The Internal and External Effects of Resolutions by International Organizations

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1. The Notion of Resolution

International organizations are organized systems of decision-making founded by member states. All international organizations know of a certain minimum of decisions which they have to take. They have to adopt their budget, lay down rules for their personnel etc. The decisions must be taken by organs representing the international organization. In that respect there is no difference between the law of international organizations and internal constitutional or administrative law of member states[1].

Concerning the organs of international organizations different types can be distinguished. There are executive organs as secretary-generals or boards of governors and there are organs in which states are represented. They are frequently called Council, Committee of Ministers, General Assembly. And there exist organs where individuals, elected or delegated, are members with specific competences[2]. Examples for those organs are the Parliamentary Assembly of the Council of Europe or the European Parliament.

For the second and third category of organs, namely those where states are represented or where a parliamentary type of representation exists,

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[1] See R. Bindschedler, International Organizations, General Aspects, in: R. Bernhardt (ed.), Encyclopedia of Public International Law (EPIL), Instalment 5 (1983), p.119.

[2] Cf. I. Seidl-Hohenveldern, Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften (4th ed. 1984), p.110 et *seq.*

decisions will be taken by a vote which may require unanimity, qualified or simple majority. The outcome of such a vote will be a resolution of the organ concerned[3]. The legal effects of such a resolution will depend on the specific constitutional system applicable for the international organization. Special rules for the form and procedure of the resolution may apply depending on the specific provisions.

2. *The Relevance of Resolutions for the Internal System of the International Organization*

Resolutions will be adopted for the development of the internal structure of the organization, for laying down rules of procedure, for setting up sub-organs or entities and in general for rule-making within the system. Through resolutions of the competent organs the consensus of member states as to the normal practice within the organization will be formed. In the same way new activities falling within the sphere of competence of the organization may be circumscribed by resolutions.

The establishment of peace-keeping-forces by the Security Council and the General Assembly of the United Nations is a good example for the use of resolutions to develop the internal structure of the organization[4]. Another example is the recent adoption by the Committee of Ministers of the Council of Europe of rules concerning compensation for applicants before the European Commission of Human Rights after the Committee of Ministers has established a violation[5]. The rule is covered by Art.32 of the European Convention on Human Rights but a framework had to be established within the Committee of Ministers[6]. No internal system of an international organization can be understood without taking into account the body of resolutions existing within that organization.

As to the binding force of resolutions within the organization the following seems to be generally accepted. Resolutions have binding force for the officials of the international organization. The officials are generally not entitled to question the lawfulness of a resolution. This is indeed the general consequence of the fact that these officials are under a duty of loyalty to the organization. They have to accept resolutions in the same

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[3] A wider notion is apparently used by H. Schermers, International Organizations, Resolutions, in: EPIL Instalment 5 (1983), p.159.

[4] The resolutions are to be found in: R. C. R. Siekmann, Basic Documents on United Nations and related Peace-Keeping Forces (1985).

[5] Rule 9, para.2, Rules of Procedure for Art.32.

[6] Frowein-Peukert, EMRK-Kommentar (1985), p.427 et *seq.*

way as civil servants have to comply with administrative rules or orders they receive from their superiors. An exception may exist where a resolution was adopted by a parliamentary organ which is not competent to give orders to the officials of the organization. In practice this seems to be a rather rare occurrence.

Resolutions are also binding for all the subordinate organs of the international organization. Where the resolutions are adopted by an organ composed of representatives of the member states they will be binding for the executive organs of the international organizations if no other special rule exists. As for the organ which has adopted the resolution it is bound by that resolution until a further resolution having the same rank has come into force.

Although much will depend on the specific constitution of the international organization a certain presumption exists that resolutions lay down general rules while specific decisions have to be taken by the competent administrative organ. The International Court of Justice stated in 1977 for the United Nations:

> "In regard to the Secretariat the General Assembly is given by the Charter a power to make regulations, but not a power to adjudicate upon, or otherwise deal with particular instances"[7].

