
The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ

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Abstract

This article aims to extract from the jurisprudence of the International Court of Justice a basic theory of legal effects of unilateral instruments of international organizations in public international law. These effects can be divided into three categories. The first is substantive effects. These include binding, authorizing and (dis)empowering effects. The second category is causative effects, whereby determinations of fact or of law bring substantive effects into existence. The third category is modal effects – how and when the substantive effects come into existence (e.g. immediate or deferred, retroactive or non-retroactive, reversible or irreversible effect). Each of these categories of legal effects behaves differently according to whether the effects are intrinsic or extrinsic. Intrinsic effects are based on the special treaty powers of the United Nations Security Council and General Assembly. In this hypothesis, all three categories of effects exist to the full extent that the explicit and implicit powers of the adopting body allow for them. Extrinsic effects are directly based on general international law, in particular on the rules of formation of customary international law. Here, there are no causative effects. Substantive effects do not strictly speaking exist; only pre-substantive ones do. And modal effects are always immediate, non-retroactive and reversible.

Introduction

Previous studies of the legal effects of resolutions of the United Nations Security Council (SC) and General Assembly (GA), as established in the judgments and opinions of the International Court of Justice (ICJ), have focused on binding effect, with only passing

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references to other substantive effects such as authorizing effect and (dis)empowering effect or to the modal effects that shape them and the factual and legal determinations that trigger them.¹ This article aims to correct that imbalance.

The effects differ according to the type of resolution.² The term ‘resolution’ as used in UN practice has a generic sense, including *recommendations* and *decisions*, both of which have a vague and variable meaning in the Charter.³ The Court, on the other hand, reserves the expression ‘decision’ for binding resolutions and ‘recommendation’ for non-binding ones.⁴ A resolution is ‘binding’ when it is capable of creating obligations on its addressee(s).⁵ There is some disagreement over whether *declarations*, which in theory only interpret the Charter or assert the content of general international law,⁶ constitute a sub-category of recommendations or a separate category. Our analysis will show that there is a point in treating these as a separate category. Note that a resolution, as a formal instrument, may combine different provisions that, substantively, respectively recommend, decide or declare. These three expressions will here be used in their substantive meaning, whereas ‘resolution’ will, depending on the context, either be a generic substantive term or designate the formal instrument.

Other factors relevant for the effects are the conventional⁷ or customary⁸ legal basis of the resolutions, their compatibility with the Charter (*intra vires* or *ultra vires*),⁹ their addressees (one member, some members, all members, other UN organs . . .), their subject matter (to which the Charter may attach different legal consequences), their terminology (*shall* as opposed to *should*, *recommend* as opposed to *demand*, etc.), and, for the possible effects on international customary law, the ways they are adopted,

¹ In particular A. Basak, *Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice* (1969); Thierry, ‘Les résolutions des organes internationaux dans la jurisprudence de la Cour Internationale de Justice’, 167 *Recueil des Cours* (1980) 385.

² According to *Black’s Law Dictionary* (7th edn, 1999) a *resolution* is a ‘formal expression of an opinion, intention, or decision by an official body or assembly’. It is therefore a unilateral instrument. On the various types of UN resolutions, see Lagoni, ‘Resolution, Declaration, Decision’, in R. Wolfrum *et al.* (eds), *United Nations: Law, Policies, and Practice* (1995), at 1081–1091.

³ Therefore one cannot rely on Charter terminology to identify the legal effects of a given resolution. See J Castañeda, *Legal Effects of UN Resolutions* (1969), at 14; Johnson, ‘The Effect of Resolutions of the General Assembly of the United Nations’, 32 *British Year Book of Int’l L* (1955–56) 97, at 107–108.

⁴ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* [1962] ICJ Rep 151, at 163 (hereinafter ‘*Certain Expenses*’) (ICJ decisions are available at <http://www.icj-cij.org>), with analysis by Basak, *supra* note 1, at 80, 144.

⁵ Since the ICJ has found recommendations to have certain legal effects that nonetheless do not amount to those of decisions, I prefer a less inclusive definition of ‘binding’ than Castañeda, *supra* note 3, at 20–21.

⁶ In practice they often contain provisions of both *lex lata* and *lex ferenda*. See Castañeda, *supra* note 3, at 168–169; B Sloan, *United Nations General Assembly Resolutions in Our Changing World* (1991), at 45–47, 68–69. This is of crucial importance for Section 2 of this article.

⁷ In most cases the basis is the UN Charter, except when another agreement gives special effects to a UN resolution.

⁸ Either an internal UN customary norm or international customary law.

⁹ The Court has never invalidated a SC or GA resolution, so we will not deal with this issue.

who and how many vote for and against them, and perhaps even why they do so.¹⁰ But the title of the resolutions (declaration, code, charter . . .) is irrelevant, as is the express or implied nature of the powers upon which their adoption is based.¹¹

The most fundamental factor is whether the effects are intrinsic or extrinsic. Intrinsic effects stem directly and immediately from the adoption of the resolution, on the basis of powers supplied by a treaty or the customary law internal to it (usually the UN Charter, but possibly another treaty making use of the existing UN institutional structure¹²). Extrinsic effects spring from the resolution but are, due to the adopting body's lack of the necessary powers, directly based on international customary law.¹³ The difference between the two hypotheses is the absence or presence, between the resolution and general international law, of an intermediate legal basis providing the adopting body with the relevant special powers.

There are three basic types of legal effects.¹⁴ A legal rule, when triggered by a determination that the conditions for its application are fulfilled, states the obligations, rights and powers that result.¹⁵ A resolution may therefore have the legal effect of (i) creating obligations, rights and/or powers (which we shall call 'substantive effects')¹⁶,

¹⁰ See Pellet, 'La formation du droit international dans le cadre des Nations Unies', 6 *EJIL* (1995) 401, at 417–418, para. 22; Sloan, *supra* note 6, at 108.

