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Unilateral acts of international organizations as a source of international law

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1. Introductory remarks

It is unquestionable that the development of international organizations has made and continues to make its mark on the means by which international law is created. In this respect, the statement opening the ground-breaking study by K. Skubiszewski on law-making resolutions of international organizations retains its timeless relevance[1].

The influence of international organizations on the development of international law has been analysed by many other eminent internationalists[2], who have examined the multifaceted role played by international organizations in respect of treaty law. In the first place, we should recall the initiating influence of organizations on the development of contractual law – understood as the involvement of an organization in the course of creating and concluding international agreements by states, as well as changes in existing norms[3].

[1] K. Skubiszewski, *Uchwały prawotwórcze organizacji międzynarodowych. Przegląd zagadnień i analiza wstępna*, Poznań 1965, p. 11.

[2] The following works can be given as examples: M. Lachs, *Le rôle des organizations internationales dans la formation du droit international*, [in:] *Mélanges offerts à Henri Rolin: Problèmes de droit des gens*, Paris 1964, p. 156 et seq.; D. Vignes, *The Impact of International Organizations on the Development and Application of Public International Law*, [in:] R.St.J. Mac Donald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague *et al.* 1983, p. 809 et seq. and earlier studies such as C.W. Jenks, *The Impact of International Organizations on Public and Private International Law*, "Transactions of the Grotius Society", Vol. 37 (1951), pp. 23-50.

[3] N. Buchowska, *Współudział organizacji międzynarodowych w procesie tworzenia prawa międzynarodowego*, „Prawo i Administracja", vol. VI, Piła 2007, p. 226.

First and foremost, an organization can initiate the conclusion of a given international agreement, that is to propose that it be made, or even present its own draft of one. An organization can also convene a diplomatic conference in order to agree the text of such an agreement. That same organization can also perform the role of such a conference by consolidating the text of the agreement and adopting it in a resolution of one of its organs[4]. Let us ignore in this context issues associated with the role of a depositary or rights concerning interpretation and revision of a treaty concluded with the participation of an international organization. We should also recall one creative manner of elaborating the norms of treaty law in situations where an organization itself (alongside states) becomes a party to an international agreement[5].

Nevertheless, participation of an organization in the creation of international law cannot be reduced to joining into traditional law-making processes[6]. In this context, it is useful to make a distinction between law-making *sensu largo*, *i.e*. any influence at all (independent or in cooperation) on the creation or shaping of norms of international law, and law-making *sensu stricto*, *i.e.* direct and unilateral creation of norms[7]. And it is these very acts of international organizations, their meaning, and the direct impact exerted by inter-governmental organizations on the shape of the contemporary law of nations which will be the primary subject matter analysed. We are thus interested in the effect of the unilateral, law-making activity of inter-governmental organizations in the form of sources of international law.

Of particular significance in the considerations conducted in this chapter are the necessary references to enhanced regional economic integration (visible in the law of the European Union[8]), but the primary field of analysis will be the perspective of general international law, which – without limiting itself to the law of a particular international organization – aims at more general determinations as to the status of acts of international organizations from the perspective of sources of international law.

2. The international organization and its acts

Our considerations should begin with a definition of international organizations themselves. This is a difficult task when considering the tremendous diversity among such

[4] W. Morawiecki, *Funkcje organizacji międzynarodowej*, Warszawa 1971, p. 125.

[5] N. Buchowska, *op. cit.*, p. 226.

[6] See e.g. H. Bokor-Szegö, *The role of the United Nations in international legislation*, Budapest 1978.

[7] C. Denis, *Le pouvoir normatif du Conseil de sécurité des Nations Unies: portée et limites*, Bruxelles 2004, p. 9.

[8] See e.g. A. Doliwa-Klepacka, *Stanowienie aktów ustawodawczych w Unii Europejskiej*, Warszawa-Białystok 2014.

entities[9]. As opposed to states, international organizations do not apply the principle of equality, nor do they enjoy the general competence of states. Instead, their activity is the product of the principle of specialisation[10]. The distinguishing of a non-state subjectivity means, firstly, autonomy vis a vis member states[11]. Here, emphasis is necessary on the element of distinct will – *volonté distincte* treated as a main, fundamental component of international legal personality[12].

This element of the definition is expressed very succinctly under the approach proposed by Ph. Gautier, which treats an international organization as "an autonomous entity, set up by a constituent instrument, which expresses its independent will through common organs and has a capacity to act on an international plane"[13]. It has also been reflected in the definition adopted by the authors of a Polish textbook devoted to institutional law. J. Menkes and A. Wasilkowski hold that "an international organization is an association of members (organism) appointed by a certain number of members to exist on the basis of an agreement, whose object is to achieve a distinct, common interest or objective. It has the capacity to act in its own name (…)"[14]. And it is this effect of such activity that we will take the most interest in.

[9] In the course of work on the law of treaties, in 1950 J. Brierly suggested defining an organization as "an association of States with common organs which is established by treaty" ("Yearbook of the International Law Commission" 1950, Vol. II, p. 223). In turn, H. Lauterpacht in commentary on his draft, treated organizations of states as "entities which are created by treaty between States, whose membership is composed primarily of States, which have permanent organs of their own, and whose international personality is recognized either by the terms of their constituent instrument or in virtue of express recognition by a treaty concluded by them with a State" (Yearbook of the International Law Commission" 1953, Vol. II, p. 99). See also J. Kolasa, *La notion d'organization internationale contemporaine*, "Polish Yearbook of International Law", Vol. XII (1983), p. 95 et seq.

[10] See Ch. M. Chaumont, *La signification du principe de spécialité des organizations internationales*, [in:] *Problèmes de droit des gens. Mélanges offerts à Henri Rolin*, Paris 1964, p. 55 et seq.

[11] Which was excellently captured by Sir Gerald Fitzmaurice in his definition of an organization as part of his work for the International Law Commission on codification of the law of treaties; in 1956 he suggested understanding an organization as "a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member-States, and being a subject of international law with treaty-making capacity" – *Law of Treaties*, Doc. A/CN.4/101, Report by G.G. Fitzmaurice, Special Rapporteur, "Yearbook of the International Law Commission", 1956, Volume II, p. 108.

[12] See H.G. Schermers, N. Blokker, *International institutional law: unity within diversity*, 5. rev. ed., Leiden-Boston 2011, p. 44 et seq.; P. Sands, P. Klein (eds.), *Bowett's Law of International Institutions*, Sixth ed., London 2009, p. 15 and very clearly I. Seidl-Hohenveldern, *The Legal Personality of International and Supranational Organizations*, "Revue Egyptienne de Droit International", vol. 21 (1965), p. 66; I. Seidl-Hohenveldern, G. Loibl, *Das Recht der internationalen Organizationen einschließlich der supranationalen Gemeinschaften*, 7., überarbeitete Aufl., Köln 2000, p. 5. Compare: J. Sandorski, *RWPG – forma prawna integracji gospodarczej państw socjalistycznych*, Poznań 1977, p. 47 et seq. N.D. White, *The law of international organizations*, Second edition, Manchester 2005, p. 30.

[13] Ph. Gautier*, The Reparation for Injuries Case Revisited: The Personality of the European Union*, "Max Planck Yearbook of United Nations Law", vol. 4 (2000), p. 333.

[14] J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Wprowadzenie do systemu,* Warszawa 2004, p. 55. See also the newer textbook of those authors, *Organizacje międzynarodowe. Prawo instytucjonalne*, 2nd edition, Warszawa 2010, pp. 91-2.

A unilateral act is an act made by one subject of international law, action undertaken by that one subject[15]. One characteristic is thus independence, *i.e.* the absence of a partner whose declaration of will complementing a given act would determine an agreement has been made[16]. Recognising the autonomy of organizations in respect of member states is sufficient grounds. The view of V.-D. Degan should be considered an isolated one, that from the perspective of member states, the acts of an international organization are not comparable, particularly when they express a position identical to that of members towards the unilateral acts of other states. And thus, in the cited author's view, a unilateral act of an organization is only an act which is directed at a state which is not a member state, on condition that it did not participate in its adoption[17]. But this view does not enjoy widespread support. The opposite view is the majority one, concerning the separate personality of the organization and autonomy of will, which is not identical with the will of member states (either all of them or each of them individually). But, as Skubiszewski argues, it is inappropriate to assign to states the behaviours of an international organization to which they belong[18]. By the same token, it will be difficult to recognise an organization as the collective proxy of the states that comprise it.

Fundamentally, in the unilateral character of an act we are stating that a given act should be attributed exclusively to the international organization. This is consistent with an understanding typical for international responsibility. Through attribution, a given act or omission is linked with a state and/or international organization[19]. A fundamental rule concerning attribution of the act of an international organization was captured in Art. 6 of the draft Articles on responsibility of international organizations[20], which states: "the conduct of an organ or agent of an international organization in the performance of func-

[15] W. Czapliński, *Akty jednostronne w prawie międzynarodowym*, „Sprawy Międzynarodowe", no. 6/1988, p. 98. P. Saganek, *Akty jednostronne państw w prawie międzynarodowym*, Warszawa 2010, p. 33. Similarly, rejecting exclusively one will, the matter is put by F. Rigaldies – see F. Rigaldies, *Contribution a 1'etude de 1'acte juridique unilateral en droit international international public*, "Revue juridique Thémis", 1980-81, p. 419.

[16] J.D. Aston, *Sekundärgesetzgebung internationaler Organizationen zwischen mitgliedstaatlicher Souveränität und Gemeinschaftsdisziplin*, Berlin 2005, p. 52; W. Czapliński, *op. cit.,* p. 98.

[17] V.-D. Degan, *The Sources of International Law*, The Hague 1996, pp. 176-7; previously given in part as: *Unilateral Act as a Source of Particular International Law*, "Finnish Yearbook of International Law", Vol. V (1994), p. 175 et seq.

[18] K. Skubiszewski, *Enactment of Law by International Organizations*, "British YearBook of International Law", Vol. 41 (1965–66), p. 222.

[19] P. Klein, *La responsabilité des organizations internationales dans les ordres juridiques internes et en droit des gens,* Bruxelles 1998, p. 375.

[20] Responsibility of international organizations, Text of the draft articles with commentaries thereto, International Law Commission, Report on the work of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011), GAOR Sixty-sixth Session Supplement No. 10 (UN Doc. A/66/10 and Add. 1).

tions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization"[21].

In spite of the significant growth in the number of organs and concomitant qualitative changes, of no significance will be the various classifications employed by representatives of international law doctrine[22]. In the context of relations of an international organization with its member states, attention should be focused on the dualistic nature of the activity undertaken. Organs of an international organization are composed of representatives of states, which are operating in a dual character. Retaining their internal (domestic) mandate, they are undertaking functions at the level of the international organization. George Scelle describes such a situation with the term *dédoublement fonctionnel*.[23] Reference to this can also be found in an advisory opinion of the PCIJ in a case concerning interpretation of Art. 3 paragraph 3 of the Treaty of Lausanne. In the ruling, the Hague Court claimed, in referring to the Council, that "It is, therefore, composed of representatives of Members, that is to say, of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage"[24].

It should be emphasised that the resolutions of international organizations are not a direct expression of the will of member states. This will is expressed in the treaty appointing a given organization and assigning it the competency to issue resolutions, but in the process itself of drafting resolutions, their participation is not always necessary[25]. It is difficult to view an international organization as merely the sum of its member states.

However, if we do apply the classic approach, it can be demonstrated that, ultimately, the source of the norms of behaviour created by an international organization will be the shared will of states[26]. R. Higgins notes what she considers an obsessive interest in the resolutions of organizations as a separate issue. As this consummate internationalist observes, resolutions are only one of the many manifestations of the practice

[21] Art. 6(2) specifies that „The rules of the organization apply in the determination of the functions of its organs and agents". Definitions of both notions are supplied in Art. 2 of the draft. Under Art. 2(c), "'organ of an international organization' means any person or entity which has that status in accordance with the rules of the organization". However, „agent of an international organization" under Art. 2 (d) "means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts".

[22] See e.g. Z.M. Klepacki, *Organy organizacji międzynarodowych. Studium porównawcze,* Warszawa 1973, p. 12 et seq.

[23] G. Scelle, *Le phénomène juridique de dédoublement fonctionnel*, [in:] W. Schätzel, H.-J. Schlochauer (Hrsg.), *Rechtsfragen der internationalen Organization: Festschrift für Hans Wehberg zu seinem 70. Geburtstag*, Frankfurt am Main 1956, p. 324 et seq.

[24] Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion of 21 November 1925 Permanent Court of International Justice, Series B, No.12, p. 29.

[25] R. Sonnenfeld, *Podstawy prawne kompetencji uchwałodawczej Rady Bezpieczeństwa ONZ*, „Przegląd stosunków międzynarodowych", no. 1(73), Opole 1978, p. 17.

[26] W. Morawiecki, *Funkcje…,* p. 121.

of states[27]. Adopting this perspective, we should understand the consequences of the applied simplification – here we are employing the mediation of a non-state subject of international law. However, it is not always a simple task to draw a distinction between an organization and its member states.

A quite interesting situation is in respect of legal protection of the environment, where the significance of conferences of states-parties is growing[28]. They participate in the enactment of law in a dual manner: through drafting and amending primary law, and through the enactment of secondary law. As regards structure, it can be equated with international organizations, which lack only distinct legal personality[29]. A more cautious position, however, is expressed in treating conferences of parties as merely a formula of a diplomatic conference ensuring a continuous – or at least regular – grounds for taking decisions[30]. In this context, we may observe a natural tendency, by no means limited only to the sphere of environmental protection, that states are not eager to equip new subjects (international organizations) with the appropriate competences, particularly the right to enact law[31].

An assessment of the criterion of unilaterality cannot be conducted in an abstract manner, but only through interpretation of the provisions granting law-making competence to particular international organizations[32].

There is no doubt that the framework of analysis for unilateral acts of international organizations is negatively impacted by significant definitional discrepancies[33], thus it is necessary to begin with bringing order to the terminology. The potential for building

[27] R. Higgins, *The Role of Resolutions of International Organizations in the Process of Creating Norms in the International System*, [in:] W.E. Butler (ed.), *International Law and the International System*, Dordrecht et al. 1987, p. 22.

[28] V. Röben, *Institutional Developments under Modern International Environmental Agreements*, "Max Planck Yearbook of United Nations Law" Vol. 4 (2000), p. 363 et seq.

[29] See R.R. Churchill, G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, "American Journal of International Law", Vol. 94 (2000), *passim* esp. p. 625; Cf. J. Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, "Leiden Journal of International Law", Vol. 15 (2002), p. 16, G. Ulfstein, *International framework for environmental decision-making*, [in:] M. Fitzmaurice *et al.* (eds.), *Research handbook on international environmental law*, Cheltenham 2010, p. 40.

[30] M. Fitzmaurice, *Law-making and International Environmental Law: The legal character of decisions of conferences of the parties*, [in:] R. Liivoja, J. Petman (eds.), *International Law-making: Essays in Honour of Jan Klabbers*, London 2014, p. 195 and 207.

