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Summary record of the 1645th meeting

Topic:
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raised the question how much was to be included in the definition. An element of doubt was also present in that the definition did not actually mention the rules expressly adopted by the organization. Moreover, the expression used initially, for instance, in article 6, was "relevant rules of the organization"; that concept was then extended to cover "relevant decisions", which raised the question what was meant, in the particular case, by "relevant".

53. Since the differences in drafting already created enough difficulty, he considered that, if there was to be a definition, that adopted in article 1, paragraph 1 (34) of the 1975 Vienna Convention should not be altered. Rather than creating fresh doubts about new language, it would be better to leave well alone and let time work out a solution of the problem.

The meeting rose at 1 p.m.

1645th MEETING

Wednesday, 6 May 1981, at 10.30 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Filling of casual vacancies in the Commission (article 11 of the Statute) (A/CN.4/377 and Add.1)

[Item 1 of the agenda]

1. The CHAIRMAN said that at a private meeting the Commission had selected Mr. George H. Aldrich to fill the vacancy left by the resignation of Mr. Schwebel, who had been elected a judge of the International Court of Justice.

2. A telegram had been sent to Mr. Aldrich inviting him to take part in the work of the Commission as soon as possible.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/339 and Add.1–4, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 2 (Use of terms), subpara. 1 (*j*) ("rules of the organization"), and para. 2[1] (*concluded*)

3. Mr. ŠAHOVIĆ said that, after hearing the Special Rapporteur, he thought it would be preferable, in the definition in article 2, subpara. 1 (*j*), to retain the adjective "relevant", the presence of which was in fact justified by the Commission's decision on first reading to define the "rules of the Organization". Without that adjective, the formula adopted would be too broad, since the word defined the nature of the decisions and resolutions to be taken into consideration as delimiting the field of application of the draft. The expression "relevant rules of the organization" was as it were the parallel, *mutatis mutandis*, of the formula "internal law of the State".

4. Although the content of articles 6 and 27 of the draft[2] might seem to militate in favour of retaining the definition of the expression "rules of the organization", he pointed out that it was perhaps only the novelty of the expression that had made the Commission wish to define it, whereas the expression "internal law of the State" did not need to be defined. The Commission would probably be better able to take a final position on that point when it had examined all the articles and had been able to study the use of the expression in the various texts forming the draft. For his part, he was inclined to favour the inclusion of a definition of that expression in the draft.

5. As to the question whether the mention of "relevant rules" in numerous articles of the draft was sufficient, the final answer would also depend on the consideration of each provision as the Commission's work advanced. On the whole, however, the present text appeared to be satisfactory in that respect.

6. With regard to draft article 2, paragraph 2, he observed that the expression "rules of any international organization" must clearly be interpreted in accordance with subpara. 1 (*j*) of the same article. He pointed out, however, that the 1975 Vienna Convention[3] did not refer, in its article 1, paragraph 2, to the rules of international organizations but to "other international instruments". The Commission should perhaps consider what latitude it had in regard to that formula, for its draft introduced a set of new notions resulting from the special situation of international organizations and originating in documents of the most diverse kinds.

7. Mr. SUCHARITKUL said he supported Mr. Šahović. He noted that article 2, subpara. 1 (*j*) listed three kinds of sources of rules and that the concept of constituent instruments was somewhat imprecise. The draft defined an international organization as an intergovernmental organization, and thus excluded non-governmental organizations such as the Inter-

[1] For the text, see 1644th meeting, para. 37.

[2] See 1644th meeting, footnote 1.

[3] *Ibid.*, footnote 7.

national Red Cross. Agreements concluded between States and organizations of that kind would therefore be outside the field of application of the draft.

8. The Commission should also be aware that the rules of international organizations were not always clear when they were first established. For example, in the case of Association of South-East Asian Nations (ASEAN), which was an intergovernmental organization for co-operation, the constituent instrument itself was difficult to identify since it consisted of a series of declarations (Bangkok, Manila, Jakarta, etc.). A situation of that kind certainly justified mentioning "established practice" in the definition of sources of the "rules of the organization".

9. In his opinion, the inclusion of the adjective "relevant" in subparagraph (*j*) was essential in order to make it clear that the reference was to the decisions and resolutions of the organization that related to its administration or management. Mr. Verosta was certainly quite justified in saying, as he had at the previous meeting that the Commission was not bound to follow closely the text of article 1, paragraph 1 (34) of the 1975 Vienna Convention. Nevertheless, after re-examining the matter, he thought it very useful to adopt a definition including the adjective "relevant", which meant relating to the structure or constitution of the organization.

