>33</sup> This type of customary law, the customary rule to recognize certain unanimously adopted resolutions as binding international rules under certain specific conditions, may come into existence. It would not be too idealistic to imagine the formation of that sort of customary rule in the contemporary international legal system in which the traditional law-making process no longer suffices in adapting the law to reality, and it may be said that the “nécessité pousse dans ce sens.”<sup>34</sup> However, we are not yet there and we have to satisfy ourselves with the fact that unanimously adopted resolutions of the United Nations are, “irrespective of the Charter, an expression of an opinion on the law by almost all the countries of the world,”<sup>35</sup> and constitutes strong proof of the existence of an *opinio juris*.

#### (4) Resolutions as a new source of law

There is an opinion according to which the resolutions of the United Nations have acquired (or are acquiring) the character of source of law.<sup>36</sup> This opinion<sup>37</sup> is based on the idea that “the substance of a legal principle is the judicial conscience of peoples which manifests itself in the forms of conventions, customs and the opinions of qualified jurists.”<sup>38</sup> According to this theory, a resolution is a tangible manifestation of the “juridical conscience of peoples.”

Some delegates to the Sixth Committee of the General Assembly at its XVth

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33 VIRALLY, Michel. “Notes sur la validité du droit et son fondement”, Recueil d’études en hommage à Charles Eisenmann, Paris, Cujas, 1975, p.467.

34 Ibid.

35 SKUBISZEWSKI, Krzysztof. “The General Assembly of the United Nations and its power to influence national action”, *PASIL*, 1964, pp.170-173.

36 In his dissenting opinion in the Advisory Opinion of the ICJ on “Reservations to the Genocide Convention”, Judge Alvarez maintained that the resolutions of the United Nations General Assembly “have not acquired a binding character, but they may acquire one if they receive the support of public opinion which in several cases has condemned an act contrary to a Declaration with more force than if it had been a mere breach of a convention of minor importance.” ICJ Reports, 1951, p.52.

37 Six months later, in his individual opinion in the “Anglo-Norwegian Fisheries Case”, Judge Alvarez went further and included General Assembly resolutions in the category of legal rules of what he called “the new international law”. Judgement of December 18, 1951, ICJ Reports 1951, p.152.

38 Ibid. (ICJ Reports 1951), p.148.

session (1960) felt it necessary to claim General Assembly resolutions are a source of international law.<sup>39</sup> A writer has elaborated, in his study on the New International Economic Order, the question of resolutions in the context of “a new and rich source of law”.<sup>40</sup>

All these opinions are interesting. For they assume that the United Nations General Assembly as an international deliberative organ is the closest reflection of the will of the international community. Though one can understand these opinions, it is difficult to go so far as to conclude with them that the United Nations resolutions have attained the status of a new source of law. In order to do so, either the doctrine of sources of international law must be fundamentally revised, or a universal recognition of resolutions as a distinct source must be proved.

(5) Legal bindingness resulting from combining the resolution with a general principle of law

An effort has been made to explain the binding effect of a “non-binding” resolution by the application of a legal principle such as good faith or estoppel.<sup>41</sup> A state will be bound by a resolution when it has voted for it because that state is expected by the rest of the international community to abide by its own declaration by virtue of the principle of good faith. According to an author, “the least can be said is that it is not excluded that a delegation may become bound by a declaration put forward by itself and by its vote in the General Assembly. If many, or even a majority of the delegations act in this way, the declarations adopted by Assembly may indeed become documents with binding force.”<sup>42</sup>

Still another writer suggested a similar reasoning within the more limited

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39 A Mexican representative asserted: “The theory of the sources of international law should be revised to take into account the numerous resolutions and decisions produced by a vast array of international organizations.” GA OR 15th Session, Sixth Commission, SR, 1960, 665th Mtg., 9 Nov. 1960, p.79; A Thai delegate concurred with him by stating that: “There was certainly a feeling that some fresh study of the whole field of international law was called for and it was undoubtedly true, as the representative of Mexico had shown, that new trends had emerged in international law. That was in no way surprising, for law had always been a dynamic and constantly changing thing.” Ibid. 666th Mtg., 10 Nov. 1960. p.81.

40 BEDJAOU, Mohamed. *Pour un nouvel ordre économique international*, Paris, UNESCO, 1978, pp.192-196. He also speaks about a “failure of the traditional sources of international law”. Ibid. pp.136-140.

41 SCHACHTER, Oscar. loc. cit. p.16.

42 HAMBRO, Edvard. loc. cit. p.86.

context of a code of conduct adopted in an international organization in the form of a recommendation.<sup>43</sup> In his view, a code of conduct<sup>44</sup> can become legally binding if it is used by national courts as proclaiming a statutory duty with respect to certain business practices.<sup>45</sup>

The principle of good faith, estoppel, etc. play a significant role in international law<sup>46</sup> and they are also very important in the context of the relevance of United Nations resolutions.

While it is a modest claim, it can safely be maintained that “a state that voted for a non-binding code has no obligation to comply with it. However, if another state does comply with the recommended [code], the first state may not claim that such an action is illegal.”<sup>47</sup>

#### (6) Relativity of international law sources

The traditional enumeration of sources of international law included in Article 38 of the Statute of the ICJ and focussing mainly on treaty and custom no longer provides a complete explanation of the emergence of law in contemporary international society.<sup>48</sup> This could have already been said at the League of Nations' period. Fauchille in his *Traité de droit international public* mentioned resolutions of the League of Nations as a distinct source of international law beside the two traditional ones: custom and treaty.<sup>49</sup> This tendency became more apparent after the Second World War. For example, Mme Bastid in her

43 FIKENTSCHER, Wolfgang. “United Nations Code of conduct: new paths in international law”. *Amer. J. Comp. Law*, Vol.30 (1982), p.592: “... it would amount to an unfair advantage if a few firms harvest what all others voluntarily gave up in obedience to the WHO guideline. The distributors' argument that ‘their’ governments (4 out of 22) did not subscribe to the Code, will hardly be taken as an excuse for doing what the others, for whatever reasons, gave up.”

44 Here, WHO's “Infant Formula Code” Cf. *infra* note (76).

45 Ibid.: “... the provisions of the Code, under the standards of the various national laws, can be invoked as binding rules, possessing importance as foundations for damage claims under the doctrine of breach of statutory duty. Secondly, ... violation of the Code can amount to an unfair trade practice under national laws on unfair trading.”

46 VIRALLY, Michel. “Review essay: Good faith in public international law”. *AJIL*, 1983, pp.130-134.

47 SCHACHTER, Oscar. *ibid.* RC 1982-V, p.131.

48 VAN HOOFF, G.J.H. *Rethinking the sources of international law*, Deventer, Kluwer, 1983, pp. 179-180.

49 FAUCHILLE, Paul. *Traité de droit international public*, Paris, Rousseau, 1922, p.41: “Les sources du droit international positif sont: la coutume et les traitées. Une troisième source existe depuis que le pacte du 28 avril 1919 ... a institué la Société des nations. Cette troisième source est: les résolutions du Conseil et de l'Assemblée de la SdN.”; p.48: “... le Conseil et l'Assemblée peuvent voter des résolutions susceptible de produire des effets

1966-67 course had enumerated treaty, custom, general principles of law and judicial decisions as four principal sources and in 1969-70 she added a fifth category in which she included, among others, decisions of the Security Council of the United Nations.<sup>50</sup>

These are not the resolutions we are talking about. They are fully legally binding because the constitutive instruments empowered the respective organs to adopt binding resolutions.<sup>51</sup> The important point, here, is the fact that the resolutions of an international organization were considered as an independent source of law belonging neither to custom nor to treaty.

Besides this recognition of decisions of international organizations as an independent source of international law, many attempts were made to describe the new phenomenon of "quasi-legislation" by international organizations.<sup>52</sup> These were followed by other scholarly efforts approaching the problem from a new angle. Instead of clinging to the traditional list of sources, they aimed at broadening the scope of legal sources by including various legal instruments which had hitherto not been considered legally binding. The trend became most striking in the 1970's when the idea of an international law of development (*droit international du développement*) became preponderant among French international lawyers, and in which resolutions of international organizations constitute the principal component of the new framework of this branch of international law.<sup>53</sup>

The widening of the scope of sources of international law was accompanied by the recognition of certain areas of law which are situated between *lex ferenda*

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juridiques par elles-mêmes, sans avoir besoin d'être ratifiées par les gouvernements . . . . Les résolutions de la SdN sont des actes juridiques créateurs d'obligations internationales: elles constituent ainsi une source particulière du droit international positif."

50 BASTID, Suzanne. *Droit des gens, principes généraux*, Université de Paris, Institut d'études politiques, Fascicule III, Les cours de droit. 1966-67 and 1969-70, respectively.

51 Articles 5 and 15 of the Covenant of the League of Nations. Article 25 of the United Nations Charter.

52 JENNINGS, Robert Y., for instance, added legislation by international organizations to other traditional sources of international law. "General course". *RC* 1967 II, p.343: "... there is now an important source of law that is outside the scheme of Article 38 altogether, namely the capacity of many international organizations to enact laws and regulations operating within the sphere of their competence: a development of increasing significance."; Cf. among others, YEMIN, Edward. *Legislative powers in the United Nations and specialized agencies*, Leyden, Sijthoff, 1969; ROUYER-HAMERAY, Bernard. *Les compétences implicites des organisations internationales*, Paris, LGDJ, 1962.

53 VIRALLY, Michel. "Vers un droit international du développement", *AFDI*, 1965, pp.8-9. PELLET, Alain. *Le droit international du développement*, Paris, P.U.F., 1978, p.55.



and *lex lata*.<sup>54</sup> The existence of a twilight zone has been recognized. Authors discussed "gentlemen's agreements" as something necessary to fill the gap in existing legal instruments in order to adapt to the new structure of international relations which is more complex than ever.<sup>55</sup> They also spoke about "soft law" to explain certain aspects of the contemporary international legal system.<sup>56</sup> The usefulness of these "soft" instruments is more apparent in economic matters. The concept of "programmes" has been legally studied<sup>57</sup> and the development decades of the United Nations have been regarded as more than simple slogans or rallying cries; as a conceptual framework and an organizing principle.<sup>58</sup> In all these efforts to find ways of explaining the function of non-binding instruments in general, resolutions of international organizations occupy a prominent place.<sup>59</sup>

A similar tendency to evaluate the legal significance of instruments beyond their formal legal status, can be found in some authors who go as far as arguing that ratified treaties and instruments that are not meant to be legally binding can be placed on the same footing.<sup>60</sup> What counts for these authors is not whether

54 ABI-SAAB, Georges. "The legal formulation of a right to development (Subject and content)". Workshop, the Hague, 10-18 October 1979, Hague Academy of International Law/United Nations University, Sijthoff, 1980, p.162.