[31] C.F. Germelmann, *Moderne Rechtssetzungsformen im Umweltvölkerrecht – Entwicklung und Perspektiven sekundärrechtlicher Regelungsmechanismen*, "Archiv des Völkerrechts", Bd. 52 (2014), p. 335.

[32] M. Frenzel, *Sekundärrechtsetzungsakte internationaler Organizationen: völkerrechtliche Konzeption und verfassungsrechtliche Voraussetzungen*, Tübingen 2011, p. 17.

[33] J. Kolasa, *Some Remarks on the Concept of a Resolution and Decision of International Organizations*, [in:] J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague 1984, p. 494.

a general theory in this scope is, at times, brought into question[34]. Diversity in nomenclature leads to a blurring or even dispersion of the fields of the present analysis.

From a general perspective, K. Kocot defines acts of an international organization as „all official declarations of will of the organs of international institutions, *i.e.* all verbal declarations of will originating from international organizations, which, on the basis of the will of states, are intended to have specific effects in the area of functions and competences of the organization"[35]. After implementing such a collective definition, he adds that they do not always lead to the creation of a new norm, or changes to an existing one, or any modifications at all of an obligational relationship[36].

As a generic notion, Z. Doliwa-Klepacki uses the term „decision", understood as all acts constituting the formal expression of will of the organs of an organization[37]. We may consider whether such a broad definition is justified. It would seem more appropriate to limit the meaning to this term to binding acts, and thus a decision can be defined as any form (announced in writing or derived from established practice) of will expressed by every organ of an international organization that is binding on its addressee[38]. It thus encompasses both resolutions of collective organs[39] and regulations of one-person organs.

The suggestion offered by N. Buchowska also does not seem entirely justified; she proposes capturing the notion of "resolution" as a general, "collective" term for delineating all unilateral acts[40]. She is, of course, right to state categorically that "regardless of the number of members comprising an organ undertaking a resolution, and the manner in which that resolution is adopted, it always constitutes an expression of the international organization itself, and not its constituent members"[41]. But it is difficult to agree with her observation that "fundamentally, every act of will of an organization is, from a formal perspective, a resolution, as it is almost always adopted by a collegial organ"[42]. This quite obviously glosses over the acts adopted by the UN General Secretary, the so-called *Presidential Statements,* expressed by the president of the Security Council, as well as acts of the President of the European Council.

[34] See J. Castañeda, *Legal Effects of United Nations Resolutions*, New York and London 1969, p. 1 et seq.

[35] K. Kocot, *Organizacje międzynarodowe. Systematyczny zarys zagadnień prawa międzynarodowego*, Wrocław *et al.* 1971, p. 216.

[36] *Ibidem*.

[37] Z.M. Doliwa-Klepacki, *Proces podejmowania decyzji w organizacjach międzynarodowych*, Warszawa 1979, p. 11 and *idem, Encyklopedia organizacji międzynarodowych*, Warszawa 1997, p. 165.

[38] J. Kolasa, *Some Remarks …*, p. 499.

[39] See A. Wasilkowski, *Zalecenia Rady Wzajemnej Pomocy Gospodarczej,* Warszawa 1969, p. 35, who defines a resolution as "every act constituting the formal expression of the will of an organ of an international organization operating under the principle of collegiality".

[40] N. Buchowska, *Uchwały organizacji międzynarodowych w polskim porządku prawnym – zarys problematyki*, [in:] P. Wiliński (ed.) *Prawo wobec wyzwań współczesności*, Vol. 2, Poznań 2005, p. 246.

[41] *Ibidem*, p. 245.

[42] *Ibidem*, p. 246.

Various classifications of acts of international organizations can be applied. M. Virally suggest first a distinction based on his own classification, which distinguishes between the acts of intergovernmental organs and acts of other organs (administrative, judicial, parliamentary)[43]. Objective criteria can also be applied, differentiating "personal" decisions, *i.e.* those which award particular legal status or functions to defined subjects, and "essential", in turn divided according to the character of the competence exercise or of the act[44]. Yet another classification assumes a distinction based on criteria of form, content, and conditions[45]. In respect of the first category, a distinction is made between an international agreement, organizational decision, resolution, recommendation, and consensus. However, from the perspective of content, mention is made of constitutive, administrative, technical and management decisions, as well as legal and technical support.

From the perspective of the manner by which a given act is adopted, we may distinguish those adopted unanimously and ones passed by a majority of votes. This distinction needs to be viewed in conjunction with the composition of the organ of an international organization, which can be divided into organs comprised of representatives of all member states of a given organization and organs with membership limited to just some representatives. A distinction should also be drawn of organs populated not by representatives, but rather international functionaries.

Another distinction refers to the sphere of regulation. In its classic definition, the performance of regulatory functions can be treated as "a political process by which states and members of an international organ reach an understanding concerning norms which are intended to provide relatively durable regulation of the relations among the participants (subjects) of international relations"[46]. If we analyse the creation of regulations governing the behaviour of member states outside an organization, and thus external regulation, which we can define as „the issuing of legal regulations by organs of international organizations serving to achieve its external tasks and of obligatory application towards member states"[47]. It is important here to distinguish external regulation from internal, *i.e.* the enactment of the internal law of an organization.

The internal law of an organization includes norms enacted by the organization, referring to its structures, elaborating general statutory principles concerning the func-

[43] M. Virally, *Unilateral Acts of International Organizations,* [in:] M. Bedjaoui (ed.), *International Law: Achievements and Prospects,* The Hague 1991, p. 243

[44] *Ibidem*, p. 244.

[45] G.F. FitzGerald, *The International Civil Aviation Organization – A Case Study in the Implementation of Decisions of a Functional International Organization*, [in:] S.M. Schwebel, *The Effectiveness of International Decisions, Papers of a conference of The American Society of International Law, and the Proceedings of the conference*, Leyden 1971, p. 157.

[46] W. Morawiecki, *Funkcje…*, p. 121.

[47] *Ibidem*, p. 177.

tioning of its organs and the performance of tasks assigned to the organization, as well as determining the procedure in effect within the organization[48]. They can thus be described as norms affecting the internal life of an international organization[49]. However, we should proceed with care considering the multiplicity of views[50], also taking into account reference to the established practice of an organization[51].

There are disputes within the doctrine of international law concerning the qualification of those internal rules, and specifically about the answer to the question of whether the internal rules of a given organization can be considered international law[52].

If we consider the creation by an international organization of norms which are directly binding on member states, it would be necessary to first distinguish the introduction of changes in the statutes of those organizations themselves. Of course, some organizations, like the European Union, assume an extremely conservative, traditional model of statutory changes, requiring a new agreement be made between all of the states[53]. However, with increasing frequency revision procedures are becoming far simpler, and they are often composed of two stages: adopting a resolution to make changes, and then their acceptance by a defined number of member states, with the effect of their applying to all members of the organization. By the same token, we are dealing with a mixed mechanism that combines the traditional consensual method with the imposition of obligations against the will of states in the minority. In the literature we may encounter such extreme diagnoses that this type of mechanism constitutes a general rule, whereas exceptions to it should be set out *expressis verbis* in the statute of a given organization[54].

[48] K. Skubiszewski, *op. cit.*, p. 25.

[49] W. Morawiecki, *Prawo wewnętrzne organizacji międzynarodowej*, „Państwo i Prawo" 1969, vol. 1, p. 37.

[50] See J. Kolasa, *Z zagadnień tzw. prawa wewnętrznego organizacji międzynarodowych*, „Prawo XXXII", Wrocław 1970, p. 95.

[51] See definition of internal rules of an organization, adopted by the International Law Commission during codification of responsibility of international organizations (art 2(b)): *"rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization*.

[52] Affirmatively G. Balladore Pallieri, *Le Droit Interne des Organizations Internationales*, "Recueil des Cours de l'Académie de Droit International", Vol. 127 (1969-II), p. 1. The international character of norms of internal law of an international organization is negated by: L. Focsaneanu, *Le droit Interne de l'Organization des Nations Unies*, "Annuaire Français de Droit International", Tome 3 (1957), p. 315; P. Cahier, *Le Droit Interne des Organizations Internationales*, "Revue Général de Droit International Public", Vol. 67 (1963), p. 563; J.A. Barberis, *Nouvelles Questions concernant la Personnalité Juridique Internationale*, "Recueil des Cours de l'Académie de Droit International", vol. 179 (1983-I), p. 225. In the Polish literature see J. Kolasa, *La notion..., passim*. Compare pt. 5 of commentary to Art. 10 Articles on responsibility of international organizations, § 5 p. 32.

[53] See Art. 48 Treaty on European Union.

[54] E. Schwelb, *The Amending Procedure of Constitutions of International Organizations*, "British Year-Book of International Law", Vol. 31 (1954), p. 58.

Finally, a distinction should be made of acts according to their real binding scope[55]. Acts of an organization can be binding *in toto*, but they can also merely set out a binding objective, while leaving addressees freedom in the choice of means by which particular effects are brought about. An ideal example of this is the construction of the Directive in the European Union[56]. In turn, among non-binding acts we may distinguish recommendations *sensu stricto*, recommendations with legal effects, and recommendations creating formal/procedural obligations.

3. Law-making acts of organizations and sources of international law

Considerations of acts of international organizations are undertaken in this work from the perspective of sources of international law, thus attention should be focused primarily on law-making acts.

In a study on law-making acts of the UN and specialised organizations, P. Rösgen sets out three characteristics of such acts: unilateral acts (and thus without the necessity of acceptance by member states), which are legally binding and addressed to all member states of an international organization[57]. It is precisely these three elements: unilateral, binding, and of a general character, which establish a legal act.

Edward Yemin, the author of a seminal monograph on law-making competencies within the UN system, gives a similar account of three conditions of law-making acts: their unilateral character, the creation or modification of elements of a legal norm, and their general character, *i.e.* they are directed to an unspecified group of addressees, and are suitable for repeat application[58]. A. Marschik gives as characteristics of a law-making act generality, abstractness, sustainability, and the binding nature of the decision[59].

As regards the Polish literature, it would seem necessary to refer to the works of K. Skubiszewski. In his comprehensive study, he lists the following requirements for

[55] See H. Miehsler, *Zur Autorität von Beschlüssen internationaler Institutionen*, [in:] Ch. Schreuer (Hrsg.), *Autorität und international Ordnung: Aufsätze zum Völkerrecht*, Berlin 1979. R.L. Bindschedler, *Rechtsakte der internationalen Organizationen*, [in:] E. Bucher, P. Saladin (Hrsg.), *Berner Fesgabe zum Schweizerischen Jurisentag 1979 dargebracht von der juristischen Abteilung der Rechts – und wirtschaftswissenschaftlichen Fakultät der Universität Bern*, Bern und Stuttgart 1979, p. 361 et seq.

[56] See Art. 288 Treaty on the Functioning of the European Union.

[57] P. Rösgen, *Rechtsetzungsakte der Vereinten Nationen und ihrer Sonderorganizationen: Bestandaufnahme und Vollzug in der Bundesrepublik Deutschland*, Bonn 1985, p. 7.

[58] E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies*, Sijthoff, Leyden: 1969, p. 6: "legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addressees and capable of repeated application in time".

[59] A. Marschik, *Legislative Powers of the Security Council*, [in:] R. St.J. Macdonald, D.M. Johnston (eds.), *Towards world constitutionalism: issues in the legal ordering of the world community*, Leiden et al. 2005, p. 462.

considering a given act by an organization to be a law-making act: such an act "must be a binding act, and must formulate general (abstract) norms regulating the behaviour of an unlimited number of cases"[60]. Skubiszewski's definition is adopted by N. Buchowska, who considers as a law-making resolution a resolution binding on member states, addressed *pro foro externo*, and containing norms of a general and abstract character[61].

The issue of sources of international law is at the heart of fundamental discussions in the doctrine. It also frequently evokes a sort of helplessness – for example, we may invoke the statement of C. Parry, who points out the impossibility of saying what sources are, and only allows for the possibility of discussing them[62].

The classic point of departure for sources of international law is Art. 38 of the Statute of the International Court of Justice. It strongly repeats the disposition of the analogous provision in the Statute of the Permanent Court of International Justice. The work of the PCIJ Statute led to acknowledgement of general principles as a source of law, which some scholars consider a revolution in the classic theory of sources of international law[63]. Recognition of the acts of an organization can be treated as yet another revolution in the development of the theory of sources[64].

It is also difficult to consider Art. 38 of the Statute an exhaustive enumeration of all sources of international law. From a formal perspective, it expresses (merely) the grounds for rulings by the primary judicial authority of the United Nations. First and foremost, the disposition contains no mention of unilateral acts. In the classic definition, authors have captured unilateral acts only from the perspective of states[65]. As is generally known, Art. 38 ICJ Statute does not make any direct reference to acts undertaken by international organizations.

The absence of unilateral acts of states and international organizations in the disposition of Art. 38 ICJ Statute does not mean that they shall not have the status of sources of law. This has been written about *inter alia* in the first report of the International Law Commission's Special Rapporteur, V. Rodríguez Cedeño[66]. However, some studies by

[60] K. Skubiszewski, *Uchwały…*, p. 178.

[61] N. Buchowska, *Wykonywanie kompetencji prawotwórczych przez organizacje międzynarodowe w ramach systemu* contracting out, „Ruch Prawniczy Ekonomiczny i Socjologiczny" 2008, no. 4, p. 29.

[62] C. Perry, *The Sources and Evidences of International Law*,Manchester 1965, p. 27.

[63] A. Verdross, *Die Quellen des universellen Völkerrechts: eine Einführung*, Freiburg 1973, p.11.

[64] See e.g. R. Geiger, *Die zweite Krise der völkerrechtlichen Rechtsquellenlehre*, "Österreichische Zeitschrift für öffentliches Recht und Völkerrecht", Bd. 30 (1979), p. 234.

[65] P. Guggenheim, *Traité de droit international public: avec mention de la pratique internationale et Suisse*, Genève 1953, pp. 147-8.

[66] First Report of the Special Rapporteur, Mr. Víctor Rodríguez Cedeño, UN Doc. A/CN.4/519, § 67: "However, there are or can be other sources. The fact that they are not mentioned in Article 38 cannot in itself preclude their treatment as such. Two other sources are frequently utilized: unilateral acts and the resolutions of international organizations". However, it should be noted that this statement is contained in a provi-

outstanding internationalists devoted to the issue of sources of international law entirely avoid the question of resolutions of organizations[67].

The absence of such references can be explained by repetition of PCIJ regulations developed in times when the phenomenon of organizations was not so widespread[68]. But already at the beginning of the previous century W. Kaufmann included the law of organizations as part of the law of nations[69]. Interestingly, he also did this in reference to other, non-intergovernmental organizations. His position, however, did not gain other advocates.

Traditionally, states are both the creators and the addressees of norms of international law. Meanwhile, in respect of law-making acts of international organizations, states will only be addressees, *i.e.* the performers of norms enacted by an entity external in relation to them[70].