In that respect the Court suggested an important and useful distinction between the broad regulatory powers of the General Assembly and the authority of the Secretary-General to decide specific cases, as Theodor Meron has correctly emphasized[8]. In his concurring opinion to the Advisory Opinion of 20 July 1982 (Application for Review of Judgement No.273 of the United Nations Administrative Tribunal) Judge Mosler dealt with the relationship of different resolutions of United Nations organs. He stated:

> "In municipal legal systems it is a generally accepted principle that everyone can rely on the validity of a legal norm duly enacted by the competent authority and promulgated in due form to whom it may concern. The internal law of the United Nations Organization is, as far as the relationship between the Organization and its staff-members is concerned, in the same legal position as domestic law ... If the International Civil Service Commission erroneously interpreted General Assembly Resolution 33/119, and the Secretary General consequently amended rule 109.5 in a manner not in conformity with the will expressed by

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[7] ICJ Reports 1977, p.61.

[8] T. Meron, Charter Powers of the United Nations Secretary-General with regard to the Secretariat and the Role of General Assembly Resolutions, ZaöRV 42 (1982), pp.731, 751.

that resolution, that error of interpretation is to be imputed to the United Nations Organization, but not to the staff-members, who are bound by the rules, and correspondingly, can rely on their validity"[9].

In another context in the same concurring opinion Judge Mosler recognized that there may be a hierarchy of norms within the system of international organizations:

"This regulation is the higher norm in the hierarchy of the legal provisions applicable to the present case. Resolution 34/165 could not have the effect of changing the law, since it did not either amend regulation 12.1 or clearly state that the General Assembly decided either to disregard this regulation or ..."[10].

3. The Lawfulness of Resolutions

There are comparatively few charters of international organizations which provide for an organized system in which the lawfulness of resolutions can be tested. This is the case for the European Communities where resolutions which have binding force for the member states concerned, as regulations, directives or decisions, can be attacked before the European Court of Justice[11]. Within such a system acts of the organization which are binding according to the constitutional instrument but which have not been declared null and void by the respective court are valid and no challenge to their lawfulness is possible[12].

As the International Court of Justice has underlined there is no procedure for determining the validity of acts of the United Nations. Therefore, as the Court observed, each organ of the organization must, in the first place, determine its own jurisdiction[13]. The Court has stated in the Namibia Advisory Opinion that "a resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted"[14]. In the Advisory Opinion concerning Certain Expenses of the United Nations, the Court hinted at the possibility that the violation of internal provisions may

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[9] ICJ Reports 1982, p.386.

[10] ICJ Reports 1982, p.388.

[11] Art.173 EEC-treaty.

[12] Art.184 EEC-treaty provides for judicial review also where the lawfulness of a regulation is challenged incidentally in a case.

[13] Certain Expenses of the United Nations (Advisory Opinion), ICJ Reports 1962, pp.151, 168.

[14] South West Africa/Namibia (Advisory Opinion), ICJ Reports 1971, pp.16, 22.

not make the act itself illegal if it is within the general jurisdiction of the organization. A presumption is seen to exist for actions appropriate for the fulfillment of one of the stated purposes of the United Nations as being valid.

The Court stated:

> "If it is agreed that the action in question is within the scope of the functions of the organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the organization. Both national and international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an ultra vires act of an agent"[15].

Where no possibility exists to settle by judicial procedure a dispute as to the lawfulness of any act of the international organization, the danger is always present that the states concerned may take the law into their own hands. This is what happened when member states of the United Nations refused to pay their share of the budget for peace-keeping-operations because they considered these acts to be illegal under the Charter. The advisory opinion of the International Court of Justice in the *Certain Expenses* case was not binding and was, in fact, not accepted by the states concerned. Unless a compromise is found, a dispute as to the legality of United Nations acts may well lead to the non-recognition of the acts by some states[16]. This is a considerable weakness of the system. Legal doctrine has discussed possible limitations for a state to rely on the unlawfulness of acts of the organization. It is frequently stated that a distinction may be made between acts manifestly *ultra vires* and others. One may not expect a great deal of clarification by that distinction[17].