55 MUNCH, Fritz. "Non-binding agreements", *ZaöRV*, 1969, P.I et seq; HUBER, Hans. "Internationale Quasi legislative", *Ann. Suisse de droit int.*, 1971, p.9 et seq; LAUTERPACHT, Elihu. "Gentleman's agreements", Flume et al. *Internationales Recht und Wirtschaftsordnung*, Festschrift F.A. Mann, 1977, p.396 et seq; ROESSLER, Frieder. "Law, de facto agreements and declarations of principles in international economic relations", *Germ YBIL* 1978: SEIDL HOHENVELDERN, Ignaz. "International economic 'soft law'", *RC* 1979-11; BOTHE, Michael. "Legal and non-legal norms a meaningful distinction in international relations?" *Neth. YBIL*, 1980; EISEMANN, Pierre Michel. "Le gentlemen's agreement comme source du droit international", *JDI*, 1979, No.2, p.326 et seq.; an extensive discussion was made at the Institute of International Law: "La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l'exception des textes émanant des organisations internationales)" Rapport provisoire, Exposé préliminaire, Rapport définitif by VIRALLY, Michel. *Annuaire IDI*, Vol.60, Part I (1983) (Session of Cambridge).

56 DUPUY, Rene-Jean. "Droit déclaratoire et droit programmatoire: de la coutume sauvage à la 'soft law'", *L'élaboration du droit international public*, Paris Pedone, 1975., SEIDL-HOHENVELDERN, Ignaz. *ibid.*

57 MORAND, Charles-Albert. "Reflexions sur la nature des recommandations internationales et des actes de planifications", *RGDIP*, 1970, Vol.74, p.967 et seq; VIRALLY, Michel. "La notion de Programme, un instrument de la coopération technique multilatérale", *AFDI*, 1968, pp.101-113.

58 MARTIN, Jean-Pierre. "The development decade", *Annual Review of United Nations Affairs*, 1965-1966, N.Y., Oceana, 1967, p.48.

59 VAN HOOFF, G.J.H., *Op. cit.* pp.180-187.

60 SCHWELB, Egon. "Neue Etappen der Fortentwicklung des Völkerrechts durch die Vereinten Nationen", *AV*, 1966, p.44: (translation by the present writer) "... doctrines are developed which doubt the binding character of duly concluded treaties under certain

the instrument is or is not furnished with the necessary conditions formally classified as a source of international legal obligation but whether the international legal society directs or not its activities according to it.<sup>61</sup>

### 3. The Need for a New Approach

When we examine the arguments and the counterarguments discussed so far, resolutions of the United Nations emerge as legal instruments which are not agreements, nor customary rules, nor a "new source of law", nor simple declarations of political intention. On the other hand, a resolution may carry fragments of each of these elements. The relevance of resolutions to customary law can be especially great,<sup>62</sup> as we can see in the development of legal concepts in regard to the international protection of human rights and decolonization. If the legal character of resolutions cannot be relegated to any single source of law<sup>63</sup> and, at the same time, is not yet recognized as a new source of law, it is undefinable *a priori* unless one accepts an imperfect empirical definition such as: "A resolution of the United Nations General Assembly is a legal instrument by which the Assembly being the most representative organ to reflect international public opinion (i.e. the opinion of the international community) adopts by majority vote or consensus a position calling upon the member states or international organizations to undertake or refrain from certain actions, a legal instrument *sui generis* that implies certain elements of interpretation of the Charter and which can enhance the creation of customary law, but which as such is neither treaty nor custom."

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conditons. Meeting of these two tendencies, one being the doctrine which recognizes legal value of theoretically non-binding instruments and the other being *vice versa*, leads to the diminishing of the difference between international treaties and other international instruments, and to wipe out the barrier between them. "This approach has been the target of Prosper Weil's criticism. Cf. his article in *AJIL*, 1983, *supra*, footnote (12).

61 STERN, Brigitte. "The legal character of emerging norms relating to the New International Economic Order. Some comments.", in Hossain ed. *Legal aspect*, etc., op. cit., p.72: "This analysis leads us to the conclusion that if in strict theory, a resolution never has a binding force, in practice its effect can be the same as if it had such binding force."

62 ABI-SAAB, Georges. "La coutume dans tous ses Etats ou le dilemme du développement du droit international général dans un monde écalte". in *International law at the time of its codification* Essays in honour of Roberto Ago, Milan, Dott. A. Giuffrè, 1987, p.56.

63 The danger of relegating the new instruments forcibly to any of the traditional sources has been pointed out by JENNINGS, Robert Y. "What is international law and how do we tell it when we see it", *Ann.Suisse DI*, 1981, p.76. Also VAN HOOFF, G.J.H., op. cit. p.179: SCHREUER, Christoph. "Recommendations and the traditional sources of international law", *Germ. YBIL*, 1977, p.113.

What is demonstrated by this statement (empirical description) is that what is needed is not an inquiry into legal bindingness but into the elements of crystallization of legal principles and development of international law implied in the resolutions.

An interesting approach in this direction is proposed by Falk, who argues that the degree of authoritativeness of a resolution “depends upon a number of contextual factors, including the expectations governing the extent of permissible behaviour, the extent and quality of the consensus, and the degree to which effective power is mobilized to implement the claims pointed out in the resolution.”<sup>64</sup> This theory which stands on “a more sociologically grounded reinterpretation of the basis of obligation in international law”<sup>65</sup> is a courageous attempt to detach us from the traditional approach of the legal bindingness test; but it has two limitations. The first is the criterion Falk uses. He tries to evaluate a legal instrument according to its capability of serving as a ground for justification. This capability is certainly an element of a legal norm, but it is not enough. The second limitation is the contention that the General Assembly can be said to have acted as a legislative body when certain resolutions acquire sufficient authoritativeness. This again goes too far because the degree of compliance, as such, does not automatically indicate that the General Assembly has legislated. Criticism was voiced by an author who maintained that the element of “legitimization” was lacking in Falk’s argument.<sup>66</sup> This criticism is valid but only to the extent to which it points out that Falk went too far in asserting a “quasi-legislative” competence of the General Assembly, a conclusion which could lead to a misunderstanding as to the legal character of those resolutions with a high degree of compliance. On the other hand, this criticism could not really perceive the “problematique” Falk had introduced. In a sense, the lack of argument about legitimization was exactly the point which Falk had intended to make. The essentials of Falk’s argument were to go beyond the discussion of legitimization or, in other words, to avoid the argument about the legal value of United Nations resolutions, an argument which is anchored in the

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64 FALK, Richard A. “On the quasi legislative competence of the General Assembly” *AJIL*, vol.60, 1966, p.786.

65 Ibid. p.782.

66 ONUF, N. “On Prof. Falk’s quasi legislative competence”, *AJIL*, 1970, pp.349-355.

traditional approach of treaty law and customary law. The merit of Falk's argument is to be found in his attempt to avoid the impasse in which all other efforts to give more legal significance to United Nations resolutions ended up and which resulted from the difficulty of explaining the legal significance of a resolution essentially in the light of either treaty law or custom.

A similar point of view was presented at the Colloquium organized by the Graduate Institute of International Studies Geneva in 1970. Abi-Saab introduced the subject by stating: "... le degré de l'obligatorité ne dépend pas tant de l'instrument que de son contenu et du cadre institutionnel qui entoure son application."<sup>67</sup> Therefore, "ce qui importe (...), ce n'est pas tant l'aspect formel de l'instrument que son effet ou sa signification juridique." According to this argument, the legal significance of a United Nations resolution is not determined *a priori*, but *a posteriori* by considering three elements. These are: concreteness of the provisions of the resolution, circumstances of the adoption of the resolution and the existence of a follow-up mechanism for implementation of the resolution.<sup>68</sup> The results of this test are the evaluation of resolutions on their probability of compliance and not an evaluation of their formal bindingness. According to this approach, a resolution which stands the test of all three requirements obtains the highest degree of compliance. The approach does not say that a resolution thereby becomes a legally binding instrument. Although it does not rule out the relevance of a resolution to the traditional sources of international law, it is silent on the relation between the resolution and the sources of international law. The argument for this test and the argument for the legal bindingness test run on two different lines.

In appreciating this approach, one should perhaps keep in mind that it is neither the final nor the perfect method by which one can assess the legal significance of a resolution. In other words, there are resolutions which do not pass the test but considered together with other related ones, the group of resolutions as a whole may gain legal significance. The fact that "follow-up" is counted as an important element of the test implies that the judgement on the

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67 *Les résolutions dans la formation du droit international du développement*, Geneva, Institut universel de hautes études internationales, 1971, p.9.

68 The same or similar criteria are adopted also by some other authors, e.g. STERN, Brigitte. "The legal character of emerging norms relating to the New International Economic Order. Some comments", in Hossain ed. *op cit*, pp.71-72.

legal significance cannot be made instantaneously. In other words, if the test had been applied, for instance, to the Universal Declaration of Human Rights at the time of its adoption in 1948, the Declaration would have certainly had some difficulties in satisfying all the requirements of the test.

#### 4. Significance of the New Approach to the Legally Binding Instruments

The proposition that the study on United Nations resolutions should not be centered on their legal nature but on the extent of their application or the effectiveness of their implementation is not only valid in regard to resolutions but it is also important for the assessment of the legal significance of any other legal instrument including the traditional legally binding ones.<sup>69</sup> This is particularly true in the contemporary international legal system in which legally “soft” instruments have acquired a certain civic status thereby obscuring the wall between the traditional sources and the purely *recommendatory* or *political* instruments.<sup>70</sup> We find cases in which a multilateral treaty duly concluded is not effective because it does not satisfy the conditions with which we try to evaluate the resolutions of the United Nations: consensus, concreteness and follow-up. A good example can be drawn from the experience of the ILO.