Following C. Parry, it may be observed that when discussing sources of international law, the transition from states to new collective institutions of the international community would seem a natural one[71]. Other internationalists go even further and demonstrate the necessity of the existence of at least a limited law-making power, derived from the need to ensure the effective functioning of the international community[72]. In this manner we may translate the overwhelming consensus among states into ordinal rules and legal norms, regardless of the objection of one or more sovereign states[73]. An exceptionally accurate remark is that of J. Brunnée, who holds that the creation of international law is expressed in the constant conflict between state sovereignty and the effective implementation of the objectives of the international community[74].

Granting an organization the capacity to impose external regulations implies an indisputably serious risk on the part of member states, which results from their *a priori* consent to undertake obligations arising out of the later activity of that very international organization. Thus, the practice of states protecting themselves against the uncomfortable (for them) imposition of obligations (or activity against their will) by the inter-

sion that addresses sources of law and sources of obligations jointly: *A. Sources of international law and sources of international obligations*.

[67] See e.g. G.G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, [in:] *Symbolae Verzijl*, The Hague 1958, p. 153 et seq.

[68] See N. Buchowska, *Uchwały organizacji międzynarodowych jako źródło prawa międzynarodowego*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny", LXII, 3, 2001, p. 53.

[69] W. Kaufmann, Die *modernen nichtstaatlichen internationalen Verbände und Kongresse und das internationale Recht*, "Zeitschrift für Völkerrecht", 1908, p. 436 et seq.

[70] See e.g. W. Meng, *Das Recht der internationalen Organizationen: eine Entwicklungsstufe des Völkerrechts; zugleich eine Untersuchung zur Rechtsnatur des Rechtes der Europäischen Gemeinschaften*, Baden-Baden 1971 p. 71 et seq. (esp. p. 76).

[71] C. Parry, *op. cit.*, p. 19.

[72] R. Falk, *On the Quasi-Legislative Competence of the General Assembly*, "American Journal of International Law", Vol. 60 (1966), p. 785.

[73] *Ibidem*.

[74] J. Brunnée, *op. cit.*, p. 5.

national organization comes as no surprise, particularly through limiting the scope of the performed regulations „only to matters which do not engage the more serious interests of states, and thus of a more technical than political nature"[75].

In the context of the creation of international law, it is necessary to confront the potential of this conception with not only the elastic reaction of an international organization to fluid situations and needs, but it should also be categorically stressed that the use of the traditional inter-state method in this scope is excessively arduous and slow. In other words, international agreements are too static to allow for a swift and effective adaptation to evolving needs[76]. In addition, objective considerations, specifically, the highly-specialised nature of the material regulated, primarily technical content, is frequently left to regulation by international organizations[77].

The fundamental question concerns the autonomous nature of an act, and thus whether it can be held to be an independent source of international law, *i.e.* one giving rise to rights and duties for particular subjects when it is not linked with a declaration of will from another entity[78]. Disregarding previous perspectives rejecting the legal character of resolutions[79] or treating such acts as new law, distinct from both the internal law of states and from international law (which would to a large extent reflect the present autonomous understanding of EU law)[80], the primary axis of the dispute can be reduced to the question of whether they constitute an independent source of international law.

Dionisio Anzilotti treated the decisions of international organizations (*reglements der Kollektivorgane*) as a particular form of treaty, which was concluded through the mediation of organs rather than in a direct manner[81]. In the course of his Hague lecture, A.J.P. Tammes drew attention to the grounds for the adoption of resolutions in a treaty and emphasized that the International Court of Justice did not need an additional, direct reference to apply decisions of an organization[82]. In this context we may cite an earlier opinion of Basdevant, expressed during work on the ICJ Statute. This long-serving judge

[75] W. Morawiecki, *Funkcje…*, p. 177-8. As this internationalist adds, this is also the source of the term „regulation", suggesting rather a detailed elaboration of the content of more general norms previously adopted under another mode.

[76] M. Benzing, *International Organizations or Institutions, Secondary Law*, "Max Planck Encyclopedia of Public International Law", § 5.

[77] K. Skubiszewski, *Uchwały…*, p. 175.

[78] W. Czapliński, *op. cit.*, p. 103.

[79] As Count G. Balladore Pallieriin his Hague Academy lecture: *Le droit interne des organizations internationales*, "Recueil des Cours de l'Académie de Droit International", Vol. 127 (1969), p. 36 [quoted after:] R. Sonnenfeld, *Podstawy prawne kompetencji…*, p. 19.

[80] See R. Sonnenfeld, *Podstawy prawne kompetencji …*, pp. 19-20.

[81] D. Anzilotti, *Lehrbuch des Völkerrechs*, Band 1: *Einführung – Allgemeine Lehren*, Berlin –Leipzig 1929, p. 223.

[82] A.J.P. Tammes, *Decisions of International Organs as a Source of International Law*, "Recueil des Cours de l'Académie de Droit International", Vol. 94 (1958-II), p. 269.

of the Permanent Court of International Justice stated that, while Art. 38 is not composed well, based on its disposition the predecessor to the International Court of Justice had functioned very well, and thus no change to it is necessary[83]. In a similar vein the problem is treated by the editors of the newest Oppenheim's treatise[84]. Sir Robert Jennings and Sir Arthur Watts, addressing the rapid development by members of the international community of a new procedure for collective action, arrive at the conclusion that this can at present be considered nothing more than another form of the emergence of rules, whose legal force is derived from traditional sources of international law[85]. That said, they do allow for future acquisition by those collective activities of the nature of a separate source of law[86].

In the Polish literature, M. Muszkat, in "An outline of public international law" categorically rejects recognition of the resolutions of international organs as a source of international law, because "in each case they are binding upon states […], this binding force is always the product of the prior consent of states formulated in an agreement"[87]. H. Thirlway similarly captures this reduction to the agreement constituting an international organization[88]. Interestingly, we are *nolens volens* referring to the approach represented by the Soviet doctrine of international law[89]. But it would be wrong to engage in over-simplification. Firstly, we may also find among Soviet scholars a position more favourable to treating resolutions as sources of international law[90]. Furthermore, in this manner the quoted English author elaborates his deliberations formulated several decades ago, maintaining that a new source of international law cannot arise in another manner than through an existing source of law recognised by the international community[91]. He emphasised that considerations of stability and certainty, which are those served by the theory of sources of law, should be the lens thorough which the category of sources of law is viewed as a closed catalogue[92].

[83] UNCIO, Vol. XIV, p. 170.

[84] See R. Jennings, A. Watts, *Oppenheim's International Law*, 9th ed., vol. 1, part 1, Longman, London-New York 1996, p. 46.

[85] *Ibidem*.

[86] *Ibidem*, p. 47.

[87] M. Muszkat, *Część pierwsza: Wiadomości podstawowe*, Rozdział IV: *Źródła prawa międzynarodowego* [in:] M. Muszkat (ed.), *Zarys prawa międzynarodowego publicznego*. Vol I, Warszawa 1956, p. 26

[88] H. Thirlway, *The Sources of International Law*, Oxford 2014, p. 33.

[89] See G.I. Tunkin, *Zagadnienia teorii prawa międzynarodowego*, Warszawa 1964, p. 155.

[90] W.N. Durdieniewski, S.B. Kryłow (*Podręcznik prawa międzynarodowego*, Warszawa 1950, p. 31) treat acts of international organs as „a third source of international law" and regret that they are not treated with sufficient attention „in spite of the tremendous role and significance of that source".

[91] H. Thirlway, *International Customary Law and Codification: an examination of the continuing role of custom in the present period of codification of international law*, Leyden 1972, p. 39.

[92] *Ibidem*, p. 42: "the purpose of a theory of sources is to ensure stability and certainty; and for that reason, it appears axiomatic that the class of sources should be a closed class, not in the sense of being in-

Another group of authors treats resolutions as executive acts in relation to the statute of the organization, comprising part of the category of treaty law. This is the approach taken by A. Verdross. Alongside the three primary formal sources, he also distinguished secondary formal sources (*formelle Völkerrechtsquellen zweiten Ranges*), the most important of which are norms created by international organizations on the basis of founding treaties[93]. In this category he distinguished between regulations and norms applicable to member states – either of a technical nature, secured by the possibility of opting out of being bound, as in the case of the World Health Organization and the International Civil Aviation Organization, or by concrete directives issued under the statute of the organization. Verdross clearly emphasises here that they cannot issue any general norms[94]. In addition, they will essentially be able to issue only recommendations.

In a similar vein in his Hague lecture, G. Arangio-Ruiz derives the binding force of treaty law from customary law, and thus gives the label of tertiary law to the secondary law of international organizations[95].

In the Polish scholarship, R. Bierzanek was a supporter of treating resolutions as „*sui generis* contractual law"[96]. A similar view was also taken by R. Sonnenfeld, who treated law-making resolutions as executive acts in respect of the primary treaty, *i.e.* belonging *sensu largo* to treaty law[97]. Echoes of this approach can be found in the textbook by J. Menkes and A. Wasilkowski. They point out that decisions will frequently be of an exclusively executive or incidental nature[98]. These authors admit the potential recognition of law-making resolutions as a new source of international law as "a logical solution, and perhaps belonging to the future, but presently of a rather academic nature". They classify law-making resolutions as a „type of sub-culture (derivative form) within the framework of treaty law"[99]. They base this conclusion on the absence of references to resolutions as a separate source of law in any act of international law, and the lack of distinction of that category in the constitutions of contemporary states[100]. Such

variable, but in the sense we have indicated, namely, of being variable only through a change brought about by the operation of one of the recognized sources, one of the members of the class".

[93] A. Verdross, *Die Quellen des universellen Völkerrechts: eine Einführung*, Freiburg 1973, p. 137.

[94] *Ibidem*, p. 138.

[95] G. Arangio-Ruiz, *The normative role of the General Assembly of the United Nations and the declaration of principles of friendly relations*, "Recueil des Cours de l'Académie de Droit International", Vol. 137 (1972-III), p. 728. Similarly: G. Schulz, *Entwicklungsformen internationaler Gesetzgebung*, Göttingen 1960, p. 113.

[96] R. Bierzanek, *Metody rozwoju i formułowania prawa międzynarodowego a ONZ (Odczyt wygłoszony na Kongresie International Law Association w dniu 2 września 1947 r. w Pradze)*, „Państwo i Prawo", 1948, no. 2, p. 9

[97] R. Sonnenfeld, *Podstawy prawne kompetencji…,* p. 22.

[98] J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Prawo instytucjonalne*, 2nd edition, Warszawa 2010, p. 322.

[99] *Ibidem*, p. 324.

[100] *Ibidem*.

a justification can leave one wanting, as it expresses a potentially excessive degree of caution. In turn, P. Guggenheim and K. Marek pointed out the difficulties of separating treaty law and international legislation, and out of caution they locate the activity of an international organization within the "border one" between those two fields of consideration[101].

But it should be kept in mind that authorisation does not imply they achieve the same rank. Municipal legislation, adopted on the basis of a constitution, does not achieve the rank of a constitution itself[102]. This issue is excellently portrayed in a joint dissenting opinion in the *South West Africa* case by Sir Percy Spender and Sir Gerald Fitzmaurice:

> the fact that an act is done under an authority contained in an instrument which is itself a treaty (in this case the League Covenant) does not per se give the resulting act a treaty character. To take a familiar recent instance-under Article 17 of the United Nations Charter the General Assembly is authorized to approve the budget of the Organization, and the budget as approved is binding on the Member States. It could not be contended that it is on this account a "treaty" any more than could a resolution of the General Assembly apportioning the expenses of the United Nations amongst its Members under Article 17 (2) of the Charter[103].

As emphasised by K. Skubiszewski, in spite of law-making activity being based on treaty authorisation, we are dealing with a new and separate source[104]. In this scope, we may invoke the fundamental difference between the distinction of formal sources of law and their dependence[105]. Attempts at squeezing the acts of international organizations into the framework of sources set out in Art. 38 of the ICJ Statute seem unsatisfactory[106]. Indeed, such an operation of „extending" classic sources would do more harm than good[107]. Thus, the decisions of international organizations should be treated as an independent but secondary source of law[108]. Independence is expressed in the absence

[101] P. Guggenheim, K. Marek, *Völkerrechtliche Verträge*, [in:] H.-J. Schlochauer (Hrsg.), *Wörterbuch des Völkerrechts* begründet von Professor Dr. Karl Strupp in völlig neu bearbeiteter zweiter Auflage, Berlin 1962, p. 535.

[102] K. Skubiszewski, A *New Source of the Law of Nations: Resolutions of International Organizations*, [in:] *Recueil d'études de droit international en hommage à Paul Guggenheim*, Genève 1968, p. 519.

[103] South West Africa (Ethiopia v. South Africa), Proceedings joined with South West Africa (Liberia v. South Africa) on 20 May 1961, Judgment of 21 December 1962, Preliminary Objections, Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice, ICJ Rep. 1962, p. 491.

[104] K. Skubiszewski, *Uchwały prawotwórcze…,* p. 144.

[105] *Ibidem* oraz P. Reuter, *Organizations internationals et evolution du droit*, [in:] *L'évolution du droit public: études offertes à Achille Mestre*, Paris 1956, p. 452 et seq.

[106] G. Schulz, *Entwicklungsformen internationaler Gesetzgebung*, Göttingen 1960, p. 112; J. Kolasa, *Ku koncepcji międzynarodowego prawa uchwalanego*, [in:] K. Wolfke (red.), *Aktualne zagadnienia źródeł prawa międzynarodowego*, Wrocław 1984, p. 12. Cf. R. Monaco, *Sources of international law*, [in:]R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, Amsterdam 2000, p. 476.

[107] G.J.H. van Hoof, *Rethinking the sources of international law*, Deventer 1983, p. 190.

[108] G. Jaenicke, *Völkerrechtsquellen*, [in:] H.-J. Schlochauer (Hrsg.), *Wörterbuch des Völkerrechts* begründet von Professor Dr. Karl Strupp in völlig neu bearbeiteter zweiter Auflage, Berlin 1962, p. 772.

of the possibility to directly invoke will expressed by member states (mediation in the organization), while the secondary character refers to the basis for binding force resulting from a treaty.

Similarly, S.E. Nahlik, in spite of emphasizing the derivative nature of resolutions in respect of treaties, did not exclude the possibility of taking into account the role of resolutions passed by organizations in the event of a future revision of ICJ Statute within the scope of Art. 38[109]. Interestingly, he did not foresee a growth in the significance of resolutions, as, in his words, "the subjective and objective scope of enacting norms binding on states in this manner is minor, and encompasses a narrow and tightly defined sphere"[110]. In comparison with the creation of treaty law and ascertaining customary law, the scope of law-making competences of international organizations seemed limited in G. Jaenicke's view, thus he felt it premature to treat this activity as international law-making[111].

On the other hand, O.Y. Asamoah, in a study devoted to the legal meaning of declarations made by the UN General Assembly, states that, in appropriate conditions, resolutions of the Assembly can constitute not only a substantive, but also a formal source of international law[112]. In the latter meaning, resolutions constitute (or may constitute) – in Asamoah's opinion – the practice of states[113]. In the sense, more prevalent and more frequent, resolutions lead to (generate) practice which can achieve the status of law. Then, a resolution becomes evidence of the existence of a law whose formal effect is the product of subsequent practice of states[114]. In this manner, we are referring – consistently with the most popular justification – to customary law.