10. As the Special Rapporteur had shown, international organizations expressed themselves by various kinds of instruments: constituent instruments, but also headquarters agreements, conventions on the privileges and immunities of organizations, and even the conclusion of agreements with States, as in the case of the World Bank. The obligations which derived from those different instruments were obligations subject to law of treaties.

11. He supported the Special Rapporteur's position on the independence of the draft articles. He only wished to stress that when the text was submitted to the General Assembly it should be accompanied by the necessary explanations and justifications to avoid any misunderstandings.

12. The form of subparagraph (*j*) was perfectly acceptable, and the phrase "in particular" gave the flexibility necessary for a provision of that type, since, in the practice of international organizations, official documents of all kinds were to be found, which were difficult to qualify, but nevertheless contained rules relating to the constitution or operation of the organization.

13. Mr. PINTO, commenting generally on the Special Rapporteur's tenth report (A/CN.4/341 and Add.1), said he noted that the Special Rapporteur had stated that there were two schools of thought: one held that international organizations should be assimilated to States so far as treaty-making was concerned; the other considered that there were fundamental differences between States and organizations, which should be recognized and provided for.

14. His own view was that the Commission should not be unduly concerned about such conceptual questions as equality between the parties since, in an absolute sense, States and international organizations could never be on an equal footing. In that connection, he had read elsewhere the phrase "congruent inequalities", which would seem apt in the present context. International organizations should perhaps rather be seen as the "robots" of the international community, inasmuch as they could only do what they had been programmed to do by Member States. The Commission must therefore adopt a practical approach while endeavouring to be fair to both sides. The treaty-making capacity of international organizations was clearly limited, each organization being entrusted with the performance of certain specific tasks. All the Commission needed to do, therefore, was to make sure that international organizations were enabled to perform those tasks adequately. The draft prepared thus far reflected that approach and, accordingly, he endorsed it. One matter that would have to be taken into account, however, was public accountability, since Member States subjected the actions of international organizations to a measure of scrutiny.

15. On the methodology of the draft, he agreed that it should be self-contained, autonomous and independent of the Vienna Convention[4] and of any other convention, if only for ease of reference. In addition, however, if the wording of the draft articles was precisely the same as that used in the Vienna Convention or other conventions, legal advisers would be bound to look to the origin of such wording and would no doubt search for inherent meanings, with a resultant constant reference to parent treaties. Conversely, any slight change in wording would inevitably raise questions, if not problems. It would, however, be helpful to know whether a particular formulation in the draft was the same as that used in the Vienna Convention or some other parent convention.

16. One minor point arose in regard to the third sentence of paragraph 14 of the Special Rapporteur's report. While he (Mr. Pinto) had some sympathy with the idea that the draft articles should be given legal force by, for example, a declaration of the General Assembly, he wondered whether that was the general view, and whether the sentence in question was not too condensed.

17. Turning to points of drafting, he said that, while he agreed with the Special Rapporteur on the need to "lighten" the draft, he also agreed with Mr. Ushakov (1644th meeting) that what was important was clarity for the purpose of application, rather than for the convenience of the reader.

18. One question which had not been raised by the Special Rapporteur concerned the definition of a

[4] *Ibid.*, footnote 3.

treaty as laid down in subpara. 1 (*a*) of article 2. He doubted whether an agreement between international organizations could be called an "international agreement", and wondered whether it would not suffice to say simply "an agreement governed by international law".

19. With regard to the definition of an "international organization" laid down in subpara. 1 (*i*) of article 2, he realized that the Commission had not wished to define the status of an international organization as such, but it might be necessary to determine whether the articles applied to a group of States that concluded a treaty. Possibly, therefore, it might be advisable to refer to the special characteristics of an organization, rather than to its intergovernmental nature. If, for example, three or four States acting as a group concluded an agreement with another State or with an organization, could they claim that they were acting as an international organization, or did an international organization have some special characteristic which that group must also have for the articles to apply? If so, it might be necessary to say something to the effect that the group was more than the sum of its separate parts, or, possibly, that it had a separate personality.

20. He had been in two minds about the inclusion of the word "relevant" in the expressions "relevant rules of the organization" and "relevant decisions". On balance, he would prefer to omit that word, since the relevance of such rules or decisions would be clear in any practical context, and it would be advisable to have the broadest possible framework in order to avoid loose interpretation.

21. With regard to the definition of "rules of the organization" as laid down in article 2, subpara. 1 (*j*), it might be necessary to refer also to the organization's rules of procedure; possibly, however, the inclusion of the words "in particular" was enough.

22. Mr. BARBOZA welcomed the fact that, for its second reading of the draft articles, the Commission had chosen the method of article-by-article consideration, which appeared to be a compromise solution that also offered the advantage of practicality.