¹¹ In *Effects of Awards of Compensation made by the United Nations Administrative Tribunal* [1954] ICJ Rep 47, at 58 (hereinafter: 'UNAT'), the Court attributed full legal effect to the GA decision creating the UN Administrative Tribunal, although there was no express provision for this power in the Charter. See also Basak, *supra* note 1, at 168.

¹² The ICJ has not dealt with this hypothesis, which is therefore not included in the present article. The PCIJ, on the other hand, faced it on several occasions – see de Visscher, 'Observations sur les résolutions déclaratives de droit adoptées au sein de l'Assemblée générale de l'Organisation des Nations Unies', in E. Diez (ed.), *Festschrift für Rudolf Bindschedler* (1980), at 173–185.

¹³ On the theory of intrinsic and extrinsic effects, see Virally, 'Les actes unilatéraux des organisations internationales', in M. Bedjaoui (ed.), *Droit international* (1991), at 271, para. 55, 274, para. 64.

¹⁴ The word *effect* simply means consequence. The *legal* effect should be distinguished from any moral, political, or other effects which do not fall within the scope of this article.

¹⁵ Castañeda, *supra* note 3, at 118. I believe that Castañeda's examples of diverse (substantive) legal effects can be systematized into two dual categories. The first includes rights and obligations, which may cancel each other out – binding effect imposes an obligation or takes away a right, and, inversely, authorizing effect confers a right or takes away an obligation. Prohibiting effect (forbidding some action) is merely a kind of binding effect. The second category includes empowering effect and its opposite, disempowering effect. An empowering effect confers the capacity to alter legal relations (to create and extinguish rights, obligations, and powers). A disempowering effect detracts from it. This duality is supported by leading legal theorists. HLA Hart, *The Concept of Law* (2nd edn, 1994), in particular at 95–98, argues that a distinction must be made between primary rules (to which binding and authorizing effects belong) and secondary rules (to which (dis)empowering effects belong). H. Kelsen, *General Theory of Norms* (1991), at 103, also distinguishes empowering effect from authorizing ('permitting') and binding ('commanding') effect. WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (2001) makes the same distinction, but adds further refinement in separating rights/duties from privileges/no-rights and powers/liabilities from immunities/disabilities. There may be space in ICJ jurisprudence for accommodating these refinements – see *infra*, at 888.

¹⁶ Combacau, 'L'écoulement du temps', in Société française pour le droit international (ed.), *Le droit international et le temps* (2001) 77, at 98–100, paras 21–22, argues that there are other legal effects, such as the creation of an organization. However, an organization has legal existence only if it can be opposed to other entities, which implies the creation of obligations, rights, and powers. So the act of creation is not a separate legal effect.

and/or (ii) making determinations¹⁷ of facts (e.g. that an alleged fact is true) or legal situations (e.g. that an obligation was violated), which trigger the substantive effects ('causative effect'). To this should be added (iii) how and when the substantive effects operate ('modal effects'). Each of these categories has a dual nature according to whether the effects are intrinsic or extrinsic. By showing this, the present article aims to contribute to the basic theory of the legal effects of unilateral instruments in public international law.¹⁸

Several issues are closely related to the present topic, yet fall outside of it. Sometimes there is only an illusion of legal effects. This is the case when a resolution simply restates an obligation, a right or a power that already exists. Declarations in principle only interpret or restate the law, in which case they have no legal effect. Likewise, a resolution which merely interprets the Charter does not, in theory, have any legal effect of its own. To the extent that it details and substantially adds to the Charter, any ensuing legal effect does not come from the resolution of a given organ, but from the fact that it may be considered generally acceptable by UN Members.¹⁹ Here we find legal effects, but they do not originate in the resolution. Legal effects deriving from someone's (anticipatory or subsequent) acceptance of a resolution, or the particular way in which it was adopted, or obligations protracted on its basis,²⁰ do not stem from the resolution itself.

Section 1 will examine the intrinsic effects of decisions and recommendations on the UN legal order. The possible extrinsic effects of declarations on general international law are then considered in Section 2.

1 Intrinsic Legal Effects

The ICJ has not recognized any intrinsic legal effects based on customary norms internal to the UN legal order or operating on general international law.²¹ Hence, this

¹⁷ The ICJ also uses 'determine' as a synonym for 'decide', but that is not the relevant meaning here.

¹⁸ Notable contributions include: Castañeda, *supra* note 3; Rigaldies, 'Contribution à l'étude de l'acte juridique unilateral en droit international public', 15 *Themis Revue Juridique* (1980–1981) 417; Skubiszewski, 'Resolutions of the General Assembly of the United Nations – Definitive Report', 61 *Annuaire de l'institut du droit international* (1986) 305; 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* (1996), at 381–392. For an excellent general study of legal effects, with special emphasis on their temporal aspects, see Combacau, *supra* note 16, at 94 f.

¹⁹ Report of Committee IV/2 of the UNCIO, San Francisco, 12 June 1945, UNCIO Doc 933, IV/2/42(2), at 7; 13 *UNCIO Docs*, 709, at 709–710.

²⁰ In *Certain Expenses*, *supra* note 4, at 168–169, it was not a defective decision ('*ultra vires act*') but rather an external agreement that bound the UN, since 'obligations of the Organization may be incurred by the Secretary-General, acting on the authority of the Security Council or of the General Assembly, and the General Assembly "has no alternative but to honour these engagements"' (at 169).