Among the 169 International Labour Conventions adopted by the ILO as of 1989, there are several Conventions which deal with certain social goals in vague terms and wordings.<sup>71</sup> They have come to be called “promotional Conventions” in the ILO language<sup>72</sup> because they do not lay down precise standards a state binds itself to attain on ratification, but set objectives to be attained by means of continuing efforts by the ratifying states. The implementation of ILO Conventions is relatively well ensured by an established system of supervision<sup>73</sup>

69 ABI-SAAB, Georges. loc. cit. (Workshop, the Hague, 1979), p.162.

70 SCHWELB, Egon. loc. cit. (AV, 1966): STERN, Brigitte. loc. cit. (Hossain ed. Legal aspects of the NIEO), p.74: “It must be noticed here, that the type of dialectical analysis formerly made in order to appraise the legal value of a resolution, can also, and must also, be made for international conventions.”

71 Equal Remuneration Convention, 1951 (No.100); Discrimination (Employment and Occupation) Convention, 1958 (No.111); Employment Policy Convention, 1964 (No.122); Human Resources Development Convention, 1975 (No.142) are regarded as such. See also MORGENSTERN, Felice. “International legislation at the crossroads”, *BYIL*, 1978, pp.103-104.

72 Report of the Committee of Experts on the Application of Conventions and Recommendations, ILO Conference, 67th session, 1981, Report III (Part 4A), p.13.

73 VALTICOS, Nicolas. “Un système de contrôle international: la mise en œuvre des conventions internationales du travail”, *RC* 1967 I. LANDY, Ernest. *The effectiveness of international supervision*, London, Stevens, 1966.

and there is no doubt about the legal effect of an ILO Convention as a treaty in the sense of the Vienna Convention on the Law of Treaties. According to our criteria test, what is lacking in those promotional Conventions is the condition necessary to satisfy the second requirement: the concreteness of the content. While Conventions such as those on minimum age setting specified ages for the ratifying states to implement in their national jurisdiction (an “obligation de resultat” as it is called in French), the promotional Conventions only indicate some directions towards which the governments should canalize their activities in regard to the question stated in the Convention (“obligation de moyen”) For instance, the Employment Policy Convention, which is the most representative among the promotional ones, has only three operative articles and its essential part can be summarized in a single sentence as short as “Each member shall pursue an active policy of full, productive and freely chosen employment.”

Since its adoption in 1964 the Convention has been ratified by 71 countries (as at June 1988) and the ILO’s supervisory machinery, particularly the Committee of Experts on the Application of Conventions and Recommendations, has been exercising the usual supervision on the Convention more than 20 years. The Committee has, however, encountered some difficulties in evaluating the member states compliance with the requirements under the Convention because it was not worded in concrete legal terms. The main reason for the difficulty is the vagueness of the provisions.<sup>74</sup> The margin of the interpretation being very wide, ratifying states can fulfil their obligation to submit to the ILO’s supervision by delivering a periodical report on the law and practice of their countries in broad terms which can allegedly be considered to be in conformity with the Convention.<sup>75</sup>

Here we are facing a situation in which a legally binding instrument also has difficulties as regards its practical effect and the degree of application when it does not satisfy the conditions of the test. This situation shows that the validity of our test is not limited to the evaluation of resolutions but that it can also be

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<sup>74</sup> Report of the Committee of Experts, *ibid.* 1983, p.18.

<sup>75</sup> The ease with which a state can claim compliance with the Convention becomes greater when the state concerned adopts a constitutional system in which a ratified treaty obtains the status of national law automatically at the deposit of ratification. For this problem, see LEARY, Virginia. *ILO Conventions and national law: the effectiveness of the automatic incorporation of treaties in national legal systems*, The Hague/Boston, Nijhoff, 1982.

used in the context of legally binding instruments.

A promotional Convention of the ILO can thus be qualified as something which situates itself between a solid legal instrument and a less solid one of the character of a recommendation. A “softening” phenomenon of the hard law can be seen here. However, the supervisory machinery of the ILO has continuously tried to push the promotional Conventions to the same level as other more concrete standards setting ones.<sup>76</sup>

The supervisory body of the ILO is not empowered to give authentic interpretation of a Convention but the position taken by the Committee of Experts and the legal opinion expressed by the Office have had a considerable impact upon the member states. The accumulation of the Committee of Experts’ comments on the manner of application of an ILO Convention by ratifying states have made up “case laws” which have the effect of amplifying and making concrete the meaning of the Convention’s provisions that would have otherwise remained as simple as at the very beginning.

This brief description of the promotional Conventions of the ILO has two important implications. First, our three criteria test seems to be valid also in the appraisal of the legal significance of a legally binding instrument. Secondly, the existence of an efficient follow-up machinery appears to be an important factor, probably the most important in the assessment of the legal significance of the instrument concerned.

## **5. The Codes of Conduct: A New Vehicle in the Development of International Law**

Special mention should be made of a particular type of instruments that are increasingly resorted to in recent times to provide a legal framework in certain fields of international (economic) activities. It is especially relevant in the present context because its effectiveness does not rely on the form of the instrument as such, but on other elements surrounding its adoption and securing its implementation. It is not surprising that many of these codes have been adopted in the form of a resolution of international organizations. A code of conduct, or behaviour, or whatever else it is called, is not necessarily a novelty

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76 Report of the Committee of Experts, *ibid.* p.192.

in international law. During the preparation of the Vienna Convention on the Law of Treaties, different views were expressed by successive Special Rapporteurs as to its form of adoption. Brierly and Lauterpacht considered the drafting of an instrument in the nature of an agreement, i.e. a treaty. When Fitzmaurice took over the task of the Special Rapporteur the International Law Commission changed its attitude and began favoring the adoption of a set of rules in the form of an expository code. One of the reasons for it was that the explanatory and declaratory contents of the draft articles were not fitting in a treaty.<sup>77</sup> At its 13th session, however, the Commission returned to its original idea of a treaty and the new Special Rapporteur Waldock was instructed to submit a report on that basis. The Commission provides several reasons: "an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law," and a multilateral convention would give the newly independent states the opportunity of participating in the formulation of the law and by their participation secure to the law of treaties "the widest and most secure foundations."<sup>78</sup>

The reasoning of the International Law Commission may be true with respect to an instrument which deals with traditional legal subjects. The usefulness of a code of conduct grows with the emergence of new needs for regulating economic matters. The notion of a code of conduct thus appears in an instrument adopted in 1974 within the framework of UNCTAD. Following several recommendations<sup>79</sup> with a view to promoting the development of the merchant marines of developing countries, establishing a machinery for consultation between shipowners and shippers, and fixing special freight rates bearing in mind the disadvantaged position of developing countries, UNCTAD convened a diplomatic conference which adopted the Convention on a Code of Conduct for Liner Conferences. As the title shows, it is a treaty. The reasons why the title of the convention bears the words "code of conduct" are found in the background of the adoption of the convention and its content. The idea of adopting some code of conduct was first developed through the liner conferences, which were an

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<sup>77</sup> HOLLOWAY, Kaye. *Modern trends in treaty law*, London, Stevens, 1967, pp.23-24.

<sup>78</sup> Report of the International Law Commission. 14th session, 1962, pp.23-24. A/5209, p.3, para 17.

<sup>79</sup> UNCTAD Res. 69 (III), Res. 70 (III), Res. 71 (III).



exclusive organization of developed countries, and this organization did not intend to make it an international treaty. Third World countries, through UNCTAD, however, succeeded in changing the general direction of the code and making the whole thing a legally binding instrument. Secondly, the content of the convention is a set of rules governing the behaviour of the shipowners and shippers, which truly reflects the word "code of conduct" or "code of behaviour".<sup>80</sup> Difference of opinion as to the form of the instrument had persisted until the final adoption by a vote. It resulted in a number of negative votes cast by some important countries of maritime transport and it had to wait more than 10 years to enter into force by acquiring the required number of ratifications.

Three codes of conduct have been drafted in UNCTAD and ECOSOC. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices is the only one which was completed and adopted as a resolution of the General Assembly.<sup>81</sup> This code has a character of anti-monopoly legislation and it may have a considerable impact upon developing countries which are about to create an anti-monopoly legislative machinery. Furthermore, this code is very interesting in its section G which provides for a supervisory machinery. It established an intergovernmental group of experts which is empowered to "present a place for a multilateral consultation and exchange of opinions" and to "make appropriate reports and recommendations."<sup>82</sup> It is especially worth noting that the same provision specifies that the group "should not act as a tribunal or make judgements on activities of particular governments or enterprises". The fact that the code had to limit expressly the scope of the group's competence, is a sigh that the group has a potential power to give some quasi judicial decisions. As the experience of the Committee of Experts on the Application of Conventions and Recommendations of the ILO shows, even a machinery which had not been empowered to undertake judicial activities at the outset could be transformed into a quasi-judicial body through the practice of the organ and state practice relevant to its

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80 STAMPFLI, Lorenz. "Le code de conduite des Conférences maritimes—Exemple d'un nouvel instrument du droit international du développement?", *Rev belge DI*, Vol. XII, 1976, pp. 113-115.

81 GA Res. 35/63, 5 December 1980.

82 Section G, 3(a) and (f).

decisions. the group of experts established for the code may, with time and through practice, gain certain importance as a quasi judicial body in supervising the implementation of the code, if a sufficient volume of business is entrusted to it.

