American Society of International Law

LEGAL ADVISERS AND INTERNATIONAL ORGANIZATIONS

Meeting, August 26-31, 1967

HOW TO SECURE COMPLIANCE WITH DECISIONS OF INTERNATIONAL INSTITUTIONS

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Note: This paper was prepared for an earlier meeting on Legal Advisers and International Organizations, held in August 1965.
How to Secure Compliance with Decisions of International Institutions

1. 'Decision' must here include recommendations.

A decision proper is binding on members: it may be a constitutional requirement (suspension of vote under U.N. Charter, Article 19), or quasijudicial (adoption by U.N. General Assembly of decision of Administrative Tribunal; or finding that member persistently disregards its obligations) or discretionary (decision of Security Council under Ch. VII).

Recommendations vary in strength: they may set standards with which it is in the common interest that members comply, though not strictly bound to do so (European Communities practice).

2. Where a member has accepted a decision, noncompliance may arise through Parliamentary opposition and refusal to legislate, or changed circumstances, bringing unforeseen difficulties, or the requirement of a long period of time to give effect to the decision, or simply, governmental inertia (Examples from IMF practice).

Where a decision is contested by a member, directly or indirectly there may be a dispute as to the constitutionality of the decision.

3. The extent of compliance with a decision may be checked by systematic reports from members; regular consultation with members - special commissions of inquiry (Examples from IMF and U.N. practice).

Where there is non-compliance, the institution is in certain cases, e.g., where decision is a constitutional requirement or quasi-judicial, in duty bound to enforce the decision; in other cases it has a discretion.

Thus it may acquiesce in the non-compliance; or modify the decision in the particular case, e.g., changed circumstances; or impose sanctions available to it (permitting other members to withdraw benefits from defaulting member, as under GATT; imposing directly or indirectly some financial disability, as under IMF or ECSC Treaty: the possibility of suit in national courts is not to be excluded); or expel the defaulting member or compel it to withdraw from the institution.

(Czechoslovakia and IMF, 1954; South Africa and FAO, ILO, WHO.)
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APPLYING, AND EFFECTING COMPLIANCE WITH, DECISIONS
(WITH REFERENCE TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS)

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Note: This paper was prepared for an earlier meeting on Legal Advisers and International Organizations, held in August 1965.
Applying, and Effecting Compliance with, Decisions
(with reference to the European Convention on Human Rights)

A. Statutory Texts

Article 32 of the Convention

(1) If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.

(2) In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.

(3) If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph (1) above what effect shall be given to its original decision and shall publish the Report.

(4) The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

Article 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Article 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.
Article 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

Article 3 of the Statute

Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.

Article 8 of the Statute

Any Member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such Member does not comply with this request, the Committee may decide that it has ceased to be a Member of the Council as from such date as the Committee may determine.

B. The De Becker case

A journalist of Belgian nationality, Raymond De Becker, was, during the occupation of Belgium by the Nazis, the editor-in-chief of the well-known Brussels daily, "Le Soir". After the liberation, De Becker was sentenced in 1947, on a charge of collaboration with the enemy, to lifelong imprisonment, which was reduced by a measure of clemency in 1950 to 17 years' imprisonment. In 1951 he was granted a conditional release. Nevertheless, one of the results of his conviction was forfeiture of the rights listed in Article 123 sexies of the Belgian Penal Code, including:

(e) the right to have a proprietary interest in or to take part in any capacity whatsoever in the administration, editing, printing, or distribution of a newspaper or any other publication;

(f) the right to take part in organising or managing any cultural, philanthropic or sporting activity or any public entertainment;

(g) the right to have a proprietary interest in or to be associated with the administration or any other aspect of the activity of any undertaking concerned with theatrical production, films or broadcasting.
The application lodged by De Becker in September 1956 having been declared admissible, the Commission, after the failure of an attempt to reach a friendly settlement, drew up a report in which, by 11 votes to 1, it expressed the opinion

"that paragraphs (e), (f) and (g) of Article 123 sexies, insofar as they affect freedom of expression, are not fully justifiable under the Convention whether they be regarded as providing for penal sanctions or for preventive measures in the interests of public security. They are not justifiable insofar as the deprivation of freedom of expression in regard to non-political matters, which they contain, is imposed inflexibly for life without any provision for its relaxation when with the passage of time public morale and public order have been re-established and the continued imposition of that particular incapacity has ceased to be a measure 'necessary in a democratic society' within the meaning of Article 10, paragraph 2, of the Convention."²

The De Becker case was brought before the Court by the Commission in April 1960. Two days before the first hearing -- set for 3rd July 1961 -- there was published in Belgium the Civic Black Lists Act ("Loi relative à l'épuration civique) of June 30th 1961, which, inter alia, amended paragraphs (e), (f) and (g) of Article 123 sexies in such a way as to limit the forfeiture of the rights listed therein to activities of a political nature. It also provided an opportunity for De Becker to seek a remedy, through the Courts, even for this last remaining ban.

Thus amended, Article 123 sexies was judged by the Commission to be compatible with the Convention. In its submissions at the hearing of 5th October 1961, the Commission requested the Court

"to note that the limitations maintained by the Act of 30th June 1961 as regards freedom of expression, insofar as these apply to Mr. De Becker, do not go beyond the 'formalities, conditions, restrictions, or penalties' author-

¹See the text of the Decision in Yearbook of the Convention II, p. 214.

²The Commission's Report will be found in the publication of the European Court of Human Rights entitled "De Becker Case", Series B: Pleadings, Oral Arguments, Documents, 1962, pp. 11-153.
ised in Article 10, paragraph 2 of the Convention."³

However, the Court was not required to pass judgment. At the conclusion of the hearing on 5th October 1961, De Becker sent a letter to the Commission stating that his claim had been met by the law of 30th June 1961 and that he was withdrawing his Application.⁴ Noting that on the day when the hearings terminated the Commission and the Belgian Government had made concordant submissions asking that the case should be struck off its list, the Court decided, on 27th March 1962, by six votes to one, that there was no reason to continue its examination of the case ex officio.⁵

The De Becker case was, in fact, only a test case, since other Belgian citizens, as a result of their attitude during the occupation of Belgium, had forfeited the same rights as the Applicant. The importance attached to the De Becker case by the Belgian Government is thus understandable. The law of 30th June 1961 was voted by the Belgian Parliament at the Government's request, with reference to the very procedure then taking place in the De Becker case before the organs set up under the Convention.

C. The Applications by Ofner, Hopfinger, Pataki and Dunshirn against Austria

The decisions whereby the European Commission of Human Rights declared these four Applications admissible⁶ have led to a revolution in Austrian penal procedure. Those decisions cast doubts upon the conformity with the Convention of the provisions in the Code of Penal Procedure of 1873 under which appeal proceedings and the hearing of a plea of nullity usually take place at non-public hearings, in the absence of the accused and his counsel, but in the presence of the Public Prosecutor or his representative, who is heard by the Court.

Immediately the Commission's Decisions were delivered, the

³Ibid. p. 216

⁴Ibid. p. 254

⁵The judgment appears in Series A of the publications of the European Court of Human Rights.

Austrian Minister of Justice, as a first step, sent a circular to counsel in the Public Prosecutor's department requesting them to cease attending non-public hearings of the Court of Appeal and the Supreme Court. This action was designed to prevent future or current trials from giving rise to fresh admissible applications.

As a second step the Minister of Justice tabled a Bill in Parliament amending the Code of Penal Procedure by introducing rules requiring oral proceedings in the presence of both parties and re-establishing the principle of "equality of arms" between the accused and the Public Prosecutor. The Bill, adopted on 18th July 1962, became law on 1st September of that year.

The problem was still not solved, however, if the Austrian Government desired to prevent an unfavourable opinion by the Commission in two of the four cases, namely those of Pataki and Dunshirn. The other two cases, those of Ofner and Hopfinger, had meantime resulted in the opinion of the Commission that there had been no violation of the Convention, and opinion confirmed by the Committee of Ministers. Clearly, however, this was an opinion which related only to these particular cases. In addition, some 20 similar cases were still pending before the Commission.

Consequently, on 26th March 1963 the Austrian Parliament felt it advisable to adopt a new law, which came into force on 5th April 1963, under the terms of which all those whose Applications concerning the appeals procedure have been declared admissible by the Commission are entitled to request the opening of new appeal proceedings before the Court -- though not before the same judges -- which examined the original appeal.

In its report, the Commission, while considering that the earlier procedure was not compatible with the Convention, asked the Committee of Ministers not to take action on the cases outstanding, since the new legislation was calculated to give satisfaction to the Applicants. The Committee of Ministers adopted the Commission's proposal.

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7 See extracts from the law in Yearbook of the Convention V, p. 344.
8 Yearbook of the Convention VI, p. 708
9 Yearbook of the Convention VI, p. 804
10 Resolution (63) DH 2 of 16th September 1963, Yearbook of the Convention VI, p. 736.
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PROCEDURES DEVELOPED BY INTERNATIONAL ORGANIZATIONS
FOR CHECKING COMPLIANCE

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Note: This paper was prepared for an earlier meeting on Legal Advisers and International Organizations, held in August 1965.
Procedures Developed by International Organizations for Checking Compliance

1. Periodic Reports

The International Labor Organization has developed an elaborate system of periodic reports to check on compliance with a variety of constitutional obligations and decisions. Other international organizations (for instance, WHO, UNESCO and FAO) have tried to do the same, not always with success. The United Nations has now adopted this procedure in the field of human rights.

One of the main activities of the International Labor Organization is to prepare common social standards in the form of international conventions or recommendations, and the Constitution of the ILO requires that Members submit these instruments to the competent authorities for the enactment of legislation or other action. After ratifying a convention, a Member often has to modify its legislation, issue regulations, and provide for uniform interpretation of the Convention. All these steps are monitored by the ILO through a system of reports. In the first place, each Member is obliged to report details as to the submission of a particular instrument to its competent authorities. Secondly, each Member has to report annually on steps taken to implement each Convention which it has ratified. Thirdly, each Member has to report periodically on the effect given in practice to an unratified Convention, whenever the Governing Body requests such information.

The replies are examined annually by a Committee of Experts and at each International Labor Conference by a special Committee. These Committees examine national legislation for conformity to international obligations, and study the manner in which the relevant national laws are applied in practice. Comments by organizations of workers and employers are considered, whenever available, and governments are often asked for explanations. The reports of the Committees point out inconsistencies in legislative texts or practice, and usually are accepted by the Governments concerned. (For a survey of the effectiveness of the observations made by the two Committees, see International Labor Conference, 37th Session, Report III, Part IV, pp. 72-86.)

It has been suggested that this system, though useful, is not sufficient, and that an international system of labor inspection should be established to supplement it.

The Constitution of the World Health Organization requires annual reports from each Member on "the action taken and progress
achieved in improving the health of its people," and on action taken
with respect to relevant recommendations, agreements, conventions
and regulations adopted by the Organization. While the reports
have been found useful in providing a store of information for the
Organization and have helped Members to understand more clearly
what their health problems were and what needs to be done to meet
them, the WHO has found it rather difficult to prepare a meaningful
summary and analysis of Members' reports. Starting in 1956, however
these reports became the basis of the Director-General's four-
yearly reports on the world health situation.

A system adopted by the United Nations Educational, Scientific
and Cultural Organization is somewhere between the systems of the
ILO and WHO. Annual reports are presented by Members on "laws,
regulations and statistics relating to educational, scientific and
cultural life and institutions." Periodical reports on recommenda-
tions and conventions and special reports on particular educational
or cultural problems are also required. A special committee exam-
ines these reports, and presents its comments to the Conference.

The provisions in the Food and Agricultural Organization Con-
stitution are similar to those in the UNESCO and WHO Constitutions,
requiring in particular reports on the progress made by Members
"toward achieving the purpose of the Organization." Though most
Members have complied with the obligation to submit reports, the
Secretariat of the Organization has not succeeded in analyzing
them in an effective manner; the requirements with respect to the
reports were, therefore, relaxed in later years.

The United Nations has experimented with requiring periodic
reports in various areas. Early attempts to obtain comprehensive
reports on the implementation of recommendations in the economic
and social field (see, for instance, UN Doc. E/1117, 3 February
1949), were abandoned after a while. On the other hand, an effec-
tive system of reporting was developed with respect to trusteeship
areas and non-self-governing territories. Since 1956, an elaborate
procedure for periodic reporting has evolved with respect to human
rights.

Questions:

a. What are the main advantages of periodic reporting?

b. What difficulties have arisen in connection with
   periodic reports?

c. What improvements in the system of periodic reporting
   should be introduced?
2. Procedures for interpreting international agreements

Most international organizations have the customary provisions for the reference to an international tribunal (usually the International Court of Justice) of disputes relating to the interpretation or application of the constitution of the Organization and, in some cases, also of the conventions or regulations adopted by the Organization. In practice, almost no use has been made of these provisions for judicial interpretation, except for a relatively large number of arbitrations under the Universal Postal Conventions and under the conventions relating to the transport of goods and persons by rail. On the other hand, Members of international organizations resort frequently to procedures of administrative interpretation which find no mention in constitutional instruments.

Such a procedure is used frequently at the ILO, where the International Labor Office furnishes to Members information relevant to the interpretation of international labor conventions, making it clear, however, in each case that it really has "no special authority under the provisions of the Constitution of the ILO to interpret the provisions of an international labor convention, authority to give an international binding interpretation being reserved to the International Court of Justice." (33 ILO Official Bulletin 305 (1950).) Nevertheless, the view has been expressed by the Office that "when an opinion given by the Office has been submitted to the Governing Body and published in the Official Bulletin and has met with no adverse comment, the Conference must, in the event of its subsequently including in another Convention a provision identical with or equivalent to the provision which has been interpreted by the Office, be presumed, in the absence of any evidence to the contrary, to have intended that provision to be understood in the manner in which the Office has interpreted it." (23 idem 30-33 (1938); Jenks, "The Interpretation of International Labor Conventions by the International Labor Office," 20 British Year Book of International Law 132, at 133 (1939).)

The ILO Constitution provides also for investigation of complaints by one Member against another with respect to violations of labor conventions, and this procedure was used with success in 1962 and 1963 in two cases relating to the Forced Labor Convention, one involving a complaint by Ghana against Portugal, and one relating to a complaint by Portugal against Liberia.

In WHO the International Sanitary Regulations provide expressly for the reference to the Director-General of "any question or
dispute concerning the interpretation and application of these Regulations." (37 WHO Official Records 352-53 (1951).) Where a settlement is not reached, the dispute may be referred to the Committee on International Quarantine, either by the Director-General on his own initiative or at the request of the State concerned. (Ibid.; 48 idem 23 (1953).) The procedure before the Committee resembles that used in a contentious case before an international tribunal. (55 idem 42-43; 56 idem 70, 72-73 (1954).) Many questions have been submitted to the Director-General and the Committee on International Quarantine but none of them has assumed the proportions of a "dispute," and only one case (relating to yellow fever provisions) had to be referred to the World Health Assembly for solution.

The agreements establishing the International Monetary Fund and the International Bank for Reconstruction and Development have given the power to interpret them to the Executive Boards of these institutions, and large numbers of decisions have been issued by them. (See Hexner, "Interpretation by Public International Organizations of Their Basic Instruments," 53 American Journal of International Law 341-70 (1959).)

The Convention on International Civil Aviation conferred on the Council of the International Civil Aviation Organization the jurisdiction to decide in the first instance disagreements relating to the interpretation and application of the Convention. The Council was confronted in 1952 with a dispute between India and Pakistan before it developed any rules on the subject. An elaborate set of rules was finally adopted in 1957. (ICAO Doc. 7782-C/898.) Many interpretative decisions have been adopted by the Council apart from actual disputes between Members.

Questions:

a. Why is there no resort to the International Court of Justice for the settlement of disputes relating to the interpretation of the Constitutions of international organizations or conventions adopted by such organizations?

b. What role should be played in international organizations by the various means for non-judicial settlement of disputes?

c. What are the advantages and disadvantages of "administrative" interpretation?

d. Can a set of model rules of administrative procedure be drafted for the benefit of international officials engaged in administrative interpretation?
3. Complaints by non-governmental organizations and individuals

The ILO Constitution allows industrial associations of employers and workers to submit "representations" reporting that a Member "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party." Some ten cases were presented to the ILO under this provision, and most of them were settled in a satisfactory manner.

Special procedures were also developed by the ILO to deal with complaints relating to freedom of association of workers and employers, and several hundred cases were examined under these procedures.

In the United Nations the right of examining petitions from individuals and organizations was established by the Charter only in the trusteeship area. Large numbers of such petitions were examined by the Trusteeship Council and the Fourth Committee of the General Assembly. In 1962 the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was authorized by the General Assembly "to carry out its task by employment of all means which it will have at its disposal," decided to hear petitioners and accept written petitions. Many petitions were examined by it, and formed one of the bases for the Committee's recommendations for granting the right of self-determination to various territories. The Special Committee on Apartheid has also, since 1963, accepted memoranda from organizations and individuals, and heard persons or representatives of organizations who were "in a position to provide it with information." (UN Doc. A/5497, pp. 13-25, 16 September 1963.) Proposals have been made that the United Nations should develop similar procedures for dealing with violations of human rights throughout the world.

Regional precedents for such procedures exist in Europe and, to some extent, in Latin America. The European Convention on Human Rights has conferred on the European Commission of Human Rights jurisdiction to receive petitions by individuals, and authorized the Commission to bring such petitions before the European Court of Human Rights. Ten countries have accepted the jurisdiction of the Commission with respect to petitions and eight accepted the jurisdiction of the Court as well. An Inter-American Commission on Human Rights established in 1959 has ingeniously developed procedures enabling it not only to study human rights in general but also to discuss concrete situations and to receive petitions to hold hearings and to make investigations on the spot.
Questions:

a. Should there be a broadening of the power of international non-governmental organizations to call a specific violation of an international convention to the attention of the appropriate international organization?

b. Should that power be conferred also on some national governmental organizations?

c. In what categories of cases should individuals be granted the right of petition?

d. What procedures should be developed for dealing with such complaints and petitions?
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APPLICATION AND ENFORCEMENT OF INTERNATIONAL ORGANIZATION LAW BY NATIONAL AUTHORITIES AND COURTS

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Note: This paper was prepared for an earlier meeting on Legal Advisers and International Organizations, held in August 1965.
It is not the purpose of this outline to bring about a dis-
cussion of the monist-dualist theories, or a detailed examination
of national constitutional practices, or a systematic consideration
of interaction between international and national law in the con-
text of international organization. On the contrary, it is hoped
that the outline may help to identify specific problems which le-
gal advisors have encountered in their work or which they consider
relevant from the viewpoint of ensuring more effective application
of international organizational law and that the discussion would
focus on these problems.

The material in Section I of the outline dealing with "self-
executing" rules concerns primarily the more integrated organiza-
tions such as the European Communities which face the need of en-
suring uniform application of their law by national agencies in
the member states. It might be interesting to explore, however,
whether and to what extent somewhat similar problems may have
arisen with respect to other organizations.

Section II, on the other hand, is of obvious general concern
in that it raises in broadest terms the question of obtaining com-
pliance -- in the form of adjustment of national law -- with rules
of international organization law which do not have "self-executing"
effect in national law and thus necessitate action by the national
law maker.

Section III raises four general questions which may provide
a basis for discussion.

I. Application and enforcement of "self-executing" or "directly
applicable" provisions of treaties establishing international or-
ganizations and of legal acts of such organizations.

The effect of these provisions in national law is generally
determined by national constitutional practices with respect to
treaties, which vary from country to country.

1. Selected national constitutional patterns providing for
application of these provisions in national law:

(a) The Netherlands Constitution represents the most
"advanced" pattern in that it includes all the
following elements:
(i) Authorization to delegate legislative, administrative and judicial powers by treaties to international organizations;

(ii) Exclusion of application of any national law which is incompatible with "self-executing" provisions of any prior or subsequent treaty or act of an international organization;

(iii) Authorization to deviate from the Constitution by treaties;

(iv) Exclusion of treaties from judicial reviews for constitutionality.

(Arts. 60, 66, 67 of the Netherlands Constitution.)

(b) Other modern constitutions contain variants of one or more of the above elements. Thus the French Constitutional pattern prescribes superiority of all treaties over national law and excludes judicial review for constitutionality (Art. 55). The German Basic Law (Art. 24) and the Italian Constitution (Art. 11) authorize transfer of "sovereign powers" to international organizations without providing explicitly for superiority of treaty law.

(c) Under the U.S. Federal Constitution a treaty prevails over prior or subsequent state law, over prior federal law but not over subsequent federal law (Art. VI, paragraph 2). Treaties are subject to judicial review for constitutionality.

(d) In the United Kingdom, treaty-making is exclusively within executive power and as a consequence there can be no "self-executing" treaty; a national judge can only apply an act of Parliament embodying the rules of the treaty and the "latest" act of Parliament binds the national judge.

2. What problems arise in connection with the application of "Self-executing" or "directly applicable" provisions of international organization law?

(a) In "non-integrated" organizations such as the U.N. and its specialized agencies, e.g.
(i) Articles 104 and 105 of the U.N. Charter providing that the U.N. shall enjoy legal capacity and necessary privileges and immunities in member territory. Both articles were held self-executing by lower courts in the U.S.;

(ii) Art. VIII 2b of the International Monetary Fund Agreement providing that exchange contracts involving member currency which are contrary to certain exchange control regulations of other member states shall be unenforceable in member territory. Many cases have arisen under this provision in national courts;

(iii) European Convention for the Protection of Human Rights and Fundamental Freedoms in those member states of the Council of Europe which have taken steps to make this Convention applicable in national courts or agencies. Some members did not take such steps and with respect to these latter members the Convention is enforceable only through the European Commission and -- upon acceptance of its jurisdiction -- also through the Court of Human Rights. Do difficulties arise from the divergence?

(b) In case of "integrated" organizations such as the European Communities:

(i) The Court of Justice of the European Communities defined the Community as "a new legal order of international law" whose "subjects are not only the member states but their nationals as well" and construed very broadly the concept of "directly applicable" provisions of the E.E.C. Treaty which national courts must apply (Case 26/62, Van Gend & Loos v. Netherlands Fiscal Administration). The same Court ruled that the Treaty makes it "impossible" for member states to accord superiority to a prior or subsequent national law over the Community legal order. (Case 6/64, Costa v. E.N.E.L.)