²¹ Art. 38(1) of the Statute of the ICJ does not list the resolutions of the SC and the GA as sources of international law, nor does the Charter provide for any such effect. On GA resolutions, see Report of Committee II/2 of the UNCIO, San Francisco, 23 May 1945, UNCIO Doc 507, II/2/22, at 2; 9 *UNCIO Docs*, 69, 70; 26 *GAOR Annexes*, agenda item 90, Doc no A/8568, §27 (1971). On SC resolutions, Art. 25 of the Charter empowers the SC to decide upon certain matters within its competence, not to make general rules applicable for all at all times. But see, e.g., SC Res 1373, 28 Sept. 2001.

section is limited to effects based on treaty law and operating on the UN legal order. Most of the Court's discussions of the legal effects of GA and SC resolutions have concerned the existence, force and scope of binding effect. But it has also dealt with authorizing effect, which is not necessarily the mirror image of binding effect, and (dis)empowering effect. Finally, the Court has begun to outline its approach to the causative and modal effects respectively triggering and shaping the substantive ones.

A Binding Effect

Discussions of binding effect abound in ICJ jurisprudence and legal literature. Consequently, this section will only provide a concise overview. Only decisions have binding effects; recommendations do not.²² Crudely put, the decisional powers of the GA are restricted to 'organizational' matters internal to the UN legal order (including semi-external matters such as the budget, or admission, suspension and expulsion of members), while the SC also possesses decisional powers in the 'operational' realm of international peace and security.²³

1 The Binding Effect of GA Decisions

The binding effect of GA decisions is limited, *ratione materiae*, to organizational matters, but may cover, *ratione personae*, the entire UN sphere.

Although GA resolutions are recommendatory as a rule,²⁴ especially regarding external relations with Member States,²⁵ the Court has recognized the binding legal effect of GA decisions pertaining to the admission of new Member States,²⁶ voting procedure,²⁷ or apportionment of the budget,²⁸ and in general has confirmed that the

²² In the 1955 *Voting Procedure* case Judges Lauterpacht and Klaestad argued that Member States have a duty to consider them (*Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa* [1955] ICJ Rep 67, Separate Opinion of Judge Klaestad, at 88; Separate Opinion of Judge Lauterpacht, at 119. Judge Lauterpacht also thought that consistent exercise of the 'legal right to disregard the recommendation', in the face of the solemn, repeated, and broadly representative will of the organization, may eventually amount to 'the abuse of that right' (*ibid.*, at 120). On these opinions, see Johnson, *supra* note 3, at 99–105. B Sloan has argued that the ICJ's 1980 *Regional Office Agreement* advisory opinion establishes for Members a *duty to co-operate* with the UN, implicitly linked to UN recommendations (Sloan, *supra* note 6, at 29–31). It is not clear, however, how a general duty to co-operate implies any specific duty arising from individual recommendations.

²³ Beside its 'operational' powers, the SC also has some powers of the same 'organizational' nature as the GA, but the ICJ's jurisprudence has not focused on these. My distinction between 'organizational' and 'operational' powers, adopted for greater clarity, is loosely inspired by Detter, *supra* note 18, at 384.

²⁴ *South West Africa (Ethiopia v S Africa; Liberia v S Africa) (Second Phase)* [1966] ICJ Rep 6 (hereinafter '*South West Africa*'), at 50–51, para. 98. See Basak, *supra* note 1, at 124, 139–140.

²⁵ *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, at 178 (hereinafter: '*Reparation for Injuries*').

²⁶ *Competence of the General Assembly for the Admission of a State to the United Nations* [1950] ICJ Rep 4, at 8 (hereinafter '*Admission to the UN*'); *Certain Expenses*, *supra* note 4. For a detailed analysis, see Basak, *supra* note 1, at 40–48.

²⁷ E.g. *Voting Procedure*, *supra* note 22, at 76–77, consistently uses the term 'decision'. See the analysis by Basak, *supra* note 1, at 136–137. See also at 58–66.

²⁸ *Certain Expenses*, *supra* note 4, at 164, 177. See analysis by Basak, *supra* note 1, at 48–58.

Court possesses certain powers of decision.²⁹ The Court has never clarified whether the GA has any decisional powers in mandate/trusteeship matters.³⁰ Resolutions of the GA have no binding effect in the operational realm of international peace and security. Neither the GA's budgetary powers in this area, nor its enforcement powers to suspend or expel UN Members, fall outside of the organizational sphere.³¹

Ratione personae, GA decisions obviously bind their (valid) addressees. They may also bind the UN at large, and consequently all Member States, e.g. through their regular contributions to the budget.³² This generalized effect includes those that voted against the decision, such as the trustee state in questions pertaining to its trusteeship.³³ So the binding scope of GA decisions covers the entire internal UN sphere.

2 The Binding Effect of SC Decisions

The ICJ has not definitively decided whether SC decisions possess an overriding binding effect, but it has specified that the binding effect includes, *ratione materiae*, operational matters and covers, *ratione personae*, all Member States.

Unlike the recommendations of the SC,³⁴ its decisions have binding force,³⁵ but the Court has made only a provisional finding that SC decisions have an overriding normative power capable of pre-empting obligations flowing from traditional sources of international law.³⁶ Recognizing such overriding binding force would give a secondary source of UN law (decisions) a greater normative value than many primary sources of international law (treaties) – thereby giving the SC a potentially very disruptive power – and would ultimately place great faith in the SC truly acting on behalf of all Member States.³⁷

²⁹ *Certain Expenses*, *supra* note 4, at 163–164. See Basak, *supra* note 1, at 51–52.

³⁰ *Northern Cameroons*, Preliminary Objection [1963] ICJ Rep 15, at 24, did not decide the question of the GA's power to terminate trusteeship agreements, since this was not in dispute between the parties. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* [1971] ICJ Rep 16, at 50 (hereinafter: 'Namibia'), para. 105, seems to recognize the GA's power to terminate mandates, but is inconclusive due to ambiguities regarding both the legal basis of the power of termination and the role of the SC (see Bollecker (now Stern), 'L'avis consultatif du 21 juin 1971 dans l'affaire de la Namibie (Sud-Est Africain)', 17 *Annuaire Français de Droit International* (1971) 281, at 308–311; Jacqué, 'L'avis de la Cour Internationale de Justice du 21 juin 1971', 76 *Revue Générale de Droit International Public* (1971) 1046, at 1083). Finally, *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objection [1992] ICJ Rep 240 (hereinafter: 'Nauru'), at 253, para. 29, after citing the *Northern Cameroons* case, inconclusively found that the GA decided to terminate a trusteeship agreement 'in agreement with the Administering Authority'.