The International Code of Conduct on the Transfer of Technology (UNCTAD) and the Code of Conduct for Transnational Corporations (ECOSOC) have so far not been adopted by the respective organs but some influence has been already seen.<sup>83</sup>

Codes of conduct have been adopted in other organizations of the UN family: in the ILO and the WHO. The importance of the Tripartite Declaration of the Principles on Multinational Enterprises and Social Policy adopted at the Governing Body of the ILO cannot be neglected.<sup>84</sup> The International Code on Marketing of Breastmilk Substitutes (so-called "Infant Formula Code") adopted by the World Health Conference in 1981 is again, in spite of its small scope of application and limited coverage, not a negligible instrument. Some 120 states have notified the Director-General of WHO of the adoption of national measures to implement the Code.<sup>85</sup> According to an author, this can also be regarded as a code on unfair trade and, therefore, a part of the code on the restrictive business practices which can be invoked before national courts to be applied as a valid legal norm on the basis of the principle of good faith.<sup>86</sup>

While OECD is not a universal organization and not related to the United Nations, its Code on transnational corporations should be noted. In June 1976, OECD adopted a Declaration concerning Foreign Investment and Multinational Companies to which Guidelines for Multinational Companies were attached. The guidelines are non-mandatory, as it is stated in Guideline No.6. Therefore, member states of the OECD are not bound to take measures to implement them. However, a number of cases have been reported in which conflicts had been

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83 It has been claimed that the adoption by OECD of its Guidelines for Multinational Enterprises in 1976 was prompted by the United Nations' action. The OECD, according to D.C. Campbell/R.L. Rowan, *Multinational Enterprises and the OECD Industrial Relations Guidelines*, Pennsylvania Univ., 1983, p.1.

84 GUNTER, Hans. "The Tripartite Declaration of Principles (ILO): Standards and Follow-up, in *Legal problems of codes of conduct for multinational enterprises*, ed. N. Horn, Kluwer, 1980, pp.155-176.

85 SHUBBER, Sami. "The International Code of Marketing of Breast-Milk Substitutes", *International Digest of Health Legislations*, (WHO), 1985, Vol.36, No.4, p.896.

86 FIKENTSCHER, Wolfgang. "United Nations Codes of Conduct: New paths in international law", *AJ Comp. L*, Vol.30 (1982), p.590.

solved by applying the OECD Code.<sup>87</sup> Commenting on one of the cases thus solved, a journalist described it as follows: "Even plastic teeth can bite sharply if you snap them shut hard enough."<sup>88</sup>

All these codes mentioned sofar have been adopted in the form of non-binding instruments. In many cases, however, there was strong opposition to the adoption of these instruments in the form of a voluntary code when the instruments were drafted. There was, moreover, a movement towards providing for future possibility of changing the voluntary character of the instrument into an obligatory one. The Restrictive Business Practices Code could only be adopted in the present form with the understanding that on its review foreseen in 1985, serious consideration would be given to changing the legal character of the instrument.<sup>89</sup>

However, whether the form of a treaty is better than a "non-binding" resolution is open to debate. For while a treaty signed and ratified is clear as to its legal form, it may entail some problems. Instruments which purport to reform the existing economic order can contain many provisions which are not easily acceptable to developed countries. Therefore, even if an instrument is successfully adopted, entry into force may take some time because of the lack of the necessary number of ratifications. It goes without saying that a treaty binds only states which ratify it. Furthermore, a treaty may become stagnant by the very nature of its consolidating function and may not serve as an adequate instrument to regulate continuously evolving subjects. In the regulation of economic activities, legal stability is not the primordial aim of the law but a quick adaptation to evolving surroundings is also strongly desired. It is especially true in the case of instruments which aim at regulating subjects, such as multinational enterprises which act transnationally, i.e. which conduct activities without being hampered by national borders. One of the reasons for the adoption of the ILO Tripartite Declaration on Multinational Enterprises as a "non-

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87 BLANPAIN, Roger. *The OECD guidelines for multinational enterprises and labour relations, 1976-1979*, Kluwer, Deventer, 1979, pp.123-236.

88 "Chasing the multinational", *The Economist*, London, 4 June 1977, p.93.

89 Section G, 6 of the "Code" (GA Res. 35/63). It is interesting to note in this context, that the similar discussion has taken place in the drafting process of the Code of Conduct on Transfer of Technology. See YUSUF, Abdulqawi A. "L'élaboration d'un Code international de conduite pour le transfert de technologie. Bilan et perspectives", *RGDIP*, 1984, Vol. 88, No.4, P.821.

binding” instrument of the Governing Body and not as a convention, was to avoid a number of inadequacies inherent to a treaty.

Here, special importance is attached to the choice of the form of “code of conduct”. The fact that an instrument is adopted in the form of a code of conduct does not mean that the international community has not been able to reach an agreement to formulate something in a legally more solid form. On the contrary, the form of a code of conduct has been deliberately opted using resolutions of international organizations as a vehicle. The importance of resolutions of international organizations is thus enhanced by the increasing importance of codes of conduct.<sup>90</sup>

## II. The Concept of Follow-Up in the Context of United Nations Resolutions

The present study has endeavoured to explain the difficulty of determining the legal character of the United Nations resolutions *a priori* and it has proposed instead to focus attention on the application side of resolutions. In what follows, special emphasis is put on the process of follow-up which purports to give legal importance to resolutions *a posteriori*.

### 1. The Concept of Follow-Up

The concept of follow-up is a common notion used in general to indicate a further action added to a previous one which resembles to a certain degree that of the supervision used in the legal literature and usually designating an action that forms a part of the follow-up but which has a more precise and particular function. In order to have a clear view of the concept of follow-up, which is the centre pillar of the present study, it is necessary, first of all, to distinguish it from that of supervision.<sup>1</sup>

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90 As this study does not aim at discussing the legal nature of a code of conduct, as such reference is simply made to a few works which deal with the question more directly: SANDERS, Pieter. “Codes of conduct and sources of law”, in *Le droit des relations économiques internationales*, Etudes offertes à Berthold Goldman, Paris, Lib. Techniques, 1982; BAADE, Hans W. “The legal effects of codes of conduct for MNEs”, *Germ. YBIL*, 1979, Vol. 22, pp.11 52; and many other articles included in *Legal problems of codes of conduct for multinational enterprise*, ed.Norbert Horn, Deventer, Kluwer, 1980.

1 VAN HOOFF, *op. cit.* (“Rethinking the sources of international law”), uses the concept of

Despite the fact that the term supervision is currently used in legal literature, it is not free of ambiguity, a fact which troubled some of the authors who wanted to study it systematically.<sup>2</sup> It comprises administrative as well as judicial supervision. The notion of political supervision is also sometimes used to indicate some aspects of administrative supervision by international organizations.<sup>3</sup> There are writers who distinguish various kinds of supervision according to the subject matter or the means<sup>4</sup> and there are those who combine the two elements.<sup>5</sup> It should be noted, in this context, that the study of the notion of supervision and its content in international law is not very well developed. There is only a limited number of works on this subject.<sup>6</sup> Whatever the definition and classification of the concept of supervision, one thing is certain: any supervision aims, in the last resort, at securing the effectiveness of a legal norm. Law is not an end itself. It needs to be implemented and the implementation has to be ensured. The function of supervision as a verification of the implementation of law is very important for the effectiveness of a legal system.

As far as securing compliance with legal norms is concerned, sanctions have

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follow-up to indicate "a class of manifestations of consent or acceptance", (p.256) in the context of explaining together with other "classes of manifestations" the diversity and the complexity of the contemporary sources of international law. The concept of follow-up has, however, not been clearly distinguished from supervision and enforcement. The concepts of supervision, enforcement or follow-up are even sometimes used interchangeably. See *op. cit.* pp.258-279.

2 KOPELMANAS, L. "Le contrôle international", *RC* 1950 II, p.63: "Une des premières difficultés du problème du contrôle réside dans l'imprécision terminologique": HAHN, Hugo. "Internationale Kontrolle", *AVR*, Vol.7 (1958), p.89: "Various interpretations are possible to the word of supervision", (translation by the present writer).

3 MONACO, Ricardo. "Le contrôle dans les organisations internationales", *Internationale und staatrechtliche Abhandlungen*, Festschrift für Walter Schätzel, Düsseldorf, 1960, p.330.

4 MERLE Marcel, "Le contrôle exercé par les organisations internationales sur les activités des Etats membres", *AFDI*, 1959, HAHN, Hugo. *ibid.*; VAN DIJK. P (ed.) *Supervisory mechanisms in international economic organisations*, Kluwer, Deventer, 1983, pp.18-20: "non-judicial supervision."

5 KOPELMANAS, *ibid.*; VAN ASBECK, F.M. "Quelques aspects du contrôle international non-judiciaire de l'application par les gouvernements de conventions internationales", *Nederlands Tijdschrift voor Internationaal Recht*, 1959.

6 Apart from VAN HOOFF, *op. cit.*, KOPELMANAS, *ibid.*, MONACO *ibid.*, MERLE, *ibid.*, and VAN ASBECK, *supra*, there are only a few since 1933 when KAASIK, M. wrote the first, but still one of the most profound studies, on this topic. *Le contrôle en droit international*, Paris, 1933. As the most recent literature, we can mention CHARPENTIER, Jean. "Le contrôle de l'exécution des obligations des Etats", *RC* 1983-IV, pp.151-245; VAN DIJK, *op. cit.*, in particular its Part I "Mechanism of international supervision" (pp.1-45). A bibliography on the topic is given in footnote I, p.40 of his article.

a similar purpose, and it is correct to discuss them in the same context with supervision.<sup>7</sup> However, it must be noted that the two legal institutions have different characteristics. While a sanction takes place when there is a breach of law, supervision, on the other hand, is rather preventive or promotional in its nature so that it can (or should) be exercised even if there is no apparent inconsistency with the legal norm in question.<sup>8</sup>

In a domestic legal system, judicial supervision is the fundamental institution to safeguard the effectiveness of the law. This is not the case in the international legal system which lacks centralized machineries.

Follow-up is a wider concept which distinguishes itself from that of supervision to the extent that it comprises also activities (essentially performed by international organizations) which fall outside the scope of the supervision in the strict sense of the term. The coming section examines supervision in the narrow sense and the one coming after it analyzes follow-up in its proper meaning, that is the function which may go further than supervision<sup>9</sup> and which may concretize and operationalize the content of the original instrument with a view to heightening its legal relevance.

## 2. Supervision Conducted on the Basis of an Agreement

International supervision has been defined as “a legal institution established mostly by an agreement between state parties submitting themselves to supervision exercised by other states or international organizations in respect to implementing consensual commitments.”<sup>10</sup> Recourse may be had to a variety of procedures and methods.