"Regulations" enacted by the institutions of the European Economic Community and Euratom are by the terms of the two Treaties "directly
applicable in each member state" (Arts. 189 E.E.C. Treaty and 161 Euratom Treaty) upon publication in the Official Journal of the Communities.

Three types of issues have come before courts: What provisions of the Community Treaties and regulations accord rights to individuals which the national courts and agencies must enforce? Can Community Treaties and acts be attacked before national courts for unconstitutionality (in Italy and in Germany)? Are national courts bound to accord superiority to Community law over national law even if the latter is subsequent in time?

(ii) Are there "directly applicable" provisions in the Central American Integration Treaties and if so what sort of questions have been raised in this connection?

II. Application and enforcement of international organization law which is not "self-executing" or "directly applicable," but requires modification of national law in member states.

1. Application of non-self-executing provisions of treaties establishing international organizations which call for modification of national law.

2. Application of legal acts of organs of international organizations requiring modification in national law, e.g.

   (a) decisions of the U.N. Security Council (such as decision prohibiting direct delivery of arms to the Congo -- the U.S. executive orders implementing the decision); decisions of the O.E.C.D. Council;

   (b) recommendations of the U.N. Security Council or of the General Assembly (the problem here is to obtain acceptance and implementation);

   (c) "directives" adopted by the institutions of the European Economic Community and Euratom which "bind any member state to which they are addressed, as to the result to be achieved, while leaving domestic agencies competence as to form and means" (Arts. 189
of the E.E.C. Treaty and 161 Euratom Treaty);*

(d) judgments of the International Court of Justice;
judgments of the Court of Justice of the European Communities declaring that a member state has failed to fulfill its obligation under the Treaty in enacting (or failing to enact) a national legal measure;**
judgments of the European Court of Human Rights.

3. "Transformation" into national law of normative acts of U.N. specialized agencies, e.g.

(a) conventions and recommendations of the International Labor Organization;

(b) technical regulations of the International Civil Aviation Organization which under certain circumstances become "automatically" binding upon member governments;

(c) Codex Alimentarius prepared jointly by the Food and Agriculture Organization and the World Health Organization.

(A separate category for this type of acts which might include also U.N. sponsored conventions may be justified on practical rather than systemic-logical grounds.)

III. Some general questions.

(1) To what extent do international organization -- regional or universal -- rely on national courts and administrative authorities for the application and enforcement of international organization law? In the past, has this means proved appropriate essentially only on the regional level, where broad consensus exists, or are

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*In certain respects "directives" are quite unique. It may be argued for instance that member states are not free to change their law in the general area covered by a directive without prior consultation with the appropriate Community institution

**Judgments of the Court of Justice of the Communities rendered against individuals or enterprises are enforceable in national courts.
there any lessons of more general application to be learned from past experience? Are there any trends on a regional or worldwide level that should be encouraged?

(2) To what extent do divergencies of national constitutional practices concerning treaty-making and the effect of treaties in national law pose difficulties in obtaining compliance with international organization law? What means could be devised to reduce these difficulties?

(3) Where national courts or administrative authorities interpret, apply and enforce international organization law, do divergencies in interpretation pose problems? What are the means -- if any -- to ensure uniform interpretation, uniform application? Is this exclusively a problem of integrated regional organizations? Are reports of national decisions readily available to practitioners and scholars?

(4) Where compliance with a rule of international organization law requires modification of national law by the national law-maker, do difficulties arise in ensuring national action? What devices of coordination, supervision or compulsion are available or could be developed considering the growing interdependence of states?
American Society of International Law

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MAKING INTERNATIONAL LAW IN THE UNITED NATIONS

by Sir Kenneth Bailey, C.B.E., Q.C.
High Commissioner for Australia in Canada

(Reprinted from the Proceedings of the American Society of International Law, 1967)
MAKING INTERNATIONAL LAW IN THE UNITED NATIONS

BY SIR KENNETH BAILEY, C.B.E., Q.C.

High Commissioner for Australia in Canada

I am deeply sensible, Mr. President, of the honor done me, and in my person to the international lawyers of Australia, in according me an opportunity of addressing this great Society, in such pleasant circumstances and in such distinguished company including, to my joy, so many who have made significant contributions to our understanding of the subject I have chosen, and so many old friends and colleagues, to whom particularly I now address myself, in affection, in trepidation, and in deep respect.

My subject is not a new one. Ever since the establishment of the United Nations, it has been a recurring theme for scrutiny by the scholars and debate by the diplomats. This Society itself has, on other occasions, taken the matter under advisement. I address myself to the subject tonight not so much in the hope of saying anything new about it as in the conviction of its continuing contemporary importance. The views expressed are of course my own, and not necessarily representative.

What has given the question of making international law in the United Nations its continuing contemporary importance is that a funny thing seems to have happened on the way to, or perhaps from, the East River. Not funny—ha-ha, that is, but funny-peculiar. Suddenly, the current facts don’t seem any longer to fit the classical formulas.

One of the primary objects of the United Nations was, and is, to establish a world in which men and nations could live in justice and peace under international law. To initiate studies and make recommendations for the progressive development of international law is one of the express duties imposed by the Charter on the General Assembly. This duty the General Assembly has performed extensively, by the preparation directly or indirectly, of international conventions for adoption by states. About these conventions, important as they are, I shall not speak further, but shall turn instead to consider how, and how far, the United Nations and, in particular the General Assembly, have engaged in developing the other great branch of international law—the customary or general law of nations: the body of rules, that is to say, evidenced or established by general practice accepted as law.

Ever since the establishment of the United Nations, this question has been under discussion, most often in the form of an inquiry whether resolutions of the General Assembly have, or can have, binding legal force. Indeed the question had often been canvassed in relation to the League of Nations, and other international organizations. To follow the rich and diverse literature would be fascinating, but tends rather to engulf the inquirer in a veritable Serbonian bog of technicalities. Let me draw back hastily from it. Within the structure of the United Nations organs themselves, some decisions of the General Assembly incontestably do bind Members legally—an apportionment among Members, for example, of the expenses of the Organization under Article 17 of the Charter, though such an apportionment has looked pretty toothless since the refusal of the General Assembly to apply in 1964 the sanction provided in Article 19. But the real question concerns the legal character of recommendations made by the General Assembly outside the Organization itself, recommendations that is to say, to states; primarily of course to states Members of the United Nations.
On this question, let me align myself with the answer given by Manfred Lachs of Poland, now a Judge of the International Court of Justice. In his Hague Academy lectures on Outer Space Law in 1964, he said, referring to the Declaration of Legal Principles concerning Outer Space: “decisions adopted by the General Assembly are, in principle, no more than recommendations ... with some exceptions only—they cannot be viewed as creative of legal rights or obligations”.

But it is at this point that contemporary facts begin to escape a little from the traditional categories. To say that a resolution is recommendation only is undoubtedly to assert that governments are under no legal obligation to comply with it. Does this relegate General Assembly resolutions wholly to the sphere of moral or political precepts, with no relevance to law? Many authorities have answered “yes” to this question. But customary law consists of the rules established by the general practice of states, which certainly includes their diplomatic acts and public pronouncements. The establishment of a general international organization such as the United Nations necessarily enlarges the area within which evidence of the practice of states can be found. It will include, for example, the numberless votes cast and views expressed by the representatives of states in the General Assembly and its main committees and subsidiary organs, and of course the resolutions adopted by these bodies.

To be creative of law, practice must no doubt be accepted and followed as law, out of legal duty. But the distinction between mere social usage and true legal custom is not always clear or easy to draw. If a resolution is accepted by unanimity and is generally followed in practice, it may quickly acquire obligatory character. The now common United Nations procedure of appointing an ad hoc committee to examine and report on the degree of compliance with a resolution is calculated to hasten and clarify the process by which a resolution may come to be accepted as having acquired obligatory character.

The well-known Resolution 1514 of 1960, “Declaration of the Granting of Independence to Colonial Countries and Peoples,” was not unanimously adopted, and was so extreme and tendentious in some of its propositions as almost to underline the absence of any obligatory character. Yet it seems in many quarters to have acquired already the status of a complex of legal rights and duties. The sponsors of last year’s Resolution No. 2145 on South West Africa, for instance, insisted on a text according to which the General Assembly reaffirmed that Resolution 1514 is fully applicable to the people of the Territory, “and that, therefore, the people of South West Africa have the inalienable right to self-determination, freedom and independence in accordance with the Charter.” To the lawyer, the critical word is, of course, “therefore.” Probably nobody would deny the full application to South West Africa of Resolution 1514. Nor probably would any deny that the people of the Territory were entitled to the rights specified. But to many lawyers it was simply a solecism to assert that the people of the Territory derived these rights from Resolution 1514. They sprang from the Charter, and a resolution of the General Assembly could no more create them than it could take them away.

In this particular instance the assertion of legal operation and effect for a resolution of the General Assembly was, in my own view, mistaken. But a weak illustration can scarcely destroy a good case. And it does seem to me that one must accept the possibility that a recommendation of the General Assembly will, perhaps even quickly, be found to express
a general practice accepted as law, and thereby to acquire legal character. The resolutions on outer space may supply an illustration. In 1961, the General Assembly "commended" to states "for their guidance" the principle, amongst others, that "outer space and celestial bodies are free for exploration and use by all States." If this resolution were legally obligatory, it would follow that a state which put a satellite into orbit in space would not commit even a technical infringement of the sovereignty of other states, though the space vehicle had traversed their superjacent space without their consent. Resolution 1721 was expressed strictly in the form of a recommendation only. But some states thought and said that even then, only four years after Sputnik I, the text was declaratory of international law. Would that be disputed by any state today? It is a case of what Dr. Bin Cheng calls "instant customary law."

I put it no higher than this, that resolutions of the General Assembly, notwithstanding their basic legal character as recommendations only, may constitute an important step in the development of general, customary, international law. They will do so insofar as they serve to define and establish a general practice accepted as law. As international lawyers we should neither fear nor deplore, but on the contrary should welcome, such a development. But I draw three conclusions.

First conclusion: Particular attention should be given to the substance of General Assembly resolutions which in express terms purport to formulate or declare rules or principles of international law. They might become very hard to alter, notwithstanding the general non-obligatory character of the instrument concerned. The best-known instance in this field is perhaps Resolution No. 96, by which the General Assembly affirmed (1946) "that genocide is a crime under international law." I am not suggesting any need for changing this proposition. But there was another instance last year, in Resolution No. 2160, the subject of which was the "strict observance of the prohibition of the threat or use of force in international relations, and of the right of peoples to self-determination." The first operative paragraph begins by "reaffirming," with a single alteration not for present purposes relevant, the duty laid down in Article 2(4) of the Charter to refrain from the use or threat of force in international relations. There followed these words:

Accordingly, armed attack by one State against another or the use of force in any other form contrary to the Charter of the United Nations constitutes a violation of international law giving rise to international responsibility.

The effect of this gloss on the Charter is by no means clear. It was a compromise text, worked out in the main Political Committee of the General Assembly, and one of the proposals which formed the basis of the compromise was certainly put forward in order to establish the highly controversial view that Article 2(4) of the Charter was aimed at political and economic measures as well as the use of armed force. If Resolution No. 2160 as finally adopted is intended to include this idea, it seems to me completely at variance with the Charter itself. On what I think to be the natural reading, I do not think it does so. My point, however, is that a resolution purporting to declare what constitutes a breach of international law calls for special legal consideration.

Second conclusion: That in view of the potential rôle of General Assembly resolutions in the development of general international law, states need to decide for themselves whether or not they are content to let a proposed text bear the character of the unanimous opinion of the United Nations, or at any rate the consensus of the General Assembly, by which I mean an opinion held widely and without dissent. Anything less than that degree of support would scarcely qualify a resolution to
represent *general* practice, or *general* acceptance as law. Without going into fine questions about the effect of, say, a single negative vote, it is at least plain that majority votes record just as much what was not agreed as what was.

Some authorities have suggested that states which have supported a resolution in the General Assembly, are, as a matter of law, precluded either by the technical rule of estoppel or by the broad equitable principle of good faith, from denying the obligatory character of the resolution. This seems to me to do less than justice to the *prima facie* recommendatory of all General Assembly resolutions. It may be different, of course, in the rare cases where a state has declared its own intent to treat a resolution as binding. However, that may be, it is surely clear that the potential role of General Assembly resolutions in the development of international law must be taken into account in deciding a state's voting position even on "political" proposals. A vote may be given on purely political grounds, and for purely political purposes. But it may have important consequences in the development of international law just the same.

*Third conclusion:* That in view of the close *interpretation* of political and legal considerations and elements in the vital Charter areas of the maintenance of international peace and security, the peaceful settlement of disputes and the like, political texts can seldom be usefully adopted in abstraction from the relevant legal factors. Governments must ask themselves whether they could live with the text if it appeared, sooner or later, as the statement of a binding rule of international law.

This conclusion has special current significance because three recent sessions of the General Assembly (1963, 1965 and 1966) have constituted or reconstituted a large and representative Special Committee on the Principles of International Law Concerning Friendly Relations and Co-operation among States, in accordance with the Charter of the United Nations. The task of the Special Committee is to study seven principles of "friendly relations," as embodied in the Charter, with a view to the formulation of a Declaration of these principles. The Eastern European group prefers to speak of them as the principles of "peaceful co-existence." They are: the principle that states shall refrain in their international relations from the threat or use of force; the principle that states shall settle their disputes by peaceful means; the duty not to intervene in matters within the domestic jurisdiction of any state; the principle of sovereign equality of states; the duty of states to co-operate with one another; the principle of equal rights and self-determination of peoples; the principle that states shall fulfill in good faith their Charter obligations. On some of these subjects, the Charter already contains a fairly systematic set of provisions. Others are included only by bare mention or even by implication. Here the task of the Special Committee is essentially *law-making*, to formulate, within the framework of a bare concept or heading, a set of rules in accordance with the letter and spirit of the Charter. It has sought accordingly to proceed by way of consensus rather than merely by way of majority vote, in the conviction that this is the most effective means of securing the essential element in the establishment of a general practice *accepted as law*.

One of the principles on which no specific Charter provisions exist is the duty of non-intervention. The General Assembly in 1965, as a result of strenuous last-minute efforts in the Political Committee to reach a compromise text, adopted a resolution (No. 2131) entitled "Declaration on the inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty." The resolution
was adopted without dissent, and with only one abstention, by the United Kingdom. Several states (including the United States and Australia) explained, in supporting the resolution, that while they accepted the text as a statement of political intention and obligation they did not think its terms were juridically acceptable.

The sequel was, to the Western group at least, disconcerting. In the Special Committee in 1966 it was found impossible to change so much as a single word of Resolution 2131. The Special Committee even resolved, by majority vote, that Resolution 2131:

By virtue of the number of States which voted in its favour, the scope and profundity of its contents and, in particular, the absence of opposition, reflects a universal legal conviction which qualifies it to be regarded as an authentic and definite principle of international law.

Notwithstanding these categorical expressions, the size and strength of that dissenting minority would be sufficient to make clear that Resolution 2131 itself cannot in its present form be regarded as defining a general practice accepted as law. There were in fact further discussions in the General Assembly later in the year, and there is hope of some progress when the Special Committee meets again this summer. It is much to be hoped that there will be no suggestion, at that time, that the terms of Resolution 2160, on the observance of the prohibition of the use of force, are such as likewise to fetter the Special Committee in its work of formulating and elaborating the principles of international law embodied in the Charter.

I fear, Mr. President, that I have spoken in too great detail of the process of developing in the United Nations, chiefly by means of General Assembly resolutions, the body of general or customary international law. I suppose what I have really tried to say comes down to one very simple and homely proposition: that the process does in fact take place, even in a General Assembly which is not a super-legislature; that the process calls for wider recognition and sharper scrutiny than perhaps has been accorded hitherto; and that the price paid for inattention to the process can well be something more substantial than merely headaches for the lawyers. A resolution on the record may today, in point of law, look like only a recommendation, or even a mere "open." But it is to be remembered that propaganda can create pressure; that pressure can create practice; and that practice can create law. The process is valuable in proportion as it is understood.
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THE DEVELOPMENT OF INTERNATIONAL LAW BY THE POLITICAL ORGANS OF THE UNITED NATIONS

by Rosalyn Higgins
The Royal Institute of International Affairs

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V. CONCLUSION

On the basis of the above-mentioned Draft Articles 68(b) and 69(3)(b) on the Law of Treaties of the International Law Commission, may I suggest a theory of "legislation by unanimous practice of Members" according to which a practice in the application of the Charter which clearly establishes the understanding of all Members regarding its interpretation constitutes a binding interpretation of the Charter. Whether a unanimous resolution of the General Assembly may be taken to establish such understanding must be determined in each particular case and depends, inter alia, upon the number and nature of the abstentions and absences. Members show the position they take not necessarily or exclusively by voting or within the United Nations. In any case, it is the practice of Members and not the General Assembly resolution qua resolution which matters. Where the unanimous practice of Members is not compatible with the text of the Charter, it is still relevant, since, as we have seen, a treaty can be modified by such practice, even if it contains a formal revision clause. Here again it depends upon the circumstances of the case whether a unanimous General Assembly resolution constitutes such practice. And here again such a resolution matters only qua Members' practice.

Such practice can, of course, also have its starting point in majority resolutions, just as such resolutions may lead to the creation of customary law through the adoption of practices accepted as law or may otherwise become effective. The closer and more frequent contacts between Members caused by their participation in a permanent organization may facilitate and accelerate the creation of customary law (a sort of pressure-cooked customary law which U.N. organs help create—as midwives—but which they do not create themselves).

As Sir Humphrey Waldock has pointed out, there is a need to provide for flexibility and to allow for the development of the Charter in order to adapt it to new conditions. There is also the need to protect Members against the creation, by changing majorities, of new obligations without their consent. The above-mentioned criteria of unanimous practice of Members, of the accelerated creation of customary law, and of effectiveness may be means—although admittedly not very satisfactory means—for reconciling these needs.

THE DEVELOPMENT OF INTERNATIONAL LAW BY THE POLITICAL ORGANS OF THE UNITED NATIONS

By Rosalyn Higgins

Royal Institute of International Affairs

INTRODUCTION

If I seem to dwell in this paper on theory rather than illustration, I hope that I may be forgiven; for as I understand it, my task is not to identify norms which are in the process of evolution but rather to analyze the processes by which they evolve.
International treaties and international custom have long been recognized as sources of international law. Yet only comparatively recently has it been admitted that international organizations are a significant forum in which to search for such sources of law. And the acknowledgment of the contribution of political organs to the development of international law has been even longer in coming. The political organs of the United Nations provide a clear forum for the practice of states, whether this practice comprises the total of their individual acts or the performance of collective acts. Further, the organs themselves have tasks to perform which also contribute to the clarification and development of law. Why, then, has there been a certain reluctance to concede a law-creating role to the political organs of the United Nations? Partly it has been due to continuing emphasis on state sovereignty, with a concomitant reluctance to attribute indirect law-developing roles to international bodies; partly because the contractual theories of law development have ostensibly been reinforced by the Charter distinctions between "decisions" and "recommendations" as well as by stipulated voting majorities; and partly because of the intellectual problems presented by the necessity of distinguishing state practice from the practice of organs qua organs.

Objections

Before we turn to an analysis of the actual methods by which political organs of the United Nations can develop law, there are some basic objections which must be met.

First, insofar as the attitudes taken by states in international organizations largely reflect their self-interest and political motivations, how can they be said to be participating in a law-creating process? The answer, very briefly, is that so far as custom is concerned, politically motivated state practice in non-institutionalized bilateral and multilateral diplomacy is accepted as evidence. There is no logical reason why it should not also be within the framework of international organization. What matters is that opinio juris should be brought to bear here also: state practice becomes evidence of law only when the vast majority of states believe themselves to be legally bound.

It is notoriously difficult both to ascertain the moment at which usage becomes custom and the number of states which have to feel bound before a custom emerges. On the former point some marginal help is provided by the practice of international organizations, because of the frequent presentation of resolutions incorporating rules of law, on which there is an open and ascertainable vote. On the latter point—the number of states which have to feel bound by a rule of law—the U.N. system seems to me to present a complication, because it provides for certain voting majorities for the passing of decisions which do not necessarily correspond with the quantification which we seek to identify in the realm of custom.

Second, insofar as the organs under consideration are, by definition, political, it may be argued that they pay no attention to law or at most only give lip service to it. I think it can be shown, however—and this
task has been excellently performed for us by Dr. Schachter in a recent issue of the American Journal of International Law—that in fact these organs find it helpful politically to invoke legal principles in order to reach normative decisions. The collective processes in a United Nations organ help to focus attention upon the need for mutual observance of the rules. Indeed, in some cases reference to a widely accepted rule of law can serve as a bridge between differing ideologies.

PROBLEMS

Tracing the pattern of law development in the United Nations presents singular intellectual difficulties, because of the problem (1) of distinguishing between the various sources of law. The Charter is a treaty which contains provisions relating to its internal affairs. The meaning to be given to these provisions is developed by state practice in specific cases, but a practice which is largely based upon treaty interpretation. Moreover, the Charter also contains clauses which concern general international law: the articles on use of force (2(4)), on self-defense (51) and on domestic jurisdiction (2(7)) may be cited. These rules are also applied and developed, often on the basis of treaty interpretation. In addition to this twilight area of customary and treaty law, it may also be mentioned that, in carrying out its tasks of maintaining peace and security, the Security Council often witnesses and participates in the invocation of legal norms which are not even a formal part of the Charter system. The question of rights of passage through the Suez Canal is a case in point. The demand by Egypt for the withdrawal of British troops in 1947 is another example. Here, then, a political organ is called upon to apply, in the fulfillment of its treaty purpose, rules of general international law to specific situations.

It seems to me that development through state practice occurs in each of these areas. Nonetheless, the blurring in the U.N. system of sources which have traditionally been separate, namely, treaty and custom, has led to results of more than merely academic interest. I wish to refer here to (2) the doctrine of "subsequent practice." In 1950 the International Court of Justice in the Status of South West Africa Case, said:

Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument.

The Court, indeed, has frequently referred to, and taken note of, the practice of United Nations organs. This tendency was most noticeable in the Expenses case, though the Court was once again at pains to point out that this practice was in fact entirely consistent with the intention of the framers as signified by the travaux préparatoires. Judge Fitzmaurice went so far as to say:

According to what has become known as "the principle of subsequent practice", the interpretation in fact given to an international instrument by the parties to it, as a matter of settled practice, is good pre-
sumptive (and may in certain cases be virtually conclusive) evidence of what the correct legal interpretation is.