States wishing to reject resolutions by international organizations as unlawful can rely on famous statements by judges of the International Court of Justice. In the *Certain Expenses* case Judge Winiarski, then President of the Court, concluded:

> "It is the State which regards itself as the injured party which itself rejects a legal instrument vitiated, in its opinion, by such defects as to render it a nullity

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[15] ICJ Reports 1962, p.168.

[16] J. A. Frowein, United Nations, in: EPIL Instalment 5 (1983), pp.272, 278.

[17] Compare E. Osieke, The Legal Validity of Ultra Vires Decisions of International Organizations, American Journal of International Law 77 (1983), pp.239, 249 et *seq.*

... A refusal to pay, as in the case before the Court, may be regarded by a Member State, loyal and indeed devoted to the Organization, as the only means of protesting against a resolution of the majority which, in its opinion, disregards the true meaning of the Charter and adopts in connection with it a decision which is legally invalid"[18].

Similarly Judge Gros stated in 1980:

"A decision of the WHO which is contrary to international law does not become lawful because a majority of States has voted in favour of it ...; member States are not bound to implement an unlawful act if that is what they hold it to be, and the practice of international organizations has shown that recourse is had in such circumstances to a refusal to carry out such act. Consequently nothing is settled by a decision taken by a majority of member States in matters in which a specialized agency oversteps its competence. Numbers cannot cure a lack of constitutional competence"[19].

It is impossible to solve that issue in a satisfactory manner in present-day international law. If one realizes that even binding decisions by the International Court of Justice are sometimes rejected as null and void because the decision of the Court on jurisdiction is seen as faulty[20], one must conclude that states will not be willing to give up that last possibility. The only hope which could be expressed is that with a growing international confidence instances of that sort will become rarer[21].

4. Legal Consequences of Resolutions for Member States

We shall now consider the legal consequences of resolutions which are accepted as being lawful. No issue arises where the charter of the international organization declares that a resolution is formally binding. Within the system of the European Communities a resolution may amount to a formally binding legal instrument as a Regulation or Directive[22]. Within the United Nations system the Security Council can take binding decisions

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[18] ICJ Reports 1962, p.232.

[19] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion), ICJ Reports 1980, pp.4, 35.

[20] The United States seem to have taken that position as to the decision of the ICJ concerning its jurisdiction in the *Nicaragua* case. Cf. K. Oellers-Frahm, Die »obligatorische« Gerichtsbarkeit des Internationalen Gerichtshofs, ZaöRV 47 (1987), p.24 et *seq.*

[21] As to nullity in international law generally see J. A. Frowein, Nullity in International Law, in: EPIL Instalment 7 (1984), p.361.

[22] Art.189 EEC-treaty.

under chapter VII[23]. Although these decisions will be formally adopted by a resolution they are of a different category. Therefore they shall not be discussed in the present context. Unless a state argues nullity it is bound to follow a binding decision.

It is, however, of considerable interest to find out whether resolutions which are not formally binding may nevertheless have legal consequences. Resolutions of that sort are recommendations to member states and they are frequently qualified as such. Recommendations may become binding on a state concerned if that state formally enters into the obligation vis-à-vis the international organization to implement such a resolution[24]. This can be of importance.

It is wellknown that a dispute has existed from the very beginning whether or not Security Council resolutions based on Art.40 of the United Nations Charter concerning provisional measures are binding as such[25]. Although the better arguments would seem to show that the resolutions in fact have binding character as all members of the Security Council implied when resolution 598 (1987) concerning the war between Iran and Iraq was adopted[26], this may not be the view of the states parties to the conflict. As soon as they declare themselves ready to implement such a resolution, they are bound by public international law to do so[27].