International organs may be created to supervise through inspection the implementation of treaties and agreements on specific matters, such as disarmament, arms control and the peaceful use of atomic energy. By article 10, paragraph 5 of the Treaty for Prohibition of Nuclear Weapons in Latin America,

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7 VIRALLY, Michel. *l'Organisation mondiale*, Paris, Colin, 1972, pp.190-192.

8 Defined by CHARPENTIER as “contrôle systématique” in contrast to “contrôle contentieux”. (op. cit. pp.196-206)

9 A function which has been described by some authors as the “creative function” of a supervision, VAN DIJK, op. cit pp.11-14.

10 HAHN, Hugué ibid. p.91. (translated and paraphrased by the present writer) A similar concept is also presented by the same author in Strupp-Schlochauer (eds.) *Wörterbuch des Völkerrechts*, Bd. II (1961), P.67.

signed in 1967, the Council is empowered to “ensure the proper operation of the control system in accordance with the provisions of this Treaty.” Inspection based on special agreement concluded within the framework of the IAEA is a method which envisages the supervision of implementation of a bilateral agreement to be exercised by an international organization with several sanctions in case of non-compliance.<sup>11</sup> In the same context, the Human Rights Committee as provided for under Article 28 of the International Covenant on Civil and Political Rights can also be mentioned to represent a machinery of supervision established by an agreement, in this case the Covenant itself.

Article 7 of the Antarctic Treaty of 1959 provides that “in order to promote the objectives and ensure the observance of the provisions of the present Treaty, each Contracting Party . . . shall have the right to designate observers to carry out any inspection provided for by the present Article”, and that observers “shall have complete freedom of access at any time to any or all areas of Antarctica.” This is a unilateral inspection system by individual states and it is a rather progressive type of inspection.

While an international inspection system is normally based on a special agreement which also establishes, at the same time, the organ for supervision, some international organizations may be equipped with a constitutional system of supervision such as the ILO. Under article 22 of the ILO Constitution, member states are obliged to cooperate with the organization’s supervisory activities. An independent Committee of Experts has been established by the Governing Body of the ILO to examine the annual reports supplied by the member states on the application of ratified Conventions and sometimes on non-ratified ones and Recommendations. In case of non compliance, several devices are provided for to secure the correct and prompt application of the instruments concerned.<sup>12</sup>

It has been mentioned earlier that judicial supervision is the fundamental institution for securing the effectiveness of a legal system in a domestic society, but such is not the case in the international society. Nevertheless, there are several measures contemplated within the framework of international organizations. The constitutive instruments of a few specialized agencies provide for

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<sup>11</sup> Article 12 (c) of the Statute of the IAEA.

<sup>12</sup> VALTICOS, Nicolas. *International labour law*, Kluwer, Deventer, 1979, paras. 614-647.

the legal disputes on the interpretation or the application of their constitutions to be brought before the ICJ.<sup>13</sup> In the ILO, differences in the interpretation of Conventions are, in the last resort, to be referred to the ICJ.<sup>14</sup>

### 3. Supervision of Non-Consensual Instruments

The international supervision discussed sofar is a legal institution created by an international agreement for the purpose of supervising the effective implementation of certain treaty obligations incorporated in the same agreement or in other international instruments. This type of activity has been commonly understood as international supervision. But the evolution of universal organizations and the development of their supervisory functions has made it possible to supervise the implementation of instruments that are not legally binding.<sup>15</sup>

Three combinations of this type of supervision can be envisaged. The first is found when the implementation of a non-consensual instrument, usually not legally binding, is supervised by a machinery established by an international agreement. The second is just the other way round: the implementation of a legally binding instrument is supervised by virtue of a non-binding instrument. The third combination which is peculiar to international organizations is where the implementation of a legally non-binding instrument is supervised by virtue of another legally non-binding instrument.

supervision instruments	Instruments supervised	
	binding	non-binding
binding	C11	C12
non-binding	C21	C22

<sup>13</sup> e.g. ICAO Convention, Art. 84; UNESCO Constitution, Art. 14.

<sup>14</sup> Arts. 29 (2), 31, 32.

<sup>15</sup> VAN HOOFF, *op. cit.*, p.270.



The three cases correspond to the three spaces C12, C21 and C22 of the diagram shown below. International supervision as exercised by the organs of the United Nations generally falls into one of these three categories.

The supervisory function exercised by the ILO in regard to its recommendations and non-ratified conventions is an example which falls under the category described as C12. In order to conform with article 19 paragraph 6 of the ILO Constitution member states are under an obligation to supply reports to the ILO as to the position of the law and practice in their respective countries concerning matters dealt with in the recommendations and non-ratified conventions showing the extent to which effect has been given or is to be given to them. This presents a very interesting legal situation. For there is a legal obligation to supply reports but there is no obligation to implement the legal instrument which is the subject of the report. Therefore, it is admissible for a member state to comply with its constitutional obligation by reporting that the instrument concerned has not been implemented. In fact, a number of reports are received by the supervisory machinery of the ILO every year which indicate that national law and practice are not in conformity with the ILO instruments.<sup>16</sup>

Resolutions of the General Assembly which invite member states to abide by the obligations set forth in the Charter and, accordingly, have the effect of supervising the application of the principles of the Charter, that is an international treaty with full binding effect, fall under the category of C21. The function of the recently created Committee on Economic, Social and Cultural Rights<sup>17</sup> is another example of the C21 type supervision in which the supervising machinery has been established by a "non-binding" resolution and which supervises the application of a binding instrument, that is in this case the International Covenant on Economic, Social and Cultural Rights.

When the General Assembly, at the suggestion of a special committee set up to review and appraise the performance of relevant states and organizations in implementing provisions of a particular resolution, urges member states to

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16 See for instance, para. 8 of the General Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference 72nd Session, 1986. p.5.

17 ECOSOC Res. 1985/17. See ALSTON, Philip. "Out of the abyss: the challenges confronting the new U.N. Committee on Economic, Social and Cultural Rights", *Human Rights Quarterly*, Vol.9.

implement the resolution under review, this review and appraisal function exercised by the special committee constitutes an international supervision which falls under the category of C22 because neither the supervising instrument nor the instrument to be supervised is a “legally binding” one.<sup>18</sup>

When a legal norm embodies principles which are not formulated in a readily applicable manner, scrutiny in the form of regulation or standard-setting or some other refinement is needed in order to make these principles effective. Likewise, when a principle of international law is embodied in a United Nations resolution, some additional action is needed. It may take various forms. In the case of the Universal Declaration of Human Rights, it eventually took the shape of the two Covenants, i.e. the form of international treaty. Action, however, does not necessarily have to be in the form of a treaty. As long as the newly formulated principles are in a developing stage, a less tight instrument may prove to be more convenient for making them viable legal principles. United Nations resolutions become, in this context, adequate vehicles for making the principles gradually more concrete and operational.

If we examine the relation between the Declaration on Permanent Sovereignty over Natural Wealth and Resources<sup>19</sup> or the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>20</sup> and the resolutions which have subsequently been adopted to complement and to develop those declarations, we can see a dynamic interaction between the two types of resolutions. When the latter declaration was adopted in 1960, “decolonization” was still regarded as a “political” goal to which the efforts of the member states were to be geared. No imminent legal effect could be attached to it at that stage. The process of refinement made this concept clearer and added legal significance to it so that one could in due course speak of a “right to decolonization”. The subsequent action of relevant bodies of the United Nations made “legally feasible” the original resolution which was too general and not operational as such

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18 SANDERS, Pieter “Codes of conduct and sources of law” *Le droit des relations économiques internationales* (Mélanges Berthod Goldman), Lib. Techniques, Paris, 1982, p.281: “Although each of them is “legally non-binding” some machinery has nevertheless been provided for to supervise the observance of the Codes.”

19 GA Res. 1803 (XVII) or even earlier: GA Res. 626 (VII) of 1952 on “Exploitation of natural wealth and resources.”

20 GA Res. 1514 (XV)

at the outset.

The same evolution can be observed in the context of permanent sovereignty over natural resources. At the time of the adoption of the resolution in which the term permanent sovereignty first appeared, few people could really define what was meant by the concept. But the continuous stream of resolutions, each time a little more concrete in content, finally made the original resolution more relevant. This set of resolutions consists of an original resolution and subsequent resolutions complementing it. From a functional point of view, the succeeding resolutions play the role of follow-up in the sense that they complement the original resolution by substantiating its content.

There is no rule prohibiting legally non-binding rules to be implemented and their implementation supervised. Under C22 type of situations, both the instruments used for supervision and those which are the object of the supervision can be “legally non-binding”. The nature and effectiveness of supervision “dépend beaucoup moins de la nature juridique de la décision à contrôler que des pouvoirs généraux de décision dont dispose l’organe contrôleur.”<sup>21</sup> In such a situation, the supervision not only has the passive function of ensuring the implementation but it can play an active role of changing the legal quality of the original instrument, a role one author has designated as a “creative function”<sup>22</sup> It is correct to assume that “dans les rapports internationaux, ce n’est pas seulement le légalité qui engendre naturellement le contrôle, mais c’est aussi le contrôle qui permet de renforcer le contenu de la légalité”,<sup>23</sup> the “content” in this case being understood as “quality”.

As that type of supervision which falls under the category of C12 and C22 has a dynamic character affecting the legal nature of the instrument supervised, it is proposed to use the word follow-up in order to distinguish it from the traditional term “supervision”. The follow-up includes supervision but it goes beyond it in the sense that it does not only aim at securing compliance with the instruments concerned but also enhances the development of the original instruments by making them more concrete, operational and their content more legally relevant. Using the above-mentioned diagram, it can be said, in broad terms,

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21 VIRALLY, Michel. *op. cit.* (L’organisation mondiale) p.191.

22 *Supra* footnote (8).

23 MERLE, Marcel, *ibid* (AFDI 1959) p.416.

that the content of the supervision falling on the squares C12, C21 and C22 sometimes supersedes a simple function of supervision in the strict sense of the term but goes further and may gain an additional importance in the original instrument. The situation of C22 is most representative. We will call this positive function of the widened scope of supervision "follow-up".