Although Judge Fitzmaurice refers here to the "parties to the treaty," the practice that the Court actually considered in its Opinion included the practice of the major political organs and even of the Working Group of 15 on Finances.

This point was picked up by Judge Spender, who declined to equate the practice of United Nations organs with the practice of the parties to a treaty. He thought that in any event the practice of parties to a multilateral treaty was of small probative value in assessing the intentions of the original, more limited parties.

Where does the greater merit in this dispute lie, and how does it tie in with my earlier point about the blurring in the U.N. system of the traditional sources of law? The Report of Committee IV/2 at San Francisco makes it clear 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." It seems to me that the repeated practice here of the organ, in interpreting the treaty, establishes a practice and ultimately custom. States may provide evidence of an accepted practice both while acting qua states and qua organs. Therefore, on the question of whether this practice should be considered by the Court, Sir Percy Spender's objections are irrelevant. For although organ practice may not be good evidence of the intention of the original parties, it is of probative value as customary law. In other words, the argument about "subsequent practice" has been obscured by semantic ambiguity, for in reality it covers two concepts: first, treaty interpretation by the parties, and second, developing custom. Moreover—and I offer here an obiter opinion—in interpreting the constitutions of dynamic international organizations the primary canon should not be the intention of the original parties but rather the evidence which can be adduced of the obligations which the present members feel are incumbent upon them.

Continuing from here, we come face to face with another intellectual dilemma. All Members have the duty to obey the terms of the Charter to which they are parties. And the organs of the United Nations have the initial right to interpret the institution. Are all Members then bound by recommendations (normally considered non-binding) which interpret the Charter? Does this not obliterate the distinction between decisions and voces? I would suggest that the right of an organ to interpret goes to the question of its jurisdiction. They have a clear authority here and dissenting individual states may not reserve their positions.1 But where

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1 Cf. Tamnes, 94 Hague Academy Recueil des Cours 265 (1958), who asserts that a state may always hold its individual view against the interpretation of the organ, provided that it has not recognized in advance the organ’s power of effective interpretation. He also offers as grounds for this view the argument that an organ as well as an individual state can become a judea in re sua, especially when it is seeking to expand its activities. Such a view seems to this writer to run counter to the "effectiveness" principle in the interpretation of international constitutions. We may also
the organ is passing on matters concerning the substantive rights and
duties of states, it has the initial authority to interpret the Charter but
the state may, in the non-regulatory area (that is, outside of Chapter 7
and Article 19), reserve its position, but only after considering the recom-
mandation in good faith.

There are two other problems of theory which I should have liked to
have dealt with at this point: (3) whether United Nations decisions are
to be considered a new "source" of law and (4) the relevance of an under-
standing of the ultra vires doctrine to legal developments in the United
Nations. Due to limitations of time, I mention the first only to pass on
from it, and I will restrict myself to a few very brief remarks on the
second.

How do we meet the objections of those who say that, in their view, a
certain practice of the United Nations is illegal, and that no amount of
repetition can make it "legal"? I think the answer is that individual
illegal acts do not, of course, constitute "new law"; but the gradual ac-
ceptance by states of a deviating norm will, in time, establish a new custom.
Professor Tammes, in his Hague lectures on "Decisions of International
Organizations as a Source of International Law," makes the point well
when he says, apropos of new rules sometimes stemming from a succession
of unlawful individual acts, "It might be paradoxically said that the first
illegal acts must already have contained an element of law."

When these acts stem from the practice of U.N. organs qua organs,
rather than qua states, it seems to me that something more needs to be said,
for here the whole question of ultra vires raises its ugly head. This is
obviously especially true where the law-creating rôle concerns matters in-
ternal to the organization. The International Court of Justice, in the
Expenses case, made an obiter pronouncement to the effect that, even if
the United Nations had acted in a manner not in conformity with the
Charter division of functions between organs, such action would still bind
the organization vis-à-vis third parties, provided that it was within the
purposes of the United Nations. The question that is here relevant from
our point of view is whether such acts can be lawmaking for U.N. Mem-
bers inter se, and vis-à-vis the Organization as such. Sir Gerald Fitz-
maurice, in his separate opinion, tantalizingly touched upon this question
and then decided that he need not answer it. But some fascinating issues
are involved. Does a state which casts a dissenting vote in the Assembly
on a budgetary matter still incur obligations vis-à-vis the Organization
and other Members, even if one admits that the Organization has incurred
mention here Fitzmaurice's view that the prime competence of an organ to interpret
the Charter is in fact a protection of sovereignty, as it protects states from the attempts
of other states to determine such matters unilaterally. 92 ibid. at 5 (1957).

2 We may note that the Court's Opinion here was referring to acts which are ultra
vires rather than a détournement de pouvoir. The latter is action taken within the
formal limits but for an improper purpose, involving an incorrect exercise of discretion.
The ability of such action to bind the organization, even vis-à-vis third parties, is thus
still an open question. For some comments on détournement de pouvoir and inter-
an obligation vis-à-vis a third party? There is yet no clear legal development discernible on this point, but one can readily imagine future situations where the issue will have to be squarely faced.

A. Methods by Which International Law is Clarified and Developed in the Political Organs of the United Nations

When one talks of the development of a norm, one means really two things: first, the process by which the content of the norm emerges; and second, the means by which states come, or are introduced, to feel that it is binding upon them. In other words, the legal development of a rule comprises both the material source and the formal source. I therefore propose to look at these separately.

1. The process by which the content of norms is clarified or developed:
   (a) Decisions which U.N. organs take concerning their own jurisdiction and competence, when acquiesced in by sufficient numbers over a period of time, form "Charter Law" if they fall into some recognizable pattern. A customary practice of internal Charter practice thus becomes established. The degree and length of acquiescence need here perhaps to be less marked than elsewhere, because the U.N. organs undoubtedly have initial authority to make such decisions. The aspects of treaty interpretation and customary practice in this field merge very closely.

   Even decisions on the internal workings of the United Nations may ultimately come to establish not only a special "Charter constitutional law," but may in time evidence a special new branch of the customary law on the interpretation of treaties.

   (b) On occasions United Nations organs may seek to pass resolutions deliberately declaratory of existing law. One may cite for example General Assembly Resolution 375 (IV), the Declaration on the Rights and Duties of States, though in the event this particular Declaration was not in fact adopted. It covers certain traditional rights and duties in 14 basic articles, ranging from jurisdiction to intervention to sovereign equality. Although the General Assembly is not a legislative body, the adoption of such a type of resolution by an overwhelming majority or by unanimous vote would surely provide probative evidence of the belief of states concerning certain rules of law.

   (c) United Nations political organs may also pass resolutions which may be described as confirmatory of existing law, where perhaps areas of doubt have existed. The unanimous General Assembly approval of the Nuremberg principles in Resolution 95 (1) served this function.

   (d) Similarly, there may exist competing claims within an area of law where the rules are generally agreed upon. A political organ of the United Nations may decide to draw up a declaratory resolution on the law. This outcome may involve debates, the examination of the issues in particular committees, invitations to governments to extend their opinions, and the request for guiding memoranda from the Secretariat. All these processes were in evidence in the history of General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources. These
events and the final votes and resolutions are also surely part of the law-
developing process of the United Nations, though I am well aware that
this very sort of process sets up its own counter-tendencies of arriving
at declarations of a low level of specificity. The recognition of “appropriate compensation” in Resolution 1803 allows room both for certain
states to feel that they have triumphed in the death throes of the “ade-
quate, effective and prompt” requirement; and for advocates in the capital-
exporting countries to argue that “appropriate” in this context must be
read to mean “adequate, effective and prompt”! No matter. The Soviet
doctrine of “no compensation” has been clearly removed from the scene,
and useful confirmation in other areas has occurred.

(c) The political organs of the United Nations may pass resolutions
which recommend the adoption of new rules of law. This may be done
either by the drawing up of draft conventions for states to accept—General
Assembly Resolutions 96 (I) and 180 (II) on Genocide and 369 (IV)
on the Declaration of Death of Missing Persons being cases in point; or
by merely adopting resolutions.

No clearer example of the latter method exists than General Assembly
Resolution 1962 (XVIII)—the Declaration of Legal Principles Governing
the Activities of States in the Exploration and Use of Outer Space. Signi-
ficantly, this last resolution was adopted upon the recommendation of
the First, and not the Sixth, Committee. It does not “bind” states, but
estoppels may arise in relation to votes in favor of it, the doctrine of ac-
quiescence will operate in relation to it, and it has an undoubted place in
the law-creating process.

(f) The political organs of the United Nations—and this is especially
ture of the Security Council—have to make decisions which in fact apply
specific rules to particular situations. Although these organs may fre-
quently seek to avoid attributing “guilt” or even “illegality” to one side
or the other in a particular dispute, the resolutions passed at the culmina-
tion of a debate are often based upon a legal requirement to be found in
the Charter. Further, to arrive at a resolution the Security Council may
find it necessary to go beyond pointing out the relevance of certain Charter
articles to this particular situation, and indicate specific rules of general
international law which govern the case in question. Dr. Schachter has
aptly classified this law-creating rôle as the conversion of “soft law” into
harder, more precise law. If the decision of the organ is widely sup-
ported, it has probative value as evidence by the parties of their legal
obligations; and the repetition of a stream of similar decisions provides
the foundation for custom. Once again, the interpretative and developing
functions are closely interwoven. This is true, whether the dispute con-
cerns, for example, the relevance of Article 2 (7) to the placing of a
matter on the agenda or the classification of certain retaliatory incursions
into adjoining territory as impermissible.

(g) Rules internal to the Organization, or concerning the status and
rights of the Organization, frequently emerge as the result of functional
necessity. The pragmatism of the Congo operation is typical of functional-
ism at work.
It seems to me that there is an interesting relationship which could usefully be explored—though not within the confines of this short paper—between functionalism and implied powers. In the Reparation for Injuries case the Court found that the United Nations had capacity to bring international claims. Although it is in a sense the Court that is "law-creating" here, it is in another sense merely declaring what the law is. Whereas it is arguable that the seeds of international personality are in the Charter itself, the authority to use it to bring claims was given to the United Nations not by the Charter but by the Members, subsequently. "The Court concludes that the Members have endowed the Organization with capacity to bring international claims when necessitated by the discharge of its functions." (I.C.J. Rep. 1949, pp. 179–180.) The relationship between implied powers and functionalism is apparent here: but the point I wish to make is that U.N. political organs have at least an initial discretion to decide what actions are necessary to carry out their functions—whether it be an Interim Committee, a Peace Observation Committee, the right to hold prisoners of war, or whatever—and upon that practice its implied powers will be built.

Functionalism does not always rest on implied powers, however. The need for the United Nations to represent the interests of universality, for example, has had direct results in terms of legal development. Thus the very fact that international treaties are concluded under United Nations auspices tends to lead to developments in the law in favor of a flexible approach to treaty questions. This has been true in the matter of reservations, where the universal character of the United Nations was a telling factor in reducing the old rule (that no reservation may be effective against a state without its express consent) to a mere guiding principle. Again, we may cite the interrelated activities of the General Assembly, the Sixth Committee and the International Law Commission on the extension of participation in conventions concluded under League of Nations auspices. In spite of the careful formulas selected, certain inroads are undoubtedly being made upon the old norm of unanimity in treaty revision.

(b) United Nations treaty functions must be mentioned as a fertile area for legal developments. The very ability of the United Nations to make treaties with other organizations and states has led to a whole new field of treaty law. Moreover, the requirement, affecting states, of registration under Article 102, as well as the depositary functions of the Secretary General, has seen the emergence of a rich practice gradually forming a customary law.

B. Methods by Which States Come to be Bound by Developing Norms

This interesting area—a mixture of constitutional technique, public opinion and psychology—can only be touched on briefly here. Both Dr. Skubiszewski and Professor Tamnes have shown that the constitutional provisions and the practical realities of international organizations have a significant rôle to play in securing behavioral compliance. "Behavioural compliance is not, of course, the same as opinio juris: but there is, quite
obviously, a very close relationship between them.’’ Emphasis on the
general duty of states to co-operate in carrying out Charter obligations,
the specific pressures to submit reports and information on certain matters,
the intermingling in resolutions of developing norms with well established
rules, are all techniques relevant to this point. There is a psychological
pressure upon a government not to vote against a law-creating resolution
if virtually all other states are likely to vote for it. Indeed, states are
further encouraged not to cast contrary votes by allowing them the right
to have their objections or conditions fully recorded in the minutes. One
could continue the list. Above all, most states have a long-term interest
in supporting U.N. norm-based procedures, for these are tangible evidence
of the common interest, and thoughts of reciprocity and a shared desire
to avoid nuclear war hold good here as elsewhere.

DEVELOPMENT OF PEACEFUL SETTLEMENT AND PEACEFUL
CHANGE IN THE UNITED NATIONS SYSTEM

BY GAETANO ARANGIO-RUIZ

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1. I propose to make a very tentative assessment of the United Nations
system of peaceful settlement of disputes; and to show, on that basis, the
necessity for international lawyers to promote more consistent and vigor-
ous policies of progressive development in the field. I refer to interna-
tional disputes, namely, disputes between states or other sovereign
entities, as subjects of international law; and to the settlement of such
disputes as a positive achievement under Article 2(3), Chapter VI, and
other provisions of the U.N. Charter, as distinguished from the merely
negative achievement of abstention from recourse to force or to threat
thereof, as envisaged in Article 2(4). Peaceful change is also of interest,
of course. The necessity of developing U.N. peacekeeping functions should
not lead us to overlook the development of the ability of the United Na-
tions to achieve the settlement of legal and political disputes and to pro-
mote peaceful change.

2. It is generally agreed that while the U.N. Charter was clearly meant
to innovate radically with respect to the Covenant in the maintenance of
international peace and security, it was meant to do so in a smaller
measure in the settlement of disputes. Not even a pessimist can deny,
however, that considerable steps forward have been made with the adoption
of the Charter also in the field of settlement: I mean in both settlement
in a narrow sense and in peaceful change. I would sum up the main
features of the U.N. system in the following points.

A. In the field of settlement in a narrow sense, as well as in peaceful
change, the first element is of course the indirect impact of the stricter,
sanctioned prohibition of the use or threat of force. A second element is
the acceptance, in a measure wider than in the League of Nations Covenant,
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THE QUASI-JUDICIAL ROLE OF THE SECURITY COUNCIL AND THE GENERAL ASSEMBLY

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THE QUASI-JUDICIAL RÔLE OF THE SECURITY COUNCIL AND THE GENERAL ASSEMBLY

The Charter of the United Nations says little about violations of the obligations it imposes. In fact, there are only two provisions which expressly refer to responsibility for action in the event of violation of the Charter obligations: one is Article 6, which provides that a Member "which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council"; the other is Article 14, which states that the General Assembly may recommend measures for the peaceful adjustment of any situation likely to impair the general welfare or friendly relations among nations, "including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations." While both of these provisions furnish a basis for the organs to pass upon alleged violations, neither directly provides that states may bring complaints of violations or that it shall be the duty of the organ to determine whether or not a violation has occurred. The emphasis in Article 14 is placed on recommended "adjustments" of situations impairing general welfare or friendly relations; Article 6 is directed to "persistent violations" which may be deemed to warrant the extreme sanction of expulsion. Of the many other Charter articles conferring functions on the two main political organs, none provides specifically for the responsibility of deciding whether a state has failed to live up to its obligations.

This cautious approach to the function of determining violations is not surprising. In part, it reflects the traditional view in favor of auto-interpretation by states of their international obligations and their reluctance to confer superior authority on collective organs. It will be recalled that a proposal which would have assigned to the International Court of Justice primary competence to decide questions of Charter interpretation was rejected in San Francisco. Nor was there a general disposition to confer on the Security Council the task of passing on complaints of non-observance of Charter precepts, even though the Council was required to deal with disputes and, in the circumstances of Chapter VII, was granted the authority to make binding decisions. It seems probable that the principal draftsmen believed that the primary task of the Council—to maintain or restore international peace and security—would not be served and, indeed, might possibly be impeded if the Council had to decide which side had been guilty of violating its legal obligations. Some recalled the past experience with apparently seamless webs of charges and counter-charges in international disputes, and it was understandable that they should have wanted the Council to be relatively unfettered in its authority to take whatever measures it considered likely to bring about peace and security without determining which side might have been responsible for violating its legal obligations.

The considerations which led the founding fathers to eschew a quasi-judicial rôle for the political organs are undoubtedly still persuasive to
many governments. This is evidenced, in some measure, by the fact that, even when complaints and charges of violations are made, the organs are usually reluctant to decide the issue of responsibility; they tend to adopt recommendations or decisions which avoid judgments on the charges made and seek to bring about a settlement or adjustment of the dispute without determining guilt or innocence of any party. Their objective is a resolution which will be acceptable and therefore likely to be implemented by the governments directly concerned; it will often not serve this end to decide whether the charges and counter-charges of illegality are well founded.

This approach made good sense at San Francisco and for the most part still does. Yet governments have repeatedly called upon the political organs to pass judgments on whether states have observed their obligations, and in several cases the organs have in fact done so, either explicitly or by clear implication. True, these cases are few in number, compared to the multitude of questions dealt with by the United Nations, but they are regarded as among the “leading” cases because of their legal implications and political repercussions. Examples which come to mind are the cases relating to Suez, Hungary, Korea, Congo, South Africa, and the Portuguese territories.¹

It may be said that none of these cases is a shining example of United Nations achievement; nearly all have left deep scars and a sense of frustration. Is this because they have been dealt with in terms of the Charter obligations (rather than through negotiation) or is it the other way around—that the legal prescriptions were invoked because the problems could not be settled merely through compromise and adjustment? There is, of course, no ready answer for all cases, but they suggest that the intractability of the problems tends to bring about a focusing on legal principles and a recourse to normative judgments by the political bodies. This is so, in spite of both the general predisposition to favor compromise and the recognized limits on United Nations authority. Certainly almost everyone would prefer settlements that did not place in issue the authority of the United Nations—an almost inevitable result of its judgments attributing “guilt” to a state. It is not surprising that these cases involve the burning issues of our day rather than the lesser disputes (such as boundary quarrels) which are usually considered as more suitable for legal adjudication. These lesser disputes can be side-stepped; the others cannot: they either involve violence with its threat of global conflagration or the insistent demands to eliminate colonialism and stigma of racial discrimination, both equally incendiary issues.

It would perhaps be stretching a point to conclude from this that when

¹ In all of these cases, resolutions were adopted at one stage or another which explicitly or by unmistakable implication declared state conduct to be contrary to the Charter. There was, of course, a much larger number of cases in which charges of illegality were extensively debated without the adoption by the organs of decisions confirming such charges. However, in some of these cases, the proceedings may be said to exhibit a broad consensus on the characterization of certain conduct as legally impermissible.
When the chips are down, law becomes necessary. The cases do, however, indicate how difficult it can be to ignore the problem of legal responsibility when disputes are brought to the United Nations political organs and the Charter principles are invoked as a basis for decision. True, governments do not have to assert non-compliance with a Charter obligation as a basis of competence, since both the General Assembly and the Security Council have ample authority to consider disputes and situations on other grounds. Yet, in most cases affecting peace and security or questions of colonialism or acute matters of human rights, charges will be made by the complaining states that Charter obligations have been violated. The evident reason for this is that the behavior of a state cannot easily be challenged solely on grounds of "policy." For, unless it can be shown that a course of conduct involves a departure from legal obligations, the matter will normally be regarded as within the discretion of the state or, in Charter language, within its "sovereign" rights or domestic jurisdiction. The question of responsibility may be, of course, ultimately avoided if a settlement should be achieved, but when a solution is not obtained and the pressures continue, the issue of Charter compliance is likely to become the focus of the debate.

It can hardly be claimed that, in considering such charges of violations, the members of the organs observe judicial standards of impartiality. They will, of course, exhibit partisanship and interest in varying degree. Governments are expected to take positions in the political organs in accordance with their conceptions of national interest and it is apparent that these conceptions will embrace considerations based on ties of alliance, friendship or political bargaining. However, it is not sufficient for Member states to argue their case on grounds of national interest alone, since the organs contain varied and conflicting ideas of national interest. Whatever the actual motives for a state's position, its justification in the international forum must include grounds that will be acceptable to other states, a requirement which is not simply a matter of logic but the consequence of the political necessity of achieving the widest possible support. The decision that emerges, as shown by the cases mentioned above, will be supported (one might even say "necessarily" supported) by Member states having divergent interests and ideologies and their agreed evaluation of the specific facts in Charter terms will be accorded weight precisely because of their diverse and representative composition. It does not seem far-fetched to characterize such decisions in conventional legal terms as a contemporaneous construction by the parties of their treaty obligations expressed through formal decisions of a competent organ.

It may be asked whether such judgments can be considered authoritative unless it is shown that they have an effect on state conduct and are not merely verbal admonitions. To respond that they have moral weight and influence public opinion seems too vague and uncertain to carry conviction, especially in the face of a determined stand by the "target" governments. On the other hand, one can hardly disregard the evidence that resolutions of United Nations organs critical of state behavior as contrary to the peremptory principles of the Charter have played a rôle in both
domestic and external criticism of the government concerned. Thus, in regard to Suez and the Congo, it was apparent that, in the countries directly concerned, important political groups and personalities were influenced by the positions of United Nations organs in relation to the commitments of their governments and that their criticism had an impact on governmental policy. Nor can one overlook the consequences of a resolution on the officialdom of a government. Just as a superior official will rarely direct a subordinate to disobey a rule, officials in most governments would probably be reluctant (except under great pressure) to disregard an authoritative decision of a United Nations organ which asserts a legal requirement based on the Charter. Even if we recognize that these are points on which verifiable data are fragmentary, it is difficult to deny that influential groups within national states generally believe that the self-interest of their states not only extends to immediate gains and losses but also includes the factor of reciprocity and a long-term interest in order and stability. Rarely will responsible national officials lose sight of the possibility that a failure on their part to observe the rules can be used “against” them in the future and thereby weaken the basis for their own reliance on commonly accepted restraints.

This is, of course, far from saying that all United Nations decisions are given effect or are enforced; it is merely pointing out that judgments by United Nations organs asserting legal requirements possess a degree of authority that generates pressures—internal or external—in favor of compliance. Perhaps that is all that can be said, short of plunging into the details of each historical situation. One other point might be noted: the test of “effectiveness” is not only measured by compliance; for a government may flout a United Nations decision and then pay a price for it. This price may take various forms; for example, defections from political parties ideologically disposed to support of the recalcitrant state or a weakening of confidence in internal order which reduces the flow of investment to the non-complying country. It is not inconceivable that the governments affected will modify their position in future situations or that others in similar circumstances will profit by the example.