23. Referring to draft article 2, subpara. 1 (*j*), he said he had noted that the term "rules of the organization" had been used in three ways in the draft: first, in a general way, corresponding to the concept of the internal law of the State; secondly, with the addition of the adjective "relevant", which referred to certain specific rules relating expressly to the aspect concerned; and, thirdly, in a specific sense, in draft article 46.

24. The Special Rapporteur had himself described the disadvantage of the definition given in subparagraph (*j*), but he (Mr. Barboza) thought the list of sources was useful, particularly because of the express mention of "established practice", which was of special importance in the case of international organizations. It should nevertheless be noted, in regard to methodology, that sources which were not on the same level were brought together in a single provision. He could, however, accept the solution proposed by the Special Rapporteur, though not without questioning whether the formulation adopted was effective enough and whether it would not be desirable to draft a separate definition for a term that was so important in the draft articles. He considered it highly desirable for the Commission to give further thought to the choice of terms. The use of the adjective "relevant" to qualify the rules of the organization in provisions covering certain specific cases seemed to him to be superfluous, because there was, in fact, no doubt about the precise rules referred to, which formed the internal law of the organization.

25. He would also like the Commission to give careful consideration to the proposal made by Mr. Pinto that the definition in article 2, subpara. 1 (*i*), should be expanded to take account of the different types of international organizations, mentioning, for example, the criterion of international personality or that of centralization, in order to distinguish international organizations proper from groups of States which joined together to conclude a treaty.

26. Mr. FRANCIS said he subscribed to the view that the Commission should prepare an autonomous set of draft articles, rather than a direct adjunct to the Vienna Convention. By so doing, it would avoid limiting the General Assembly's freedom to choose the final form to be given to its proposals.

27. He also agreed that it would be advantageous to maintain some degree of uniformity between draft article 2, subparagraph 1 (*j*) and article 1, paragraph 1 (34) of the 1975 Vienna Convention. For that reason, and because an international organization could take many decisions—such as those by the United Nations on *apartheid* and racial discrimination—which had no bearing on its rules of conduct, he believed that it was very important to retain the word "relevant" in article 2, subpara. 1 (*j*). That word should also be retained in article 6, where it served to make it clear that the rules referred to were not the rules of an international organization in general, but those relating to the organization's capacity to conclude treaties.

28. Mr. DÍAZ GONZÁLEZ urged that, in view of the written comments submitted by States and international organizations and the views expressed in the Sixth Committee, it was necessary for the draft articles to be so worded that they were easy to read.

29. In article 2, subpara. 1 (*j*), he thought the word "relevant", which qualified the words "decisions and resolutions", could be deleted, since any decisions and resolutions of an international organization that were not relevant would simply not be adopted by the competent organs. The essential elements of the definition of the term "rules of the organization" were the constituent instruments of the organization, which governed not only its capacity to conclude treaties, but also all its legal activities and, as the Special Rappor-

teur had emphasized, constituted the constitutional law of the organization. It was the constituent instrument of an organization that established its legal capacity and defined its purposes. Hence it was not necessary to ask whether an international organization was an intergovernmental organization or whether its constituent instrument was based on a declaration or on an agreement. A constituent instrument was what gave an organization its status as an international organization, and that instrument took precedence over all the rules or decisions and resolutions that might emanate from its competent organs. Since decisions and resolutions that were not relevant were inconceivable, the word "relevant" could be deleted. As Mr. Ushakov had pointed out, it was also necessary to ensure that the wording of article 2, subparagraph 1 (*j*) was fairly general.

30. Mr. VEROSTA said he thought the provisions under consideration must be read in conjunction with article 46. As Mr. Pinto had pointed out, every formulation employed by the Commission would be critically examined by international law experts. There appeared to be some support in the Commission for the deletion of the word "relevant" in article 2, subparagraph 1 (*j*). The deletion of that rather vague word seemed especially necessary in the light of article 46.

31. The definition of the expression "rules of the organization" covered both constituent instruments and the decisions, resolutions and established practice derived therefrom. There was no doubt that an international organization was always established by the will of a certain number of States. Even the organizations mentioned by Mr. Sucharitkul, which did not have a specific constituent instrument, had been established as a result of an expression of their will by a group of States. It should be noted that the expression "rules of the organization" had no counterpart for States; the "rules of the State" were, in fact, its internal law. According to the Commission's definition, the "rules of the organization" were really the constituent instruments, in other words, the treaties between States establishing international organizations. The States which thus set up international organizations could give the organs of those organizations some freedom of action.