### **III. Mechanisms and Functioning of the Follow-Up Activities**

Having described the role of follow-up in the international legal system, we can now examine the methods of follow-up used by the organs of the United Nations. These methods can be classified into four major groups: recitation, review and appraisal, reporting and elaboration.

#### **1. Recitation**

If an order or an appeal is not followed by the addressees, the first thing one can do with a view to making them abide by it is to repeat the original invitation. For the addressees may have perhaps overlooked it or they may have simply under-estimated its importance. This is why the most obvious form of follow-up is the recitation (repetition) of the previously adopted resolutions. Be it a machanical repetition or paraphrasing of the contents of resolutions adopted earlier, recitative resolutions can be on almost all items treated in the United Nations.

One of the most frequently repeated issues in the discussions of the United Nations is the question of human rights. The Universal Declaration of Human Rights has been regarded as a code setting standards of conduct and serving as a basis for appeals urging and recommending to governments to take measures to promote respect for and observance of human rights and fundamental freedoms. As early as its third session during which the Declaration was adopted, the General Assembly adopted two resolutions referring to the Universal Declaration.<sup>1</sup> They were followed by a huge number of resolutions which made clear reference to the Declaration and/or the Charter provisions on human

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<sup>1</sup> Res. 265 (III) "Treatment of people of Indian origin in the Union of South Africa"; Res. 285 (III) "Violation by the USSR of fundamental rights, traditional diplomatic practices and other principles".

rights. Just to cite but a few of them, there are, for instance, Res. 446 (V) in 1950 on “Human rights in non-self-governing territories”, Res. 2027 (XX) in 1965 on “Measures to accelerate the promotion of respect for human rights and fundamental freedoms”, and Res. 36/55 in 1981 on “Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief”.

Another attempt of the United Nations in reminding the member states of the importance of the Declaration was undertaken in 1950. The General Assembly invited all states and interested organizations to adopt 10 December of each year as Human Rights Day, to celebrate the proclamation of the Universal Declaration of Human Rights, and to exert increasing efforts in the field of human rights.<sup>2</sup> It invited also all states to report annually through the Secretary General the observance of Human Rights Day.

The same with decolonization and permanent sovereignty over natural resources: these items have given place to a great number of resolutions. The most representative resolution on the decolonization issue is Res. 1514 (XV) on the “Declaration on the Granting of Independence to Colonial Countries and Peoples”.<sup>3</sup> It was directly followed by Res. 1541 (XV),<sup>4</sup> Res. 1654 (XI)<sup>5</sup> and Res. 1810 (XVII).<sup>6</sup> Numerous resolutions adopted thereafter which have some relevance to the question of decolonization implicitly or explicitly refer to Res. 1514 (XV). Permanent sovereignty over natural resources is another subject on which resolutions have been repeated, either carrying the title of permanent sovereignty as such or making a specific reference to Res. 1803 (XVII) which has been labelled “permanent sovereignty over natural wealth and resources”, a terminology that has been established since.

Recitation as such does not change the legal significance of the original resolution. But the continuous recitation of the same principles or exhortations

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<sup>2</sup> GA Res. 423 (V).

<sup>3</sup> This is not the first resolution to deal with decolonization. There is a series of resolutions starting with Res. 421 D (V) of 1950 which recognized “the right of peoples and nations to self-determination” as a fundamental human right.

<sup>4</sup> It provided for criteria of application.

<sup>5</sup> It recognized that Res. 1514 (XV) had not been implemented and established a Special Committee of 17 members to examine the application of the resolution and to make recommendations on the progress and extent of its application.

<sup>6</sup> It enlarged the membership of the Committee from 17 to 24 and furthermore scrutinized the Committee’s mandate.

can attribute more weight to the original instruments as legally relevant ones. Recitation can at least prove the will of the repeating organ to keep the instrument alive and of permanent relevance, to make it, in other words, more legally viable. It is a necessary step before resorting to more powerful methods for securing compliance, just like in daily life where one begins by reminding somebody of his obligation before instituting legal proceedings.

## 2. Review and Appraisal

Review and appraisal procedures are used in order to evaluate the extent of the implementation of a resolution and to provide objective indices for further compliance with the original instrument. This is a method of follow-up which has become increasingly popular with respect to resolutions dealing with economic matters, especially resolutions which set up programmes for development.

As an example, the purpose of such a review and appraisal has been clearly worded in the International Development Strategies for the 1970's and the 1980's: "Review and appraisal at all levels should be informed by the common purpose of assessing the manner in which the operation of the International Development Strategy has contributed to economic growth and social progress with a view to identifying shortfalls in the achievement of the goals and objectives of the Second United Nations Development Decade . . .";<sup>7</sup> "The process of review and appraisal forms an integral part of the International Development Strategy. Its aim will be to ensure the effective implementation of the International Development Strategy for the Third United Nations Development Decade and to strengthen it as an instrument of policy . . .".<sup>8</sup> The importance attached to review and appraisal can be seen in the fact that those principal programmes of the United Nations for development contain independent chapters devoted solely to them. It is also to be noted that the Charter of Economic Rights and Duties of States provides, as well, for a system of review and appraisal.<sup>9</sup> While the method of supervision has long been proved to be efficient in securing compliance with a legal instrument, as the ILO experience has clearly shown,<sup>10</sup> the

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7 GA Res. 2801 (XXVI).

8 GA Res. 35/56 and Annex. Annex para. 169.

9 GA Res. 3281 (XXIX), Art. 34.

10 See for instance VALTICOS, Nicolas. Ibid. (Un système de contrôle . . .)

United Nations in the 1960's was not yet aware of its importance and the programme for the First Development Decade<sup>11</sup> did not contain a specific provision for review and appraisal. However, the review and appraisal process was subsequently built up through spontaneous activities of the United Nations organs. ECOSOC in 1962 adopted a resolution<sup>12</sup> which reviewed the degree of attainment of the goals of the programmes. The General Assembly in the same year recalled the targets of the Decade.<sup>13</sup> In the following year, responding to the request of ECOSOC<sup>14</sup> the Secretary General issued a report entitled: "United Nations Development Decade: Activities of the United Nations and related agencies in the immediate future."<sup>15</sup> Two evaluation reports were prepared by the Secretariat in 1965.<sup>16</sup> The General Assembly in the same year adopted a resolution which discussed the extent of implementation of the Decade and requested the Secretary General and the specialized agencies to devise a method of evaluating the progress.<sup>17</sup> The importance of this resolution lies in the fact that it made Secretary General one of the most important organs to carry out review and appraisal tasks.

Another important step towards establishing review and appraisal as a fundamental pillar in the follow-up mechanism can be seen in 1969 in a General Assembly resolution which recommended that "existing arrangements for the review and appraisal of the progress towards achieving goals and objectives should be fully and effectively utilized, strengthened as required, and com-

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11 GA Res. 1710 (XVI) and Res. 1715 (XVI).

12 ECOSOC Res. 916 (XXXIV).

13 GA Res. 1833 (XVII): ".....a number of governments announced increased contributions to these programmes, with the result that total contributions are now estimated at \$120 million."

14 ECOSOC Res. 1916 (XXXVI), Para. 13.

15 E/3776, ECOSOC OR 36th Session, Annexes. This report contained a concise statement, agency by agency, of the main activities planned for the following two or three years.

16 The first one made the following evaluation: "One of the sectors in which the United Nations has been most successful during the first part of the Development Decade has been in the provision of an institutional framework for development. In addition to the establishment of UNCTAD as a permanent organ of the General Assembly, regional institutes for development planning have been created, the African Development Bank has been founded and may be followed by an Asian Development Bank, and the UNITAR has been established." (E/4033, Note by the Secretary General, "Progress report submitted in accordance with Council Resolution 984 I (XXXVI)") The other one is an over all review of the Development Decade describing the extent of results achieved in the first half of the Decade. It is an objective description about the growth in GNP, per capita income, difference between developed and developing countries, population growth and reports on the activities of various organs of the United Nations in implementing the programme of the Decade.

17 GA Res. 2084 (XX).

plemented by new arrangements, as appropriate . . .”<sup>18</sup> Following on this recommendation ECOSOC took up the question of review and appraisal as an independent issue just before the adoption of the International Development Strategy for the Second United Nations Development Decade<sup>19</sup> which led to the inclusion in the final text of the Strategy of a whole section exclusively to review and appraisal procedures.<sup>20</sup>

During the Second United Nations Development Decade, the system of review and appraisal was developed further.<sup>21</sup>

The important event in this respect is the establishment of a Committee of the ECOSOC on review and appraisal composed of 54 members . . . to assist the General Assembly in the over-all review and appraisal of the Second United Nations Development Decade.<sup>22</sup> Other bodies of the United Nations system were also requested to function as reviewing machineries: the Committee on Development Planning was assigned by the ECOSOC “in addition to its current functions, the task of preparing comments and recommendations that could help the Council on discharging its responsibility to the General Assembly relating to biennial over-all review and appraisal of progress, . . .”<sup>23</sup> The Trade and

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18 GA Res. 2571 (XXIV).

19 ECOSOC Res. 1556B (XLIX): “...after the adoption of the International Development Strategy, it will be appropriate to prescribe the procedure to be followed in evaluating the progress made in its implementation”. The resolution decided also: “to elaborate, in the light of the relevant decisions of the General Assembly at its 25th session and at the earliest possible opportunity after the launching of the Decade, the detailed procedures for such over-all review and appraisal.”

20 GA Res. 2626 (XXV), part D “Review and appraisal of both objectives and policies”.

21 The General Assembly at the same session requested various United Nations bodies (specialized agencies, regional economic commissions etc.) to continue to review progress in their respective sectors according to the procedures already established and to be adopted as necessary. (ECOSOC Res. 1556B (XLIX)) It further instructed the Secretary General to submit to the ECOSOC a report outlining the details on a system of over-all appraisal. In accordance with this resolution, the Secretary General sent a note verbale to governments of member states requesting them to transmit to him their views on a system of over-all appraisal of progress in implementing the International Development Strategy. (E/5000 and Add. 1-7, Note by the Secretary General “Second United Nations Development Decade. Review and appraisal of the objective and policies of the International Development Strategy. Views of governments on a system of over-all appraisal of progress in implementing the International Development Strategy.”) At the same time, the Secretary General provided the ECOSOC with a report on “A system of over-all review and appraisal of the objectives and policies of the International Development Strategy” which classified various levels of appraisals and the executing bodies of those appraisals (E/5040) It also presented the content of appraisal procedure and improvement in information. In the annex of the report, the Secretary General further suggested some indications for monitoring performance in respect of the various elements of the Strategy.