In this context, it is worth citing the weighty confrontation of resolutions of organizations with customary law, as performed by M. Bedjaoui. He treats resolutions of international organizations as a modern source, accenting the drawbacks of custom and the treaty method, while stressing their significance for developing states[115]. Of course, we may wonder about the legitimacy and perspectives for domination of the international community of states by the numerically larger group of developing states, which attempt in this mechanical manner to advance their own interests[116].

[109] S. E. Nahlik, *Wstęp do nauki prawa międzynarodowego*, Warszawa 1967, p. 417 et seq.

[110] *Ibidem*, p. 413-4.

[111] G. Jaenicke, *Völkerrechtsquellen*, [in:] H.-J. Schlochauer (Hrsg.), *Wörterbuch des Völkerrechts* begründet von Professor Dr. Karl Strupp in völlig neu bearbeiteter zweiter Auflage, Berlin 1962, p. 772.

[112] O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague 1966, p. 46.

[113] *Ibidem*.

[114] *Ibidem*.

[115] M. Bedjaoui, *Towards a new international economic order*, Paris 1979, pp. 140-2.

[116] See A. Bleckmann, *Völkerrecht*, Baden-Baden 2001, p. 85 (§ 225).

Paul Reuter perceives in the development of the law of international organizations a shift from the law of coordination to the law of subordination[117]. D. Sijdjanski goes even further, seeing in them the initial phase of a federal international law[118].

Irrespective of the extent to which we are prepared to accept such radical approaches, we should take notice of the conclusion that flows from these ideas, allowing us to treat resolutions as a separate source of law within the framework of international law. The Polish literature has seen calls for the adoption of a separate category of sources of international law in the form of "adopted law"[119]. K. Skubiszewski wrote similarly of a „fourth source of international law", as acts by international organizations establishing law cannot be assigned to any of the three traditional sources[120]. A more optimistic position in this scope is taken by K. Wolfke, who clearly states that „resolutions of international organizations as a primary instrument for achieving the goals and statutory objectives of such organizations are presently considered among the sources of international law"[121]. J. Gilas states directly that „presently, resolutions of international organizations are considered the new main source of international law"[122].

Indeed, as early as in 1963, during his Hague lecture, H. Waldock suggested treating the acts of international organizations as primary sources of international law within the meaning of Art. 38 of the Statute of the International Court of Justice[123], and not as derivative of treaties on the formation of international organizations. He accepted the fact that while a treaty is the origin of the legal force of an organization's acts, the moment of its conclusion is also the inception of an independent organization which becomes a new decision maker within the international community.

The International Court of Justice, in the context of a decision by the Security Council, gave an excellent account of this dependency in an advisory opinion in the matter of Kosovo:

> Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover,

[117] P. Reuter, *Organizations internationals et evolution du droit*, [in:] *L'évolution du droit public: études offertes à Achille Mestre*, Paris 1956, p. 449

[118] D. Sijdjanski, *Du Fédéralisme national au Fédéralisme international*, Lausanne 1954, p. 14.

[119] J. Kolasa, *Ku koncepcji…., passim.*

[120] K. Skubiszewski, *Uchwały prawotwórcze…*, p. 144.

[121] K. Wolfke, *Uchwały organizacji międzynarodowych*, [in:] B. Hołyst, E. Smoktunowicz (ed.), *Wielka encyklopedia prawa*, second edition, Warszawa 2005, p. 1083.

[122] J. Gilas, *Prawo międzynarodowe*, Second edition, Toruń 1999, p. 74.

[123] H. Waldock, *General Course on Public International Law*, "Recueil des Cours de l'Académie de Droit International", Vol. 106 (1963-II), p. 103.

> Security Council resolutions can be binding on all Member States […], irrespective of whether they played any part in their formulation[124].

It is without doubt that the creation of law by international organizations is the most similar to the manner in which municipal law is enacted[125]. Comparisons with national legislation created by parliament seem natural[126]. However, we recall that in traditional terms, "international legislation" has been understood as the making of international agreements[127], and according to an even more traditional definition, as exclusively international custom[128]. At present, we may speak in this context of international organs adopting norms which are directly binding on states[129]. We should be aware, however, that the absence of a uniform understanding of this term is the result of the untranslatability of domestic legislative mechanisms onto international law[130].

As the International Criminal Tribunal for the Former Yugoslavia so excellently put it,

> It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. […] There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects[131].

For international legislation, creating something along the lines of a parliament, regardless of practicability, could have a disintegrating influence[132]. Sir Hersch Lauterpacht addressed international law-making in the sense of "enactment of laws overriding

[124] See Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010, ICJ Rep. 2010, p. 442, § 94.

[125] N. Buchowska, *Kompetencja prawotwórcza organizacji międzynarodowych*, [in:] P. Wiliński (red.), *Prawo wobec wyzwań współczesności*, Poznań 2004, p. 327.

[126] G. Dahm, *Völkerrecht*, Band I, Stuttgart 1958, p. 26, Band III, Stuttgart 1961, p. 174.

[127] J.I. Knudson, *Methods of International Legislation with Special Reference to the League of Nations*, Genève 1928, p. 16. See also M.O. Hudson (ed.), *International Legislation: A collection of the texts of multipartite international instruments of general interest beginning with the Covenant of the League of Nations*, Volume I 1919-1921, Washington 1931 p. xiii et seq.

[128] See T. Gihl, *International legislation: an Essay on changes in international law and international legal situation*, London *et al*. 1937, p. 151.

[129] "[A]doption by international bodies of norms that are directly binding upon States" – See J. Brunée, *International Legislation*, "Max Planck Encyclopedia of Public International Law", § 1.

[130] See M.L. Fremuth, J. Griebel, *On the Security Council as a Legislator: A Blessing or a Curse for the International Community?*, "Nordic Journal of International Law", Vol. 76 (2007), p. 342.

[131] *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2.10.1995, § 43.

[132] H. Huber, *Die Internationale Quasilegislative*, "Schweizerisches Jahrbuch für internationales Recht", Band XXVII (1971), p. 24.

the will of a dissenting minority"[133]. Similarly, P.B. Potter accents the nature of "international legislation as the enactment of international law by formal action of less-than-unanimous consent"[134].

As it is, support for the rule of the majority can be found in the writings of Grotius. In his seminal work on the law of war and peace, the father of the contemporary law of nations refers to the right of the majority in the following manner:

> (…) all (societies) have this in common to them, that in matters for which each Association was instituted, the whole body, or the major part in the name of the whole body, oblige all and every the particular members of the society. For it is certainly to be presumed, that those who enter into a society are willing that there should be some method fixed of deciding affairs; but it is altogether unreasonable, that a greater number should be governed by a less; and therefore, tho' there were no contracts or laws that regulate the manner of determining affairs, the majority would naturally have the right and authority of the whole[135].

Such an approach can be considered innovative – indeed, traditionally there has been reliance on unanimity resulting from the fundamental sovereignty of members of the international community, customary law, or the principle of equality of states[136]. However, the exclusion of a sovereign decision about submission to the will of the majority would also be in direct conflict with the argumentation presented above[137]. We recall the classic *dictum* of the Permanent Court of International Justice, as expressed in the *Lotus* case, that limitations on the sovereignty of states may not be presumed[138]. That said, voluntary submission to the will of the majority cannot be ruled out *a priori*[139]. The defence of unanimity has also been based on the premise that the requirement of unanimity promotes consultations and international cooperation[140].

Reliance on the principle of unanimity leads in almost every case to paralysis[141]. However, views expressed immediately after the end of World War II on the death of the principle of unanimity were premature[142].

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[133] H. Lauterpacht, *International law: a treatise by L. Oppenheim, Vol. 1: Peace*, 7th edition, London 1947, p. 26, footnote 3.

[134] P.B. Potter, *An Introduction to the Study of International Organization*, Fifth edition completely revised and extended, New York –London 1949, p. 209.

[135] H. Grotius, *The Rights of War and Peace (2005 ed.), Vol. 2*, http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-2005-ed-vol-2-book-ii.

[136] Critically on the issue see: C.A. Riches, *Majority rule in international organization: a study of the trend from unanimity to majority decision*, Baltimore 1940, p. 8 et seq.

[137] See F.S. Dunn, *The Practice and Procedure of International Conferences*, Baltimore 1929, p. 126.

[138] PCIJ, Series A, No. 10, „Lotus" Judgment of 7 September 1927, p. 19-20.

[139] C.A. Riches, *op. cit.*, p. 291 et seq.

[140] *Ibidem,* p. 12.

[141] Ch. Tomuschat, *Obligations Arising for States Without or Against Their Will*, "Recueil des Cours de l'Académie de Droit International", 1993, vol. 241, p. 326.

[142] See C. W. Jenks, *Some Constitutional Problems of International Organizations*, "British YearBook of International Law", Vol. 22 (1945), p. 34.

In practice, the principle of consensus has achieved a great deal of significance, as it links respect for state sovereignty with consideration of the interest of the majority of states. Growth in the number of members of organizations, a product of decolonisation, is given among the causes of the growth in the importance of consensus[143]. It may also be argued that a decentralised international community is not prepared to express *volonté générale*[144]. We are aware of the multiplicity of meanings ascribable to the term *consensus*: from total unanimity, through a situation of nearly complete unanimity with a few states abstaining or opposed, to the opinion of the majority with a strongly emphasized minority opinion[145]. Here a strong similarity to majority voting can be observed.

From the procedural perspective, we may speak of *consensus* as a means of adopting a resolution which is already the product of general agreement[146]. At times, it is treated as the bastard child of unanimity[147]. In turn, from the substantive perspective this term expresses a certain content agreed upon and adopted without voting[148]. In this context, some speak of "une quasi-résolution plus «floue» dans son texte, moins précisément adoptée, donc plus vague dans sa portée, et à laquelle il paraît d'avoir recours lorsqu'on juge trop difficile ou trop long de faire adopter une résolution classique"[149]. Of course, this framing undermines the postulate of legal certainty. From this perspective, it could be held that the formal adoption of a resolution reinforces the position of an international organization expressed therein as a source of law.

Consensus is treated as a (pre-)source of law, and not exclusively as an expression of the manifestation of sources[150], which requires separate analysis undertaken in the course of considerations on non-binding acts (see *infra*, point 5).

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[143] H.G. Schermers, N. Blokker, *International institutional law: unity within diversity*, 5. rev. ed., Leiden-Boston 2011, § 784, p. 546.

[144] See H. Rolin, *De la volonté générale dans les organizations internationales*, [in:] *La technique et les principes du droit public. Études en l'honneur de Georges Scelle*, Paris 1950, tome II, p. 553 et seq. Cf. K. Zemanek, *Majority rule and consensus technique in law-making diplomacy*, [in:] R.St.J. Mac Donald, D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, The Hague et al. 1983, pp. 871 and 879.

[145] See A. D'Amato, *On Consensus*, "Canadian Yearbook of International Law", vol. 8 (1970), p. 106; Cf. R. Wolfrum, *Konsens im Völkerrecht*, [in:] H. Hattenauer, W. Kaltefleiter (Hrsg.), *Mehrheitsprinzip, Konsens und Verfassung: Kieler Symposium vom 14.-16. Juni 1984*, Heidelberg 1986, p. 79 et seq.

[146] K. Skubiszewski, *Uchwały prawotwórcze…,* p. 24-25.

[147] See L. Condorelli, *Voluntarism* versus *Majority Rule*, [in:], A. Cassese, J.H.H. Weiler, *Change and Stability in International Law-Making*, Berlin – New York 1988, p. 117.

[148] K. Skubiszewski, *Uchwały prawotwórcze…*, p. 25.

[149] G. de Lacharriere, *Consensus et Nations Unies*, "Annuaire Français de Droit International", Tome 14 (1968), p. 14.

[150] The main representantive of such a stance is B. Simma, *Methodik und Bedeutung der Arbeit der Vereinten Nationen für die Fortentwicklung des Völkerrechts*, [in:] W.A. Kewenig (Hrsg.), *Die Vereinten Nationen im Wandel: Referate und Diskussionen eines Symposiums „Entwicklungslinien der Praxis der Vereinten Nationen in völkerrechtlicher Sicht", veranstaltet aus Anlaß des 60jährigen Bestehens des Instituts für Internationales Recht an der Universität Kiel, 20. – 23. 11. 1974*, Berlin 1975, pp. 98-99. See also O.J. Lissitzyn,

4. Binding character of an act

The capacity of international organizations to issue binding acts remains the exception rather than the rule. In numerical terms, formally non-binding acts are predominant and quite diverse. In this context, therefore, it comes as no surprise that R. Baxter referred to international law in its "infinite variety"[151].

We may also invoke consequences: a resolution will be legally binding if violation of it would constitute a violation of international law[152]. This definition, however, constitutes a tautology, it refers to the affiliation of a given rule with international law. From a broader perspective, we may refer to binding character as an immanent feature of law in general[153]. Thus, if we are to construe criteria for binding character, we should include the authority to issue binding resolutions after requirements are fulfilled with regards to voting and procedures; and ultimately, this act must be promulgated with the intent of effecting a binding resolution[154].

Substantiation of the binding character of acts issued by international organizations can take diverse forms[155]. From a historical perspective, it is simplest to draw an analogy to treaties, but presently this analogy is rejected. A fantastic illustration of this assumption is supplied by the dispute between Poland and Lithuania concerning railways, and which was the subject matter of an advisory opinion of the Permanent Court of International Justice. Owing to a difference of opinion over the resumption of rail connections along the Landwarów-Kaisiadorys route following World War I, a case was heard by the Council of the League of Nations, which recommended the initiation of negotiations in its resolution of 10 December 1927[156]. Referring to this resolution, in its 1931 opinion the Permanent Court held that both states had participated in the adoption of the resolution, and that they were bound by it through the expression of consent[157]. The Polish side claimed that the parties to the dispute, through the adoption of the recommendation, had undertaken an obligation not only to enter into negotiations, but also to conclude a final agreement facilitating the initiation of rail traffic along the aforementioned route. The

Discussion [in reference to] O. Schachter, *Legal Problems*, [in:] R.N. Swift (ed.), *Annual Review of United Nations Affairs 1963-1964*, New York 1965, p. 128.

[151] R.R. Baxter, *International Law in 'Her Infinite Variety'*, "International and Comparative Law Quarterly", vol. 29 (1980), p. 549.

[152] R. Lagoni, *Resolution, declaration, decision*, [in:] R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, New, Revised English Edition,Volume 2, München 1995, p. 1084.

[153] J.-P. Jacqué, *Eléments pour une téorie de l'act juridique en droit international public,* Paris 1972, p. 231.

[154] R. Lagoni, *op. cit.*, p. 1084-5.

[155] See J. Klabbers, *An Introduction to International Institutional Law*, Second ed., Cambridge 2009, p. 184 et seq.

[156] Text of the resolution cited on p. 115 of the ruling.

[157] Railway Traffic between Lithuania and Poland, Advisory Opinion of 15 October 1931, PICJ, Series A/B, no. 42, p. 116.