³¹ *Certain Expenses*, *supra* note 4, at 163–165. See Basak, *supra* note 1, at 57.

³² This is clear from *Certain Expenses*, *supra* note 4, although it never says so explicitly. See Basak, *supra* note 1, at 54–55, 68.

³³ *South West Africa, Preliminary Objection* [1962] ICJ Rep 319, at 342, confirmed by *South West Africa* *supra*, note 24. See Basak, *supra* note 1, at 119, 138.

³⁴ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK)*, Preliminary Objection [1998] ICJ Rep 9, at 26 (hereinafter: 'Lockerbie'), at para. 44.

³⁵ *Reparation for Injuries*, *supra* note 25, at 178; *Namibia*, *supra* note 30, at 53, para. 115.

³⁶ *Lockerbie*, Provisional Measures [1992] ICJ Rep 3, at 15, paras 39–40. See criticism by Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', 5 *EJIL* (1994) 1, at 4. But see Pellet, *supra* note 10, at 423, para. 28.

³⁷ Art. 24(1) of the UN Charter.

Ratione materiae, the binding effect of SC resolutions belongs to the realm of international peace and security³⁸ and includes enforcement under Chapter VII of the UN Charter,³⁹ but is not limited to that.⁴⁰ Since just about any significant international event or situation can be characterized as a threat to peace and security,⁴¹ the scope of the SC's binding powers, if combined with an overriding binding force, would make the SC a dauntingly powerful organ. Whether a specific SC resolution is binding is determined by the language used in it, the discussions leading to it, the Charter provisions invoked, etc.,⁴² all with the purpose of establishing the *intent* of the SC.⁴³ The precise content of the binding effect is left to the SC itself,⁴⁴ but the Court has found certain 'implicit' legal effects and, inversely, put some limits on the effects⁴⁵ when these conflict with the principles and purposes in Chapter I of the UN Charter.⁴⁶ This limitation is too vague to have much practical value in the absence of any organ competent to review the validity of SC resolutions.⁴⁷

Ratione personae, an SC decision may bind all UN Member States, including 'those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council'.⁴⁸ As for non-Member States, the most coherent interpretation of a difficult passage in the *Namibia* opinion rejects any direct binding effect.⁴⁹ This interpretation respects the basic principle that treaties only bind parties, and avoids the difficult question of whether the UN Charter is subject to special rules within the law of treaties. It also leads to the same practical outcome since just about every state is now a member of the UN.

³⁸ *Admission to the UN*, *supra* note 26, at 8–9.

³⁹ *Certain Expenses*, *supra* note 4, at 163, confirmed by *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ (hereinafter '*Wall*'), 14, at para. 26.

⁴⁰ *Namibia*, *supra* note 30, at 52–53, para. 113, confirmed by *Wall*, *supra* note 39, at 54, para. 134, finding that Israel had 'contravened' a number of SC resolutions, none of which were adopted under Chapter VII of the UN Charter. Only obligations, of course, can be contravened.

⁴¹ Such as AIDS – see SC Res 1308 (2000).

⁴² *Namibia*, *supra* note 30, at 53, para. 114.

⁴³ In *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, at 104, para. 32, the Court found it unnecessary to decide whether certain SC resolutions *could* be binding in nature, since it was sufficient, for the purposes of the question before the Court, to determine that the SC had not *intended* to establish the alleged obligation. See also Rovine, 'The World Court Opinion on Namibia', 11 *Columbia J Transnat'l L* (1972) 203, at 228–229; Mori, 'Namibia Opinion Revisited: A Gap in the Current Arguments on the Power of the Security Council', 4 *ILSA J Int'l & Comp L* (1997) 121, at 128.

⁴⁴ *Namibia*, *supra* note 30, at 55, para. 120.

⁴⁵ *Ibid.*, at 55–56, paras 122–125.

⁴⁶ *Ibid.*, at 52, para. 110.

⁴⁷ Note, however, that *Certain Expenses*, *supra* note 4, at 167–168, found that the purposes of the UN as 'set forth in Article 1 of the Charter', 'are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action'.

⁴⁸ *Namibia*, *supra* note 30, at 54, para. 116. See also *Reparation for Injuries*, *supra* note 25, at 178.

⁴⁹ *Namibia*, *supra* note 30, at 56, para. 126. See the interpretation by Widdows, 'Security Council Resolutions and Non-Members of the United Nations', 27 *Int'l & Comp L Quarterly* (1978) 459, at 461–462; Cahier, 'La Charte des Nations Unies et les Etats tiers', in A. Cassese (ed.), *Current Problems of International Law* (1975), at 99–100.

B Authorizing Effect

Some resolutions create rights, implying reciprocal obligations to fulfil those rights or at least not to interfere with them.⁵⁰ But are authorizations then necessarily included in decisions, or may they also be included in recommendations?

1 Authorizing Effect in a Decision

The Court has on several occasions endorsed the idea of a UN decision having an authorizing effect.

The 1962 *Certain Expenses* opinion noted: ‘If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or *authorization* in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute “expenses of the Organization”’.⁵¹ The reference to ‘the maintenance of international peace and security’ suggests that the Court found the given resolution to be a *decision*. The ICJ also quotes the SC resolution establishing the United Nations Operations in the Congo (ONUC), according to which the Security Council ‘*Decides to authorize* the Secretary-General . . .’.⁵² Clearly, an SC decision here had an authorizing effect.