22 ECOSOC Res. 1621 (LI).

23 ECOSOC Res. 1625 (LI).



Development Board of UNCTAD was instructed “to establish adequate procedures and mechanisms for defining and keeping under constant review the indicators and other data necessary for assessing progress in the implementation of policy measures within the field of competence of UNCTAD.”<sup>24</sup>

General Assembly resolution 3176 (XXVIII) on the “First biennial over-all review and appraisal of progress in the implementation of the International Development Strategy for the Second United Nations Development Decade”, a voluminous resolutions adopted in 1973 on the basis of the efforts made (by various organs<sup>25</sup> was the principal landmark of the review and appraisal procedure for the United Nations Development Decade. ECOSOC in 1971 described the review activities as follows: “This will be the first time that the world community will endeavour to undertake such a comprehensive exercise.”<sup>26</sup> The biennial review and appraisal was not only the result of the years of trial and error to establish a workable system of reviewing but also a corner stone and a basis for the future work of review and appraisal procedures.

This spontaneous development of the review and appraisal system has continued and many instruments adopted during the 70's and the 80's which deal with economic development contain, to a greater or lesser degree, provisions on review and appraisal. Article 34 of the Charter of Economic Rights and Duties of States and Part IX, paras. 2, 3 and 8 of the Programme of Action on the Establishment of a New International Economic Order relate to the measures of review and appraisal. The importance attached to review and appraisal is clearly worded in the New International Development Strategy for the 1980's by the expression: “The process of review and appraisal forms an integral part of the International Development Strategy.”<sup>27</sup> As quoted above, the Third United Nations Development Decade's programme devotes a chapter exclusively to review and appraisal measures.

A system of review and appraisal has spontaneously developed in the United

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24 UNCTAD Res. 79 (III).

25 Just to cite the names of the organs and the codes of various reports: Office of Economic and Social Affairs: (E/5267, E/5268); UNCTAD Secretariat: (TD/B/429/Rev.1); Committee on Development Planning: (E/5293); Committee on Review and Appraisal: (E/5316); Commission for Social Development: (E/5252); Commission on Science and Technology: (E/5272); Administrative Committee on Co-ordination: (E/5289); and many others.

26 E/5184, ECOSOC OR 53rd session, Suppl. 11.

27 GA Res. 35/56 and Annex, Annex Para. 169.

Nations. As the example of the evolution in the United Nations Development Decade showed, the awareness of the importance of review and appraisal grew with time and after the Second Development Decade which included a special provision for a review and appraisal system, it has become almost self evident that a programme-setting instrument be equipped with an adequate machinery for review and appraisal. But the question about how effective these review and appraisal mechanisms are, in terms of inciting or begetting compliant positive action by member states, remains a separate one.

### 3. Reporting

Again the experience of the ILO shows that the method of periodical reports is an excellent way of supervising the implementation of legal instruments.<sup>28</sup> However, not all international organizations are equipped with a system of supervision through a periodic reporting established by their constitutional instruments. In the absense of institutional arrangements, it is not s legal duty for a member state to report on its activities to an international body. Nevertheless, member states do in many cases comply with the requests of the organizations asking them to provide certain information.

In its Resolution 624 (X X II) of 1956, for instance, ECOSOC requested member states of the United Nations and the specialized agencies to transmit to the Secretary General, every three years, a report describing developments and the progress achieved during the preceeding three years in the field of human rights.<sup>29</sup> The first series of the reports was to cover the years 1954-1956. But the expected reports did not come before the Commission on Human Rights till 1958 and the Commission decided to defer consideration of the matter because the number of reports received was not sufficient yet.<sup>30</sup> In 1959, the Commission considered the reports submitted by 41 governments and 5 international organizations. In 1961, the Commission considered the second series of the reports, covering the years from 1957 to 1959, submitted by 59 governments and 2 international organizations.

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28 See for instance, LANDY, Earnest A. *The effectiveness of international supervision*, London, Stevens, 1966.

29 This idea emanates from the discussion in the Commission on Human Rights. ECOSOC OR 22nd session, Suppl. 3, Report of the Commission on Human Rights. E/2844 (1956).

30 30 governments and 5 international organizations.

On the same occasion, the Commission on Human Rights set up a Committee on Periodic Reports on Human Rights, consisting of its members (Afghanistan, Austria France, India, Panama and Poland) to examine the summaries of periodic reports for 1957-1959, in order to prepare draft comments, conclusions and recommendations, and to make recommendations to the Commission on the procedure to be followed with respect to future periodic reports.<sup>31</sup> The Committee met early in 1962 to examine the 1957-1959 reports and made comments and recommendations. Agreeing with the Committee's recommendations, the Commission on Human Rights endorsed a draft resolution and the ECOSOC adopted it as Res. 888B-(X X XIV), July 1962. While welcoming the cooperation of governments to a certain degree, and the achievement of part of the purposes,<sup>32</sup> this resolution estimates that "the reports make little reference to the situation in non-self-governing and trust territories"<sup>33</sup> and that "the situation in a number of countries and territories still continues to remain unsatisfactory both in the field of civil and political rights and in the social, economic and cultural rights,"<sup>34</sup> and decided to "continue the system of communication by governments of periodic reports on human rights."<sup>35</sup>

This reporting system has been continued and in 1965 the third series of the reports, 1960-1962, was examined. The results of this examination was reviewed as resolution 1074C (X X X I X) in July 1965. This resolution evaluated the reporting system stating that it was "not only a source of information, but also a valuable incentive to Governments' efforts to protect human rights and fundamental freedoms and to the implementation of the Universal Declaration of Human Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples and the Declaration on the Elimination of All Forms of Racial Discriminations",<sup>36</sup> and set up more detailed provisions on the reporting system.<sup>37</sup> One of the innovations was to separate the reports into three categories, and the governments were asked to submit each category of reports

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31 Commission on Human Rights Res. 3. (XVII), ECOSOC OR 32nd session, Suppl. 8, Report of the Commission on Human Rights, E/3456 (1961), p.305.

32 Para. 1, Para. 2, Second Para, Para. 3, (b)(c)(d)(e)(f)(g).

33 Ibid. Para. 3(a).

34 Para. 2, first Part.

35 Para. 5.

36 ECOSOC Res. 1074 (XXXIX), Para. 4.

37 Paras. 6, 8, 9, 10, 17, and 18.

annually for the period of three years.<sup>38</sup> Accordingly after 1965, the system was established in which a government sent a report on civil and political rights in the first year, on economic, social and cultural rights in the second and on freedom of information in the third, which then was examined by an ad hoc committee established by the Commission, and comments, conclusions and recommendations were forwarded to the Commission.

Recourse to the reporting method is also had regarding economic questions, though not always in as remarkable a way as in the example given so far. The reporting is here used rather sporadically in the form of government replies to an inquiry addressed to them by the Secretary General or by special machineries to review the progress of programmes concerned. For instance, in the preparation of the studies and the report requested from him by the Committee of Development Planning of ECOSOC, the Secretary General made use of the communications on appraisal of national progress submitted by governments in June 1972 upon his invitation.<sup>39</sup> For the purpose of drawing up a report to the General Assembly on the mid-term review and appraisal of the Decade, the Secretary General addressed an inquiry to member states in 1974.<sup>40</sup> Furthermore, in order to facilitate the third of the biennial over-all review and appraisal of the International Development Strategy, a report was prepared by the Secretary General in October 1976.<sup>41</sup> Finally, the Third United Nations Development Decade (The New International Development Strategy) expressly requests in a special paragraph member states to submit reports on measures taken. This paragraph 177 reads: "Developed countries, individually or through their relevant organizations, are invited to transmit reports of their development assistance efforts in the light of the commitments undertaken by them in the International Development Strategy and in relevant international forums."

The effect of this reporting system can only be evaluated after 1990 when the Decade comes to an end. Although, generally speaking, the reporting method is worked out through efforts made after the adoption of the original

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38 Para. 6.

39 The International Development Strategy, First Over-All Review and Appraisal of Issues and Policies. E/5268, ST/ECA/177, UN Publ. Sales No. E.73. II. A.6. pp.iii-iv.

40 A synoptic view of the replies of governments to that inquiry is provided in a note issued by the Secretary General in June 1975 (Yearbook of the United Nations, 1975, p.365).

41 E/5981, ST/ESA/68 (1977) ("Economic and social progress in the Second United Nations Development Decade").

instrument, i.e. on *ad hoc* basis, it usually proves, once established, to be an efficient method of follow-up.

#### 4. Elaboration

The concept of follow-up has been defined above as something which is wider in scope than supervision in the strict sense of the term. While the methods described so far may be equally employed for the purpose of supervision, in the narrow sense, the methods discussed here are especially important for the follow-up in its wider sense. All activities which do not belong to any of the three methods mentioned above can be considered as falling under this fourth category which is designated as "elaboration". It is, therefore, a very wide concept. Although there are some typical methods for elaboration, such as the working out of more extensive legal instruments or programmes for the better implementation of original instruments, it is difficult to enumerate all the methods used in this category of follow-up. Indeed, even a recitation can sometimes imply some degree of elaboration unless it is a mere word-by-word repetition of a preceding resolution. So does a review and appraisal action by which the current situation is not only reviewed but some proposals are implicitly made within the review action itself.

Elaboration becomes most important in cases where a resolution only points the direction of goals and objectives and when they are expressed in general terms. On the other hand, a concrete proposal is better followed up by recitation or reporting procedures.

As resolutions on economic development are in many cases formulated in a programmatic manner, they need to be followed up essentially by elaboration. Resolutions concerning the New International Economic Order are the most representative among them. Elaboration becomes significant in these cases.