Court concurred with this interpretation, but only within the scope of commencing and continuing negotiations to the extent possible with a view to concluding an agreement. This conclusion was justified by invoking the practice of the Council itself. It observed, however, that the obligation to engage in negotiations does not entail an obligation to reach an understanding.[158]

We may consider the wording of the position expressed by the Court. It doubtlessly makes a distinction between the obligation of effort and of result. It expresses the significance and the role of *pactum de negotiando*, and is treated in this way[159]. From the perspective of the creation of international law by international organizations, this argumentation is less than convincing. However, it should be observed that the aftermath of this theory can be found in the Luxemburg case law. In case no. C-311/94, the Court of Justice of the European Union held that by virtue of its participation in the adoption of "Recommendations", The Netherlands was bound by that document[160].

It is difficult to concur with a conception which treats the resolution of an international organization as an agreement (even in simplified form[161]) concluded between states whose representatives had voted for a resolution[162]. It should be kept in mind that accreditation before an organization does not automatically imply automatic authority to conclude this type of "treaty".

Depending on the position adopted in the course of voting, various justifications of binding force can be observed. The simplest scenario concerns a resolution adopted unanimously. In the absence of unanimity, a resolution passed by a majority via the required procedure will be binding upon the states voting for it on grounds of their expressed consent, and under the *estoppel* principle. The possibility of referring to the latter principle comes in for harsh criticism as leading to greater legal uncertainty[163]. T.O. Elias presents a justification for this binding force applying to the remaining states as well[164]. Member states which abstained from voting would be bound on grounds of ac-

[158] *Ibidem*.

[159] H.G. Hahn, *Das pactum de negotiando als völkerrechtliche Entscheidungsnorm*, "Außenwirtschaftsdienst des Betriebs-Beraters"; Bd. 18 (1978), p. 489 et seq.; U. Beyerlin, *Pactum de contrahendo und pactum de negotiando im Völkerrecht?*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", Bd. 36 (1976), p. 427; see also L. Marion, *La notion de pactum de contrahendo dans la jurisprudence internationale*, "Revue Générale de Droit International Public", tome 78 (1974), p. 351 et seq.

[160] See Judgment of the Court of 15 October 1996. – IJssel-Vliet Combinatie BV v Minister van Economische Zaken. – Reference for a preliminary ruling: Raad van State – Netherlands. – State aid for the construction of a fishing vessel. – Case C-311/94, European Court reports 1996 Page I-05023

[161] See M. Frankowska, *Umowy międzynarodowe w formie uproszczonej*, Wrocław *et al.* 1981, p. 54 et seq.

[162] C. Parry, *The sources and evidences of international law*, Manchester 1965, p. 22.

[163] I. Detter, *The Effect of Resolutions of International Organizations*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krzysztof Skubiszewski*, The Hague 1996, p. 392.

[164] T.O. Elias, *Modern Sources of International Law*, [in:] W. Friedmann *et al.* (eds.), *Transnational Law in A Changing Society: Essays in Honor of Philip C. Jessup*, New York and London 1972, p. 51.

quiescence, as abstention is not a vote against. In turn, members whose position was overruled in the vote should be considered as bound under the principle of the democratic majority.

Another justification can be based on abstract authorisation, consent, expressed in the course of accession to (creation of) an international organization. This mechanism is clearly presented by I. Detter, who indicates that accession to a treaty, the „constitution" of an international organization by states, means consent to undertaking certain legal obligations in the future, without consent expressed in each individual case[165]. Such a principle, in Detter's opinion, would seem to be a particular element of the *pacta sunt servanda* principle, which applies in respect of that constitution. The argumentation presented above is, of course, more convincing than that of the binding force of unilateral acts by states[166], although its abstractness and the absence of reference to reality may grate[167]. However, we may consider the direct application of consent as a consequence – albeit far from those initially intended – of membership in an international organization[168].

However, in his treatise on the law of international organizations, I. Seidl-Hohenveldern points out that the parties to a treaty appointing an international organization have undertaken an obligation to implement the founding treaty, referring in this manner to the theory of implied powers[169]. This concept consists in recognising that an international organization possesses certain additional competences beyond those given to it directly in the act constituting a given organization. Such additional competences are necessary and important in the fulfilment of the tasks and objectives of the organization, as well as the performance of its functions, but also for the exercise of those competences granted explicitly[170]. As we may read in the advisory opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case, "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as

[165] I. Detter, *Law making by international organizations*, Stockholm 1965, p. 322.

[166] E. Suy, *Les actes juridiques unilatéraux en droit international public*, Paris 1962, p. 30 et seq.

[167] A. Pellet, *Article 38*, [in:] A. Zimmermann *et al*. (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford 2012, p. 768.

[168] See e.g. E. Lauterpacht, *The Waning of the Requirement of Consent*, "Proceedings of the American Society of International Law", Vol. 85 (1991), p. 39.

[169] I. Seidl-Hohenveldern, *Das Recht der internationalen Organizationen einschließlich der supranationalen Gemeinschaften*, Köln 1967, p. 204. Reference tot hat formula may be found in the subsequent editions of this treatise – see I. Seidl-Hohenveldern, G. Loibl, *Das Recht der internationalen Organizationen einschließlich der supranationalen Gemeinschaften*, 7., überarbeitete Aufl., Köln 2000, p. 227.

[170] K. Skubiszewski, *Implied Powers of International Organizations*, [in:] Y. Dinstein, M. Tabory (eds.), *International Law at a Time of Perplexity*, Dordrecht *et al*. 1989, p. 856.

being essential to the performance of its duties"[171]. The primary judicial organ of the United Nations applied implied powers to the performance of the functions and securing the object and purpose of the Organization. However, in a dissenting opinion, judge Hackworth linked them with powers granted explicitly[172].

The ICJ also offered a narrow interpretation of implied powers in its advisory opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[173]. It was pointed out that:

> (…) international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the „principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. (...) The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers[174].

And thus, the grounds of the implication can be purposes, functions, and powers granted directly, although this should always be done cautiously[175].

The possibility of deducing law-making powers as implied powers is categorically excluded by K. Skubiszewski[176]. In turn, W. Morawiecki states that powers to enact norms can be expressed directly in the statute of an organization, but also in an implied manner; he specifies by explaining this can be done when they concern the internal functioning of the organization, or when they only constitute recommendations. This position thus has much in common with the approach of K. Skubiszewski detailed above. F. Er-

[171] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Rep (1949), p. 182. The Premanent Court of International Justice had also made similar declarations in an advisory opinion concerning the International Labour Organization, PCIJ, Series B. No. 13, 23.07.1926, *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer*, p. 18.

[172] ICJ Rep. 1949, p. 198: "Powers not expressed cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted". Similarly, in a dissenting opinion attached to an ICJ advisory opinion of 1954, "The doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers" – see *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, Dissenting Opinion by Judge Hackworth, ICJ Rep. 1954, p. 80.

[173] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. (1996). See J. Klabbers, *An Introduction to International Institutional Law*, Cambridge 2004, p. 80.

[174] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. (1996), point 25, pp. 78-79.

[175] K. Skubiszewski, *Implied Powers…,* p. 868.

[176] K. Skubiszewski, *Uchwały prawotwórcze…,* p. 31.

macora, on the other hand, feels that reference to the conception of implied powers is unnecessary on grounds of logic[177].

In turn, the most conservative approach assumes the necessity of acquiring consent in every case. This is derived from the demand for equal treatment of states[178]. Such an approach would, however, seem to equate the organs of an international organization to a conference of states. Nevertheless, the example of the reactions by some Member States of the European Union to the decision of the Council concerning relocation of refugees[179] demonstrates that this is not an entirely fictional scenario.

Another concept assumes allowances for opting out of the binding force of a resolution following its adoption through the submission of a reservation within a stipulated deadline. This mechanism is excellently depicted in solutions adopted under the Chicago Convention on International Civil Aviation[180]. Article 37 of the Chicago Convention contains a general provision concerning the adoption of international norms and principles of conduct[181]. At the same time, however, it was permitted to take advantage of *contracting out*, consisting in the acceptance that resolutions passed by an organization are assumed to be binding, and only the performance of a given action can release a state from its obligation. Indeed, the Convention in Art. 38 introduces "departures from international standards and procedures"[182]. By the same token, insofar as no reservation to a res-

[177] F. Ermacora, *Das Problem der Rechtsetzung durch internationale Organizationen (insbesondere im Rahmen der UN)*, [in:] "Berichte der Deutschen Gesellschaft für Völkerrecht", Heft 10, Karlsruhe 1971, p. 93.

[178] A. Verdross, *Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", Bd. 26 (1966), p. 692.

[179] See Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 239, 15.9.2015, pp. 146–156) and 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 248, 24.9.2015, pp. 80–94).

[180] The Convention on International Civil Aviation made at Chicago on 7 December 1944 and entered into force on 4 April 1947. For the (original) text of the Convention see 15 UNTS., pp. 295 et seq.

[181] "Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with: a) communications systems and air navigation aids, including ground marking; b) characteristics of airports and landing areas; c) rules of the air and air traffic control practices; d) licensing of operating and mechanical personnel; e) airworthiness of aircraft; f) registration and identification of aircraft; g) collection and exchange of meterological information; h) log books; i) aeronautical maps and charts; j) customs and immigration procedures; k) aircraft in distress and investigation of accidents; and other such matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate."

[182] "Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State

olution of the International Civil Aviation Organization is submitted within the appointed time, it enters into force without the necessity of any actions being taken.

A similar mechanism was used within the framework of exercising of the law-making power given to the World Health Organization (WHO)[183]. Under Art. 21 of the WHO Constitution, the Health Assembly adopts two regulations: Nomenclature Regulations and International Sanitary Regulations, which, since a thorough revision in 1969, have been called International Health Regulations. For many years, merely cosmetic changes were performed on the latter document; a breakthrough occurred in 2005, in the form of new health regulations adopted to assist effective reaction to the H1N1 virus epidemic[184]. In accordance with Art. 22, the Assembly should notify all member states of regulations adopted under Art. 21, and appoint a period for exercising the right to submit a reservation or rejection of the act in its entirety to the Director-General. And thus, in the event there are no reservations/rejections, an act will be binding without the necessity of any other actions being performed by member states.

More examples of the application of the mechanism can, of course, be given[185]. From the perspective of our analysis, of importance is the sort of reversal of the mechanism for the adoption of obligations. States will be automatically bound by the act of an international organization, and if they desire to avoid being bound, they should submit a clear declaration to that effect. Taking into account the possibility of a state or states expressing such a position would at the same time seem to exclude a strictly unilateral character of an act adopted by an international organization. What is of greater importance, the binding character of acts of international organizations could be eroded, but only in relation to states submitting a declaration. It should be noted, however, that contracting out by one or more member states does not negate the validity of the resolution in respect of other (the remaining) states. From the perspective of an international organization, this will be only an exception from the law-making activity it engages in.

which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State."

[183] Constitution of the World Health Organization, Art. 59, July 22, 1946, 14 UNTS 185.

[184] See W. Burek, *Zmiana sposobu realizacji kompetencji prawotwórczych przez Światową Organizację Zdrowia*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego", vol. XII, A.D. MXIV, pp. 78 et seq.

[185] A similar mechanism enabling to lay down technical regulations may also be found in World Meteorological Organization – see N. Buchowska, *Wykonywanie kompetencji prawotwórczych…*, p. 40 et seq. Cf. K. Skubiszewski, *Uchwały…*, p.. 63.

5. Soft law

Above we have observed that only a small portion of the acts created by international organizations are binding acts. The question arises of the possibility to introduce gradation of binding force. As convincingly observed by J. Klabbers, gradation can be taken into consideration in respect of concreteness, detail, specificity, scope, etc., but not in respect of validity[186]. In this definition, employment of the concept of *soft law* is not at all necessary[187]. P. Weil also regrets the blurring of levels of normativity[188]. On the other hand, A. Pellet considers this perspective on the matter to be simplified, and argues that the "soft" character of law can be derived from both its insertion into a non-binding instrument but also from the content itself, and thus can be expressed both formally and substantively[189].

Some terms can produce consternation. In his Hague lecture, G. Tunkin employs the formula of "semi-legal norms"[190]. Going beyond the framework of bivalent logic, in an expansive study published in a British yearbook of international law, F.B. Sloan addresses the binding force of recommendations[191]. He writes about „nascent legal force", which, in the absence of the relevant intention of the authors of a declaration, provoked the strong objection of H. Lauterpacht[192]. Other authors also warn against distorting the rules of international law through blurring with categories that are not entirely binding, which will lead in consequence only to creating legal instability and confusion, as well as contribute to depreciation of the discipline of international law[193].

It may not be forgotten, however, that bivalent logic does not always operate here. Attachment to it is treated as „exaggerated juridical formalism", and the application of traditional criteria and methods of municipal law for assessing the binding character

[186] J. Klabbers, *The Redundancy of Soft Law,* "Nordic Journal of International Law", Vol. 65 (1996), p. 181: "Our binary law is well capable of handling all kinds of subtleties and sensitivities, within the binary mode, law can be more or less specific, more or less exact, more or less determinate, more or less wide in scope, more or less pressing, more or less serious, more or less far-reaching; the only thing it cannot be is more or less binding".

[187] *Ibidem*, p. 168.

[188] P. Weil, *Towards Relative Normativity in International Law*, "American Journal of International Law", Vol. 77 (1983), pp. 415 et seq. and in the course of discussions on the report by M. Virally for the Institute of International Law – see Annuaire de l'Institut de droit international, Session de Cambridge, p. 369.

[189] A. Pellet, *The Normative Dilemma – Will and Consent in International Law*, "Australian Yearbook of International Law", vol. 12 (1992), p. 46 and 27, respectively

[190] G. Tunkin, *International law in the international system*, "Recueil des Cours de l'Académie de Droit International", Vol. 147 (1975-IV), pp. 61 and 70.

[191] F.B. Sloan, *The Binding Force of a Recommendation of the General Assembly of the UN*, "British YearBook of International Law", Vol. 25, 1948, pp. 1 et seq.

[192] See H. Lauterpacht, *International Law and Human Rights*, London 1950, p. 413-4 (and footnote 61).

[193] I. Detter, *The Effect of Resolutions…*, p. 392.

and force of international rules would seem affected[194]. And thus, as A. Pellet argues, it seems necessary to reject this rigour and to accept the possibility for the existence of diversity in the forms by which international law manifests itself[195].

Limited significance in a legal sense, but based on the absence of a formal connexion, it gives rise to certain consequences. As judge Klaestad remarks in a dissenting opinion to the advisory opinion of 1955 on voting procedures:

> Its effects [of a resolution adopted by the General Assembly] are, in my view, not of a legal nature in the usual sense, but rather of a moral or political character. This does not, however, mean that such a recommendation is without real significance and importance, and that the Union Government can simply disregard it. As a Member of the United Nations, the Union of South Africa is in duty bound to consider in good faith a recommendation adopted by the General Assembly under Article 10 of the Charter and to inform the General Assembly with regard to the attitude which it has decided to take in respect of the matter referred to in the recommendation[196].