The Court has repeatedly found that it has a discretionary ‘power’ to accept or refuse UN requests for ICJ advisory opinions.⁵³ Since the Court cannot issue opinions *sua sponte*, the legal effect of the GA resolution is that of an authorization. In line with the rather categorical ‘request’ for an advisory opinion found both in the UN Charter (Article 96) and the ICJ Statute (Articles 65 and 66), ICJ practice shows that these resolutions are decisions.⁵⁴ The Court has found a number of qualifications to its discretionary right, none of which alter this analysis.⁵⁵ The Court has even given a broad scope to the authorizing effect, finding that it must not be unduly restrained by the wording of the request or the circumstances surrounding its adoption. The Court

⁵⁰ On the reflex relationship between an obligation and the corresponding right, see H. Kelsen, *The Pure Theory of Law* (2nd edn, 1970), at 17, 127–128.

⁵¹ *Certain Expenses*, *supra* note 4, at 168 (italics added). See also at 160–161, 178.

⁵² *Ibid.*, at 175 (italics added).

⁵³ Beginning with *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)* [1950] ICJ Rep 65, at 72. This happened most recently in *Wall*, *supra* note 39, at 21–22, para. 44. Under our definition of a power (a capacity to alter legal relations), it is more correct to say that the Court has a *right* to issue an opinion, since it is purely advisory and hence does not in theory alter any legal relations.

⁵⁴ Basak, *supra* note 1, at 67. See also the Court’s ambiguous statement that, under Art. 12(1) of the UN Charter, a ‘request for an advisory opinion is not in itself a “recommendation” by the General Assembly “with regard to [a] dispute or situation”’ (*Wall*, *supra* note 39, at 14, para. 25).

⁵⁵ The obligation to decline a request that is not a ‘legal question’ (*Certain Expenses*, *supra* note 4, at 155) is commanded by Art. 96 of the UN Charter and Art. 65 of the Statute of the Court and does not affect the nature of the authorization. And ‘even if the question is a legal one, which the Court is undoubtedly competent to answer, it may nonetheless decline to do so’ (*ibid.*). The Court’s position that only ‘compelling reasons’ should lead it to refuse to give a requested advisory opinion (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the UNESCO* [1956] ICJ Rep at 86) is merely a self-imposed policy irrelevant to the nature of the authorizing effect.

'must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion'.⁵⁶

It is natural that decisions may have authorizing effects, since an authorizing effect upon one person corresponds to a 'correlative' binding effect upon one or several other persons, the content of which is to accommodate that right.

2 Authorizing Effect in a Recommendation?

More puzzlingly, the ICJ seems to have admitted that recommendations may have at least a certain form of authorizing effect.

One purported example of this is better explained in a different manner. Article 4(2) of the UN Charter provides that admission to the UN 'will be effected by a decision of the General Assembly upon the recommendation of the Security Council'. In its 1950 *Admission to the United Nations* opinion, the Court had to decide whether a General Assembly decision could admit a state when the Security Council had not transmitted a recommendation to it. It found that '[b]oth these acts are indispensable to form the judgment of the Organization', since 'the recommendation of the Security Council is the condition precedent to the decision of the Assembly by which the admission is effected'.⁵⁷ The Court does not pronounce itself expressly upon the legal effect of the SC recommendation. If it were an authorization,⁵⁸ then it would incur reciprocal obligations not to interfere with the GA's discretionary choice to invite or not a new Member State. But a more likely interpretation is that the SC recommendation simply makes a necessary *determination* that the applicant fulfils all the requirements of article 4(1) of the UN Charter.⁵⁹

The 1962 *Certain Expenses* opinion, on the other hand, does appear to confirm that recommendations may have authorizing effects. The Court found the GA resolutions establishing the United Nations Emergency Force in the Middle East (UNEF) to be 'recommendations' taken under Article 11 or 14 of the UN Charter.⁶⁰ But a resolution cannot establish a physical reality like UNEF by itself, it can only formulate a new legal situation.⁶¹ Then the legal effect of the above-mentioned recommendations must be to *authorize* the UN Secretary-General to establish UNEF.⁶² The right of the Secretary-General to establish the force implies reciprocal obligations not to interfere

⁵⁶ *Certain Expenses*, *supra* note 4, at 157.

⁵⁷ *Admission to the UN*, *supra* note 26, at 7–8.

⁵⁸ As suggested by Basak, *supra* note 1, at 30. See also Castañeda *supra* note 3, at 27–29.

⁵⁹ See *infra*, at 890–891.

⁶⁰ *Certain Expenses*, *supra* note 4, at 172, in light of the discussion, at 165, of 'recommendations' to set up subsidiary organs. UN Charter Arts 11 and 14 confer only recommendatory powers.

⁶¹ See, in a different context, *Namibia*, *supra* note 30, at 52, para. 111.

⁶² Compare this with the finding in *Certain Expenses*, *supra* note 4, at 169, that when the GA '[d]ecides to appropriate' a certain amount for the operations of ONUC 'this constituted an authorization to the Secretary General to incur certain obligations of the United Nations just as clearly as when' the GA '[a]uthorizes the Secretary General . . . to incur commitments' of the same kind. Pellet, *supra* note 10, at 416–417, para. 21, supports the view that UN recommendations may have authorizing effects. Certain individual judges have argued for this: *Voting Procedure*, *supra* note 22, Separate Opinion of Judge Lauterpacht, at 115; *Namibia*, *supra* note 30, Dissenting Opinion of Judge Gros, at 339, para. 33.

with that right.⁶³ But the ICJ has otherwise consistently reserved the expression ‘recommendations’ for non-binding resolutions. Did the Court really intend to stray from this in the *Certain Expenses* case?