Another example where resolutions which were not binding on non-member states were in fact accepted by one state, thereby creating a legal obligation to implement them, concerns the economic boycott on Rhodesia. In that context the Federal Republic of Germany, who was not yet a member of the United Nations at that time, notified the Secretary-General of the United Nations that it would support the economic sanctions against Rhodesia[28]. This declaration created a legal obligation for the

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[23] It is doubtful whether Art.25 makes other decisions binding as the ICJ held in the Namibia Advisory Opinion, ICJ Reports 1971, pp.16, 53; for a contrary view which seems to be the one on which United Nations practice is based, see Frowein (note 16), p.277 *et seq.*

[24] Paul De Visscher, Valeur et autorité des actes des organisations internationales, in: R.-J. Dupuy (ed.), Manuel sur les organisations internationales (1988), p.323.

[25] Cf. J.A. Frowein, in: B. Simma (ed.), Kommentar zur Charta der Vereinten Nationen (1989) (forthcoming), Art.40, No.17 *et seq.*

[26] Cf. S/PV.2750, 20 July 1987, p.16.

[27] Iraq had immediately accepted the binding nature of the resolution, ILM (International Legal Materials) 26 (1987), pp.1485–1486.

[28] D. v. Schenck, Das Problem der Beteiligung der Bundesrepublik Deutschland an Sanktionen der Vereinten Nationen, besonders im Falle Rhodesiens, ZaöRV 29 (1969), pp.257, 267.

Federal Republic of Germany. Switzerland made it quite clear that it could not accept any obligation but was willing to impose unilateral measures to avoid circumvention of the sanctions on Swiss territory[29].

May one say that there exists an obligation to at least consider seriously whether or not a state should follow a recommendation issued by an international organization? A certain logic could be seen in such a proposition, especially where the state concerned has voted in favour of the resolution[30]. However, state practice does not seem to support a clear legal obligation under those circumstances. It may be due to the number of resolutions adopted by international organizations nowadays that compliance with them is not very high in many areas. It could be something to consider for the practice of organizations whether a reduction of the number of resolutions would not sometimes be preferable. Only a systematic attitude to completely ignore recommendations could be seen as a violation of the principle of good faith and loyalty towards the organization.

More interesting legal issues arise where member states do in fact comply with resolutions of international organizations and the lawfulness of their action is later challenged. It would seem that the international organization itself can never argue that the state has acted illegally if it has complied with a resolution of the organization. This would apply to arguments concerning the lawfulness under the law of the international organization itself or under public international law in general.

It is much less clear whether there are cases where a resolution of an international organization may have a justifying effect for state action vis-à-vis a state, also a member of that organization, which later challenges the legality of the first state's action. May recommendations, non-binding by themselves, nevertheless be a justification under public international law to apply measures which would otherwise contradict rules of international law? Most, if not all the cases where states have voluntarily agreed to apply sanctions on the basis of recommendations of the General Assembly of the United Nations, for instance to South Africa, were of a nature that no rules of public international law had to be breached by the application of the sanctions themselves[31]. This is generally the case where a partial economic

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[29] R. L. Bindschedler, Das Problem der Beteiligung der Schweiz an Sanktionen der Vereinten Nationen, besonders im Falle Rhodesiens, ZaöRV 28 (1968), pp.1, 12, 14.

[30] In this sense De Visscher (note 24), p.323.

[31] See J. A. Frowein, Collective Enforcement of International Obligations, ZaöRV 47 (1987), pp.67, 70.

boycott is being imposed without any special treaty relations existing and no GATT-rules being breached. However, one may well ask whether resolutions by the Security Council or by the General Assembly of the United Nations cannot have a certain justifying effect where the recommendation is clearly within the competence of the United Nations. Paul De Visscher goes very far in accepting such a justification. He expressly states that in the relations between member states recommendations have, at the minimum, the value of authorizations which implies that states members who wish to act accordingly have the right to do so even notwithstanding treaty obligations which they may have concluded with another member state[32].