In evaluating the effectiveness of such United Nations adjudication there is another dimension which should be borne in mind. The United Nations political organs are more than places for debate and the adoption of resolutions addressed to the states. They are also centers of authority for a complex institutional system through which activities are undertaken that have an impact in a variety of ways on the policies and conduct of governments. These institutional activities are typically fact-finding procedures which range from investigations to continuing verification and supervisory operations, as in the Middle East or Kashmir. They may also extend considerably beyond fact-finding and, as we saw in the Congo, include an elaborate and costly apparatus necessary to eliminate unilateral military intervention and to develop viable administrative and economic machinery to fill a governmental vacuum. In almost all of these cases we find that the action of the Organization has been undertaken on the
basis of a normative judgment made by a political organ, a judgment which is generally considered to be an essential premise in the formulation of the general will of the Organization and in the justification of "corporate" measures taken in the name of the institution.

There is a further consequence of some significance. When an organ applies a Charter principle or any other rule of law to a particular set of facts, it is asserting, as a matter of logic, a new rule of a more specific character. This is a law-creative act, even though the members of the organ maintain (as they often do) that their decision is confined to the specific facts and they do not intend to establish a precedent. It may be that the "rule" of that case will not be followed in other situations and that its applicability will prove to be limited. But the contrary may also prove true, since, once a decision is rendered by an authoritative body, it has entered into the stream of decisions that will normally be looked to as a source of law. Considerations of equity and equal treatment will tend to favor its application in "equivalent" situations; moreover, the reasons which impelled its adoption in the one case are likely to have some influence in other cases.

The development of a body of case law in this way has its drawbacks. The facts that have been considered in each case have necessarily been limited and in large measure selected by chance; the outcome must inevitably have been influenced by the particular parties and the adversary character of the proceedings. Obviously this falls far short of the processes of conscious law-making (such as the elaboration of a treaty or a set of general rules) in which a wide range of situations and possible solutions are normally considered and the texts purposively designed to meet a variety of future circumstances.

But such general law-prescribing procedures have their own shortcomings; moreover they are not used sufficiently. Governments tend to be reluctant to assume precise commitments which may limit their action in future hypothetical cases; this reluctance is particularly strong in the kind of situations we have been discussing, namely, those involving restrictions on use of force or principles of human rights and justice. But the objection to such commitments for the future does not arise when an existing rule has been invoked in a particular case and the resulting decision can be viewed as one limited to the circumstances of that case. In addition, there is a factor of political urgency when a state brings up a complaint of illegal conduct, involving a danger to peace or an alleged violation of a strongly held principle, which cannot easily be postponed.

The "precedents" or case law thus generated have added significance in matters of peace and security because the body of principles is still so fragmentary and abstract. Such precedents contribute the specificity which is essential to convert the "soft" law of the Charter into the "hard" law needed for effective implementation. Greater precision through case law may also contribute to more rational treatment of particular problems. Broad concepts such as "intervention" are now used to describe a wide variety of situations which differ markedly in their facts and in their
bearing on policies and purposes; more specific concepts would facilitate inquiry into the particular facts and encourage consideration of policies that are relevant to achieving the major purposes of the Charter.

It may still be asked whether it would not be better to forget about applying norms and legal concepts in conflicts of interest between states because that only makes it more difficult to achieve the desired reconciliation and compromise. There is a good deal of substance to this point; clearly many situations can be more effectively dealt with through the adjustment of relations than through a quasi-adjudicative process. But the reconciling of interests may be accomplished in various ways, and it is doubtful that "compromise" is a sufficient working principle; it may at times be no more helpful than asking a man at a crossroads to adopt a middle solution by going off in between the two roads. In public affairs a rational settlement of conflicts of interest may require, or at least be aided by, a standard of general or community interest; and it is the essential function of legal norms to express that common interest. Whether or not they actually do so is a matter of empirical evaluation in any given case. I have taken it for granted that the principles of the Charter embody such community interests and I have suggested that the process of applying these principles in concrete cases is a reasonable, if faltering, way of determining new points of common interests and giving a measure of efficacy to recognized goals of international order and security.

Oscar Schachter

RECOGNITION DE FACTO—IN REVERSE GEAR

In a well-ordered world, nicely geared to democratic processes, it ought not to be hard to say who is the government of the country, who has the right to speak in its name, who can bind the state by his decision, in a word whose act constitutes an "act of state."

But unhappily not all countries follow democratic procedures in the selection of their representative officials; and we are only too familiar with coups d'État of all sorts, with colonels, majors, and even sergeants, who for one reason or another decide to overturn constitutionally elected governments and set themselves up as the head of the state. Have they a right to be recognized as such? The rule of law is well established that in their personal capacities they have no inherent right to be recognized, but that each of the other members of the international community will decide for itself when the new government appears to have the necessary stability to be taken as representative of the state and whether, expressly or impliedly, it offers assurances that it will live up to the international obligations of the state. In the meantime the new government can expect no more than de facto recognition, namely, that daily relations of a necessary character will be carried on with it, short of acknowledging its right to speak in the name of the state. Only when the second step has been taken and recognition de jure is given, may the new government claim all of the
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THE GENERAL ASSEMBLY OF THE UNITED NATIONS
AND ITS POWER TO INFLUENCE NATIONAL ACTION

by Krzysztof Skubiszewski
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THE CHANGING EFFECTIVENESS OF GENERAL
ASSEMBLY RESOLUTIONS

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(Reprinted from the Proceedings of the American Society of International Law, 1964)
THE GENERAL ASSEMBLY OF THE UNITED NATIONS
AND ITS POWER TO INFLUENCE NATIONAL ACTION

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In one of his dissenting opinions, Judge Alejandro Alvarez of the International Court of Justice, referring to the declarations and resolutions passed by the General Assembly of the United Nations, made the following observation:

[T]hey have not yet acquired a binding character, but they may acquire it 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.1

The history of the United Nations shows that the support of public opinion does not necessarily increase the role and influence of the Assembly resolutions in the sphere of national policies and action. The resolutions are addressed to Member states and governments and, therefore, it is rather the backing and compliance of the latter that remain decisive for the effectiveness of any steps taken by the General Assembly.

No full exposition of the subject is attempted by the present report. The focus of the report is on the legal aspects of legislative and executive activity as a means of exerting influence on national policies—whether and to what extent the General Assembly possesses powers of legislation and executive action, and how they supplement the traditional techniques of conference diplomacy within the United Nations.

I

The enactment by an international organization of law addressed to states and creating direct rights and duties for them constitutes the most advanced form of international legislation instrumental in affecting policies of states. Only enactment of law that takes place on the basis of majority decisions binding for the outvoted minority can be said to direct and influence national action. The requirement of majority decision is met by the General Assembly (Article 18 of the Charter), but the Assembly does not fulfill other requirements for legislation in the above sense. We know both from the reading of the Charter and the history of its drafting (the defeat of the Philippine proposal presented at the Conference in San Francisco)2 that no power to make law for states has been conferred on the General Assembly or any other organ of the United Nations. For such power, whether comprising legislation by virtue of unanimous vote, or by majority decision with the guarantees of the system of contracting-out,

1 Reservations to the Convention on Genocide, Dissenting Opinion of M. Alvarez,
or by majority decision binding for all, must always be based on an explicit and unequivocal treaty authorization.

On the other hand, the Assembly certainly possesses the competence to make the internal law of the United Nations, i.e., the law relating to the structure, functioning, or procedure of the Organization, and addressed not to its Members but to its organs, representatives, or employees. In fact, however, such law often regulates the conduct of states and constitutes a source of their rights and duties whenever they act in the framework of the Organization and in the area covered by its internal law. For instance, the application or non-application of a rule of procedure often is of importance and has influence on the merits of interests which the Members happen to espouse and defend on the United Nations platform. The General Assembly can enact internal law of the Organization not only when a specific authorization to do so has been granted to it by the Charter (Articles 21, 22, 62, paragraph 4, and 101, paragraph 1). The power of the Assembly to make its internal law can be implied, in contradistinction to creating other law. But are internal regulations a kind of law that is helpful in exercising influence on the policies of states, and does the Assembly avail itself of this instrumentality? In answering this question, two sets of internal regulations should be considered.

First, there are the resolutions whereby the Assembly created the operational agencies and regulated their terms of reference and procedure. An operational agency of the United Nations administers the latter's program of assistance: United Nations International Children's Emergency Fund, United Nations Relief and Works Agency for Palestine Refugees in the Near East, United Nations Korean Reconstruction Agency, and the Office of the United Nations High Commissioner for Refugees. In contrast to other subsidiary bodies, the operational agencies have the power to arrive at final decisions within their competence, including the capacity to participate in certain legal transactions (entering into contracts, suing in courts, et cetera). Their power of decision includes especially the disposal of funds. The funds, however, are acquired from voluntary contributions, and this, together with the fundamental feature of their task—they co-operate with and help governments, and do not direct the latter's actions—is a limitation on the agencies' ability to influence national policies. Still, each operational agency works on the basis of its own program, which is not necessarily identical with all the changing and fluctuating wishes and aspirations of the countries where the agency conducts its activities. During the discussion on the proposal to set up the Korean Reconstruction Agency, some Member states expressed fears with respect to the extent of the powers to be granted to the Agent General.


\* The Technical Assistance Board was created by the Economic and Social Council.
These doubts reflect the awareness on the part of the Members that operational agencies may lawfully become an instrumentality of influencing national policies in the area concerned.

Secondly, there are internal regulations creating machinery for compliance with the Assembly’s resolutions in fields other than relief and rehabilitation programs. We are not concerned here for the time being with organs dealing with collective measures, in particular peace-keeping or peace-restoring operations. The view was rightly expressed that “often in international affairs the creation of machinery is just as vital as the adoption of substantive solutions.”

Thus the Assembly sets up organs that study and consider information which Members are obliged to submit. Here the Assembly lays down the basis for a next stage in handling the subject matter of the information transmitted. It creates machinery that permits the Organization to study the information and facilitates the adoption of procedural or substantive recommendations. The case in point was the establishment of a special committee on information transmitted under Article 73 of the Charter. There was some opposition on constitutional grounds to the setting up of the committee. In the words of the French delegate, “certain representatives were trying to perform a creative and almost constitutional task by establishing fresh machinery.” “Chapter XI [of the Charter] was a declaration involving an obligation but not providing for a medium of implementation.” The philosophy behind this attitude has not been accepted by the Assembly either in this or in other cases.

Further, there is inquiry and investigation machinery in fields where Members have no duty to transmit the information sought by the Assembly. The lack of obligation is a weakness from which this pattern of activity obviously suffers: the success and, consequently, the effectiveness of investigation depend on the co-operation of Members. Commissions of inquiry that conduct investigations in relation to disputes which are being settled under Chapter VI of the Charter are less relevant for the purposes of our problem. An activity of more interest here is the practice of setting up subsidiary bodies which investigate facts and occurrences that are not limited to or connected with a dispute in the strict sense of the term. One of the first organs falling under that category was the Special Committee on Palestine. Another body, the Special Committee on the Problem of Hungary, though vested with wide powers of investigation, had a rather limited function and purpose. In the Hungarian question, the Assembly itself considered investigation as the only and final measure to be applied, and implicitly excluded the taking of any steps on the basis of the facts that were established and assessed through such investigation. Here the Assembly in advance relinquished any serious attempt to exert the...


an influence on the national policy in question. On the other hand, numerous studies of and investigations into the racial policies and legislation of the Union (now Republic) of South Africa that were made by different bodies from almost the start of the United Nations permitted information to accumulate that was meant to serve as the factual basis of the action that went beyond mere expression of disapproval and wishes on the part of the Assembly.

Finally, there are provisions of internal law enacted by the Assembly that deal with subsidiary organs, the task of which is to observe and look into the implementation of the Assembly's recommendations. The problem raises some constitutional issues, but as long as the Assembly acts within the framework of its substantive competence (which involves, inter alia, respect for the exclusive jurisdiction of the Security Council), the enactment of the said regulations and the ensuing activity of the Assembly and its organs are lawful. They are, however, not very effective. The basic restriction on those organs' ability to influence national action is the fact that they can perform their functions in the territories of Members only with the latter's consent. Hence the rather limited results obtained by bodies where activity was contested or at least not looked upon favorably by the states where such bodies should have exercised their functions of observation and surveillance. The Special Committee on the Balkans, the Commissions on Korea or the Peace Observation Commission are examples of bodies that were not successful in influencing national policies. Nonetheless, it has been suggested that "the fact that the Assembly has had its own eyes and ears at the scene of the difficulty has exerted an important controlling influence. . ."7 The delegate of a major Member of the United Nations contended that "in Greece and Korea, commissions of the Assembly had in the one case perhaps prevented open war and in the other case made prompt action possible."8 It cannot be denied that the Korean Commission's report in 1950, at the outbreak of hostilities in Korea, facilitated, from the procedural point of view, the decisions of the Security Council. But the main task of the two Korean Commissions remained unfulfilled, while the end of the dangerous friction between Greece and her neighbors, and the end of civil war in the former country were not brought about through the influence of the Assembly but by developments extraneous to the United Nations efforts (British military support for Greece, Truman doctrine and its application, withdrawal of backing for Greek guerrillas by Yugoslavia).

When discussing the making of law as the instrumentality whereby the Assembly tries to affect national policies, a word or two should be said of one category of the Assembly's resolutions, viz., resolutions which recite general rules of conduct destined to govern an unlimited number of situations and addressed to an unrestricted number of Members. There are resolutions which elucidate and define in a non-binding form the

provisions of customary law or deduce more detailed rules from a general principle or principles of treaty law, including the law of the Charter. Examples of resolutions belonging to this class are the Draft Declaration of Rights and Duties of States annexed to Resolution 375 (IV), Resolution 217 (III), containing the Universal Declaration of Human Rights, Resolution 637 (VII) regarding the Right to Self-Determination, Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, or the Draft Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space which is embodied in Resolution 1962 (XVIII). Where the term “draft” has been used one is tempted to argue that no legislation was implied. Instruments that purport to simply restate or interpret the law in force, on the other hand, always contain the element of law-making, as the processes of interpretation and creation of law are frequently interwoven. The resolutions under consideration are acts by means of which the juridical conscience of nations or at least of their majority finds expression; and therefore they are, to use the words of Article 38, paragraph 1(d) of the Statute of the International Court of Justice, “subsidiary means for the determination of rules of law.”

This is not much in terms of actual influence on the behavior of Member states. But there are also other resolutions. While they have the characteristics of the acts just mentioned, they are in a more conspicuous and definite way attempts at law-creating and at making Members comply with that law. For instance, Resolution 378 (V)A on Duties of States in the Event of the Outbreak of Hostilities contains rules which, if accepted as binding, would add to the duties of states engaged in an armed conflict. Also, it has been provided in the said resolution that compliance or non-compliance with the Assembly’s recommendations there embodied “be taken into account in any determination of responsibility for the breach of the peace or act of aggression. . . .” Thus we observe here the appearance of a sanction that stands behind the Assembly’s recommendation.

The tendency of making new law and imposing it on Members becomes more visible in the case of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV)). Some of the principles formulated in the Declaration are new law, not to be found in the Charter or the remaining international law. Paragraphs 3 and 4, and paragraph 5 in part can be regarded as revising Article 2, paragraph 7, Article 73 (b), and Article 76 (b) of the Charter. We also find in the Declaration a paragraph which unequivocally states that all countries must “observe faithfully and strictly . . . the present Declaration.”

Rather soon, however, the Assembly had to note that the provisions of the Declaration, “with a few exceptions” only, had not been carried out (Resolution 1654 (XVI)). Judging from the information assembled by the Special Committee that watches over the implementation of the Declara-

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tion, and from Resolutions 1810 and 1956 adopted at the XVIIth and XVIIIth sessions respectively, the non-compliance with the Declaration persists. By adopting the Declaration the Assembly committed itself to seeking changes in title to territory or, to use another term, to initiating "a process of quasi-legislation in the matter of sovereignty over territory." This was a rather bold attempt at both modifying the present law on acquisition and loss of territory and instituting United Nations supervision and guidance, that is, giving the Organization legislative powers with respect to colonial territories. The failure of the Organization to impose its will on recalcitrant Members shows the ineffectiveness of resolutions in fields where only the application of some executive measures could guarantee that the policies of Members would conform to the "will" of the Assembly. This observation brings us to the problem of the executive powers of the General Assembly.

II

The lack of full-fledged legislative powers on the part of the General Assembly can be explained by two reasons. First, states are still reluctant to bestow regulative competences on international organizations. Secondly, to achieve its purposes the United Nations is more in need of executive powers, especially powers which enable the Organization to initiate and maintain peace-restoring and peace-keeping operations. Can the Assembly undertake such operations and, generally, has it the competence to take measures in order to induce states to conform to a certain policy? If so, was the Assembly successful in exercising an influence on national action through the instrumentality of the measures of an executive character?

In some matters—they are enumerated in the several provisions of the Charter—the Assembly has powers of decision and the Members are obliged to abide by the decisions of the Assembly. But very few of these matters offer opportunity for exerting an influence on states' policies. Thus, for instance, the act of admitting a new Member did not, as a rule, affect the problems of recognition or normal relations between the admitted state and the Members which did not recognize it or maintain normal relations with it. The Assembly's decisions on the representation of the Member, where two governments competed for the function, were politically important for the winning party but less influential on extra-United Nations relations involving that government.

To give another example of a binding decision, the Assembly adopts the budget of the Organization and imposes on the Members the duty to pay their contributions as assessed by the Assembly. If they do not pay, they run the danger of being deprived of their vote in the Assembly (but not in other organs) in accordance with Article 19. But provision of money strengthens those recommendations alone where machinery financed by the United Nations has been set up to implement the recommendations. This

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10 Jennings, The Acquisition of Territory in International Law 79 (1963).
is the case of the peace-keeping or peace-restoring apparatus created by the Assembly. Measures that are to be taken through other means, especially through action by individual Members, lie beyond the activating effect of Article 19. Besides, if a Member refuses to pay and is, consequently, deprived of its vote in the Assembly, the operation that is financed by the Organization does not gain anything from the application of the sanction.

We are not concerned here with executive action and decisions which the Assembly takes by virtue of a special delegation of powers granted ad hoc by states having jurisdiction over the question. An example of this kind of activity is the decision and implementing measures taken by the Assembly on the disposition of the former Italian colonies in Africa. What we are interested in is the powers of the Assembly in the executive field under the Charter—Can the Assembly, apart from wishes, exhortations and expressions of opinion, take or recommend measures that are instrumental in shaping and influencing the Members' policies?

In paragraph 1 of the Uniting for Peace Resolution (Part A) the General Assembly interpreted the provisions of the Charter on the application of collective measures by the Assembly. The powers of the Assembly stated in that resolution are to be exercised when "there appears to be a threat to the peace, breach of the peace, or act of aggression." It is submitted that the competence of the Assembly to make recommendations on executive action in political matters is not limited to those cases. On the other hand, where there appeared to exist one of the factual situations described in the Uniting for Peace Resolution, the Assembly, until now, never went to the maximum limit of its own interpretation and did not recommend the use of force for the purpose of securing compliance with its resolutions. This, together with certain rules of the Charter, suggests an interpretation in some respects more restrictive than that contained in Resolution 377 (V) A.

Our formula for the exercise of executive powers by the General Assembly is couched in the following terms:

Whenever the Security Council fails to act in cases where it has competence—and failure to act also includes mere passivity on the part of the Council—and subject to the substantive limitation of Article 2, paragraph 7, and the procedural limitation of Article 12, the Assembly has the power to recommend any measure except measures that consist of the use of military force against a state or states. In particular, the Assembly can recommend measures short of the use of military force that would be applicable against a Member or Members, and equally it can adopt resolutions on the use and deployment of military force in a territory, not against any state but for purposes of peace-restoring and peace-keeping. The core of the interpretation here put forward is that the Assembly, by recommending measures short of the use of force against a state, becomes responsible for and initiates steps that in law, especially in view of the limitations imposed by Article 51, could never be met with armed force, while in fact a forcible reaction would be highly improbable. Also, when military force is used in the territory of a state, not against that state but to keep or restore peace,
the force is so used only with the consent of the sovereign. This leaves no room for a response involving use of armed force by states that happen to be dissatisfied with the measures taken by the Assembly. Thus the Assembly moves on a plane where sanctions are recommended and possibly applied, and still, reasonably, there is no danger of escalating the conflict.

The possibility of the reaction to the Assembly’s measures should be considered because resolutions on executive measures are recommendations. Members are not bound by them in the sense that they are under a legal duty to conform their action to the recommendation. To quote the opinion of an eminent authority expressed, however, in a different context, a Member, "while not bound to accept the recommendation, is bound to give it due consideration in good faith. If . . . it decides to disregard it, it is bound to explain the reasons for its decision." Non-compliance with the recommendations of the General Assembly may lead to the finding that the Member in question "persistently violated the Principles contained in the . . . Charter" (Article 6), and the Member may thus face the danger of expulsion from the Organization or other sanctions. Depending on the character and contents of the recommendation, even non-compliance with a single resolution may amount to a breach of the obligations flowing from the Charter. For the recommendation may spell out in detail the particular duties of Members under the Charter in a specific contingency. But as long as a formal finding to that effect is not made, it remains a _praesumptio iuris et de iure_ that the Member is not obliged to follow the Assembly’s recommendation. Therefore a Member state against which measures have been recommended by the General Assembly may resist them. In its opposition it is bound to conform to the principle of proportionality. Measures not consisting of the use of military force cannot lawfully be met with such force. If the Assembly had the right to recommend the use of military force by one state against another, and if it in fact made such a recommendation, the result could easily be a rather general war. If a major conflagration becomes unavoidable—an occurrence which in 1964 seems more unlikely than in the previous years—it is politically more desirable and legally in conformity with the Charter not to have the United Nations involved in such conflagration, on one side, through an act of the General Assembly. The Charter bestowed on the Security Council the exclusive competence to order any operation "by air, sea, or land forces of Members of the United Nations" (Article 42). Certainly, recommending such operations, which could lie in the domain of the Assembly, is not equal to ordering them. But apparently a basic rule of the Charter is that risks involved in the use of military force, whether ordered or recommended, should be taken by the Security Council alone and that any decision regarding the use of such force should be taken without definite opposition, explicit or implicit, of any of the great Powers permanently represented on the Security Council, or at least in

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circumstances where a great Power could prevent the use of force. The Charter, as a treaty establishing and organizing relations among states, still makes rather significant allowances for the balance-of-power system, and it did not go very far in setting up an opposite system, i.e., the collective security system.\footnote{12} The development of the latter system should be sought. This process, however, should evolve slowly and through cooperation rather than through attempts at too radical action on the part of the Assembly.