There may be a way to explain this apparent contradiction. Neither of the cases involving a possible authorizing effect in recommendations implied a reciprocal affirmative duty on any specific addressee. Rather, they implied general reciprocal obligations not to interfere with the given right. Is this then a true ‘right’? W. N. Hohfeld distinguishes between rights and duties on the one hand, and privileges and ‘no-rights’ on the other.⁶⁴ Applying this distinction to the *Certain Expenses* example, the UN Secretary-General has a ‘privilege’ (as opposed to a ‘right’) to create UNEF, which is correlative of a series of ‘no-rights’ (rather than duties) to prevent the Secretary-General from doing so.⁶⁵ So perhaps recommendations can only create privileges and not actual rights. More radically, H. Kelsen argues that when an obligation is not owed to a specific determinable person but to a general community, then there may be no corresponding right.⁶⁶ If the argument is turned around, a right not implying a reciprocal obligation on any specific person may not have any corresponding obligation at all. Under this analysis, the GA recommendations authorizing the creation of UNEF did not have any kind of binding effect and so did not prevent Member States from interfering with the Secretary-General’s right. In both theoretical constructions, the crucial point for our purposes is that the ‘right’ has no active reciprocal duty, and exists towards a general community rather than a specific person. A final possibility is that the Court reached an unsound conclusion.

C (Dis)empowering Effect

The Court has only on rare occasions dealt with the empowering effects of GA and SC resolutions. Its discussions nonetheless show that empowering and disempowering effects are opposites that may cancel each other out, although sometimes the (dis)empowering organ may not be able to take back what it has given.

1 Empowerment and Disempowerment Are Opposites

The 1954 *UNAT* opinion discussed the (dis)empowering effects of GA decisions:

There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of the future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise. But the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted.⁶⁷

⁶³ The issue here is not the *deployment* of the mission, for which the consent of the interested states would be necessary, but only its *creation*.

⁶⁴ Hohfeld, *supra* note 15, at 14.

⁶⁵ The Member States’ affirmative duty to pay their part of the UN budget derives from Art. 17(2), not from the recommendations authorizing the UN secretary general to create UNEF.

⁶⁶ Kelsen, *supra* note 50, at 128.

⁶⁷ *UNAT*, *supra* note 11, at 61.

So the GA decision establishing the United Nations Administrative Tribunal (UNAT) empowered it to create binding effects on the GA itself.⁶⁸ But the Court notes that UNAT remains subject to the (dis)empowering effects of GA decisions, for instance by amending or repealing the statute of UNAT. Empowering and disempowering effects are therefore *opposites*, one of them annulling the other in the same person. Binding and authorizing effects, on the other hand, are not only opposites but also *correlatives*, meaning that a binding effect upon one person corresponds to an authorizing effect upon someone else. It is somewhat artificial to think of (dis)empowering effects having correlative effects subjecting a person to – or subtracting that person from – the power of another, since a power only has *latent* effects upon its subjects (realized only if the power is exercised). But are there any limits on the ability of empowering and disempowering effects to cancel each other out?

2 Disempowering Effects Cannot Always Be Taken Back

The passage cited above in the *UNAT* case, according to which ‘the General Assembly can abolish the Tribunal by repealing the Statute’, is in a state of tension with the Court’s finding in the same case

that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intentment out of the Charter.⁶⁹

This passage suggests that the Charter intended the creation of UNAT. A power that is ‘essential’ to the workings of the UN and a ‘necessary’ implication of the Charter seems like one that *should* be exercised. If so, the GA *ought* not to adopt a resolution with a disempowering effect so extensive as to take back all powers previously conferred on the UNAT. Yet, the Court clearly said that it *can* do it. The ICJ seems to have grappled with the problematic implications of the Charter not providing for UNAT. Anyhow, all possible limits on the GA’s future disempowerment of the UNAT would flow from the Charter itself and not from the GA’s initial empowerment of the UNAT.

On the other hand, the GA can disempower itself and the UN in general to the point of taking away the very power that allows it to do so. In the 1963 *Northern Cameroons* case, the Court found that ‘the General Assembly is no longer competent pursuant to the termination of the Trusteeship as a result of resolution 1608 (XV)’, which caused all competent UN organs to lose their trusteeship powers in relation to the given territory.⁷⁰ The GA could not regain its powers by passing a resolution reversing the previous one.⁷¹ This reflects the crucial difference between binding/authorizing effects and (dis)empowering ones – the latter confer or eliminate the very capacity to create legal effects.

⁶⁸ See Castañeda, *supra* note 3, at 64–65.

⁶⁹ *UNAT*, *supra* note 11, at 57.

⁷⁰ *Northern Cameroons*, Preliminary Objections, *supra* note 30, at 35–36. See also the analysis by Basak, *supra* note 1, at 163–164. GA Res 1608 (XV), 21 April 1961 can here be regarded as a decision because the parties agreed that it had terminated the trusteeship agreement: see *supra* note 30.

⁷¹ See *infra*, at 894.

Empowering and disempowering effects, like their binding and authorizing cousins, may cancel each other out. But empowerment, being the capacity to create obligations, rights and powers, means that there are also inherent differences. If the UNAT could *bind* the hierarchically superior GA, surely it could not *empower* it. When the GA disempowered the UN entirely with regard to the Northern Cameroons trusteeship, it also lost the power to re-empower itself. The provisions found to have (dis)empowering effects were decisions, never recommendations.

D Causative Effect

Causative effect triggers, through determinations, dormant substantive effects. A *factual* determination is a finding that, in the eyes of the determining body, a certain fact did or did not happen. This may or may not be legally relevant, but only if it is legally relevant is there any causative effect. It is, for example, a (legally relevant) factual determination that one state has invaded the territory of another. A *legal* determination is sometimes explicitly or implicitly based on a factual determination which the determining body characterizes in legal terms (for instance, if the SC finds that a state has committed an act of aggression under Article 39 of the UN Charter), sometimes it is merely an identification of a specific legal situation (for instance, determining whether a particular state is or is not a trustee). Determinations have legal effects by blocking or causing the applicability of certain rules, thereby triggering substantive effects.⁷² For instance, the determination by the SC that there is a 'threat to the peace, breach of the peace, or act of aggression' marks the end of the (exclusive) applicability of Article 33 of the UN Charter and the obligations that it confers.⁷³

Two problems have surfaced in the ICJ's jurisprudence pertaining to when GA and SC determinations are binding.⁷⁴ First, do determinations take on the binding or non-binding effect of the resolutions that they are included in? Second, do these determinations bind the ICJ?