According to another argument the justification would lie in the recommendation because the view expressed by the competent United Nations organ must be deemed to have expressed a correct appreciation. This would not be a completely independent substantive justification but rather an important procedural presumption created by the recommendation[33]. It would seem that this interpretation has been adopted by United Nations practice at least in some instances.

Resolution 221 (1966) by which the Security Council called upon the Government of the United Kingdom to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia, and empowered the United Kingdom to arrest and detain the tanker Joana V upon her departure from Beira in the event her oil cargo was discharged there, raises issues in that context[34]. Britain introduced controls along the coast of Mozambique and checked over 50 tankers from 1966 to 1971[35].

It is clear that the Security Council Resolution wanted to create a legal authorization for Great Britain. To what extent could it justify action vis-à-vis another United Nations member state? At least in one case the British Navy has ordered a Greek tanker to change its direction and reach another port[36]. The interesting additional feature was that Greece had ordered her

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[32] See De Visscher (note 24), p.323: «Dans les relations entre Etats membres, les recommandations ont, au minimum, valeur d'autorisations, ce qui implique que les Etats membres qui souhaitent s'y conformer sont en droit de le faire nonobstant toute convention contraire qu'ils auraient pu conclure antérieurement avec un autre Etat membre». See also A. Cassese, International Law in a Divided World (1986), p.244.

[33] Frowein (note 31), p.70 note 15.

[34] The resolution was adopted under chapter VII.

[35] Current Survey, Rhodesia, in: Public Law 17 (1972), p.186.

[36] UN Doc.S/7249.

tankers not to transport oil to or from Rhodesia. Therefore one may conclude that Greece as flag-state was willing to accept the action by the British Navy. Under those circumstances no problem could arise.

One may argue that the Security Council acted under Art.42 of the Charter creating thereby an authorisation for Britain valid against any United Nations member state. This seems to be the most appropriate solution since Art.42 should be seen as *lex specialis* for all measures implying the use of military force decided by the Security Council[37]. A decision based on Art.42 creates a legal obligation for all states concerned. Although this seems to be the correct interpretation under the law of the United Nations the view has been expressed that the resolution authorising the British actions was a mere recommendation and was nevertheless legally sufficient in that respect[38].

One must certainly be careful not to blur the distinction between binding and non-binding acts of international organizations. However, states should not be able to raise issues of lawfulness where other states comply with recommendations of international organizations if the states affected have themselves indicated that they regard the actions recommended as lawful. Especially a state having voted for the resolution should not be able later on to complain about the lawfulness of actions taken by states on the basis of these recommendations.

Separate opinions by judges of the International Court of Justice have also implied that justifying effect of recommendations. Judge Gros stated in his dissenting opinion in the *Namibia* case[39]:

> "As Judge Lauterpacht said in 1955, and as Judge Koretzki said in 1962, I consider that the recommendations of the General Assembly, 'although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, ... do not create a legal obligation to comply with them'".

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[37] Cf. Frowein (note 25), Art.42 Nos.18, 19.

[38] G. Fischer, in: J.-P. Cot/A. Pellet, La Charte des Nations-Unies (1986), Art.42, p.715.

[39] ICJ Reports 1971, p.339.

5. Resolutions as Declaratory of General Rules of Law

It is clear that resolutions, even if adopted by consensus, are not automatically a source of international law[40]. However, they may well be declaratory of law and in that respect they will be taken into account by organs of the international organization at further occasions.

The International Court of Justice referred in a new manner to General Assembly Resolutions in its judgement in the *Nicaragua* case. It stated that the *opinio juris* may, though with all due caution, be deduced from the attitude of states towards certain General Assembly Resolutions and it used the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations. The Court added:

> "The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or illucidation' of the treaty commitment undertaken in the Charter. On the contrary it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves"[41].