On several occasions the General Assembly has recommended that measures be taken against a state. In 1946 it recommended that Spain be debarred from membership in the specialized agencies and from participation in certain conferences, and that Members recall from Madrid their ambassadors and ministers plenipotentiary. The latter recommendation was not followed without exception. The measures proved unsuccessful in bringing about a change of the Spanish domestic regime and were revoked. In 1949 the Assembly recommended—in connection with the Greek problem—that Members refrain from the direct or indirect provision of arms or other materials of war to Albania and Bulgaria. A more extensive embargo was applied in 1951 with respect to "areas under the control of the Central People’s Government of the People’s Republic of China and of the North Korean authorities."\footnote{11} In both cases the Assembly’s prohibitions were not followed by those Members who were the principal and regular suppliers of war equipment and related material to the countries involved. In 1962 the Assembly requested Members to apply several measures to the Republic of South Africa and it also requested them to end the supply of arms to Portugal. In neither case could an overwhelming compliance by Members be noted, and therefore the effectiveness of the measures on the policies of apartheid in South Africa and the policies in Angola could not even be tested. They are all examples of unsuccessful recommendations of the Assembly in the sphere of executive action. On the other hand, the Assembly succeeded in restoring and keeping peace in the Suez conflict of 1956 and created an effective machinery for that purpose in the form of the United Nations Emergency Force. This operation could be brought about through a combination of consent and cooperation of the states directly concerned and the efforts of the Organization.

It may be said that what is probably more significant at the present stage of development of international organization is not so much a series of spectacular achievements, or rather their absence, in the executive field, but the persistent and constant effort to “conceive of the Organization primarily as a dynamic instrument of governments.”\footnote{13} The present modest degree to which the General Assembly is in a position to influence national policies, and the rather restricted role of public opinion in increasing the Assembly’s influence, make the lawyer repeat, in conclusion, the words of the late Secretary General of the United Nations that “the real limitations upon action by the Organization do not derive from the..."
provisions of the Charter. They result from facts of international life in our age which are not likely to be by-passed by a different approach or surmounted by attempts at merely constitutional reform."

The CHAIRMAN introduced Mrs. Gabriella Lande of the Center of International Studies, Princeton University.

THE CHANGING EFFECTIVENESS OF GENERAL ASSEMBLY RESOLUTIONS

BY GABRIELLA ROSNER LANDE

Center of International Studies, Princeton University

The General Assembly of the United Nations has become over the years the predominant political body of the world organization. The frequent inability of the Security Council to discharge the functions assigned to it by the Charter has brought about a change in the relative powers of the Council and the General Assembly. Member states have increasingly extended the Assembly’s role in questions involving the maintenance or restoration of international peace and security and many of them have looked with ever widening hope to this organ for a solution to their problems. Assembly resolutions, moreover, while technically only recommendations, have been viewed by some Member countries, with regard to certain matters and within certain limits, as legally binding decisions.

These developments seem to indicate that the influence of the General Assembly has increased. The nature of this influence and its meaning for Member states and the United Nations Organization might be usefully assessed by examining the effect of the Assembly’s resolutions.

The General Assembly is not a world parliament. In regard to most political matters, it cannot legislate; it can only recommend. The Assembly is empowered to do no more than to issue political or socio-economic recommendations of a general or specific character which themselves lack obligatory force. It differs from the parliament of a sovereign democratic state, for the latter presupposes a certain political agreement as to ends and means which does not exist in the United Nations forum. Majority voting in a national parliament is predicated upon an implicit ability and willingness to come to terms on certain points of issue and an implicit agreement on "fundamentals," whereas in the General Assembly there is often serious contention between the Western Powers and the Soviet Union over the nature and significance of the assumptions underlying the United Nations. Serious contention exists as well between some of the colonial and anti-colonial nations in the Assembly.

Moreover, the dissentient minority within the democratic state is constitutionally compellable. It may continue to struggle for the adoption of its view, but, if necessary, it is made to conform, since the state has a near monopoly of the means of coercion. But this is manifestly not the

situations of the United Nations. Yet upon close consideration we find that General Assembly resolutions do exert considerable influence. This influence is manifested not only by the degree of compliance Member states give to Assembly resolutions, but by the general political effects which resolutions may produce in a Member state or in the relations among nations.

Let us look for a few moments at the general effects on Member states of the Assembly's political resolutions. These have been many and diverse. Some resolutions have influenced national behavior or the choice of foreign policy alternatives of Member states. The General Assembly's resolutions during the Suez crisis of 1956 were surely influential in obtaining a cease-fire and the retreat of Anglo-French forces from Egypt. After Chinese Communist intervention in the Korean War in November, 1950, General Assembly opinion and resolutions may be said to have had a restraining influence upon United States policy in Korea. They may even have helped to prevent the extension of the area of military operation close to or into Manchurian territory. Certainly, they resulted in United States acceptance of various principles as a basis for negotiating a cease-fire with the Chinese in January, 1951.

A number of Assembly resolutions have had the effect of setting standards of state behavior and have resulted in their national endorsement, at least in principle. These resolutions have crystallized elements of a new international legitimacy which at times may be hardly distinguishable from morality and justice, but which, by their constant reaffirmation, do not get lost. U.N. resolutions have defined a kind of consensus on principles—avoidance of the use of force, the right to self-determination, the right to economic development and so on. Within this category falls the Universal Declaration of Human Rights which has become a yardstick to measure the compliance by governments with international standards of human rights. It has promoted the adoption of more specific agreements along the same lines, stimulated other declarations whose purpose is the solution of international problems, and influenced legal institutions in individual countries, particularly new constitutions or constitutional amendments.

Some Assembly resolutions have affected the means at the disposal of states in their relations, particularly by creating new peace-keeping techniques to isolate clashes between smaller nations or within a smaller nation from the larger East-West struggle. The Communist retreat from South Korea in 1951, French and British evacuation of Egypt in 1956, the U.S. withdrawal from Lebanon in 1958 and the Soviet retreat from the Congo after the fall of Lumumba were surely furthered by these techniques.

A number of resolutions have put Members in the position of losing or gaining (depending on whether or not they accepted the resolutions) political friendships or understanding. A few resolutions have bound states to certain courses of action, interpreted the principle of domestic jurisdiction, or narrowed the areas traditionally considered within the exclusive realm of the national sovereign. They have had the effect of
accelerating the increase in the number of states and furthering activities
of peaceful change within nations.

In regard to the United Nations system, some resolutions have had the
effect of providing organs with additional tools with which to perform
necessary functions, enlarged the number of "world tasks" of the Organization,
interpreted the meaning of Charter principles. A number of resolutions
have clarified the legal rights and duties of Member states and of
the Organization. Assembly resolutions have set precedents, and even
institutionalized common interests.

These, then, are the very general and far-flung consequences which
Assembly resolutions may have. Their effect, however, must also be
analyzed with respect to Member states' compliance with them.

Roger Fisher has written that governments, in both their domestic and
foreign operations, are under heavy pressure from various sources to con-
form, or appear to conform, to accepted standards of behavior.¹ I believe
that this is true as well in regard to conformity with United Nations reso-
lutions. Professor Fisher identifies four sources of pressure: (1) the poss-
sibility of direct retaliation by the governments directly affected; (2)
the likelihood of an adverse reaction among allies and the nations less
closely involved in the issue at hand; (3) political criticism from a govern-
ment's own constituents; and (4) the deeply rooted moral nature of the
individual decision-makers, the "law habit."

Hence, even in the absence of an organized superior sovereign power to
compel obedience, a government in the General Assembly forum will not
easily ignore the conduct and attitudes of the majority of U.N. Members.
It must consider with care the possible reaction of other states to a defiance
of an Assembly resolution. It must weigh not only the immediate reaction
of the nations which would be most affected
by
such a breach, but also the
effect on world public opinion.

A U.N. resolution may mobilize opinion in support of its tenets. Moreover,
the Assembly sometimes is able, in the resolutions themselves, to focus
and crystallize, formulate and express world opinion. As F. Blaine Sloan
declares,

the force of a recommendation is not derived from a judgment made
in an internal court of conscience, but from a judgment made by an
organ of the world community and supported by many of the same
considerations which support positive international law. The judgment
made by the General Assembly as a collective world conscience
is itself a force external to the individual conscience of any given
state.

Sloan submits that, in view of these considerations, the Assembly's moral
force "is in fact a nascent legal force which may enjoy, in the rounded
words of Judge Cardozo, a twilight existence hardly distinguishable from
morality and justice until the time when the imprimitur of the world
community will attest its jural quality."²

² "The Binding Force of a 'Recommendation' of the General Assembly of the United
Actually, the nascent legal force of the Assembly has already begun to develop. In certain respects, the distinction between the status of resolutions as recommendations and resolutions as legislation may have become rather thin. The Assembly’s decisions, said Dag Hammarskjöld, “introduce an important element by expressing a majority consensus on the issue under consideration.” This element leaves scope for a gradual development in practice of the weight of the decisions. To the extent that mere respect, in fact, is shown to General Assembly recommendations by the Member States, they may come more and more close to being recognized as decisions having a binding effect on those concerned, particularly when they involve the application of the binding principles of the Charter and of international law.

Majority consensus and world opinion will not of course always cause compliance; but these forces do exert an influence and sometimes even exert considerable pressure.

World opinion reacted with shock to Soviet denial of human rights in the countries under its direct influence and to Soviet action in Hungary, and was reflected in the United Nations’ resolutions regarding these questions. It is improbable that the resolutions affected the conscience of Soviet leaders—they did not spur modification of Soviet action at the time—but at least total disregard of these resolutions threatened the U.S.S.R. with diplomatic isolation and helped to impress on the non-Soviet world the extent to which Communist leaders violated the fundamental rights of the individual.

At the time of the British and French inroad into Egypt in 1956, public and official concern in the United States that we would alienate and antagonize the peoples and governments of Asia and Africa were we not to criticize strongly what the majority of nations considered an illegal resort to force, certainly influenced our stand vis-à-vis Britain and France. Indeed the strong consensus of the majority of U.N. Members that the Anglo-French-Israeli attack violated the fundamental rules of international conduct, did much to bring about the cease-fire and ultimate withdrawal of troops from Egypt. Domestic opinion, especially in Britain, was also influential in modifying that government’s policy.

The danger of external consequences, the reaction of other states, and the pressures of domestic and world opinion are thus important factors influencing governmental compliance with the Assembly’s resolutions. In studying the changing effectiveness of U.N. resolutions and Member states’ compliance with these resolutions, one might, however, consider six additional important variables. These are (1) the time at which the resolutions were passed; (2) the fundamental issues lying at the root of the resolutions; (3) the vote taken on the resolutions; (4) the language of the resolutions; (5) the methods and means used by the Assembly to

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implement its resolutions; and (6) the expectations of Member states in regard to the resolutions.

First, General Assembly resolutions might be analyzed at different points of postwar history in order to determine whether their effect has varied with the years. The foreign policies of Member states may in time incorporate the behavior patterns developed at the United Nations. National aims and expectations may be reconstituted and special attention may come to be paid to what is considered "legitimate" by the General Assembly, or what the effect will be of U.N. pressures and possible interventions. Hence attention must be bestowed upon the evolution of national policies as the Member nations "learned" from the U.N. encounter.

By tracing the Assembly's resolutions and Member states' response to them through the years, one might for example show that direct attempts by the Soviet Union to extend its authority into areas outside of its direct influence has been ever more strongly resisted by other U.N. Members. This resistance may well have contributed materially to a Soviet retreat in some of these areas. Greece, Yugoslavia and South Korea are eloquent examples. Could it be demonstrated that the Soviet Union "learned" from its encounter with the U.N. and modified its behavior accordingly in subsequent years? Certainly, it accepted to stay removed from such potential cold-war areas as the Middle East and the Congo. The Kremlin will probably remain far less influenced by the U.N.'s resolutions than by its own strategic decisions arrived at on the basis of evidence regarding power relations, internal stresses and the like. But its decisions will have to take past U.N. action, as expressed by resolutions, into account. Even limited U.N. action, such as an Assembly consensus condemnatory of Soviet maneuvers in Hungary, can embarrass the Soviet Union, while investigatory and fact-finding commissions instituted by an Assembly resolution may expose vulnerabilities and failures of the Communist system, and these matters will have to be weighed.

Turning to our second variable, we might seek to discover under which conditions there is an increase in effectiveness of Assembly resolutions and under what circumstances a diminution. The fundamental issues lying at the root of a resolution—the cold-war conflict, nationalist aspirations, developments in nuclear technology—may prove important in this respect. It has often been said, for example, that U.N. resolutions have proved most effective in dealing with issues outside or on the periphery of the cold-war conflict, issues which do not engender major political dissension between the super-Powers. Secretary General Hammarskjöld, in his classic statement of the theory of preventive diplomacy, virtually discarded the idea that the United Nations could usefully or safely intervene in "problems which are clearly and definitely within the orbit of present day conflicts between power blocs." He drew the conclusion that the main field of useful activity of the United Nations in its efforts to prevent or solve

conflicts should be action to fill vacuums in areas of conflict outside or marginal to the zones already involved in the cold-war struggle. This would minimize the tendency or diminish the incentive of great Powers to move competitively into those situations. Thus, he hoped, the United Nations might prevent the widening and aggravation of the bloc conflicts.

The effectiveness of U.N. resolutions probably depends a good deal upon the basic issue to which a resolution relates.

The source of a resolution and the vote taken on it is another dimension of interest: From which nation or nations did the resolution in question spring and gain support? What were the aims of these nations and their influence? Did a nation's response to a resolution after its passage differ from its vote?

In his theory and practice of preventive diplomacy Hammarskjöld strongly implied that the United Nations' resolutions in the political and security field would not be effective in the absence of agreement between the super-Powers. Certainly, the fact that the votes of influential delegates "weigh more" than others in terms of their political influence may have a very direct bearing upon the relative effectiveness of various resolutions. The quality, quantity and intensity of the community support which stands behind a resolution may also determine what impact that resolution will have.

A powerful majority, including many influential Member states, passed the "Uniting for Peace" resolution in 1950. It was heralded immediately as a resolution carrying tremendous weight and certainly has had profound repercussions for the United Nations and the development of the General Assembly. The Assembly's decision to internationalize Jerusalem, taken at the same session, mustered a much weaker majority, lacked the support of the most influential nations, and "was discredited from the beginning."

Resolutions adopted by a two-thirds majority do not, however, always represent the opinion of mankind. It would be wise to be wary of such judgments in evaluating the vote. What is important is to try to specify the ingredients of the compromise in each resolution and the power alignments involved. A comparison of the alignments on various issues, reflecting as they do national aims in conflict, will yield the lines of influence and pressure which are vital to a study of why some resolutions are more effective than others.

The language of the resolution is a fourth variable to be considered in analyzing compliance and effect. One may find, for example, that resolutions which regret, deplore or condemn, repeated year after year, in some cases do not have a consistently beneficial influence. Repetition may be vain. Restraint of language may be important. In examining those resolutions of the Assembly which have not been complied with, one may wonder whether in every case it was wise to formulate the decision in such blunt language. For example, the Assembly's strongly condemnatory resolution against Communist China in February, 1951, may well have

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had the negative effect of increasing Chinese intransigence and postponing Korean truce talks, rather than the beneficent effect of inducing the Chinese to conform to the Assembly's will. Maximum effectiveness requires the framing of the Assembly's decisions in such a way that they exert pressure without increasing intransigence.

The language of a resolution may have other effects as well. In the "new United Nations diplomacy" of the General Assembly, where measures must be presented in terms acceptable to a two-thirds majority of the membership, the resolutions themselves may express a modification of a particular national policy. The divergence of interests in a political body representing over one hundred states is reflected in the course of negotiation and debate and must somehow be accommodated. Hence the necessary search for a common denominator often transforms a measure from what had been originally intended by the sponsor. Most frequently, it will in the end fall short of the maximum desired by its originator.

Hans Morgenthau declares that

the constant use of a certain terminology not only for the purposes of propaganda, but in the give and take of political transactions, may well exert a subtle influence upon the substance of the transactions themselves. . . . It may well result in the blunting of the sharp edges of a national policy, in its retreat from an advanced position, its reformulation and adaptation in the light of the supranational principle embodied in the language of the resolution."

The various instruments of policy, the methods and means used by the Assembly to implement its resolutions and the response of Member states to these methods are also significant in evaluating the effectiveness of resolutions. First, the Assembly, to promote compliance, has sometimes simply utilized a formal recommendation in the name of the United Nations. These are resolutions of publicity, appeal or admonition in which Members are reminded that they assumed certain solemn obligations with respect to U.N. recommendations when they ratified the Charter. Secondly, the technique of international surveillance and investigation is a means of promoting compliance. Philip Jessup has pointed out that this technique may be especially useful as an instrument for "mobilizing world public opinion and making it articulate to the point at which it becomes a factor in the power situation." 7 Indeed, the Assembly's agents in Greece, Korea and Palestine have performed a type of "watchdog function" to good advantage. Moreover, the Assembly has used various field agents to supervise the carrying out of particular recommendations or agreements, such as the Palestine Mediator, the United Nations Truce Supervision Organization in the Middle East, and the Temporary Executive Authority in West New Guinea. Thirdly, the Secretary General plays a central rôle in implementing all Assembly recommendations, and the Assembly has strengthened his hand in this regard during the last few years.

Most importantly, the General Assembly has on a number of occasions attempted to organize diplomatic, economic and para-military measures as means of gaining compliance with its recommendations or with what it considered the basic postulates of the Charter. The Assembly requested Member states to break off diplomatic relations with Spain in 1946 and with the Government of South Africa in 1962. Resort to economic pressure, mostly in the form of embargoes, was authorized by the Assembly against Albania and Bulgaria during the Greek civil war in 1949, against the aggressors in Korea in 1951, and against the Union of South Africa in 1962. United Nations military or para-military forces were of course used to help implement U.N. resolutions in regard to Korea, Suez and the Congo.

During the past eight years there has been a development in the Assembly of new and more effective instruments to deal with disputes which threaten the maintenance of international peace and security. During the crisis in Greece in 1947 and 1948, the Assembly was willing merely to pass formal recommendations calling upon the offending states to desist from what it considered illegal activities, established a commission of investigation and imposed an embargo which had in effect already been in existence. Again, during the early years of the United Nations, when the Assembly recommended a partition plan for Palestine, few Member states were willing to face realistically the problem of implementing their resolution, and rather forlornly requested the Security Council to undertake this task, which the Council refused to do. With time, U.N. organs developed new techniques of peace-keeping forces, U.N. presences, or observer groups which not only had the effect of exerting pressure upon states to comply with U.N. recommendations, but also of providing an impartial mechanism for removing elements of violence and allowing states "to be taken off the hook." The most precedent-setting of these has been the United Nations Emergency Force, the success of which stimulated the creation by the Assembly or Council of other observer and para-military units, notably the U.N. Observer Group in Lebanon, the U.N. Operation in the Congo and the U.N. Force in Cyprus. The Assembly seems to be moving ever closer toward providing "teeth" for its recommendations.

The United Nations' difficulty in solving the very real financial problem which has confronted it since the inception of the Congo operation engendered the use of a number of techniques designed to promote compliance with the Assembly's financial resolutions. The General Assembly asked the International Court of Justice whether the expenses incurred for U.N.E.F. and O.N.U.C. legally constituted "Expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter. The Court's affirmative answer to this question upheld the Assembly's right to assess all Member states for the costs of the two peace-keeping forces. The Court's opinion, being advisory, lacks compelling binding force, but it certainly carries great weight. It was accepted by the General Assembly on December 19, 1962, by a vote of 76 to 17 with 8 abstentions. Presumably, a resolution of the Assembly which itself appears to be
proper and legitimate can alter the views of others as to what is legitimate. The General Assembly's political power depends in part upon its acting within the area where it is understood to have authority.

In order to influence Members to support financial resolutions relating to U.N.E.F. and O.N.U.C., the Assembly has, moreover, adopted the practice of reducing the assessments for a substantial number of states and applying voluntary contributions to offset the deficits remaining after these deductions. Finally, the sanction against delinquent states contained in Article 19 of the Charter hovers over all negotiations and deliberations regarding the financing of the peace-keeping operations.

Member states have reacted in various ways to the different forms of pressure applied by the Assembly. Consideration of these reactions leads to our last variable, that is, national expectations and the satisfaction or disappointment experienced by Member states in regard to U.N. resolutions. Surely the effect of the Court's opinion and the Assembly's resolutions on the financing of the peace-keeping operations depends ultimately upon how Members view these operations and the U.N.'s authority to establish them. It depends upon whether a Member state views the increased activities of the General Assembly as a desirable or a dangerous development. It depends on the hopes and expectations entertained by a government and its people in regard to the United Nations. In a larger respect, a Member state's response to the U.N.'s resolutions depends on whether it considers the world organization as merely a diplomatic or parliamentary meeting ground or as a dynamic instrument of governments carrying out executive action.

The Carnegie Endowment's national studies on the United Nations indicate that in reacting to the U.N.'s work, many nations have passed through four distinct phases. This evolution may be roughly summarized as follows: (1) The phase of faith, hope and expectation—approximating the years 1945 to 1947; (2) The phase of disappointment and indifference—1948–1950; (3) The phase of self-reliance and co-operation with nations outside the U.N. context—1951 to 1955; and (4) The phase of limited confidence, beginning in 1956.

Let us hope that phase number five will be not one of limited confidence but of extended trust.

The Chairman then declared the meeting open for discussion and invited questions and comments from the floor.

Mr. Sigmund Timberg observed that in treating the topic of the panel the panelists had mentioned several different types of public opinion, as well as other influences that are not "public opinion" at all. One type of public opinion is exemplified in the results of the work of the International Commission of Jurists, in which foreign public opinion is brought to bear to alter the internal policy of a particular state. Another is found

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in the United Nations General Assembly's resolutions, which do not necessarily reflect world public opinion, but do serve to show a particular government what other governments in the world community think of its actions. The use of the brief *amicus curiae* procedure is not really a means of enforcing compliance through public opinion; the courts are not supposed to consider prevailing public opinion in arriving at their decisions and it is frequently one of their glories that they do not do so.