1 Do Resolutions Extend Their Binding Effect to Determinations?

The ICJ has addressed the question of the binding effect of determinations both in recommendations and decisions, apparently giving them the force of the resolutions containing them.

Determinations made in recommendations appear to be non-binding. In a previously quoted passage of the 1950 *Admission to the United Nations* opinion, the Court found that, for an admission to the UN, both a General Assembly decision and a Security Council recommendation 'are indispensable to form the judgment of the Organization', since 'the recommendation of the Security Council is the condition precedent to

⁷² On the theory of determinations, see Castañeda, *supra* note 3, at 118; Sloan, *supra* note 6, at 48–49; Combacau, *supra* note 16, at 100–104, paras 23–25.

⁷³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1984] ICJ Rep 392 (hereinafter: 'Nicaragua'), at 432, para. 90.

⁷⁴ A 'binding determination' has no substantive effect but is 'binding in what it determines': Castañeda, *supra* note 3, at 121.

the decision of the Assembly by which the admission is effected'.⁷⁵ The most natural interpretation is that the SC recommendation makes a *determination* that the applicant fulfils all the requirements of Article 4(1) of the UN Charter,⁷⁶ upon which the GA can then base its decision. The determination is not binding, since the GA can decide to admit the state or not. This matches the non-binding character of a recommendation. The causative effect is optional, within the discretion of the body that applies the norm.

Inversely, determinations made in decisions appear to be binding. In the *Namibia* case, the Court found that '[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence ... there is an obligation, especially upon Members of the United Nations, to bring that situation to an end'.⁷⁷ Although the Court offers no explanation, the legal determination was presumably binding because it was included in a decision contained in SC Resolution 276. The causative effect is binding upon the states that apply the norm.

All in all, it seems that the binding or non-binding nature of a resolution (decision or recommendation) also covers determinations made therein; a determination made in a recommendation is not binding, whereas a determination made in a decision is.⁷⁸ This parallelism prevents, in case of overlapping competences, an organ with recommendatory competence from pre-empting the determinations of an organ with decisional competence. But is there a specific exception, *ratione personae*, to this rule?

2 Is the ICJ Bound by Determinations Made in UN Resolutions?

It is in the nature of the ICJ, as a court, to make determinations. If a determination on a specific issue has already been made by one of the other principal UN organs, should the ICJ be in a position to challenge it? The Court has approached this question, but never squarely decided it.

Looking to establish the relevant facts in the 1986 *Nicaragua* case, the Court found that 'in its quest for the truth, it may also take note of ... the resolutions adopted or discussed by [international] organizations, in so far as factually relevant'.⁷⁹ This could be read to imply that factual determinations in GA and SC resolutions do not impose themselves upon the Court. However, the cited passage deals with the probative, not the binding, value of such determinations, without distinguishing between decisions and recommendations, or even between UN resolutions and resolutions of

⁷⁵ *Admission to the UN*, *supra* note 26, at 7–8.

⁷⁶ See *supra*, at 887.

⁷⁷ *Namibia*, *supra* note 30, at 54, para. 117. *Ibid.* at 50, para. 105, is inconclusive (see *supra* note 30); the lack of clarity is further aggravated by the fact that the (non-authoritative) French version replaces the word 'determination' with the word '*décision*'. Indeed, finding that 'South Africa has no other right to administer the territory' pertains to substantive, not causative, effect.

⁷⁸ In *Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium)* [2004] ICJ Rep (hereinafter '*Use of Force*'), at 27–29, paras 64–70, the issue was the clarity of the determinations and not their binding force.

⁷⁹ *Nicaragua*, [1986] ICJ Rep 14, at 44, para. 72.

other international organizations. One cannot conclude from this that the Court is free to reconsider determinations made in UN resolutions.

Indeed, the *East Timor* case could support the opposite proposition. Portugal argued that the Court must take as ‘givens’ the GA and SC resolutions making the legal determination that East Timor was a non-self-governing territory and that Portugal was the administering Power thereof. The Court found that the resolutions did not intend to impose any obligations, noted some conflicting state practice and concluded that the determinations in the resolutions therefore could not be regarded as ‘givens’ sufficient for deciding the dispute.⁸⁰ This leaves open the possible interpretation that, *a contrario*, legal determinations in binding decisions could be ‘givens’ imposing themselves upon the Court. But such reasoning is unreliable, since the Court may never find that any such determinations constitute ‘givens’.

All in all, it is not clear from the Court’s jurisprudence whether it is free to reconsider factual and legal determinations made in GA and SC resolutions for the purposes of settling a dispute.⁸¹ These determinations may have been made on the basis of partial information, where not all interested parties were heard, and/or too urgently for the facts to be objectively established.⁸² Although it may be tempting to rely on what other principal organs of the UN have found, the ICJ, with its judicial nature and careful approach to establishing facts, should not be bound by such determinations.

E *Modal Effects*

Modal effects establish how and when substantive effects operate.⁸³ The ICJ’s jurisprudence is still rather undeveloped on this point.⁸⁴ It has made a few findings about the temporal aspects of substantive effects, as well as their reversibility.

1 *Temporality*

The ICJ has implicitly approved of a GA decision deferring its own effect, but has denied any retroactive effect to both GA and SC decisions.

The ICJ dealt with immediate and deferred legal effects in the complex *Mortished* case. Mr. Mortished retired as a UN staff member on 30 April 1980. GA decision 33/119 of 19 December 1978 had recently changed the rules on the payment of repatriation grants to staff members leaving UN service, subjecting it to evidence of relocation. The Secretary-General amended Staff Rule 109.5 accordingly, paragraph (f) of which provided that staff members already in service before 1 July 1979 would retain their accrued right to a repatriation grant without providing evidence of relocation. This applied to Mr. Mortished.