They are thus worthy of consideration. B. Conforti goes a step further, observing in this scope the necessity to justify the failure of realisation in respect of the organ that issued them. It can even be deduced on the basis of the presumption of legal action[197].

The greatest attention has been devoted to the quasi-law-making powers of the General Assembly[198]. It should be recalled that proposals to grant the General Assembly with such powers during a conference in San Francisco were submitted by the Philippines[199]. They were ultimately rejected.

Formally non-binding resolutions of the Assembly may be treated as a modern complement to the law of treaties, as well as an authoritative interpretation or indications as to the proper interpretation of treaties[200]. They are even held as an elaboration of the provisions of the United Nations Charter[201]. In the subject literature, these resolutions

[194] J. Castañeda, *Legal Effects of United Nations Resolutions*, New York and London 1969, p. 176. The author's argument is worth citing *in extenso*: "Obviously, the legal value of declaratory resolutions allows for a wide range of shadings. There are no tangible, clear, juridical criteria that demarcate with precision the zones of binding force. Hazy, intermediate, transitional, embryonic, inchoate situations are not infrequent. […] to determine the legal value of this type of resolution by means of *a priori*, schematic, and strict criteria, implies failure to take into account the multiform variety and complexity of the underlying international reality, which must necessarily be reflected in the juridical superstructure".

[195] A. Pellet, *The Normative Dilemma – Will and Consent in International Law*, "Australian Yearbook of International Law", vol. 12 (1992), pp. 52-3.

[196] Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion of 7 June 1955, Separate Opinion of Judge Klaestad, ICJ Rep. 1955, p. 88.

[197] B. Conforti, *Le rôle de l'accord dans le système des Nations Unies* "Recueil des Cours de l'Académie de Droit International"142(1974), pp. 262ff. (to 265).

[198] R. Falk, *op. cit.*, pp. 782 et seq.

[199] UNCIO, Vol. 9 p. 316

[200] See U. Scheuner, *Recommendations and Traditional Sources of International Law*, "German Yearbook of International Law", Vol. 20 (1977), p. 107.

[201] O.Y. Asamoah, *The legal Significance of the declarations of the General Assembly of the United Nations*, The Hague 1966, p. 35 et seq.

(or at least some of them) are associated with general principles of law[202]. They can also simply be treated as a means of ascertaining legal rules[203].

During the conference in San Francisco, consideration was given to the possibility of broadening interpretation of the Charter by organs of the United Nations[204]. It was agreed that all organs of the UN are appointed to interpret its statute as a component of the performance of its functions[205]. In practice, it is associated with the unanimous position of the members, or at least the absence of overt opposition[206].

For example, L.B. Sohn states that there has never been any doubt certain resolutions of the General Assembly and Security Council have a binding effect[207]. If such a statement in respect of the Security Council does not provoke any objections, it is worth examining the justification given for the binding force of some resolutions by the General Assembly. In this respect, the position submitted by the representative of Peru in the course of examining the Hungarian question is cited, which boils down to the following logic: a decision by the General Assembly which applies the principles of the Charter in respect of a specific situation will be binding, as the Charter is binding, and the resolution of the General Assembly merely gives effect to and interprets the Charter in a specific case, thereby creating a legal obligation[208].

As regards the possibility of performing binding interpretation, diverse opinions have been expressed in the case law and the scholarship. First and foremost, we may refer to the advisory opinion of the Permanent Court of International Justice in the *Jaworzyna* case[209], or to the even more strongly emphasized position taken by A. Verdross, in accordance with which authentic interpretation can be performed only by the authority creating a given norm or authority superior to it, or through a procedure established by those authorities[210].

[202] See e.g. R. Cassin, *La déclaration universelle et la mise en oeuvre des droits de l'homme*, "Recueil des Cours de l'Académie de Droit International", Vol. 79 (1951-II), p. 294. See also A. Verdross, *Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", Bd. 26 (1966), p. 694 et seq. and O.Y. Asamoah, *op. cit.*, pp. 61-62

[203] U. Scheuner, *op. cit.*, p. 110.

[204] Committee IV/2 captured the issue thusly: "if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force" – see UNCIO Doc. 993/IV/2/42(2), UNCIO, Vol. 13, 1945, p. 709 et seq.

[205] UNCIO, Vol. 13, p. 709.

[206] L.B. Sohn, *The Development of the Charter of the United Nations: the Present State*, [in:] M. Bos (ed.), *The Present State of International Law and Other Essays written in honour of the Centenary Celebration of the International Law Association 1873-1973*, Deventer 1973, p. 50.

[207] *Ibidem*, p. 55-6.

[208] See Statement by Mr. Belaunde (Peru) in the Hungarian Question, 9th January 1957, GAOR, Eleventh Session, Plenary, pp. 836 Et seq. [cited in:] Sohn, *op. cit.*, p. 56

[209] "It is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it" – see *The Question Jaworzina (Polish-Czechoslovakian Frontier)*, Advisory Opinion of 6 Décember 1923, PCIJ Series B, No. 8, p. 37.

[210] See A. Verdross, *Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?*, "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht", Bd. 26 (1966), p. 695.

Such an approach can be treated as an expression of formalism, and a threat to the effective performance of the functions of a given organization. In this context, it would be appropriate to cite the advisory opinion of the International Court of Justice in the case concerning the interpretation of peace treaties with Bulgaria, Hungary, and Romania, in which it was emphasized that the Court's task is to interpret, not revise, the treaties[211].

Salo Engel took a position in direct opposition to that expressed above in the course of a debate conducted by the American Society of International Law. The mentioned author considered unanimous practice of Members as an interpretation with binding force[212]. In this manner, resolutions of the General Assembly are equated with the later practice of states as a means of treaty interpretation (Art. 31(3)(b) Vienna Convention on the Law of Treaties)[213]. It should, however, be kept in mind that the Vienna Convention (1969) refers to the practice of states-parties to a treaty, and thus members of an organization. In light of the autonomy of an international organization, it would be difficult to maintain the identity of the practice of member states with the practice of organs of a given organization, even if the composition of the latter includes representatives of states[214].

Within this scope, it is worth making reference to the concept of formless consent (*formloser Konsens*), which precedes an international agreement and customary law. In the opinion of B. Simma, it is a logical necessity as attempts at couching an authentic interpretation of the UN Charter arrived at in such a manner or of a new general international law in the classic categories resulting from the disposition of Art. 38 ICJ Statute are futile and objectless (*müßig*)[215]. On the one hand, the internationalist cited here, opposed to equating the practice of an organ with the practice of states, takes a critical approach to the consequences that emerge within the scope of customary law, while on the other he treats the General Assembly as a centre for communication owing to which

[211] *It is the duty of the Court to interpret the Treaties, not to revise them*. The next part of the Court's reasoning should also be presented: *The principle of interpretation expressed in the maxim: Ut res magis valeat quam pereat, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit*. – See Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 18 July 1950 (second phase), ICJ Rep. 229.

[212] S. Engel, *Procedure for the* de facto *Revision of the Charter*, "American Society of International Law Proceedings" 1965, pp. 108–116.

[213] Cf. E. Klein, *Vertragsauslegung und „spätere Praxis" Internationaler Organizationen*, [in:] R. Bieber, G. Ress (Hrsg.), *Die Dynamik des Europäischen Gemeinschaftsrechts/The dynamics of EC-law: Die Auslegung des des Europäischen Gemeinschaftsrechts im Lichte nachfolgender Praxis der Mitgliedstaaten und der EG-Organe*, Baden-Baden 1987, p. 101 et seq.

[214] See K. Skubiszewski, *Enactment*…, p. 222.

[215] B. Simma, *Methodik und Bedeutung der Arbeit der Vereinten Nationen für die Fortentwicklung des Völkerrechts*, [in:] W.A. Kewenig (Hrsg.), *Die Vereinten Nationen im Wandel: Referate und Diskussionen eines Symposiums „Entwicklungslinien der Praxis der Vereinten Nationen in völkerrechtlicher Sicht", veranstaltet aus Anlaß des 60jährigen Bestehens des Instituts für Internationales Recht an der Universität Kiel, 20. – 23. 11. 1974*, Berlin 1975, pp. 98-99.

pure, primary consent as a formal source of international law can be materialised, along with but also first and foremost before the manifestation of the emergence of a treaty or customary norm[216]. Earlier, in the face of a disorganised international community, this operation was, in the opinion of B. Simma, too abstract[217].

By the same token, consensus is set up in opposition to the consent of a state. If the latter expresses the will of a sovereign state, law-making *consensus* therefore expresses the will of the international community[218]. Yet the literature also contains views that equate consensus with the consent of a state[219]. Such a position would seem to ultimately be taken (or at least it is perceived) by R. Falk, who writes that "the myth of consent is frequently supplanted by the reality of an inferred consensus"[220]. It cannot, however, be forgotten that the impressions of agreement and unanimity which arise will frequently be illusory – states do not consider a document adopted in this manner as binding, which is why they do not express any objections[221]. It cannot be excluded that they would have voted differently had they been aware of the risk associated with the given resolution[222]. These considerations (and in accordance with the *prima facie* wording of the Charter) make it troublesome to acknowledge consensus as a source of law. An additional form of acceptance by states via some more traditional means would be necessary, or manifestation by an international organization through a binding unilateral act.

However, the dominant view places the significance of resolutions by the General Assembly in the context of customary law. Under this view, such resolutions provide evidence of the existence of an *opinio iuris*. The International Court of Justice also favours this conception, as it stated in the *Nicaragua* case:

> This opinio juris [– as to the binding character of the obligation to refrain in international relations from the threat or use of force –] may, though with all due caution, be deduced from, inter alia, the attitude of […] states towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter.

[216] *Ibidem*, p. 98.

[217] *Ibidem*.

[218] R. Falk, *op. cit.,* p. 784 invoking C.W. Jenks *Law, Welfare, and Freedom*, pp. 83 et seq., K. Skubiszewski, *Czy uchwały Zgromadzenia Ogólnego ONZ są źródłem prawa?*, „Państwo i Prawo" no. 2, 1981, p. 25.

[219] See O.J. Lissitzyn, *Discussion* [in reference to] O. Schachter, *Legal Problems*, [in:]. R.N. Swift (ed.), *Annual Review of United Nations Affairs 1963-1964*, New York 1965, p. 128.

[220] R. Falk, *op. cit.,* p. 790.

[221] See remarks by K. Subiszewski during discussion of paper by B. Simma [in:] W.A. Kewenig (Hrsg.), *Die Vereinten Nationen im Wandel: Referate und Diskussionen eines Symposiums „Entwicklungslinien der Praxis der Vereinten Nationen in völkerrechtlicher Sicht", veranstaltet aus Anlaß des 60jährigen Bestehens des Instituts für Internationales Recht an der Universität Kiel, 20. – 23. 11. 1974*, Berlin 1975, p. 112.

[222] I. Detter, *The Effect…,* p. 391.

> On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves[223].

The Hague judges still more precisely expressed this influence in an advisory opinion of 8 July 1996 on the *legality of the threat or use of nuclear weapons*:

> The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule[224].

It should generally be stated that the soft law created by international organizations gives greater freedom and flexibility than customary law. But it can also impact the formation of customary law[225]. This mechanism is described well by Sir Kenneth Bailey:

> A resolution on the record may today, in point of law, look like only a recommendation, or even a mere "*voeu*". 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[226].

By the same token, we are referring to observance of the law as a process[227].

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[223] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, §188, ICJ Rep. 1986, pp. 99-100.

[224] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Rep. 1996, § 70, p. 254-255. It should, however, be observed that the Court next adopted a quite limited position (*ibidem*, § 71): "Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be „a direct violation of the Charter of the United Nations7'; and in certain formulations that such use „should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons".

[225] See in particular a seminal study in French – G. Cahin, *La coutume internationale et les organizations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier*, Paris 2001.

[226] K. Bailey, *Making International Law in the United Nations*, "Proceedings of the American Society of International Law", Vol. 61 (1967), p. 239.

[227] See e.g. R. Higgins, *Policy Considerations and the International Judicial Process*, who defines international law in the following manner: "international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed "rules". There inevitably flows from this definition a concern, especially where the trend of past decisions is not overwhelmingly clear, with policy alternatives for the future" ("International and Comparative Law Quarterly", Vol. 17, 1968, p. 59). Similarly, E. Mc Whinney, *The World Court and the contemporary international law-making process*, Alphen aan den Rijn 1979 p. 1, and also G.J.H. van Hoof, *Rethinking the sources of international law*, Deventer 1983, p. 206 et seq.

An interesting example of this approach would seem to be the increasingly common procedure concerning follow-up activities, applied by organs engaged in human rights protection[228]. They aim at the (gradual) convincing of member states to observe recommendations which are not formally binding on them. By the same token, this procedure can be treated as an element of the dialogue between an organ monitoring observance of human rights and a member state[229].

Undoubtedly, the legal value of a recommendation is additionally expressed in the establishment of the presumption of legality of actions consistent with its content[230]. In this context we may even speak of a legitimising effect[231]. In issuing a recommendation, the organization takes on the function of expressing approval or disapproval of claims, policies, and actions of states, and thus expresses a "collective legitimisation"[232].

Let us recall the discretionary recognition enjoyed by the addressees of recommendations, but we may also not forget that continual infringement of recommended standards can ultimately lead to consequences for states choosing to ignore them. This dependency has been expressed quite succinctly by judge H. Lauterpacht in his dissenting opinion attached to the advisory opinion in the matter of voting procedure concerning South West Africa[233]. It is worth quoting directly the later portion of this carefully-worded separate opinion to the advisory opinion:

[228] See especially N. Ando, *The follow-up procedure of the Human Rights Committee's views* [in:] N. Ando *et al.* (eds.), *Liber amicorum judge Shigeru Oda*, The Hague 2002, p. 1437 et seq. and M.G. Schmidt, *Follow-up procedures to individual complaints and periodic state reporting mechanisms*, [in:] G. Alfredsson *et al.* (eds.), *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller*, Leiden 2001, p. 201 et seq.

[229] See szerzej F. Coomans*, Follow-up action to state reporting on human rights: procedure and practice of the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights*, [in:] F. Coomans *et al.* (eds.), *Rendering justice to the vulnerable: liber amicorum in honour of Theo van Boven*, The Hague 2000, p. 83.

[230] U. Scheuner, *op. cit.*, p. 118.

[231] H.G. Schermers, N. Blokker, *op. cit.*, § 1238, p. 778. See I.L. Claude, *Collective Legitimization as a Political Function of the United Nations*, "International Organization", Vol. 20 (1966), p. 367.

[232] W. Morawiecki, *Funkcje…,* p. 119.