The Chairman asked whether public opinion must be defined as the opinion of the public, or may it not also include opinion that is made public?

Mr. Timberg observed that the Society's rôle is one of making informed legal opinions public, and it should continue to be such, rather than one of bringing the public's opinion to bear in the resolution of issues involving international law.

Mr. Merrillat commented that the program chairman had asked him to speak on the "Several Rôles of Professional Opinion," and presumably for the purposes of this one paper "public" opinion referred to a specialized professional public.

Mr. James Oliver Mordock remarked that one of the important conclusions to be drawn from this meeting is that law becomes law largely to the extent that it is accepted by public opinion. Education of the public is therefore absolutely essential. Unfortunately, international law is an unfamiliar subject, even for most lawyers. The majority of them do not even know what the problems and issues are in the international community. Those who do know the issues generally talk only to each other. Experience has demonstrated that we cannot leave education in this field to the politicians. International lawyers must learn how to reach the public—to aid in this process of education. It would be of interest to know whether the International Commission of Jurists has a public relations man. Perhaps what is needed is public relations men who are legally trained. The technique of enlightened debate would be a useful means of education.

Mr. Debevoise answered that the International Commission of Jurists did not have any public relations man.

Mr. Edwin C. Hoyt, Jr., asked Mr. Debevoise whether the International Commission of Jurists had to obtain consent from the government of the country in order to send an observer to trials in the countries he mentioned.

Mr. Debevoise replied that in many cases this was necessary, and the requests of the International Commission were sometimes turned down. In at least one case, however, the Commission's observer was later admitted.

Mr. Arnold Fraleigh asked whether the International Commission of Jurists took a position on the United Nations resolutions on the South African trials.

Mr. Debevoise answered that it did not, but that the reports issued by the International Commission of Jurists on the trials were quoted at the United Nations.

Mr. Peter P. Remec, noting that the General Assembly of the United
Nations is an example of a unicameral body, asked whether it was really desirable that its resolutions be considered legally binding, in view of the somewhat less than happy experience of states that have had unicameral legislatures.

Mr. Skubiszewski replied that the quasi-legislative resolutions of the General Assembly laid down principles of conduct that are different from legal obligations imposed on the Members by treaties or custom. Many of such resolutions are worded so generally as to be useful to all sides. The General Assembly has neither the competence to legislate nor adequate means of enforcing its resolutions.

Mr. Timberg observed that, since the United Nations as an organization is so weak in power as compared to national states, it should not be equated with the latter so as to assume that checks and balances similar to those in effect in national states are needed in the United Nations.

Mr. K. Venkata Raman asked if it would not be possible to say that resolutions adopted by a large majority in the General Assembly do indeed have the effect of changing customary international law, regardless of the fact that the General Assembly does not legally have competence to legislate?

The Chairman referred the question to Mrs. Lande.

Mrs. Lande stated that, although the General Assembly, in regard to most political questions, cannot legislate, it can interpret the law, set standards of state behavior, and ask the International Court of Justice to give an advisory opinion. As Hammarskjöld declared, however, a high degree of compliance shown to Assembly resolutions may indeed bring them closer to being recognized as decisions having a binding effect on those concerned.

Professor Hans W. Baade expressed his concern that so much weight is being given to the views stated by representatives at the United Nations in the course of general debates prior to votes on Assembly resolutions. He questioned whether such views should be taken as the definitive view of that particular country on the questions at issue, because often the basic purpose of the representative’s remarks is really to influence the voting.

Professor Edward McWhinney asked Mr. Skubiszewski if General Assembly resolutions are not given a more important place in the hierarchy of formal sources of international law by certain writers on international law—for example, Dr. Manfred Lachs of Poland and Dr. Vratislav Pechota of Czechoslovakia, and even to some extent Professor Gregory Tunkin of the Soviet Union—than he has given them in his address.

Mr. Skubiszewski, in further response to Mr. Remee’s question, stated that, while he did not think a “right” under a resolution of the General Assembly could be vindicated before a court, he did not deny that the resolutions could and do produce other legal effects.

In answer to Professor Baade, he pointed out that a book recently published in Great Britain holds that the views supported by a particular country in general debates in the Assembly are “expressive” of that country’s position on the questions of international law being debated. He
added, however, that he thought they should not be considered as important as they sometimes seem to be regarded.

In response to Professor McWhinney, Mr. SKUBISZEWSKI discussed the views held by the late Judge Sir Hersch Lauterpacht and Professors Johnson and Tunkin. He then stated that he did not think General Assembly resolutions should be considered as authoritative as customary or treaty law. Under the Charter, there is no basis for attaching any special legal significance to unanimous resolutions or to resolutions that have the approval of the politically more important states. A unanimous resolution has its significance, irrespective of the Charter, as an expression of the opinion on law by almost all the countries of the world.

The CHAIRMAN thereupon adjourned the session at 5:15 p.m.
TOWARD SUPREMACY OF TREATY-CONSTITUTION BY JUDICIAL FIAT IN THE EUROPEAN ECONOMIC COMMUNITY

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TOWARD SUPREMACY OF TREATY - CONSTITUTION
BY JUDICIAL FIAT IN THE EUROPEAN ECONOMIC COMMUNITY


1. Increased interdependence of states in modern times has shaken the nineteenth century doctrines of extreme dualism and positivism. These doctrines would build an impenetrable wall between the international and national legal orders; they would elevate the state to the position of exclusive actor and deny the individual any standing in the international legal order; and, in the interpretation of a rule of law, they would exclude any regard for the political, economic, and social context in which the rule is applied.

This change is reflected in international law and in its instrumentalties, including treaties. The number of treaties has multiplied greatly. As the role of government in economic life has broadened, states have tended to include in their treaties clauses designed to impose obligations upon and grant rights to not only themselves but also individuals. Again, certain common purposes could not be achieved without common institutions; thus, states have entered into multilateral treaties establishing such institutions for consultation, coordination, and joint action. Many national constitutions have been modernized to allow delegation or transfer of national power to new international institutions (1). But, as the need for more integrated action increases, states search for new forms of association which, although going beyond the traditional organizational pattern, stop short of the fully integrated system of a federation. The result is a « chiaroscuro » enveloping the basic legal issues such as the hierarchy of treaty law and national law.

The European Community (2) is such a new association—a « person » in international law, distinct from the member states, with a distinct

(1) For excerpts from European constitutions and references to literature, see STEIN & HAY, Cases and Materials on the Law and Institutions of the Atlantic Area. See also SEIDL-HOVENVELDERN, Transformation or Adoption of International Law into Municipal Law, in International and Comparative Law Quarterly, 1969, p. 88.

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legal order which, however, interacts directly with the legal order of the member states. The treaty whereby the Community was established contains no specific clause decreeing supremacy of the Community legal order over the legal orders of the member states; and the judicial power of the Community Court of Justice is substantially more limited than the power of supreme or constitutional courts in contemporary federations.

As statesmen ponder whether the Community should evolve into a federation or a «confederation» in the nature of «Europe des patries» and as scholars dispute whether the Community is an «international» or «supranational» organization, national courts and the Community Court of Justice are faced with an increasing number of cases that demand immediate and concrete answers to specific questions involving the relationship between Community law and national law (3). Perhaps the most significant of the recent cases is one instituted by Flaminio Costa, a litigious Milanese attorney who carried his opposition to nationalization of electric power in Italy to court and, while thus far unsuccessful in his objective, provided the impulse for two notable judicial pronouncements: first, a judgment of the Italian Constitutional Court (4) that wrought consternation among the jurists of the Community in Brussels (5), led to a formal parliamentary inquiry in the European Parliament in Strasbourg (6), and sparked a controversy among scholars in Italy; and second, a judgment by the Community Court of Justice of constitutional import (7).


All translations into English in this article are this author’s own, except where otherwise indicated and except also the translations of the provisions of the Treaty Establishing the European Economic Community which follow the unofficial English version published by the Publishing Services of the European Communities 8012/6/12/XII/ 1961/5.


For a comment written from the viewpoint of German law, see Frowein, Zum Verhältnis zwischen dem EWG-Recht und nationalen Recht aus der Sicht des Gerichtshofes der europäischen Gemeinschaften, in Aussenwirtschaftsdienst des Betriebs-Raters, 1964, p. 233.


(6) Question écrite n. 27, in Journal Officiel des Communautés Européennes, August 11, 1964, p. 2161/64.

2. It all started with Mr. Costa's refusal to pay his electricity bill in the amount of 1.025 lire (3.08 dollars) to E.N.E.L. (8), the newly created governmental body that took over the Milan electric power system from a private concern by virtue of the 1962 nationalization law and implementing regulations (9). In an action brought before the Justice of the Peace (Giudice Conciliatore) of Milano, Costa, in his capacity as a consumer of electric power and as a shareholder in the nationalized concern, claimed that E.N.E.L. was not entitled to collect the bill because the nationalization law was contrary to a number of articles of the Italian Constitution, including the constitutional prohibition against parliamentarians voting in pursuance of a mandate, the prerequisites for a valid expropriation, and the «equal protection clause». In addition, he invoked article 11 of the Constitution, which provides as follows: «L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo». It was Costa's contention that the nationalization law contravened several specific provisions of the Treaty Establishing the European Economic Community; that the Community was precisely the type of international organization contemplated in article 11; that, by adhering to the Community treaty, Italy had agreed to limit its sovereignty in matters embraced by the treaty; and that, since the nationalization law infringed this limitation, which was sanctioned by the Constitution, the law was unconstitutional and therefore must be held invalid (10). On the basis of this argument, Costa demanded that the Milan court obtain a ruling on the issue of constitutionality from the Constitutional Court of the Republic, which alone had jurisdiction to determine constitutional issues. Moreover, Costa argued, whether there was a Community treaty violation depended upon an interpretation of that treaty; and, under article 177 of the same treaty, only the Community Court of Justice may give an authoritative interpretation of its provisions when such a question arises in a proceeding before a national court; in such event, a national court of last resort is obligated to suspend the proceeding and refer the question of interpretation of the treaty provisions for «preliminary decision» to the Community Court (11).

Maurice Lagrange, June 25, 1964). For a comment, see Frowein, supra, note 4; Gori, La preminenza del diritto della Comunità Europea sul diritto degli Stati membri, in Gior. It., 1964, 1, 1073.

(8) Enie nazionale energia elettrica impressa già dalla Edison Volta.

(9) Legge 6 dicembre 1962, n. 1643, Gazetta Ufficiale n. 316, 1 dicembre 1962; Leggi e decreti n. 1643, 1962, 5523, and subsequent decrees of the President of the Republic.


(11) Art. 177 provides in full:

«La Cour de Justice est compétente pour statuer, à titre préjudiciel».
By an order of September 10, 1963, the Justice of the Peace of Milan obliged Mr. Costa and referred the "preliminary" or "prejudicial" question of constitutionality to the Constitutional Court in Rome (12). Thus, the stage was set for the first judicial decision in the case.

3. The Constitutional Court rendered its judgment on March 7, 1964 (13). It apparently had no difficulty in rejecting the allegations of unconstitutionality, except that it had to deal with article 11 for the first time (14). The court interpreted that article as enabling the Italian Republic, with a view to the purposes specified therein, to adhere to treaties that limit its sovereignty upon approval given in the form of

a) Sur l'interprétation du présent Traité;
b) Sur la validité et l'interprétation des actes pris par les institutions de la Communauté;
c) Sur l'interprétation des statuts des organismes créés par un acte du Conseil, lorsque ces statuts le prévoient.
Lorsqu'une telle question est soulevée devant une juridiction d'un des États membres, cette juridiction peut, si elle estime qu'une décision sur ce point est nécessaire pour rendre son jugement, demander à la Cour de Justice de statuer sur cette question.
Lorsqu'une telle question est soulevée dans une affaire pendante devant une juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, cette juridiction est tenue de saisir la Cour de Justice.


(12) Giudice conciliatore di Milano, ordinanza September 10, 1963, in Foro it., 1963, II, 2968; Gaz. Uff., Nov. 2, 1963, n. 287, 5166; Giust. cit., 1963, III, p. 326. It appears that Costa filed two actions in the same court based on two separate bills in the same amount of lire. Thus there are technically two separate cases between the same parties involving, in the words of the Milan court, "the same object" (medesimo oggetto, Ordinanza January 21, 1964, infra, note 19 at p. 461) and handled by two different judges. The ordinanza of September 10, 1963 was rendered in the first of the two cases. A court is required to transfer the record to the Constitutional Court when two conditions are present: first, that upon summary examination, the issues prove not to be manifestly unfounded; and second, that it be in nature of a 'prejudicial' question, which in the instant case means that the lawsuit cannot be adjudged without recourse to the challenged law (CASSANDRO, The Constitutional Court of Italy, in American Journal of Comparative Law, 1969, p. 6). There is no appeal to a higher court from a judgement of an Italian Justice of the Peace. It has been suggested that in order to be able to decide whether the charge of violation of article 11 (and the Community treaty) was "manifestly unfounded" the Milan judge was required to interpret the treaty and therefore should have first requested such interpretation from the Community Court before he could refer this particular issue to the Constitutional Court (STENDARO, Discrezionalità ed opportunità del giudice di merito nella remissione di una questione pregiudiziale alla Corte di giustizia delle Comunità europee, in Temi, 1963, 1181).

(13) Supra, note 4.

(14) CATALANO, supra, note 4, at p. 405.
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an ordinary (as distinguished from a constitutional) law (15). But, the
court held that this ordinary law (and thus any treaty provision that
was thereby incorporated into the Italian legal order) may be modified
by any other ordinary law of parliament even though the adoption of
the modifying law would make Italy internationally liable for treaty
violation. « There is no doubt », the court said, « that the state must
honor its obligations or that the treaty possesses the effect given to it
by the law which approved it. But since the imperium of laws subsequent
time to that law must be maintained any possible conflict between
the two cannot raise questions of constitutionality ». Because of this
conclusion, the court, declared it unnecessary to « deal with the enature »
Of the Community, or with the allegation that the nationalization law
violated the Community treaty, or with the suggestion that the Com-

(15) The court did not accept the interpretation that article 11 had no
normative content but constituted solely an expression of the direction
of foreign policy. For the opposite view, see BALLADORE PALLIERI, Diritto costituzionale, Milano, 1950, pp. 344-345; BALLADORE PALLIERI, Diritto costituzionale, Milano, 1963, pp. 400-410.

(16) Giur ital., supra note 4 at pp. 538-39. It could perhaps be said that
by implication the Court rejected the argument urged upon it by E.N.El. and the
Avvocatura dello Stato that article 11 applies only to organizations concerned
directly with peace and justice such as the United Nations, which the
Constitution makers clearly had in mind, and found instead that it extended
also to bodies such as the Community. Argument by E.N.El. and by Avvo-
caturla dello Stato, in Giur. ital., supra, note 4 at 332-33. The Tribunale di Na-
poli rejected this argument with respect to the European Coal and Steel
Community Treaty (sent. April 22, 1964, in Foro it.; 1964, L. 1235, 1255). See
also Pretura di Roma, Ord. March 11, 1964, in Foro it., 1964, L. 896-898. The two
judgments rejected attacks against the constitutionality of the European Coal and
Steel Community Treaty. The legislative history of the Constitution seems
to indicate that European organizations such as the Community were intended
to be included within art. 11; cf. FALZONE, PALERMO, COSENTINO, La Costituzione della Repubblica italiana, Roma 1948, p. 43. The press reports a most recent
judgment of the civil court of Milan also dealing with the European Coal and

(17) Corte Costituzionale, May 18, 1960, n. 52, in Giur. it., 1960, L. 1, 1073; id., 11 March 1961, n. 1 in Giur. it., 1961, L. 861. The Court’s position is
supported by Pezzuolo, in Giur. it., 1961, L. 896-899, but the general position
position is opposed by QUADAR, Diritto internazionale pubblico, Palermo, 1949, p. 47
and Diritto internazionale pubblico, Palermo, 1966, p. 58, and CANSACCHI, in Giur. it., 1970, L. 1, 1073. But see MILLE, L’esecuzione dell’ordinamento italiano
dei atti internazionali istitutivi della Comunità economica europea e Euratom, in Raccolta di scritti in onore di A. C. Jemolo, v. III, Milano, 1963, pp. 425,
case seems to have closed another avenue that might lead to recognition in Italian law of the treaty supremacy principle with respect to any treaty, including the Community treaty.

This ruling of the Constitutional Court might have marked the end of the story in the Italian legal order. This would have been the case had the court of Milan obeyed the Constitutional Court and decided the case accordingly without, in the meantime, submitting the matter to the Community Court of Justice. Without such a submission it would have been for the executive Commission of the Community to consider whether Italy, through the failure of its courts to abide by article 177, had violated its Community treaty obligation and should, therefore, be brought before the Community Court (18). However, the Commission was spared this task since, even before the Constitutional Court had spoken, the same court of Milan in January 1964 issued a further order in which it noted Costa's allegation of the violation of the Community treaty, suspended the proceeding in Milan, and directed transmission of the record to the Community Court of Justice (19). As a «small claims» court from which there was no appeal, the Milan court apparently felt obligated according to article 177 to request also a preliminary ruling from the Community Court on the treaty issue.

4. The Community Court accepted the reference from Milan despite strenuous opposition to its jurisdiction by the Italian government and rendered its judgment on the preliminary question of treaty interpretation on July 15, 1964 (20). This judgment, however, must be read in conjunction with the opinion of the same court in an earlier case that dealt with an essentially identical legal issue. In that case, a Dutch importer of German chemicals sued in a Dutch court to recover from his government customs duties imposed upon him under a Dutch law (21), adopted after the Community treaty went into effect, which

(18) See articles 169, 170 of the Community treaty, infra notes 25 and 26. The Avvocatura dello Stato argued that the Constitutional Court could not «submit the case to an international court» because the Constitutional Court «cannot be placed within the framework of national judicial organs», in Giur. it., supra note 4, 533. Catalano seems to reach the same conclusion, in Foro it., 1963, IV, 67. See also Common Market Law Review, 1963, p. 318. On the obligation of other Italian courts to refer questions to the Community Court, see Catalano, in Foro it., 1964, V, 22-24.

(19) Giudice conciliatore di Milano, Ordinanza Jan. 21, 1964, in Foro it., 1964, I, at 460. This ordinanza was issued in the second of the two cases mentioned supra in note 12. In this ordinanza the court also referred to the Constitutional Court the allegations that the nationalization law violated still other articles of the Constitution in addition to those referred in the ordinanza of Sept. 10, 1963, supra, note 12.


(21) The new duties were included in the Tarifbesluit (Tariff Ordinance) of March 1, 1960, which repeated the nomenclature of the protocol of July 25, 1958, concluded by Belgium, Luxembourg, and The Netherlands and approved by the law of December 16, 1959. Community Treaty became effective on Jan. 1, 1958 (Recueil, infra, note 23 at pp. 9-10).
he claimed had increased the level of customs duties in contravention of an article in the Community treaty prohibiting any increase. The defendant Dutch government claimed that this article imposed obligations on member governments only: neither its text nor the intent of the parties to the treaty permitted an interpretation to the effect that an individual could acquire from that article a treaty right that he could press in a national court (22). The Dutch court referred the « preliminary question » of treaty interpretation to the Community Court, which held—disregarding the views of the Dutch, Belgian, and German governments and of its own Advocate General, and responding instead to the observations submitted by the Community Commission—that the treaty article in question did indeed create an immediate right in any individual in the Community (such as the Dutch importer) to seek relief in national courts in case of the violation of the prohibition (23).

The Community Court reasoned that, in order to determine « whether a provision of an international treaty » did create such a right, one must consider « its spirit, its structure (économie), and its wording ». The Community treaty is « more than a treaty imposing mutual obligations upon the contracting governments only »; the objective was to create a Common Market directly concerning the people who as individuals are directly affected by the working of the institutions, are called upon to participate as individuals in the European Parliament and the Economic and Social Committee, and possess the right in national courts to rely directly upon Community law as interpreted ultimately by the Community Court. The Court held:

« qu'il faut conclure de cet état de choses que la Communauté constitue un nouvel ordre juridique de droit international, au profit duquel les États ont limité, bien que dans des domaines restreints leurs droits souverains, et dont les sujets sont non seulement les États membres mais également leurs ressortissants;

que, partant, le droit communautaire, indépendant de la législation des États membres, de même qu'il crée des charges dans le chef des particuliers, est aussi destiné à engendrer des droits qui entrent dans leur patrimoine juridique;

que ceux-ci naissent non seulement lorsqu'une attribution explicite en est faite par le Traité, mais aussi en raison d'obligations que le Traité impose d'une manière bien définie tant aux particuliers qu'aux États membres et aux institutions communautaires; » (24).

(22) The article in question (art. 12) provides: « Les États membres s'abstiennent d'introduire entre eux de nouveaux droits de douane à l'importation et à l'exportation ou taxes d'effet équivalent, et d'augmenter ceux qu'ils appliquent dans leurs relations commerciales mutuelles ».
(24) In Recueil de la Jurisprudence de la Cour, supra note 23, at p. 23.
The fact, the Court added, that the member states and the Commission have the authority to institute a proceeding for bringing a treaty violation before the Community Court under articles 169 (25) and 170 (26) does not mean that individuals whose rights were impaired by the same violation could not pursue national remedies for the violation in national courts. Their right to do so is an added guarantee against treaty violations.

In this broad, novel context the Court found that the article in question, having laid down a clear and unconditional prohibition against raising tariffs that is very nature lends itself perfectly to producing a direct effect upon persons without any need for legislation by member states, must be interpreted as having direct effect and giving rise to individual rights which the national courts must vindicate, regardless of the fact that it designates the states as subjects of the obligation (27).

(25) « Si la Commission estime qu'un État membre a manqu d'une des obligations qui lui incombent en vertu du présent Traité, elle émet un avis motivé à ce sujet, après avoir mis cet État en mesure de présenter ses observations. 

Si l'État en cause ne se conforme pas à cet avis dans le délai déterminé par la Commission, celui-ci peut saisir la Cour de Justice. »

(26) « Chacun des États membres peut saisir la Cour de Justice s'il estime qu'un autre État membre a manqué à une des obligations qui lui incombent en vertu du présent Traité. 

Avant qu'un État membre n'introduise, contre un autre État membre, un recours fondé sur une prétendue violation des obligations qui lui incombent en vertu du présent Traité, il doit en saisir la Commission.