32. In his opinion, the draft articles covered all international organizations, and no hierarchy need be established for them. He did not regard the International Committee of the Red Cross as an international organization, because there had been no expression of will by the States concerned; they had not intended to establish an international humanitarian law organization, but had concluded international agreements and entrusted certain tasks to an association under Swiss law: the International Committee of the Red Cross. The States which had signed the General Agreement on Tariffs and Trade had not intended to establish an international trade organization; GATT remained a treaty, which had no organs of its own, even though conferences were regularly organized by the States Parties.

33. It was also important to consider the relationship between the rules of the organization and its internal law; for it might be thought that the rules of procedure of an organization came under its internal law, even though, in the last resort, they were also adopted by States. The members of the Commission should therefore reflect on that problem, especially if they wished to harmonize article 2, subpara. 1 (*j*) with article 46.

34. Mr. REUTER (Special Rapporteur), referring to Mr. Pinto's comments on the superfluity of the word "international" in the definition of the term "treaty" in article 2, subparagraph 1 (*a*), said that that definition was taken word for word from the Vienna Convention. The word "international" could, of course, be deleted, but since it contributed only a slight shade of meaning, some people might be surprised if it were.

35. The various comments made concerning the definition of the term "international organization" (art. 2, subpara. 1 (*i*)) were quite justified. For the time being, there was no completely general and exhaustive definition of that term. The Commission had opted for the definition given in the 1975 Vienna Convention, which referred only to the intergovernmental nature of the organizations concerned. There were, of course, institutions which Governments called international organizations, but which could not act at the level of international law. As Mr. Pinto had emphasized, the draft should obviously not apply to those organizations; so far, however, the Commission had not considered it desirable to say so.

36. The use of the term "international personality" did not seem wise. In its 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,[5] the International Court of Justice had noted that that was a doctrinal expression which had sometimes given rise to controversy. In reality, the concept of international personality did not exist—or, at least, its content was not clearly defined. If the Commission referred to it, it would tip the balance in favour of the capacity of international organizations to conclude treaties, which was the subject of article 6.

37. For the purposes of the draft articles, what counted was that an international organization should be able to conclude at least one treaty. The draft would apply to an organization whose statute provided that it could not conclude any treaties, except for its headquarters agreement. That approach exempted the Commission from having to work out a more complicated definition of the term "international organization". As some members of the Commission had pointed out, an international organization could be established without a treaty; it could be the result of

[5] *I.C.J. Reports 1949*, p. 178.

unilateral acts whose combined effect led to recognition of the existence of an international entity. Thus, the Pan-American Union seemed to have been established without a constituent instrument, since the Pact of Bogotá had been concluded subsequently.

38. With regard to article 2, subparagraph 1 (*i*) and paragraph 2, he agreed that, as Mr. Šahović had stressed, no final decision could be taken on those two provisions before other articles, such as articles 6 and 46, had been considered.

39. In article 2, paragraph 2, the Commission had not referred to the "internal law" of the organization, because it had had in mind the organization's whole legal system, in other words, its own law. But the adjective "internal" had a legal connotation: it was the converse of "international". Some people took the view that the law of an international organization was, in part at least, subject to international law, whereas others regarded it as internal law. That was the problem that had been at issue in the advisory opinion of the International Court of Justice on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*.[6] In every international organization, there was a law relating to officials that could be characterized as internal law. But was that law related to the various national laws of States or to international law? In the case in question, it had been a matter of determining whether or not the theory of *ultra vires* action by the arbitrator applied to acts governed by the internal legal system of the organization. The Court had again dealt with that question in connection with the *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO*. It had declared in its advisory opinion that the Administrative Tribunal was indeed an international tribunal but that, in fact, it formed part of the legal system of the organization, which had the character of international law.[7] The Judgments of that Tribunal were therefore final in the same way as those of the Supreme Court of a State. In the case of an international arbitrator, the theory of *ultra vires* action could have been invoked. It followed that the Commission could not use the term "internal law" of an international organization. What it had in mind was therefore clear: the whole of the law of the organization, in the broadest sense. It remained to be seen whether the expression "rules of the organization" was satisfactory.

40. In subparagraph 1 (*j*), the Commission meant to cover the whole of the law of the international organization. However, the word "rules" applied to general instruments, whereas in fact individual decisions also formed part of the law of the organization. A Security Council decision characterizing a State as an aggressor was not a rule, but a decision. It was a decision forming part of what the Commission regarded as constituting the law of the organization. Mr. Ushakov had rightly pointed out (1644th meeting) that at first sight it seemed that the word "relevant" could be deleted, but that it had been taken from another instrument and was not superfluous, because it did not qualify the rules, but the decisions and resolutions of the organization. A decision or resolution, however, might not have any legal consequences and might therefore not form part of the law of the organization. What was encompassed by the French concept of "*actes*" often had no legal effects. But the draft covered only "*actes*" which had legal effects and which constituted the law or rules of the organization. The term "relevant rules" contained in other articles of the draft designated the rules relating to the matter at issue in each article.