[233] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion of 7 June 1955, Separate Opinion of Judge Lauterpacht, ICJ Rep. 1955, p. 120: "Both principle and practice would thus appear to suggest that the discretion which, in the sphere of the administration of Trust Territories or territories assimilated thereto is vested in the Members of the United Nations in respect of the Resolutions of the General Assembly, is not a discretion tantamount to unrestricted freedom of action. It is a discretion to be exercised in good faith. Undoubtedly, the degree of application of good faith in the exercise of full discretion does not lend itself to rigid legal appreciation. This fact does not destroy altogether the legal relevance of the discretion thus to be exercised. This is particularly so in relation to a succession of recommendations, on the same subject and with regard to the same State, solemnly reaffirmed by the General Assembly. Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly. The same considerations apply to Resolutions in the sphere of territories administrated by virtue of the principles

> it is not admissible to give currency to an interpretation, without qualifying it in al1 requisite detail, which gratuitously weakens the effectiveness of the Charter. It would be wholly inconsistent with sound principles of interpretation as well as with highest international interest, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly-one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations-and to treat them, for the purpose of this Opinion and otherwise, as nominal, insignificant and having no claim to influence the conduct of the Members. International interest demands that no judicial support, however indirect, be given to any such conception of the Resolutions of the General Assembly as being of no consequence[234].

Wolfgang Friedmann points out in a similar manner that resolutions of the General Assembly, formally of no significance in the process of enacting international law, come from the most representative organ of the most expansive organization in human history, and they "clearly" have a significant impact on the development of that law[235]. In conclusion, he points out the multiplicity of channels of the growth and creation of international law, and emphasises that, just as it is absurd to equate resolutions with formal international agreements, it would also be absurd to refuse to recognise their meaning in the ongoing process of articulation and evolution of international law[236]. Similarly, M. Lachs emphasizes the clear tendency towards treating the issue of the form of international law with greater tolerance and flexibility[237].

This can be served by the creation of law through reference, which can be found in a number of shapes and forms. In this very manner a given act (primarily one of *soft law*) acquires its binding character[238]. The application of this mechanism can be seen in all clarity in reference to the UN Convention on the Law of the Sea[239]. A number of its

of the System of Trusteeship. Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction".

[234] *Ibidem*, p. 122.

[235] W. Friedmann, The *Changing Structure of International Law*, London 1964, p. 138.

[236] *Ibidem*, p. 140.

[237] M. Lachs, *Some Reflections on Substance and Form in International Law*, [in:] W. Friedmann *et al.* (eds.),*Transnational Law in a Changing Society, Essays in Honor of Philip C. Jessup*, New Work and London 1972, p. 112.

[238] See Ch. Tomuschat, *op. cit.,* p. 348 et seq. and J.D. Aston, *op. cit.,* p. 175-177.

[239] OJ L 2002, no. 59, item 543.

provisions incorporate references to standards and other rules that are to be binding upon states. For example, we may point to Art. 211(2) of this Convention, pursuant to which:

> States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference[240].

By the same token, the possibility again arises of enhancing the status of rules which were initially non-binding in international law. An institutional act acquires binding force because of a treaty formally external to it.

As K. Zemanek rightly observes, states – being not only addressees but also creators of international law – can create new law-making processes within such scope as those processes are accepted by systemic partners[241]. We again arrive at the conclusion that it is difficult to restrict considerations about the sources of international law to elements in the disposition of Art. 38 ICJ Statute.

6. The abstract and general character of an act

In considering sources of international law, it should be observed that the doctrine of sources naturally must find a way of reconciling the demand for specificity of rules with their normativity[242]. The distinction between abstract and general norms *versus* individual and specific norms does not perform as meaningful a role at the inter-state level, or within the community of states in general, as it does in municipal law[243]. Particularly in respect of international organizations, separating executive from law-making activity is far more difficult than in the case of a state[244]. Indeed, this is visible in the once-traditional name of organizations as "administrative unions"[245].

[240] See also para. 5 of that article. Other examples of the application of this mechanism are to be found in Art. 21(2) & (4), 39(2), 41(3), 42(1)(b), 53(8), 60(3) & (5), 94(5), 207(1), 208(3), 209(2), 214, 216(1),217(1)-(4), 218 (1), 219, 220 (1)-(3), 222, 226(1) & (4) of the Convention.

[241] K. Zemanek, *Is the Term 'Soft Law' Convenient?,* [in:] G. Hafner *et al.* (eds.), *Liber amicorum Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday*, The Hague 1998, p. 844.

[242] M. Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument (with a new epilogue),* Cambridge 2005, p. 303.

[243] R.L. Bindschedler, *Rechtsakte der internationalen Organizationen*, [in:] E. Bucher, P. Saladin (Hrsg.), *Berner Fesgabe zum Schweizerischen Jurisentag 1979 dargebracht von der juristischen Abteilung der Rechts- und wirtschaftswissenschaftlichen Fakultät der Universität Bern*, Bern und Stuttgart 1979, p. 361.

[244] I. Seidl-Hohenveldern, G. Loibl, *Das Recht der internationalen Organizationen einschließlich der supranationalen Gemeinschaften*, 7., überarbeitete Aufl., Köln 2000, p. 218-9.

[245] See A. Ross*, A Textbook on International Law. General Part*, London 1947, p. 224 et seq.

International law-making fundamentally excludes individual and specific norms, *i.e.* acts of application, rather than enactment, of international law[246]. For example, K. Skubiszewski categorically states that „the contents of a law-making act of an international organization are general (*i.e.* formulated abstractly) norms regulating the behaviour of an unlimited number of addressees in an unlimited number of cases"[247]. But the correctness of this position (widely held, it should be noted) is questioned with a view to the fact that this requirement is derived from the conception of the Act, and this idea is difficult to transpose onto relations between members of international organizations[248]. A distinction can also be based on the criterion of the norm created: between general norms, *i.e.* of general and abstract applicability, and detailed norms, which include decisions about the application of general norms in concrete situations[249].

Wojciech Morawiecki, as opposed to K. Skubiszewski, in the context of the law-making competence of an organization rejects the requirement that a law-making act refer to an unlimited quantity of addressees[250]. He does, however, add the general stipulation that in international law the number of entities is generally limited, and gives the example of a bilateral agreement which will be binding on only two subjects. He does, however, require such an act be of a repeatable character[251]. In this context it should be noted that the division into abstract and general norms, suitable for repeat application and derived from multilateral treaties on the one hand, and obligations of a primarily one-off character and derived from bilateral treaties on the other hand, has lost significance[252]. In both cases a uniform treaty regime is applied, as expressed in the Vienna Convention on the Law of Treaties.

Let us return, however, to the general character of regulation. As Ch. Tomuschat correctly observes in his Hague lecture, recognition of a general regulatory competence of the Security Council is neither revolutionary nor an ivory tower dream[253]. Using the example of an economic embargo imposed on a given state, he convincingly argues that the group of addressees is significantly broader, as the sanctions set out in the Council's resolution will impose difficulties on not only the direct addressee, but also on other

[246] N. Buchowska, *Kompetencja prawotwórcza…*., p. 327. J. Dehaussy (*Sources du droit international – Introduction générale*, "Jurisclasseur de droit international", fasc. 10, no. 7) treates sources as all processes in the creation of general norms intended to regulate international relations (*tout processus juridicque de créateur de norms générales destinées à régir des rapports internationaux*).

[247] K. Skubiszewski, *Uchwały prawotwórcze…*, p. 34.

[248] M. Bos, *A methodology of international law*, Amsterdam *et al*. 1984, p. 61.

[249] C. Denis, *op. cit.*, p. 2-5.

[250] W. Morawiecki, *Funkcje…,* p. 429 (footnote 1)

[251] *Ibidem*, p. 121.

[252] See A. Wyrozumska, *Źródła prawa międzynarodowego*, [in:] J. Symonides, D. Pyć (ed.), *Wielka encyklopedia prawa*, Tom 4: *Międzynarodowe prawo publiczne*, Warszawa 2014, p. 614.

[253] Ch. Tomuschat, *op. cit.*, p. 345-6.

states by necessitating modification of their position (such as the suspension of trade relations). Thus, we may also speak in this context of the general application of a given measure, which is a characteristic that qualifies the action of the Council as a normative act, and not a revolutionary breakthrough[254].

In this context, it comes as no surprise that the Security Council is treated at times as an *Ersatzlegislator* of the community of states[255]. Some authors go even further and speak directly of legislative or law-making activity[256]. They can be justified by broad discretion in assessment and strong acceptance by states[257]. As M. Akram and S. Haider Shah observe, the conceptual vagueness of peace and security render it difficult to state that the Security Council has exceeded its remit[258]. Important, however, is the exhortation by O. Corten to not confuse the strength of a fact with a legal competence[259]. It cannot be forgotten that the interpretative possibilities of the Security Council are not boundless, and it may not interpret that notion in a manner that would amount to amending the UN Charter[260]. Narrowing the law-making character to binding force in respect of decisions by the Security Council equates the creation of law with its application[261].

The biggest controversies were provoked by two resolutions of the Security Council, number 1373 and number 1540. The first of those resolutions was adopted as an element[262] of the reaction to the attack of 11 September 2001 on the World Trade Center. The Security Council set out obligations imposed on **all** [emphasis mine, BK] states: to prevent and suppress financing of terrorist acts, and the penalisation and freezing of the use of financial resources for terrorism-related purposes[263]. Attention should also be paid to the wording used in the preamble of the resolution, in which the Security Council ac-

[254] *Ibidem*, p. 346.

[255] J.D. Aston, *op. cit.*, p. 64.

[256] See K. Dicke, *Weltgesetzgeber Sicherheitsrat*, "Vereinte Nationen", Bd. 49 (2001), p. 163; S. Talmon, *The Security Council as World Legislature*, "American Journal of International Law", Vol. 99 (2005), p. 175; E. Rosand, *The Security Council as "Global Legislator" Ultra Vires or Ultra Innovative*, "Fordham International Law Journal", Vol. 28 (2005), p. 542.

[257] Interestingly, Aston applies that justification also to the Security Council's appointment of the ICTY in Resolution 827.

[258] M. Akram, S.H. Shah, *The legislative powers of the United Nations Security Council*, [in:] R. St.J. Macdonald, D.M. Johnston (eds.), *Towards world constitutionalism: issues in the legal ordering of the world community*, Leiden *et al.* 2005, p. 440.

[259] In the introduction to the work, C. Denis,*op. cit.*, p. xii.

[260] N. Angelet,*Protest against Security Council decisions*, [in:] K. Wellens (ed.),*International Law: Theory and Practice: Essays in Honour of Eric Suy*, The Hague 1998, p. 281.

[261] A. Marschik, *Legislative Powers of the Security Council*, [in:] R.St.J. Macdonald, D.M. Johnston (eds.), *Towards world constitutionalism: issues in the legal ordering of the world community*, Leiden *et al.* 2005, p. 462.

[262] Prior to that the Security Council adopted Resolution 1368 on 12 September 2001.

[263] UN Doc. S/Res/1373 (2001).

knowledged that every act of international terror constitutes a threat to international peace and security[264].

Such an approach contradicts the views of many commentators, who have interpreted the notion „threat to peace" narrowly, coupling it tightly with the threat of force, which is prohibited under Art. 2 (4) of the UN Charter[265]. However, with the passage of time a gradual broadening of the meaning of that notion took place. For example, it has been expanded to include a serious violation of human rights and international humanitarian law[266], violations of the right of nations to self-determination[267], and support for international terrorism[268]. Another example may be given in the form of Resolution 2177 (2014), in which the eruption of an epidemic of the Ebola virus is treated as a threat to international peace and security[269]. Since the end of the Cold War it has been possible to observe a clear growth in the activity of the Council in respect of applying chapter VII of the Charter[270]. Before, if the Security Council decided to employ repeatable measures, they were a concrete response to a given threat in a defined situation. This practice was broken with for the first time with the adoption of Resolution 1373 (2001).

Resolution 1540 (2004) takes things a step further, and without reference to a specific situation recognizes the spread of weapons of mass destruction as a threat to international peace and security, and obliges states to a range of activities to prevent access by private entities to this type of weapon. These are general and abstract obligations. Resolution 1540 even contains definitions (means of delivery, related materials, non-state actor)[271].

Thus, we may observe an attempt at departing from the traditional manner of setting up international obligations. Resolutions adopted by the Security Council make it possible to avoid the painstaking process of expressing consent, but is done at the expense of states which are deprived of the possibility of expressing their dissent owing to the limited number of states comprising the Security Council. Both resolutions were

[264] It is worth citing the exact wording (UN Doc. S/Res/1373 (2001) of para. 3 of the Preamble: Reaffirming further that such acts [the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001], like any act of international terrorism, constitute a threat to international peace and security.

[265] See J. Arntz, *Der Begriff der Friedensbedrohung in Satzung und Praxis der Vereinten Nationen*, Berlin 1975, p. 64, 110-111.

[266] See e.g. UN Doc. S/RES/1264 (1999).

[267] E.g. Resolution 217 (1965).

[268] See e.g. UN Doc. S/RES/1269 (1999), UN Doc. S/RES/1368 (2001).

[269] See UN Doc. S/RES/2177(2014), para. 5 of the Preamble.

[270] Attention is drawn to this *inter alia* by W. Czapliński, *Ewolucja kompetencji Rady Bezpieczeństwa ONZ*, [in:] K. Lankosz (ed.), *Aktualne problemy prawa międzynarodowego we współczesnym świecie. Księga pamiątkowa poświęcona pamięci Profesora Mariana Iwanejko*, Kraków 1995, p. 28. A detailed analysis, including from a statistical perspective, See P. Wallensteen, P. Johansson, *Security Council Decisions in Perspective*, [in:] D.M. Malone (ed.), *The UN Security Council: from the Cold War to the 21st Century*, Boulder 2004, p. 18 et seq.

[271] See UN Doc. S/RES. 1540(2004), §§ 1, 8 and 9 Preamble.

undertaken unanimously and, furthermore, it would seem that they reflected the general conviction of states that it is necessary to react swiftly to new threats. The acceptance of states can here have a convalidating effect, but the exceptional character of such legislation has been emphasized on many occasions[272]. We are dealing with great possibilities, which are nevertheless associated with great danger.

In particular the discussion accompanying the passage of Resolution 1540 demonstrates clearly the objections of states to the Security Council adopting resolutions of a law-making character. The Switzerland representative articulated the exceptional nature of the situation which led the Security Council to undertake a resolution on weapons of mass destruction[273]. However, the representative of Nepal highlighted the necessity of the Security Council acting within the mandate given to it under the UN Charter, exhorting it to reject the temptation to act as the world's law-maker, government, and court rolled into one[274]. The requirement of consent was pointed out by the representative of Indonesia, which also expressed the position of the Non-Aligned Movement[275]. A similar position was presented by the Indian representative, first during a debate[276], and then after the first debate in an official letter[277] addressed to the President of the Security Council.

[272] For example, Ambassador Stählin, representing Switzerland, emphasized: "In principle, legislative obligations (...) should be established through multilateral treaties, in whose elaboration all States can participate. It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need".(UN Doc. S/PV. 4950, p. 28).

[273] *Ibidem*; compare Egypt's position: "We note a growing trend towards granting the Security Council additional legislative powers. Here, we wish to make it very clear that membership of the United Nations and the common desire to strengthen its role places a number of responsibilities on our shoulders in conformity with the provisions of the Charter as drafted by the founding Members. Thus, in defining the role of the Security Council in terms of the maintenance of international peace and security and of guaranteeing compliance by Member States with international law, the Charter does not give the Council legislative authority; it gives it the authority to safeguard the Charter and to monitor compliance with its provisions. If in the present case that is what is required, it should be emphasized in the text" (UN Doc. S/PV. 4950, (Resumption 1), p. 3).