La Commission émet un avis motivé après que les États intéressés ont été mis en mesure de présenter contradictoirement leurs observations écrites et orales.

Si la Commission n'a pas émis l'avis dans un délai de trois mois à compter de la demande, l'absence d'avis ne fait pas obstacle à la saisine de la Cour de Justice. »


On the Van Gend case and the problem generally, see six separate reports prepared for the Second International Colloque of European Law published for the Association of European Jurists, Paris, by N.V. Uitgeversmaatschappij W. E. J. Tjekn Willink Zwolle under the title « Le problème de l'applicabilité directe et immédiate des normes des traités instituant les Communautés Européennes »: Rapporteurs: Cattapano et Monacoo (Italy); Jacobit (France); Teu Koekoeks (The Netherlands); Oppelts (Germany); Reaux (Belgium); Rapporteur Général Enaux.
However, this is as far as the Court was prepared to go. Although it spoke of Community law « which is independent of the law of the member states » and of treaty rights of individuals which « national courts must vindicate », the Court failed to specify that these rights must prevail over conflicting national legislation. The Court was not to take this next step until two years later in the Costa affair, and then only after the Italian Constitutional Court had given its opinion in the same matter.

5. When the request for a « preliminary decision » in the Costa case reached the Community Court in 1964, that court was doubtlessly cognizant of the ruling by the Italian Constitutional Court. This ruling caused concern in Community circles, not necessarily because of any belief that the nationalization law in fact violated the Community treaty, but rather because of the holding of the Italian Constitutional Court that the Milan court must disregard a treaty right if it conflicts with a subsequent national law.

Faced with this challenge to the supremacy of Community law, the Community Court started from the basic concept formulated in the Van Gend case that, « unlike ordinary international treaties », the Community treaty established a distinct legal order. That order, the court said in developing this concept further, « has been integrated with the legal orders of member states » and their courts are bound by it:

« Infatti, istituendo una Comunità senza limiti di durata, dotata di propri organi, di personalità, di capacità giuridica, di capacità di rappresentanza sul piano internazionale, ed in ispecie di poteri effettivi provenienti da una limitazione di competenza o da un trasferimento di attribuzioni degli Stati alla Comunità, questi hanno limitato, sia pure in campi circoscritti, i loro poteri sovrani e creato quindi un complesso di diritto vincolante per i loro cittadini e per loro stessi. 

Tale integrazione nel diritto di ciascuno Stato membro di norme che proprmanano da fonti comunitarie, e più in generale, lo spirito e i termini del Trattato, hanno per corollario l'impossibilità per gli Stati di far prevalere, contro un ordinamento giuridico da essi accettato a condizione di reciprocità, un provvedimento unilaterale ulteriore, il quale pertanto non potrà essere opponibile all'ordine comune. » (28)

Since the Court was unable to point to a specific « supremacy » provision in the treaty it had to rely on general provisions in addition to the basic concept. To tolerate interference with the direct effect of Community law by member states would, the court reasoned, jeopardize compliance with their treaty obligation « to abstain from any measures likely to impair the attainment of the treaty objectives » (Art. 5 (2)), bring about discrimination on grounds of nationality which the treaty

(28) Sentenza della Corte nel procedimento 6/64, Costa c. E.N.Bl., July 15, 1964, pp. 11-12 of the mimeographed text (emphasis added).
prohibits (Art. 7), and render treaty obligations contingent rather than unconditional. The treaty expressly specifies the instances, the court proceeded, when a member state may act unilaterally and when it must request authorization. These provisions and the provision that makes regulations issued by Community institutions «directly applicable in all member states» (29) would be meaningless if a member could defeat its obligations simply by enacting a contrary national law.

These factors, taken together, led the court to conclude that the law «born of the treaty» and «issuing from an independent source» cannot, because of its «specific, original character», be defeated in a national court by any «provision of national law without jeopardizing the legal base of the Community itself». The transfer of certain rights and obligations from the legal orders of the member states to the legal order of the Community has brought about a definitive limitation of sovereign rights, and this limitation is immune from a subsequent unilateral act. Thus, if, as in the Coste case, a party to a litigation in a national court relies on a treaty right and it is necessary to interpret the treaty to determine whether such right exists, article 177 must be applied and the Community Court must be asked to render the interpretation regardless of any national law that may have been enacted subsequently to the treaty purporting to modify it.

The court nevertheless recognized the limits of its judicial power derived from the allocation of jurisdiction between it and the national courts under article 177: the Community Court, on reference from the Milan court, could only interpret the treaty provisions «taking account of the legally relevant data set forth by the [court of Milan]», but it could not declare a specific Italian law void as contrary to treaty law (30). This function under the treaty was reserved to the Italian court.

(29) Art. 189 provides: «... Le règlement a une portée générale. Il est obligatoire dans tous ses éléments et il est directement applicable dans tout État membre...».

Art. 191 provides: «Les règlements sont publiés dans le Journal officiel de la Communauté. Ils entrent en vigueur à la date qu'ils fixent ou, à défaut, le vingtième jour suivant leur publication...».

(30) Arrêt dans l'affaire 6/64 cit., at p. 10. The Court noted on the same page that under article 177 it may render an interpretation of a treaty «à titre préjudiciel» but «la Cour ne peut, ni appliquer le traité à un espèce déterminé, ni statuer sur la validité d'une mesure interne au regard de celui-ci, comme il lui serait possible de le faire dans le cadre de l'art. 164». In the first case under article 177, the court rendered a strictly «abstract» interpretation, that is, one not specifically related to the case before the national court; but the Community Court upheld its right to redefine the questions put to it by the national court in the light of the record of the case and the facts therein, see «Arret de la Cour dans l'affaire 13/61», Geus c. Bosch et Van Rijn, 6 avril 1962, in Recueil de la Jurisprudence de la Cour, VIII, p. 89. The court has followed this pattern in subsequent cases. Behr believes that the court need not limit itself to an abstract interpretation. (Behr (supp.), supra, note 11, at p. 14).
Having reached these general conclusions, the court proceeded to examine the treaty provisions that Costa, in his action in Milan, alleged were violated by the Italian nationalization law. In the pattern set by the Van Gend case, the court interpreted these provisions in order to determine whether they created rights upon which individuals like Costa could rely in national courts. Of the four provisions invoked, the court interpreted two (article 53 and a section of article 37) as creating such rights, while the remaining two (articles 102 and 93(1)) the court viewed as imposing obligations on states only and not benefiting individuals directly (31). The record of the case along with the Community Court’s judgment was then duly returned to the Milan court.

6. The court of Milan, having pursued the two procedures prescribed by Italian law and the Community treaty, respectively, thus received a ruling from the Community Court that treaty rights must be given precedence over any conflicting national law; on the other hand, it was directed by the Italian Constitutional Court, to apply the national law as lex posterior, whether or not it impaired a treaty right.

An attempt to pursue the predicament of the Milan court into the complex interstices of Italian law and procedure would exceed the scope of this article and the competence of this writer. As a practical matter, although the issue of constitutionality is presently again before the Italian Constitutional Court with reference to other articles of the Constitution, there is no indication that the court will show more sympathy for the second attack against the nationalization law than it did for the first challenge. Again, although the question of whether the nationalization law conformed to the treaty has been under consideration by

(31) More specifically, the court concluded that article 102, prescribing a procedure for the prevention of «distortions» of competition by enactment of new national laws, and article 93(1) and (2), dealing with procedures before the Commission regarding removal of state subsidies, imposed obligations upon the member states only and did not create individual rights. On the other hand, article 53, prohibiting any new restrictions on the right of establishment, being «complete» and capable of direct effect upon individuals, was held to create individual rights. The court pointed out, however, that this article is not infringed by a new law as long as nationals of other member states under the new law are not treated less favorably than local nationals. Costa argued that the nationalization law, by excluding all private persons, Italians as well as nationals of other member states, from access to an important sector of Italian economy, violated article 53. Finally, responding to the charge that the nationalization law violated article 37 which prohibits, inter alia, any new state monopolies of a specified nature, the court held that this prohibition is also directly enforceable in national courts. The court defined the prohibited monopoly as one introducing new discrimination among Community nationals in conditions of supply and demand with respect to transactions in a product in the flow of commerce that may be the subject of competition and trade, providing that the monopoly affects such trade. It will be for the national judge, the court concluded, to determine whether any new law (such as the Italian nationalization law) in effect introduces a prohibited monopoly that may affect imports and exports among nationals of members states, pp. 13-17 of the mimeographed text, note 7 supra.
the Commission of the Community, there is little evidence, judging from
the Commission’s views summarized in the Community Court’s judgment,
that the Commission has reached or is likely to reach a conclusion ad-
verse to the Italian Government. Since public ownership as such is not
incompatible with the treaty (32), the only question that could arise
would be whether certain features of the law or its application constitu-
ted a concealed subsidy, a prohibited monopoly, or discrimination.

However, these pragmatic considerations do not alleviate in any
way the seriousness of the conflict between the two courts on the basic
issue of the normative hierarchy in the Community and national legal
orders. Three questions arise:

1. Do the Community treaty and regulations give rise to rights
that individuals can enforce in national courts?

2. In the Community legal order (and before the Community
Court), is a right that is derived from the Community treaty or from
a Community regulation (as authoritatively interpreted by the Com-
pany Court) superior to national law even if the latter is subsequent
in time?

3. If the answers are in the affirmative, must the supremacy be
given effect by national courts; and what is the legal situation if the
traditional national constitutional practice governing «directly applica-le» (or «self-executing») treaties does not ensure such effect?

There is no doubt that the Van Gend case answered the first question
in the affirmative. One phase of the lively debate surrounding that
case centered precisely on whether the judgment provided—or, in fact,
could provide—a reply also to the second or possibly to the third of
these questions. According to the most conservative view, the judgment
was nothing more than an elaboration of a rule enunciated by the Per-
manent Court of International Justice in its advisory opinion on the
access of certain individuals to the Danzig courts, in which the Court
recognized for the first time—and contrary to the «classic» doctrine—the
existence in international law of «self-executing» treaties and provided
a rule for their interpretation. Whether a treaty grants given individu-
als rights that they may press in national courts «depends», the Court
concluded, «upon the intention of the contracting parties»:

[A]ccording to a well established principle of international law.
...an international agreement, cannot, as such, create direct rights and
obligations for private individuals. But it cannot be disputed that
the very object of an international agreement, according to the intention

(32) Article 222 provides that the treaty «ne préjuge en rien le ré-
gime de la propriété dans les États membres». In the January 21 ordinanza
the Milan court seems to say that the nationalization law with the implement-
ing presidential decrees are in fact contrary to articles 102, 93, 53 and 57 of
the Community Treaty, see Foro it., supra note 19, 463. The court also notes
the «jurisprudence of the Court of Justice of the E.E.C.».
of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable in national courts. That there is such an intention in the present case can be established by reference to the terms of the [agreement] ... » (33).

The holding in the Van Gend case, it could be argued (if one wishes to disregard the broad language of the Community Court in the « Reasons » of the judgment), was merely an application of this rule of interpretation to another ordinary international treaty by another international court; at most, the Community Court, in interpreting the Community treaty, could be said to have modified the Danzig rule to the extent that it discarded the rebuttable presumption against the « self-executing » effect, which some had read into that rule, or even found a presumption for (instead of against) the direct applicability (34), or considered a provision « directly applicable » even when the specific language of the provision addressed itself to states exclusively (35). In any event, according to this view, since the court said nothing about the supremacy of Community treaty law, it obviously did not answer the second or third of the questions; and, since in principle the Community treaty must be treated like any other treaty, the effect to be given to a « directly applicable » provision of that treaty—and to a right arising under it—will depend on the national constitutional law and practice concerning treaties. That is clearly the position the Italian Constitutional Court took before the Community Court had rendered its decision in the Costa case.

It is beyond dispute that in the Costa case the Community Court provided an answer to the second question by declaring the absolute

(33) Jurisdiction of the Courts of Danzig, P.C.I.J., ser. B, No. 15, at pp. 17-18 (1928) (advisory opinion). « The intention of the parties », the Court continued, « which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive. This principle of interpretation should be applied by the Court in the present case. Wording and general tenor... show provisions directly applicable... » (Emphasis added).

Cf. the classic American definition of a « self-executing » treaty by Mr. Chief Justice Marshall:

« A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. 

In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court », in Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

(34) JACOMET, supra note 27 at pp. 7-10, 14.
supremacy of Community law over national law. Is it possible, or even necessary, however, to interpret this judgment to the effect that whether such supremacy will prevail in national courts will still depend upon national constitutional law and practice?

7. National practice, as Professor Ophüls points out, is based on variations of one of two basic doctrines: one, derived from natural law thinking and reflected in the Permanent Court's opinion, is embodied in the United States Constitution, which requires national courts to apply a «self-executing» provision of a treaty as the «supreme law» of the land (36). This effect attaches the moment the treaty comes into force and no legislative measure is required. Treaty supremacy is absolute with respect to the law of component states of the Union. Theoretically, if the concept of «higher laws» were to prevail completely, this treaty supremacy should also be absolute with respect to federal law and should extend not only to preexisting but also to subsequent federal law. Both Jefferson (37) and Jay (38) assumed this to be the case. However, according to a rule evolved by the United States Supreme Court, a treaty modifies a preexisting conflicting federal law but is itself modified by subsequent federal law if the two cannot be reconciled (39).

The other doctrine, inspired by the theory of strict separation of international and national law, does not admit of «direct applicability» and requires in each case a «transformation» of treaty law into the national legal order. Since under this view a treaty provision can become applicable as national law only if «transformed» by legislative action, a subsequent national law will have to be given predominance by the courts if it is contrary to a treaty provision.

In the Italian constitutional practice, which is inspired by the transformation doctrine, a law of parliament is required in order to make a treaty provision applicable with the effect of law in national courts (40). If the Community treaty is an «ordinary» treaty approved

(36) Article VI of the United States Constitution provides: «This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall, by the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding».

(37) Jefferson said in 1790: «A treaty is the law of the land, and a law of superior order because it not only repeals past law, but cannot itself be repealed by future ones», in Story, Commentaries on the Constitution of the United States, vol. II, 1891, para. 1841: «Yet Mr. Jefferson afterwards (in Nov. 1793) seems to have fluctuated in opinion, and to have been unsettled as to the nature and extent of the treaty-making power». Referring to 4 Jefferson’s Correspondence, 497, 498).

(38) See The Federalist, n. 64, 1961 (Rossiter ed.), p. 394.

(39) Whitney v. Robertson, 124 U.S. 190 (1888); John T. Bell Co. v. United States, 204 F. 2d 67 (C.C.P.A. 1953), and other cases listed in Henkin, Arms Control and Inspection in American Law, 1958, p. 174.

(40) Generally the parliament adopts a single law containing both an authorization to ratify and an «order of execution». The Italian law on
by an ordinary (as distinguished from constitutional) law any subsequent ordinary law must be applied in Italian courts even if it is contrary to the treaty. This is precisely the view taken by the Italian Constitutional Court, which did not even take note of the new concept proclaimed and defined in the Van Gend case that the Community treaty was a unique type of treaty.

It could be argued that, had the Community Court in the Van Gend case expressly stated the rule of absolute supremacy as it did two years later, the outcome before the Italian Constitutional Court might have been different. There was nothing in the Van Gend case—except perhaps the constitutional situation in the Netherlands (41), judicial restraint, or concern with possible political repercussions—that would have prevented the Community Court from taking this step at that time. However, it is questionable whether even an express statement of supremacy would have swayed the Italian Constitutional Court, considering the general attitude manifested by that court and by the Avvocatura dello Stato. The judgment—summary and brief as it is on this issue—contains not a hint that the court was prepared to accept the new idea of the Community and was willing even to consider anything except the traditional lex posterior derogat priori rule that is applicable to treaties generally. One cannot, however, go so far as to assume that the consequences of the application of this rule were not envisaged by the learned constitutional judges. As was shown earlier, the question of Community law supremacy arises not only in connection with directly applicable treaty provisions but particularly, and more importantly, with respect to Community law in the form of regulations by which the Council, and to a limited extent the Commission, are required to evolve the legal framework for the economic union and which, under the treaty, become effective in the national legal orders directly upon adoption by the


(41) Art. 66 of the Netherlands Constitution—as amended—expressly assures supremacy of treaty provisions «by which everyone is bound» over even subsequent legislation. See note 47 infra.
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respective Community organ. What would be the value and logic of this scheme if, for instance, in the antitrust field the Italian Parliament, unwilling to allow the enforcement of Regulation 17 of the Council of Ministers, could adopt a law nullifying the effects of that regulation in Italy? It surely is no answer to say that any other member government or the Commission would be entitled to bring a complaint against Italy before the Community Court (42). The fact is that for a long time to come, national authorities in antitrust and other fields will play a vital role in the application and enforcement of Community law, and member states have relied on such reciprocal enforcement as an essential component of the treaty scheme which is unique precisely because of its impact upon individuals. If this component of the scheme can be neutralized by a simple law of parliament, the legal security of the system will be reduced even if thus far there is every indication that no parliament will act lightly in violation of Community law.

It is not difficult to understand how a court, concerned exclusively with its own constitutional scene, would reach the conclusion the Italian court reached in the Costa case. The astonishing reference in the court's opinion to the executive Commission of the Community as the « advisory » Commission (43) suggests lack of familiarity with Community law. Italy, of all member states, is geographically farthest from the seats of the Community institutions and thus is most remote from their activities. Again, the politically explosive nature of the nationalization issue may have conceivably influenced the Avvocatura dello Stato toward seeking to block any possible avenue through which the nationalization law could be questioned (44).

If the Constitutional Court had been so inclined it surely could have found a way to accept the supremacy of Community law even without impairing traditional Italian constitutional practice. It could have interpreted article 11 of the Constitution to the effect that any national law contrary to a treaty falling within the scope of that article (such as the Community treaty) is unconstitutional. This view, which would have assured the Community treaty (and all treaties included in article 11) the hierarchical position of a constitutional law, was urged upon the court in the Costa case and finds support among some writers (45). Since in principle the Constitutional Court, before passing

(42) See articles 169 and 170, supra notes 25 and 26.
(43) See Giur. it., supra note 4, p. 533.
(44) The question may be raised to what extent the judgment reflects the present state of legal thought in Italy. Cf. in another context, Gozzi, Lo studio interno e comparativo della giurisprudenza e i suoi presupposti: le raccolte e le tecniche per la interpretazione delle sentenze, in Foro it., 1964, V, 73, especially § 3, § 6 notes 41 and 44 for observations of interest concerning legal education and thought in Italy.
(45) CATALANO, in Foro it., 1964, 1, 499-575 and Foro it., 1964, V, 24; also F. B., in Giustizia civ., 1964, III, pp. 102-103; Gual, supra note 27; Piola-Caseili, supra note 4.
upon the compatibility of a national law with the treaty, would have to have before it an interpretation of the treaty by the Community Court, this view would have also assured compliance with article 177.

It is noteworthy that a similar difficulty in assuring supremacy of Community law over later national law could arise in Germany, which also follows the « transformation » doctrine; the German constitutional provisions governing the treaty-federal law relationship resemble the Italian pattern. In particular, article 24 of the German Basic Law—like article 11 of the Italian Constitution—contemplates transfer of sovereign powers to international organizations and limitation on national sovereignty. However, there has been no final judicial determination as yet of the issue whether subsequent federal legislation modifies an earlier treaty or an act of an international organization. On this question the writers disagree (46). On the other hand, there should be little difficulty in The Netherlands, where the Constitution was amended in 1953 in order to ensure supremacy in national courts of any « directly applicable » treaty provisions (47). In France, the Constitution specifically decrees treaty supremacy over national law, whether enacted before or after the date of the treaty, and the trend in the jurisprudence appears to be in the direction of requiring the national judge to enforce the rule. The application of this rule in France, however, is conditioned

(46) Art. 24 of the Basic Law of 1949:
« (1) The Federation may, by legislation, transfer sovereign powers to international organizations.
(2) In order to preserve peace, the Federation may join a system of mutual collective security; in doing so it will consent to those limitations of its sovereign powers which will bring about and secure a peaceful and lasting order in Europe and among the nations of the world... »

Art. 25 of the Basic Law:
« The general rules of international law shall form part of federal law. They shall take precedence over domestic law and create rights and duties directly for the inhabitants of the federal territory. »

Translation from PEASLER, Constitutions of Nations, vol. II, The Hague, 1956, p. 54. See also arts. 59, 70 (1). FROMWEIN discusses the conflicting views and includes ample references to literature. He concludes that IPSEN, MAUNZ, NICOLAYSER, and GÖTZ appear to interpret art. 24 as assuring Community law supremacy over later national law, but JAENICKE disagrees (FROMWEIN, supra note 4, at p. 237).


upon reciprocal acceptance of the same rule by other parties to the treaty. This opens the possibility for French « retaliation » if Italy follows the rule declared by its Constitutional Court in the Costa case (48). The Supreme Court of Luxembourg has established firmly the rule of absolute treaty supremacy by its own jurisprudence (49). As for Belgium, where the Constitution is silent on this point, the Procureur Général at the Supreme Court only recently denied that the rule giving preference to subsequent law over treaty law has been accepted by the Supreme Court, and instead he foreshadowed an evolution of the jurisprudence toward treaty supremacy, particularly as concerns the European integration treaties (50). The trend in the member states thus appears to be distinctly toward the supremacy of all treaties—an other fact that one would assume would have provided food for thought for the high Italian court. This brief survey confirms, however, that the problem as it has arisen in Italy of assuring supremacy to Community law might also occur in Germany and possibly in Belgium if the traditional constitutional practice concerning international treaties is followed in national courts.

8. It has been argued with considerable persuasiveness that the Community treaty, as interpreted by the Community Court, calls for a new doctrinal basis upon which « absolute » supremacy of Community law over national law including constitutional law, must be founded and enforced both in the Community and national legal orders.

According to one view (51) the member states, by relinquishing their sovereign rights in specified areas and transferring them to the Com-


For a recent case in which the Conseil d’État found no conflict between the Community treaty and a Ministerial Decree see Droit Administratif, 1964, p. 438, with a note by Lauradère.