41. Article 27 was bound to give rise to difficulties. It was intended to enable an international organization to invoke its own law as justification for its failure to perform a treaty it had concluded. Subject to the second reading, the formulation adopted on first reading certainly applied to the whole of the law of the organization. If the Security Council took a decision and authorized the Secretary-General to conclude an agreement with a State for the implementation of that decision, it was not prohibited from subsequently changing its decision. That was why article 27 provided that an international organization was bound by its undertakings, unless a treaty had been concluded for the execution of a decision, not a rule, and the organization considered itself entitled to change that decision. Thus article 27 did cover all the law of the organization. In article 2, subparagraph 1 (*j*), the expression "rules of the organization" must therefore be understood to apply to acts having legal effect. In other articles, however, the expression "rules of the organization" was of more limited scope and covered, for example, only the rules relating to the conclusion of treaties; such rules were usually written, but could derive from practice. Thus decisions of the Security Council, which required an affirmative vote of the permanent members, could be adopted if one of the permanent members abstained. Their validity had been established by the International Court of Justice as a practice forming part of the constitutional law of the United Nations.

42. In the present circumstances, the Commission could replace the words "the rules of any international organization" in article 2, paragraph 2, by the words "the law of any international organization", since it was precisely that law which it had in mind; but that change would not solve the problem raised by the definition of the term "rules of the organization", in subparagraph 1 (*j*) of article 2. Of course, that definition could be deleted, but it should be borne in mind that the text of article 6 was the result of a delicate compromise, which had required the inclusion of the concept of "established practice" in the definition of the "rules of the organization".

[6] *I.C.J. Reports 1954*, p. 47.

[7] *I.C.J. Reports 1956*, p. 97.

43. Consequently, it would probably be appropriate to refer article 2, subparagraph 1 (*j*) and paragraph 2, to the Drafting Committee. Moreover, even if the Drafting Committee was soon able to propose wording for those provisions, the Commission would probably not be able to adopt them before it had considered certain other articles of the draft.

44. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 2, subparagraph 1 (*j*) and paragraph 2, to the Drafting Committee.

It was so decided.[8]

The meeting rose at 12.55 p.m.

[8] For consideration of the texts proposed by the Drafting Committee, see 1681st meeting, paras. 6–14.

1646th MEETING

Thursday, 7 May 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*) (A/CN.4/339 and Add.1–5, A/CN.4/341 and Add.1)

[Item 3 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 3 (International agreements not within the scope of the present articles),

ARTICLE 4 (Non-retroactivity of the present articles), *and*

ARTICLE 2 (Use of terms), subpara. 1 (*g*) ("party")

1. The CHAIRMAN invited the Special Rapporteur to introduce articles 3 and 4 and article 2, subparagraph 1 (*g*), which read:

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not apply

(i) to international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties];

(ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

(iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations,

shall not affect:

(*a*) the legal force of such agreements;

(*b*) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

(*c*) the application of the present articles to the relations between States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

Article 4. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.

Article 2. Use of terms

1. For the purpose of the present articles:

...

(*g*) "party" means a State or an international organization which has consented to be bound by the treaty and for which the treaty is in force;

2. Mr. REUTER (Special Rapporteur) said that articles 3 and 4 had not attracted any substantive comments. During the first reading, in article 3 the word "parties" had been placed in square brackets pending adoption of the definition of that term. Since that definition, which appeared in article 2, subparagraph 1 (*g*), had not given rise to any comments, the Commission could adopt it on second reading and delete the square brackets around the word "parties" in article 3, subparagraphs (i), (ii) and (*c*).

3. With regard to the words "entry into force", in square brackets in article 4, there were two possible solutions. The Commission, which must not prejudge what would happen to the draft articles, could either adopt a cautious approach and leave those words in square brackets, explaining in the commentary that "entry into force" could only be referred to if the draft were to become a convention; or it could go further and replace that term by one which would be valid whatever happened to the draft. For lack of a better solution, he suggested the term "application", which would nevertheless have the disadvantage of being rather too strong if the General Assembly decided only to recommend the draft articles as a guide to practice. In that connection, it should perhaps be pointed out, in reply to a comment made at the previous meeting by Mr. Pinto, that the General Assembly did not play the role of a legislator empowered to impose a text on States by means of a resolution. The General Assem-