[274] S/PV.4950 (Resumption 1), p. 14: "The Council needs the willing support of the broader membership to maintain international peace and security. To ensure such support, the Council should work within its mandate and be seen to be doing so. Therefore, it should resist the temptation of acting as a world legislature, a world administration and a world court rolled into one".

[275] "Indeed, we are of the opinion that legal obligations can only be created and assumed on a voluntary basis. Any far-reaching assumption of authority by the Security Council to enact global legislation is not consistent with the provisions of the United Nations Charter. It is therefore imperative to involve all States in the negotiating process towards the establishment of international norms on the issue" – See UN Doc. S/PV. 4950, p. 31.

[276] "International treaties or agreements in this field should be multilaterally negotiated, not imposed. They should be based on a balance of obligations to ensure universal adherence, which is the true test of legitimacy and credibility". UN Doc. S/PV. 4950, p. 24.

[277] Letter dated 27 April 2004 from the Permanent Representative of India to the United Nations addressed to the President of the Security Council, UN Doc. S/2004/329: "India cannot accept any obligations arising from treaties that India has not signed or ratified. This position is consistent with the fundamental principles of international law and the law of treaties. India will not accept externally prescribed norms or standards, whatever their source, on matters within the jurisdiction of its Parliament, including national

The remarks as submitted weaken the force of the unilateral vote on Resolution 1540. It should, however, be noted that the Security Council (for now) rarely chooses to make use of this new instrument for enacting international law norms. It should also be observed that it is first and foremost objectives which are set out in this manner. The manner in which an effect set out in resolutions of the Security Council is achieved remains left up to the decision of individual states, which renders this method similar to harmonisation by way of directive, which has been so thoroughly analysed within the context of European Union law.

7. Legality – the absence of defect

Recognition of the law-making effect of an organization's acts leads to the natural question of the limits of such activity by international organizations. Thus, it is necessary to explore still one more characteristic of law-making resolutions, *i.e.* the absence of defect. This is naturally associated with the issue of oversight of the legality of activities by international organizations as, after all, secondary subjects of international law, equipped with limited competences in comparison with the omnipotent nature of states as primary subjects.

This aspect was clearly emphasized by the ICJ in its advisory opinion concerning the legality of the use by states of nuclear weapons in armed conflict[278]. The Court pointed out that "(...) international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the „principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

In respect of international organizations, as opposed to states, we may distinguish two types of *ultra vires* activity. The key criterion here will be the question of whether the activity of an organ exceeds the competences granted to the organization. In the first case, we may distinguish a situation in which an organ exceeds the scope of its competences, yet its actions remain within the scope of competence of the organization as a whole. This version is treated as an internal transgression of competences. This is similar to an analogical situation in reference to states.

In an advisory opinion regarding certain expenses, the International Court of Justice referred to precisely such a case, emphasising that if there is a general convic-

legislation, regulations or arrangements, which are not consistent with India's constitutional provisions and procedures or are contrary to India's national interests or infringe on its sovereignty".

[278] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. (1996). See also J. Klabbers, *An Introduction to International Institutional Law*, Cambridge 2004, p. 80.

tion a given activity is within the scope of the functions of an organization, but activity was undertaken by an improper organ, it was irregular from the perspective of the internal structure, but costs incurred in this manner could be treated as UN expenses.[279] This was accompanied by a clear note that "both national or international law contemplate cases in which the body corporate or politic may be bound, as to third parties, by an *ultra vires* act of an agent"[280].

The second version concerns a situation where an organ violates not only the scope of its own competences, but in fact exceeds the mandate of the entire organization. For this reason, the scholarly literature employs the expression "external transgression of competences"[281]. In this we may observe the specificity of international organizations. Considering the plenitude of competences of the state, it would be difficult to identify an equivalent in respect of states.

Even an extension of the scope of the rights of an organization to include implied competences (which have been addressed above), it should still be recalled that this is not an operation that renders such organizations boundlessly similar to states[282]. For this reason as well, the assumption by an organ of new (implied) competences must be done in a manner consistent with the law of a given international organization, while the legality of the procedure may be reviewed. The organ may not, therefore, abuse its competences[283]. Let us keep in mind that a significant portion of authors in general exclude the possibility of implied law-making competences.

The observation by W. Morawiecki seems correct that states expressing consent to granting law-making competences to an organization "always resort to particular measures providing themselves with protection against the resulting risk"[284].

The validity of a law-making act will in the first place be decided about by the regulations granting that organization law-making competence. They establish formal conditions, but substantive ones as well. It is, however, difficult to generalize. It is thus

[279] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, ICJ Rep. 1962, p. 168: "If it is agreed that the action in question is within the scope of the functions of the Organization but it is alleged that it has been initiated or carried out in a manner not in conformity with the division of functions among the several organs which the Charter prescribes, one moves to the internal plane, to the internal structure of the Organization. If the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not an expense of the Organization".

[280] *Ibidem*.

[281] See e.g. B. Dold, *Vertragliche und ausservertragliche Verantwortlichkeit im Recht der internationalen Organizationen*, Zürich *et al.* 2006, p. 90.

[282] This is clearly pointed out by K. Skubiszewski, listing among the limitations primarily those resulting from the legal character of an organization – in the form of the absence of general jurisdiction over its members.

[283] K. Skubiszewski, *Implied Powers…*, p. 862: "if implication of powers amounts to a *détournement de pouvoir* the organ's activity is unlawful".

[284] W. Morawiecki, *Funkcje…*, p. 178.

necessary to undertake a casuistic interpretation. The fundamental issue is to seek an answer to the question of who may declare that the activity of an organization is *ultra* or *intra vires*. The following versions may be envisioned: the organ itself will decide, other organs of a given organization are entitled to pass judgement, a tribunal will rule on the matter, or states will be given the possibility to bypass the decisions of an organization which they consider to have been taken *ultra vires*[285]. The first of these possibilities would seem to be extremely uncomfortable for states.

The second of those situations will also rarely apply, because of the practical absence of precise rules regulating the relations among the organs of particular organizations. Generally, this type of association may be assumed (and the resulting possibility of an *ultra vires* ascertainment) between the primary (parent) organs and the auxiliary organs appointed by it. This scenario will, however, be a rare one, as the statutes of organizations only sporadically address the relevant procedures directly. In this context, the action presently envisioned under Art. 263 Treaty on the Functioning of the European Union for declaring the invalidity of EU legal acts presents itself as utterly exceptional. It can be treated as an element characteristic of regional integration organizations, unheard of in respect of coordination organizations, and that not only universal ones. The principle that one may not be a judge in one's own case would seem to argue against the implied granting of such a competence. However, account should also be taken of the effects of the gap in the law thus created, leading to the absence of the possibility for the organization to act effectively. For these reasons, accent in the scholarship (not without reservations) is placed on the necessity of taking a pragmatic approach, allowing the organization itself to take a position on the issue of the legality of resolutions it has issued[286].

A determinant of the traditional, classic approach will be the solution to the issue of interest to us within the United Nations. In the case on certain expenses, the International Court of Justice emphasized that at the international level (*i.e.* within the UN), there is no procedure comparable to that of declaring the validity of law-making or government acts[287]. Emphasis was placed on the impossibility of the UN Charter being sub-

[285] R. Bernhardt, Ultra Vires *Activities of International Organizations*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, The Hague 1996, p. 604.

[286] E. Osieke, *The Legal Validity of* Ultra Vires *Decisions of International Organizations*, "American Journal of International Law", Vol. 77 (1983), p. 242 et seq. and N. Buchowska, *Problematyka nieważności uchwał prawotwórczych organizacji międzynarodowych*, [in:] *Prawo wobec wyzwań współczesności*, Vol. III, Poznań 2006, p. 211.

[287] Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, ICJ Rep. 1962, p. 168: „In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations".

mitted to ultimate interpretation by the ICJ, from which the necessity of determining competencies (as a rule at least) by each of the organs was derived[288].

In turn, in the *Namibia* case, the presumption of validity of adoption of a resolution was expressed[289]. At the same time and in the same advisory opinion, the primary judicial organ of the United Nations held that it did not possess the competencies to review or abolish the resolutions of political organs of the UN[290]. Attention should, however, be paid to the important exhortation by M.N. Shaw that the mere existence of the presumption of validity carries within it the germ of at least a potential declaration of invalidity[291]. The issue of judicial review of acts of international organizations exceeds the scope of this work[292].

In turn, the last possibility, *i.e.* of overturning a decision of an organization by states, should be excluded at least in respect of states that voted in favour of its adoption. It would seem that this is a classic example of application of the principle of *estoppel*. If, in turn, we were to invoke the principle of loyalty, the potential to question the decisions of organizations turns out to be even narrower, as such an option will be unavailable to essentially all member states[293]. The argumentation cited here contradicts the position according to which states always retain the competence to question the resolutions of an organization to which they belong, with consideration of the consensual nature of the statute and the rights resulting thereof to examine whether, within the framework of performance of such an international agreement, it is not being violat-

[288] *Ibidem*: "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction".

[289] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, ICJ Rep. 1971, § 20, p. 22: "[a]resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted".

[290] ICJ Rep. 1971, § 89, p. 44: "undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".

[291] See M.N. Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, [in:] A.S. Muller, D. Raič, J.M. Thuránszky (eds.), *The International Court of Justice. Its Future Role after Fifty Years*, The Hague *et al.* 1997, p. 257. Cf. similar remarks by J. Klabbers: "any request to spell out the legal consequences of the acts of the Council or, for that matter, any other organ of the UN, presupposes some power of review. The question then is not so much whether the Court has the power of judicial review, but how it should exercise this power, over which acts, and on whose request" – See J. Klabbers, *International Law*, Cambridge 2013, p. 163.

[292] See e.g. E. Lauterpacht, *Judicial review of the acts of international organizations*, [in:] L. Boisson de Chazournes, Ph. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge 1999, p. 92 et seq. and B. Krzan, *Judicial review of the acts of international organizations*, [in:] J. Crawford *et al.*, *Professor, Minister, Judge – Krzysztof Skubiszewski 1926-2010,* Warsaw 2015, pp. 68 et seq.

[293] J.P. Mueller, *Vertrauensschutz im Völkerrecht*, Köln 1971.

ed[294]. Adopting such a view, in turn, leads to the threat of an organization's autonomy being undermined. Thus, in each case we are again treading the delicate ground of the relations between an organization and its members.

It is difficult to find a universal response to the effects of acts undertaken in violation of law-making competency. If an organization does not possess competence (or exceeds it) in a given area, its act would be adopted without a basis in law, and thus would be invalid. The scope and effects of this invalidity again escape universal, abstract considerations. Theoretically, it would seem that we are dealing here with invalidity *ex tunc*, but at times it would be necessary to temper such arguments with consideration for justice and certainty of law[295].

We are thus dealing with contradictory, opposing tendencies, and in spite of the passage of time, the remarks made by W. Wengler expressed in his report prepared for the Institute of International Law on judicial review of decisions by international organizations remain relevant; he emphasized that "la domaine de la nullité des actes internationaux est trop vaste, trop inexploré et trop subtil et son examen prolangerait inutilement les débats"[296]. We can thus imagine that (at least potentially) the effects of acts adopted in violation of competences will be distinguished in relation to particular states, which was mentioned two paragraphs above. By the same token, it is difficult to deduce the general consequences of unlawful acts of international organizations, which in and of itself would seem to reflect the expediency of establishing overly rigid rules in this scope[297]. However, we should recall the contrary tendencies leading to the most precise establishment of rules of accountability of international organizations[298].

8. Summary

The considerations presented above facilitate the formulation of several conclusions of a general nature. We should begin with the obvious conclusion concerning the continuing importance of acts issued by international organizations for the development

[294] E. Osieke, *op. cit.*, p. 240, affirmatively N. Buchowska, *Problematyka nieważności…*, p. 211.

[295] R. Bernhardt, *op. cit.*, p. 608.

[296] Recours judiciaire à instituer contre les décisions d'organes internationaux, Rapport par M. Wilhelm Wengler, "Annuaire de l'Institut de droit international", Vol. 47-II, Session d'Amsterdam 1957, p. 277.

[297] E. Lauterpacht, *The Legal Effects of Illegal Acts of International Organizations* [in:] *Cambridge Essays in International Law: Essays in Honour of Lord McNair*, London 1965, p. 121.

[298] Work was undertaken by the International Law Association, which in May 1996 appointed a Committee tasked with considering which measures (legal, administrative, other) should be adopted in order to protect the accountability of public international organizations vis a vis member states, third parties, and vice-versa: of members and third parties vis a vis international organizations. The final report was presented in 2004 during the ILA conference in Berlin – See International Law Association, Berlin Conference (2004), Accountability of International Organizations. Final Report, Report of the Seventieth-first ILA Conference held at Berlin, p. 164 et seq.

of international law. This observation may seem trivial, but it is vital from the perspective of analysis of the essence of a source of international law. Indeed, it allows us not only to apply the meaning of unilateral acts of international organizations to classic sources, but primarily to derive further determinations concerning their independent and autonomous role as sources of international law.

In adopting law-making resolutions, international organizations naturally base them on the authorization granted by states in the treaties appointing those organizations, but quite frequently exceeding the authorization designed by those responsible for drafting the statute of a given organization. By the same token, it is difficult to treat such "liberated" institutional acts merely as executive acts in respect of treaties. The role of acts of international organizations can also not be reduced exclusively to confirming or shaping customary norms of international law. Law-making resolutions can function as an independent source of public international law, constituting an expression of the will of international law subjects autonomous in relation to member states. We are thus dealing with a sort of emancipation of resolutions, which by no means excludes their significance in regard to classic sources of international law. The connexions between particular categories (such as between agreement and custom[299]) are quite natural, and in no way do they undermine their autonomous character vis-à-vis each other.

As an independent source, law-making acts of international organizations allow the international community to react quicker and more effectively to needs as they arise. In the main, they will regulate specific and individual situations, but with increasing frequency they are taking on the form of abstract and general acts, by the same token fulfilling the criteria traditionally reserved for the creation of law as acts of an abstract and general character. However, it should be stressed that this postulate will also not be fulfilled by other classic sources of international law, which in turn justifies a broader treatment of the category of acts of international organizations analysed here.

An ideal exemplification of this phenomenon could be the law-making practice of the Security Council, or the normative activity of organs operating within regional trade organizations. However, the price of this innovation and emancipation is limited oversight by states and other addressees of institutional activity. Resistance by states not only exhibits the additional dimension of complicated relations with the organization, but primarily can lead to undermining the effectiveness of norms enacted by international organizations, further adding to the complexity of international law-making.

[299] E.g. K. Wolfke, *Treaties and custom: aspects of interrelation*, [in:] J. Klabbers, R. Leferber (eds*.), Essays on the law of treaties: a collection of essays in honour of Bert Vierdag*, The Hague 1998, pp. 31 et seq.