##### (1) Concretization of original instruments, including interpretation

In contrast to the supervision exercised with a view to securing compliance with a binding instrument, follow-up mostly aims at promoting the observance of legally "non-binding" resolutions. Resolutions in many cases are not only recommendatory in character but also abstract and programmatic in contents. The first step in their follow-up, therefore, is to make the original instrument more concrete and operational. This may take different forms. The clearest

way is to formulate legal provisions with a view to adopting a treaty. One example is the work towards the adoption of the two International Covenants on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, which can be construed as follow-up of the Universal Declaration of Human Rights. These elaborate human rights instruments are themselves provided with supervisory machineries.<sup>42</sup> As the Covenants are binding only on the ratifying countries, the original instrument, i.e. the Declaration, continues to function as the fundamental basis of the subject matter on the level of general international law. The Declaration of Principles Governing the Sea-Bed and Ocean Floor<sup>43</sup> and the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space<sup>44</sup> present similar examples in the sense that they have been both worked out into relevant treaties.<sup>45</sup>

The second possibility is to make the contents of the original resolutions clearer by drafting more elaborate instruments though perhaps not legally binding. Various codes of conduct that are now being drafted in ECOSOC and UNCTAD are examples of this non-binding variety of follow-ups.

In many cases where the original instrument is elaborated by means of concretization, elements of interpretation can be found in the process. For in order to be able to concretize the original instrument, interpretation of some of its notions becomes inevitable. By interpreting some of the notions which are new to the United Nations, one may give new or additional meanings to them. Interpretation thus has an innovative function. We could analogously recall here the famous discussion on the indivisibility of "codification" of and "progressive development" of international law set fourth in Article 13 (a) of the United Nations Charter.<sup>46</sup> Consolidation cannot take place without an effort to interpret the actual situation. This interpretative action is normally accompanied

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42 Arts. 16-25 of the International Covenant on Economic, Social and Cultural Rights; Optional Protocol to the International Covenant on Civil and Political Rights; Arts. 8-16 of the International Convention on the Elimination of All Forms of Racial Discrimination.

43 GA Res. 2749 (XXV), (1970).

44 GA Res. 1962 (XVIII), (1963).

45 Treaty on Principles Governing the Activities of States in the Exploration of Outer Space, Including the Moon and other Celestial Bodies. GA Res. 2222 (XXI) and the United Nations Convention on the Law of the Sea, 1982.

46 Report of the International Law Commission, 8th session, GAOR, 11th s., Supp 1.9 (A/3159), (1956), p.3, para. 26.

with some elements of progressive development or elaboration. Interpretation is, therefore, an important function in elaborating the original instrument.

(2) Establishment of a special procedure or a machinery

A special procedure or machinery can be established in order to enhance the observance of the original instrument. This method is possible when the original instrument has been sufficiently developed in order to enable the follow-up machinery to check the compliance of a set of well-defined provisions. The best example can be given here again from the field of human rights. In 1967, ECOSOC adopted a resolution which entrusted the Commission on Human Rights with investigation of apartheid in South Africa, Namibia and Rhodesia, and other gross violation of human rights.<sup>47</sup> It also authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to make studies on information concerning gross violations of human rights. ECOSOC resolution 1503 (XLVIII) of 1970 which was entitled "Procedure for dealing with communications relating to violation of human rights and fundamental freedoms" entrusted the Commission on Human Rights, especially the Sub-Commission, with the competence of receiving petitions from individuals, petitions called communications in the United Nations language. They first go to the Sub-Commission whose Working Group selects important cases out of a large number of communications.<sup>48</sup> Then the Sub-Commission determines whether to refer particular situations to the Commission on Human Rights for its thorough study, investigation and eventual recommendations to ECOSOC for further action. This new task entrusted to the Commission on Human Rights was neither within the scope of its original competence nor was it based on any statutory provision. The Commission had earlier even once announced that it was not in a position to initiate any action against violation of human rights.<sup>49</sup> But the growing awareness of the importance of human rights throughout the world and the increasing number of communications on human rights addressed to the United

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47 ECOSOC Res. 1235 (XLII).

48 The number of communications reaching the United Nations was over 27,773 in 1982. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 35th s., Summary Records of the 27th Meeting, "Communications concerning human rights: request of the Working Group established under Sub-Commission Resolution 2 (XXIV) in accordance with ECOSOC Resolution 1503 (XLVIII), (E/CN.4 Sub.2/1982/SR.27).

49 LAUTERPACHT, Hersch. *International law and human rights*, London Stevens, 1950, p. 225.

Nations led the General Assembly and ECOSOC to authorize the Commission on Human Rights to undertake this new task of a remarkably progressive nature. The spontaneous development of this procedure is a very important landmark in the process of follow-up of the Universal Declaration of Human Rights.

A second example can be taken from the field of decolonization. The Special Committee on Decolonization set up by the General Assembly in 1961<sup>50</sup> was an effective machinery to enhance the implementation of the Declaration on the Granting of Independence to the Colonial Countries and Peoples. The Special Committee was requested to “examine the application of the Declaration, to make suggestions and recommendations on the progress and extent of the implementation of the Declaration,” and for that purpose authorized to “meet elsewhere than at United Nations Headquarters, whenever and wherever such meetings may be required for the effective discharge of its functions.”<sup>51</sup> The most important element in this mandate was that the Committee was empowered to employ “all means which it will have at its disposal within the framework of the procedures and modalities which it shall adopt for the proper discharge of its functions.”<sup>52</sup> Basing itself on this broad authorization, the Committee interpreted its own terms of reference to include its competence to send questionnaires to colonial countries, receiving petitions and dispatching on-the-spot missions. This is no place to discuss the work accomplished by the Committee in detail as this has been done in various studies.<sup>53</sup> It suffices to point out here that this machinery created by the General Assembly played a major role in the follow-up of the Declaration.

### (3) Studies and programmes

In order to clarify the real import of the original instrument, especially when it is not in an operational form, further study is often needed. Programmes are also designed with a view to making public the importance of the problem and

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50 GA Res. 1654 (XVI).

51 Ibid. paras. 4 and 6.

52 Ibid. para. 5.

53 RIGO-SUREDA, A. *The evolution of the right of self determination. A case study of the United Nations practice*, Sijthoff, Leiden, 1973. BARBIER, Maurice. *Le Comité de décolonisation des Nations unies*, Paris, LGDJ, 1974. GROS-ESPIELL, Hector. *The right to self-determination—Implementation of United Nations resolutions*, E/CN. 4/Sub. 2/405/Rev. 1. (1980)



sensitizing public opinion. For example, the General Assembly in 1963 designated the year 1968 as the International Year for Human Rights<sup>54</sup> and requested ECOSOC and relevant organs to prepare a programme of measures and activities during that year. According to this decision ECOSOC, particularly the Commission on Human Rights, worked out a comprehensive programme of measures and activities to be undertaken in connection with the International Year of Human Rights, which was endorsed by the General Assembly.<sup>55</sup> The establishment of the Group of Eminent Persons to study the Impact of Multinational Corporations on Development and on International Relations<sup>56</sup> is another example illustrating this method of follow-up which we have characterized as an elaboration. There is a huge number of activities, study groups, working groups etc. Which are established to study a problem with a view to elaborating it and to preparing the back ground for its further development.<sup>57</sup>

## 5. Summary

Methods used for follow-up are not necessarily limited to those enumerated above under the four major categories. As indicated at the beginning of this chapter, a method sometimes contains various aspects which are not attributable to one single category of the classified methods. The four categories are given above simply to illustrate the main characteristics of the contents of various follow-up methods, but the classification does not have any important connotation as such.

The fact that follow-up methods are interrelated and that all methods, especially the fourth category which we have categorized as "elaboration", covers a wide range of activities, shows the difference of follow-up from the traditional term "supervision". Supervision is a function to ensure compliance with a legal rule, while follow-up, though finally aiming at ensuring compliance, finds its purpose in giving more importance to the original instrument and

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54 GA Res. 1961 (XVIII).

55 GA Res. 2217A (XXI).

56 The Group was appointed by the Secretary General under the mandate of Ecosoc Res. 1721 (LIII).

57 Just to cite a few: Group of Experts on the Economic Consequences of Disarmament; Committee on the Peaceful Uses of Outer Space; United Nations Scientific Advisory Committee; Special Committee against Apartheid; Ad hoc Committee on the Restructuring of the Economic and Social Sectors of the United Nations System.

making it more legally manageable. A resolution of the United Nations can not always be supervised as it often states vaguely formulated principles and it is not legally binding as such. Follow-up is vital for United Nations resolutions because it can give added meaning and elaborate the contents of the original instrument and it can supervise the application of a resolution even if the latter is not legally binding.

## Conclusion

The purpose of this study was to conduct a critical survey of existing theories on United Nations resolutions and to explore a possibility to present a break-through in the theoretical impasse of the issue. We started from the belief that the theoretical argument on the legal nature of resolutions was not only sufficiently developed but also it reached a saturation point. On the other hand, we were convinced that United Nations resolutions continued to play an important role in international law and a different approach was needed in order to fill the gap between the theoretical difficulties and the real situation of the question.

It was proposed to shed light on the application side of the resolutions and evaluate the legal significance of a resolution by using a yard-stick which we called follow-up. As a United Nations resolution is neither treaty nor custom as such, it does not become a “legally binding” instrument even if a scrutinized system of follow-up is accompanying it and sufficient follow-up activities are exercised subsequently. However, if conditions are satisfied, i.e. if the three elements which give legal importance to a resolution are existent at its adoption and the third one namely the follow-up is exercised as effectively as possible, the difference of a resolution to another established source of international law becomes minimal.

Supposing a resolution has not been followed-up, it goes without saying that a total lack of follow-up would end up in a full failure of the original instrument. A proclamation of a principle in a single resolution without any following actions would achieve very little. The position to give little legal importance to resolutions is quite justified in this situation. A follow-up consisting of a mere repetition would perhaps not yield much. But a comprehensive system of

follow-up built on the combination of a series of methods, including repetition, is a way to make the original instrument legally relevant. In the least successful cases, follow-up can help the issue to be kept alive against the risks of degeneration.

Whether a resolution is well followed-up or not depends largely on the will of the international community represented in various organs of the United Nations. In other words, the fate of a resolution whether to stay a simple sheet of paper or a viable legal instrument is determined by the will of the international community to the same extent as it determines the creation of customary law or adoption of an international treaty.