The Court also used the General Assembly Resolution containing a definition of aggression when it deduced from it a rule of customary international law according to which the sending by or on behalf of a state of armed bands, groups of irregulars or mercenaries which carry out acts of armed force against another state of such importance as to amount to an actual armed attack conducted by regular forces, is an armed attack in the sense of customary international law[42].

The Court did not overlook the necessity to find out whether the states concerned agree to the principle at issue. In fact, when discussing the General Assembly Resolution 2131 (XX) on intervention it noted that the United States, while voting in favour of the resolution, also declared in the First Committee that it considered the declaration to be "only a statement of political intention and not a formulation of law". But the Court added that the same wording appears in the Declaration on Friendly Rela-

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[40] H.K. Skubiszewski, Les résolutions de l'Assemblée générale des Nations Unies, Annuaire de l'Institut de Droit International, Vol.61-I (1985), pp.29–358; cf. also S.M. Schwebel, United Nations Resolutions, Recent Arbitral Awards and Customary International Law, in: Realism in Law-Making, Essays on International Law in Honour of Willem Riphagen, ed. by A. Bos, H. Siblesz (1986), pp.203–210.

[41] ICJ Reports 1986, p.100.

[42] Ibid., p.103.

tions 2625 (XXV), on the adoption of which no analogous statement was made by the United States representative[43].

It remains correct that resolutions or declarations by themselves are not a source of law. However, they may well be seen as indications of what states consider to be the law. To a certain extent the character of those instruments may be similar to phenomena in municipal law, which without being law in the formal sense may influence legal decisions as means to find the law. This is true for precedents in the continental European legal systems where they have no force of law.

The statements by the International Court of Justice in the *Nicaragua* case concerned the relevance of resolutions by the competent United Nations organs for the development of rules of general international law. For the internal law of an international organization resolutions containing the confirmation of general principles of law or rules of customary international law must be even more important.

As soon as an issue arises within the international organization where the principle upheld in the resolution could apply, the respective organ will normally take that resolution into account. A state will only be able to challenge the correctness of the principle stated where it has from the very beginning objected to the earlier resolution.

A good example for this development can be seen in the treatment by the Council of the International Civil Aviation Organization of the use of armed force against civilian aircraft. After the tragedy concerning Korean Airlines flight KE 007 the Council adopted a resolution on 6 March 1984 according to which the use of armed force against a civilian aircraft in flight "constitutes a violation of international law, and invokes generally recognized legal consequences". The Council further recognized "that such use of armed force is a great threat to the safety of international civil aviation, and is incompatible with the norms governing international behaviour and with the Rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and with elementary considerations of humanity"[44].

On 10 May 1984 the Assembly of the International Civil Aviation Organization adopted a protocol relating to an amendment to the Convention on International Civil Aviation according to which the contracting states "recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the

[43] ICJ Reports 1986, p.107.
[44] ILM 23 (1984), p.937.

lives of persons on board and the safety of aircraft must not be endangered" (Art.3 *bis*)[45].

Although for the sake of clarification the organization has chosen to put an amending protocol before all the member states, which must be ratified, the Council has nevertheless expressed a very clear position concerning the legal situation already before that amendment could come into force. It would seem that the Council could not, without contradicting itself, treat the use of force against civilian aircraft as permissible. At least those states which have voted for the Council resolution should be seen as bound to comply with that principle in any future case.

Resolutions may also be qualified as an authentic interpretation of the basic obligations and principles in the charter of the international organization. Indeed, it can hardly be doubted that a general practice, as shown by resolutions, can be used to interpret the obligations contained in the charter of the international organization. In the Namibia Advisory Opinion the International Court of Justice held that a practice, even if not in line with the wording of the charter, may, if generally accepted by members of the United Nations, evidence a general practice of that organization[46]. The practice in that sense can find expression in resolutions of the international organization.

[45] ILM 23 (1984), p.705 *et seq.*
[46] ICJ Reports 1971, p.22.