(51) Opûls, supra note 27, pp. 25-27; Opûls, Quellen und Aufbau des europäischen Gemeinschaftsrechts, in Neue Juristische Wochenchrift, 1963, 1697, 1958. See also Ipsen, Europäisches Gemeinschaftsrecht, in Neue Juristische Wochenchrift, 1964, 339, 342, listing Bayer, Glaesner, Kraus, Mat-
Community, have removed the obstacles (based upon national sovereignty and reflected in national constitutional practice) that would normally stand in the way of direct effect of the treaty in national law, and thus have created an entirely new and different concept of «immediate applicability». Upon conclusion of the treaty providing for such transfer, the sovereign rights that were thereby transferred to the Community were amalgamated in the hands of a new legal person, thus bringing about a division of jurisdiction with respect to subject matter between the Community on one hand and the member states on the other. While under the American doctrine of «self-executing treaties» a treaty provision becomes effective in national law «with the assistance of the sovereign», and under the transformation doctrine «through the means supplied by the sovereign», under this new doctrine embodied in the Community treaty the effect upon national law occurs as a result of a breach or «break-through» (Durchgriff) of sovereignty. Thus, when a state enacts a law that is contrary to an ordinary treaty, it violates international law, but the law itself is valid. However, when a member state enacts a law contrary to a directly applicable Community law provision, it attempts to act beyond and outside its sovereignty (not unlike a state seeking to act beyond its territorial sovereignty), and the law is a nullity. When a national court is called upon to apply Community law, it is in the same position as a state court in the United States or a court of a German Land when they are required to apply federal law. In this system there is clearly no place for the lex posterior rule. This means that a national court can no longer apply a national law that conflicts with Community law (as interpreted by the Community Court) even though the Community Court did not (and could not) specifically pass upon the validity of that national law in a proceeding under article 177 (52).

(52) In a proceeding under articles 169 and 170, the Community Court can declare such a law contrary to the treaty. Ophûls appears to suggest that in such a proceeding the Community Court can declare the law void with direct effect in national law (Bentzer, supra note 27, at pp. 26-27) while Rigaux holds that a court's decision in that proceeding «has no immediate effect in the internal legal order and binds the state only» (Riaux, Observations, Journal des Tribunaux, 1963, pp. 190, 191). This was also the position of the Italian Government in the Costa case, as quoted by Advocate General Lagrange in his Conclusions, supra note 7, at pp. 3-4. Although Rigaux concludes that a Belgian judge is bound by a decision of the Community Court under article 177 and his judgment disregarding such a decision would be annulled by the Cour de Cassation, he seems to make this conditional upon «internal constitutional law», ibid., at pp. 191-92.

Catalano and Monacelli appear to agree with Ophûls that transfer of jurisdiction to the Community brings about, as a corollary, lack of jurisdiction of member states. Their emphasis is on the difference between the Community
Another view, purporting to reject the international law concepts of treaty-national law relationship as well as federal-state analogies, is based upon the apparently simple proposition that the Community treaty itself embodies the principle that "Community law supersedes national law." This unwritten rule is necessarily implied by the treaty and by the very nature of the Community because it is functionally indispensable for the very existence of the Community and for the achievement of the objectives laid down by the member states in the treaty (53). The need for such a rule springs from the necessity to ensure uniform effect and application of Community law and thus to avoid the divergencies and discriminations that might arise from the differing national constitutional practices described in the preceding section. The rule is thus derived from the treaty through a principle of interpretation. It is pointed out that the Community Court itself resorted to the principle of implied power when it sought to determine the limits upon the powers of the institutions of the Community (54). This principle is reflected in a federal context in United States law (55), and it was applied in an international organization context when the International Court of Justice concluded that the United Nations possessed certain implied powers not specified in its Charter (56).

The first view, and possibly also the second view, appear to lead to the following conclusion in Italian and German law: Since the Community treaty, embodying the supremacy rule, was adhered to by Italy in accordance with article 11 of the Constitution, and by Germany in accordance with article 24 of the Basic Law, and was made part of national law in both states through an act of parliament, national courts are required to apply the supremacy rule irrespective of any

and other treaties with reference to "will formation." Acts of the institutions of the Community are not the result of the "fusion" of the will of the states (as are international treaties) but they express a new will of a Community organ. But these two authors, while insisting that the concept of direct applicability under the Community treaty is different from that of a "self-executing" treaty, do not deal expressly with the position of a national judge faced with a conflict between the treaty (or a Community act) and a later national law, see Rapport cit., supra note 27, at pp. 84-9, passim.

(53) See Zwirnert, Der Einfluss des europäischen Gemeinschaftsrechts und die Rechtsordnung der Mitgliedstaaten, in Rechtsprechung der Mitgliedstaaten, 1963, p. 601. See also Gauthier, Incidences des Communautés européennes sur le droit interne des Etats membres, in Annales de la Faculté de droit de Liège, 1963, p. 21, who suggests that the "priority" of the Community law is necessary for the same reasons that require priority to be given a social group interest over a "partial" interest.

(54) Zweigert cites as examples Case n. 8/55, in Sammlung der Rechtsprechung des Gerichtshofes, vol. VII, 296, 312; Case n. 20/59, ibid., vol. VI, 685, 708; Case n. 25/59, ibidem, 747, 781. All pertain to the European Coal and Steel Community Treaty.


subsequent national law. This is a logical result even though the two constitutional articles are not construed as according constitutional status to the Community treaty or any other treaty. In fact, under this theory Community law would have a status superior to that of a constitutional law.

It should be made clear that neither of the two views set forth here has received specific approval in national courts or general acceptance in the literature, even though they are supported by respectable authority. A strong argument can be made, however, that in the *Costa* judgment the Community Court in principle embraced the new approach and held that the rule prescribing supremacy of Community law, although originating in the Community treaty, binds national courts directly and must be applied by them regardless of any contrary national constitutional provisions concerning treaty law in general (57). If this view is adopted, an Italian court would be free to proceed with an inquiry into whether the nationalization law was consistent with the Community treaty as it was interpreted by the Community Court despite the implication in the judgment of the Constitutional Court that such inquiry was irrelevant. Whether an Italian court would choose this course is obviously an open question. However, at least one Italian author has suggested that precisely because of the absolute supremacy of the Community law, the Constitutional Court did not have jurisdiction to deal with the issue of an alleged Community treaty—Italian law conflict and presumably the trial court would be free to proceed with the necessary inquiry (58).

(57) Frowein, supra note 4, at p. 236 suggests that this interpretation is one of the future. See Conclusions of Advocate General Lagrange, supra note 7, at pp. 7-8. The Advocate General said:

«Without wishing to have recourse to doctrinal concepts, which are far too controversial, on the nature of the European Communities, or to take sides between a "federal Europe" and a "Europe of fatherlands", or between the "supranational" and "international" concepts, the judge (this is his function) can only consider the treaty as it is. The treaty establishing the EEC — this is simply a statement of fact — like the other two European treaties, creates its own legal order, separate from the legal order of each of the member states, which, however, replaces (the latter orders) in part according to exact rules laid down by the treaty itself, rules that consist in agreed transfers of jurisdiction to common institutions.» (Ibid., at p. 5).

The specific argument in Italian law might be that the rule *lex posterior derogat priori* contained in art. 15 of the Preliminary Provisions of the Civil Code was modified by the Law of Oct. 14, 1957, No. 1203, approving the European Economic Community treaty to the extent a modification was necessary to assure the supremacy of the treaty and Community regulations over prior and subsequent Italian law.

(58) Miglietta, *La nazionalizzazione dell'energia elettrica e il diritto delle Comunità Europee*, in *Foro ped.*, 1964, IV, 18. The argument appears to be that, because of the special nature of the Community system, the pattern of adoption of Community law based upon a treaty falling within the scope of article 11 of the Constitution is not subject to the rules that govern ordinary treaties. In fact, a new, different system was created which is superior to any prior Italian constitutional law or any prior or subsequent ordinary law. Because of the supremacy of the Community system over the Italian legal
9. The judgment in the *Costa* case may be interpreted as holding that Community law (that is, the treaty and the regulations) is superior to national law, including national constitutions, not only in the Community legal order but also in the national legal orders and that the supremacy rule is directly and immediately applicable by national courts, any contrary national provisions regarding ordinary treaties notwithstanding. If this is the correct interpretation, it is perhaps the first time in history that a court established by an international treaty has asserted its power to determine, with effect not only in the «international» (or Community) legal order but also in national law, the hierarchical value of the very norm to which it owes its existence. If one accepts the new doctrinal basis suggested above, the Court could be said to have dealt with the Community treaty as if it were a constitution rather than a treaty and in effect to have rejected the public international law rationale for its power. One is reminded of the recent opinion of the Supreme Court of the United States in the controversial *Sabbatino* case, wherein the Court rejected the international law or «comity» rationale for the «act of state» doctrine and replaced it with a new rationale drawn from the «constitutional underpinnings» of the federation (59).

Recognition on the part of the Community Court in the *Van Gend and Costa* cases that its power to decree the supremacy of Community law does not embrace the power specifically to declare a given national law invalid prevents that court from taking the step taken by the United States Supreme Court when it asserted its power to strike down a state law or prior federal law violating a treaty. In the context of the Community, this gap may not be of decisive importance if it is realized that the decision of the Community Court interpreting the relevant Community law as well as the supremacy rule itself is binding directly upon the national judge.

As a practical proposition, it will be necessary in any case in Italy, and possibly also in Germany and Belgium where the principle of supremacy of treaty law generally (or Community law especially) over subsequent legislation is not part of established constitutional practice as yet, to adjust such practice accordingly, either by a decision of a national tribunal or by a legislative or constitutional act. The competent

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system, no question of constitutionality can arise for the Constitutional Court, and the supremacy must be given effect by ordinary and «special» Italian courts. See also *Stendahl*, supra note 12, at 1181. As to the legal effect of the Community Court’s judgment rendered in one case upon other cases before national courts involving the same question of interpretation of the same treaty provision see *Affaires jointes 28 à 30-02, Da Costa en Schouwke N.V., Jacob Meijer N.V. et Hucobst-Holland N.V. c. Administration fiscale néerlandaise*, March 27, 1963, in *Recueil de la Jurisprudence de la Cour*, 1963, IX (1), p. 65. For a comment on those cases see *Hay, Res Judicata and Precedent in the Court of Justice of the Common Market*, in *American Journal of Comparative Law*, 1963, p. 404.

Italian Court may find it advisable, when the next opportunity arises, to bring about the necessary adjustment in Italy.

It is unlikely, however, that the supremacy issue will arise very often in as sharp and inexorable a context as was presented by the Costa case. In the first place, a national court faced with an alleged conflict between Community law and subsequent national law would as a rule be able to go a considerable distance toward removing the conflict by an appropriate construction of the national law; the court might even view the Community law as *lex specialis*, which the national law as *lex generalis* does not purport to affect (60). Again, even if the doctrine of absolute supremacy is accepted without qualification, it must be kept in mind that the areas over which the Community has sole jurisdiction to the exclusion of the national lawmaker are not many. Even in a field where the Community has exclusive jurisdiction it might be unwise at this juncture to insist that every national measure automatically is void for lack of jurisdiction, regardless of its substantive content, even when the competent Community institution has not acted as yet or where the act of the institution is not necessarily in conflict with the national measure. There is hardly room in the Community context for an analogy with the federal pre-emption doctrine as it evolved in the United States. Moreover, a question may arise, particularly in the earlier stages of the Community when national policies still differ widely and common policy is not firmly set, whether each and every divergence between national and Community law should necessarily be viewed as constituting a conflict to which the Community supremacy rule must apply, especially when the national law is clearly in line with an important objective of the Community. If, for instance, the Community Commission in the exercise of its exclusive power under article 85(3) of the treaty grants an exemption to a certain cartel and thus declares it legal, may a national authority nevertheless hold such cartel illegal as contrary to national law? The national action in question aims at increasing competition, which is a basic treaty objective; should it be subordinated to another treaty objective, that is, improved rationalization of production or distribution through certain types of cartels (61)? In areas of concurrent or national jurisdiction, there will be perhaps room for the development of a doctrine of «Community fidelity» analogous to the idea of «federal fidelity» evolved by the German Constitutional Court to «sweeten» the relationship between the federation and the component Länder (62).

(60) See FROEHN, supra note 4, p. 234; PERASSI, L’État dans la communauté internationale, cit., supra note 40, pp. 242-244.
With respect to Germany particularly, another factor should be considered. In that country, largely as a result of the post-Weimar experience, the conviction is strong that the system of checks and balances of public power in general, and the federal system assuring a decentralization of public power in particular, must be preserved and must not be impaired by the Community. It is generally recognized that a major aspect of the Community scheme is the transfer of substantial law-making powers previously held by national parliaments to the Community institutions, particularly the Council of Ministers, which is composed of and dominated by national executives and is not answerable to any Community organ except, of course, in a limited way to the Community Court. If the Ministers are allowed to make law without an effective Community-level parliamentary control as is the case today, there may be some merit in the argument that an ultimate safeguard national parliaments must retain the power to compel their courts to enforce national law even where it conflicts with Community law. The problem is more general and exceeds the confines of the supremacy issue. As long as the preponderance of power remains with member states the present pattern of Community institutions may be considered adequate. But if, as is contemplated, Community law-making should substantially replace national law-making in the economic field, this pattern will require adjustment lest the basic concept of democratic government embodied in national constitutions of the member states be impaired. It has been suggested that despite a rather widely held feeling of a "crisis of parliamentarism" in Europe the remedy would be to increase the powers of the European Parliament, whose functions in the law-making process are in effect purely advisory under the present treaty (63). Such a step may prove advisable, if not indispensable, in the long run—even though it is not politically feasible today—not only to ensure political acceptance of Community law as an expression of the expectations of the people but also to protect the Community against the charge that it is incompatible with national constitutions. In fact, the German Federal Constitutional Court currently has before it the question of compatibility of the Community treaty with the German Basic Law (64); the Italian


(64) The Fiscal Court of the Land Rheinland Pfalz was the first court to question the constitutionality of the Community treaty in Germany (Judgment Nov. 14, 1963, Case n. RML III, 77/63). The case is now pending before the Federal Constitutional Court. For a partial text of the lower court holding, see Aussenwirtschaftsdienst des Betriebs-Rates, 1964, 26, and for comment, see Ohrufes, Deutsches Zustimmungsrecht zum EWG-Vertrag teilweise verfassungsunwirkt, ibid., at 65. For an opposite view rejecting the claim of unconstitutionality, see judgment of the Administrative Court of Frankfurt/Main, of Dec. 17, 1963, Case n. II/1, 63/93, ibid., at 69. See CCH Common Market Rep., 1964, para. 9135. See also Conclusions of the Advocate General, supra note 7, pp. 8-10.
courts have thus far rejected the claims of unconstitutionality as "manifestly unfounded" (65), and the issue is not likely to arise in this context in other member states of the Community since national courts do not have the authority to review laws and treaties for constitutionality. But, in most countries of the Community, the political issue of parliamentary control is likely to prove more important than the legal issue.

The Community Court must, of course, keep in mind at all times that it is not a federal court backed up by an integrated federal power, and it must be aware of the dangers inherent in pressing "legal integration" too far ahead of integration in the economic and political fields. There is, however, evidence that the court calculated the risk correctly when it declared the supremacy rule in the Costa case and that the ruling will receive the necessary political backing. When the judgment of the Italian Constitutional Court was drawn to the attention of the Councils of Ministers by a member of the European Parliament, the Councils referred the questioner to the Community Court's judgment in the Costa case. Although the Councils understandably made it clear that they did not wish to take a position on the legal issues they nevertheless expressed their awareness of the "political importance of a faithful application of Community law in the member states for the establishment of the Common Market and more generally for the realization of the objectives of the European treaties. Consequently, [the Councils] pursue with the greatest attention the problems which arise in this respect" (66). It is difficult to conceive that the "political"

(65) See supra note 16 for the judgments of the courts of Naples and Rome. The cases dealt with the European Coal and Steel Community.

(66) Journal Officiel, supra note 6. The question was directed to the Council of Ministers of the European Economic Community and to the Council of Ministers of the European Atomic Energy Community. See also statement of Prof. Hallstein, President of the European Economic Community Commission, European Parliament, Débats parlementaires, Doc. No. 13A, June 18, 1964, at 535. President Hallstein said:

"I would like to sum up the Commission's opinion on this point as follows:

First: the legal acts of the Community organs can be defined, examined as to their validity and interpreted only in terms of Community law. Assimilating them to categories of State legal systems involves the danger of misunderstandings and erroneous conclusions. Thus we are obviously led astray if regulations of the Community organs are designated as derived rules of law applied by delegation from the real lawmaker.

Secondly, the Community's legal order is, on the other hand, dovetailed into the law of the Member States in a great variety of ways. Official bodies, administrative authorities and courts in the Member States are increasingly applying rules of Community law. This interplay of two legal systems is not without precedent. Federal associations of various types and degrees offer examples of it. Here the rule that each part can only lay down valid law in the sphere of competence allotted to it, or which it has retained — a rule which, as we know, also applies to our Community — avoids constant conflict between different legal systems. If, however, an overlap of competence should exceptionally exist and there should be a clash of valid rules apparently requiring equal respect, it necessarily follows from the character of the merger into a wider order that the law of the superior association takes precedence — but I repeat, only in its sphere of competence.

Thirdly, this precedence above all means two things: the rules of Com-
branch of the Community could have gone much farther in expressing its support for the Community judiciary than it did in this official reply.

In the legal-constitutional sense, the Costa judgment is a milestone. In the social context, a rule has been proclaimed that is designed to strengthen the symbol of the Community and thus to contribute, along with the economic, political, and social factors, toward the partial transfer of the loyalties of the people to the Community. Such a change in the fundamental attitudes of individuals will be necessary if the Community is to become in reality something more than an instrumentality of national governments.

In the literature, the problem of Community law supremacy has evoked significant methodological controversy. The question is, as demonstrated above, to what extent solutions of Community problems will be derived from concepts of international law, federal-state law, or public law generally and, above all, to what extent these solutions will be hampered by unreasoned dogmatic positivism.

The significance of the legal and political issues discussed in this article extends beyond the arena of the European Community. Central American integration, for instance, has now reached a stage of development—at least on the legal-institutional level—where the problem of the relationship between Central American integration law and national law of the member states is coming under scrutiny. A seminar group assembled by the Inter-American Institute of International Legal Studies has recommended that this problem be included in a systematic examination of legal issues posed by Central American integration (67).

As current intergovernmental institutions prove inadequate to achieve the common interest of member states on regional or functional levels, the interaction of treaty law with national law will demand increasing attention.

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Community law come first irrespective of the level of the two orders at which the conflict occurs. And further, Community law not only invalidates previous national law but also debar subsequent national law. Both rules of conflict are part of that solidly entrenched body of law applied in comparable cases. Without them to acknowledge the supremacy of Community law would be no more than a courteous gesture, carrying no obligations. In reality the Member States could do with it what they liked.

Fourthly, and in support of the above, a unified solution valid for the whole Community must be provided for the order of precedence here mentioned. Any attempt to solve the order of precedence differently to accord with the idiosyncrasies of the Member States, their constitution and political structure, runs counter to the unifying character of European integration, and thus to the fundamental principles of our Community. The Commission thinks it particularly important to note this fact. (67) Report of the General Secretariat, Inter-American Institute of International Legal Studies, Seminar on Legal and Institutional Aspects of Central American Integration, at p. 8 (Engl. text) (Washington, D.C. 1964). For the texts of the Central American integration treaties, see Instituto Interamericano de Estudios Jurídicos Internacionales, Instrumentos Relativos a la Integración Económica en América Latina, Washington, D.C., 1964.
Having received the "preliminary" judgments of the Italian Constitutional Court and of the Court of Justice of the Communities, the Giudice Conciliatore of Milan reopened the proceeding on Costa's action against ENEL. In a judgment of May 4, 1966, the Giudice Conciliatore held that the Law No. 1643 of December 6, 1962, establishing ENEL, and the implementing Presidential decrees were "inapplicable" because they conflict with the EEC Treaty Article 37(1) & (2) as interpreted by the Community Court of Justice, in that they constitute a "new monopolistic measure" which has resulted "in a discrimination between Italian nationals and nationals of other EEC members in supplying electric power." These Treaty provisions grant rights to individuals which the Giudice Conciliatore must protect even though the conflicting Italian law was passed after the law giving effect to the EEC Treaty. The reason for this, the Giudice stated (quoting at length from the judgment of the Community Court), is the special nature of the EEC Treaty, differing from "ordinary" international treaties. Moreover, the Law No. 1643 must be disregarded on the further ground that in adopting it the Italian government failed to consult the EEC Commission as prescribed by Articles 102 and 93 of the EEC Treaty. Although the Community Court interpreted these provisions as not granting any treaty rights to individuals, nevertheless in the Italian national legal system an individual may assert the invalidity of any law adopted in disregard of procedures prescribed by ordinary legislation. The Giudice Conciliatore concluded that the plaintiff was not indebted to the defendant in the amount of Lire 1,925 and that the defendant, having lost the case, must pay the cost of the proceedings (with the exception of the proceeding before the Italian Constitutional Court) in the amount of Lire 620,000. 21 Foro Padano, V, 3-8 (No. 5, May 1966).
Postscript

Having received the "preliminary" judgments of the Italian Constitutional Court and of the Court of Justice of the Communities, the Giudice Conciliatore of Milan reopened the proceeding on Costa's action against ENEL. In a judgment of May 4, 1966, the Giudice Conciliatore held that the Law No. 1643 of December 6, 1962, establishing ENEL, and the implementing Presidential decrees were "inapplicable" because they conflict with the EEC Treaty Article 37(1) and (2) as interpreted by the Community Court of Justice, in that they constitute a "new monopolistic measure" which has resulted "in a discrimination between Italian nationals and nationals of other EEC members in supplying electric power." These Treaty provisions grant rights to individuals which the Giudice Conciliatore must protect even though the conflicting Italian law was passed after the law giving effect to the EEC Treaty. The reason for this, the Giudice stated (quoting at length from the judgment of the Community Court), is the special nature of the EEC Treaty, differing from "ordinary" international treaties. Moreover, the Law No. 1643 must be disregarded on the further ground that in adopting it the Italian government failed to consult the EEC Commission as prescribed by Articles 102 and 93 of the EEC Treaty. Although the Community Court interpreted these provisions as not granting any treaty rights to individuals, nevertheless in the Italian national legal system an individual may assert the invalidity of any law adopted in disregard of procedures prescribed by ordinary legislation. The Giudice Conciliatore concluded that the plaintiff was not indebted to the defendant in the amount of Lire 1,925 and that the defendant, having lost the case, must pay the cost of the proceedings (with the exception of the proceeding before the Italian Constitutional Court) in the amount of Lire 620,000. 21 Foro Padano, V, 3-8 (No. 5, May 1966).