⁸⁰ *East Timor*, *supra* note 43, at 103–104, paras 30–32.

⁸¹ The *Nicaragua* case dealt with factual determinations and the *East Timor* case with a legal determination, but there is hardly a relevant distinction in this.

⁸² Bowett, *supra* note 36, at 9, n 27. For instance, SC Res 1530, 11 Mar. 2004, misidentified the perpetrator of the bomb attacks carried out in Madrid, Spain, on the same day.

⁸³ Combacau, *supra* note 16, at 100–104, paras 23–25, shows that causative effect is by definition instantaneous and, hence, I would add, not subject to modal effects.

⁸⁴ But see, in a different context, *Nicaragua*, *supra* note 73, at 419, para. 62.

But on 17 December 1979, the GA adopted decision 34/165, effective as of 1 January 1980, according to which all staff members would be subject to the evidence requirement. No longer exempt, Mr. Mortished's seised the UNAT, which ruled that he held an acquired right by virtue of Staff Rule 109.5(f), even though it was no longer in force at the date of his retirement. Acquired rights were protected by Staff Regulations and Rules, entitling Mr. Mortished to compensation. The Committee on Applications for Review of Administrative Tribunal Judgments requested an advisory opinion from the ICJ on whether the UNAT had erred in not giving immediate effect to GA decision 34/165's requirement of evidence of relocation.

The ICJ found that UNAT's 'decision was not that resolution 34/165 could not be given immediate effect but, on the contrary, that the Applicant had sustained injury precisely by reason of its having been given immediate effect by the Secretary-General in the new version of the Staff Rules which omitted Rule 109.5(f).'⁸⁵ The 'immediate effect' given by the Secretary-General does not arise from the resolution itself, but from the Staff Rules. Indeed, GA decision 34/165, adopted on 17 December 1979, did *not* have an immediate effect, since it deferred its own substantive effect until 1 January 1980.⁸⁶ Deferred effect is no doubt the exception and immediate effect the rule, since it is hard to imagine any other reasonable default starting point for a substantive effect.

The ICJ has clearly denied retroactive effect to both GA and SC resolutions. In the preliminary objections phase of the *Lockerbie* case, the Court had to decide whether the case was inadmissible because certain SC resolutions had disposed of the dispute. The Court denied the objection, finding that '[t]he date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard since they were adopted at a later date'.⁸⁷ Even if the Court had found another date to be relevant, this argument denies any retroactive effect to the given resolutions.

The Court similarly addressed a GA decision in the 2003 judgment on the application for revision of the judgment on preliminary objections in the *Genocide* case. The Federal Republic of Yugoslavia (FRY) argued that its recent admission to the UN showed that at the time of the initial judgment it had not been a party to the ICJ Statute, had not been bound by the Genocide Convention and hence the ICJ had no personal jurisdiction over it. The Court found that 'General Assembly resolution 55/12 of 1 November 2000 [admitting the FRY to the UN] cannot have changed retroactively the *sui generis* position which the FRY found itself in vis-à-vis the United

⁸⁵ *Application for Review of Judgment no. 273 of the United Nations Administrative Tribunal ('Mortished affair')* [1982] ICJ Rep 325 (hereinafter '*Mortished*'), at 354, para. 55.

⁸⁶ *Ibid.*, at 329, para. 12. The deferral of the substantive effect to a later point is itself immediate. See Combacau, *supra* note 16, at 97, para. 19.

⁸⁷ *Lockerbie*, Preliminary Objection, *supra* note 34, at 26, para. 44. See also at 23–24, para. 38.

Nations . . . ’.⁸⁸ Non-retroactive effect is no doubt the rule, as it is in all legal systems for the sake of legal security, but one may imagine cases in which a resolution could provide for its own retroactivity.⁸⁹

2 Reversibility

The ICJ has recognized the irreversibility of one kind of UN resolution, but also the reversibility of others.

In the 1963 *Northern Cameroons* case, the ICJ found that GA Resolution 1608 (XV) – terminating a trusteeship agreement – had a ‘definitive legal effect’ that a Court judgment could not change.⁹⁰ This ‘definitive legal effect’ must be understood as an exception rather than a rule. First of all, the termination of a trusteeship agreement by nature has a definitive effect that even the GA itself could not reverse, since Resolution 1608 (XV) disempowered the GA in the matter.⁹¹ Moreover, the *Nauru* judgment reaffirmed the *Northern Cameroons* finding, also in the context of the termination of a trusteeship agreement, noting that ‘[s]uch a resolution had “definitive legal effect”’.⁹² Other resolutions might not.

Indeed, under normal circumstances, the legal effects of a resolution must be understood to end where the adopting body reverses it by a new incompatible resolution. In the previously discussed *Mortished* case, GA Resolution 34/165 effectively reversed the prior decision in Resolution 33/119, which exempted some UN staff members from having to provide evidence of relocation in order to obtain their repatriation grant. Such reversible legal effect must be the rule, or else two incompatible substantive legal effects would coexist.

Under special circumstances, the legal effects are ‘definitive’, meaning that no change or reversal is possible. Under normal circumstances, another resolution by the same body may no doubt reverse them, partially or entirely.

These findings of the Court, incomplete as they are, reflect some basic truths about the modal effects attached to obligations, rights and powers created by GA and SC resolutions. As a rule, these are immediate, non-retroactive and reversible. In many cases the resolution itself could modulate the first two, by deciding on its own retroactivity, deferring its effect or, if the effect is not instantaneous, programming its own modification or termination (transient legal effect).⁹³ A resolution cannot, on the

⁸⁸ *Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* [2003] ICJ Rep 24, para. 71, confirmed in principle by *Use of Force*, *supra* note 78, at 32, para. 78, although the specific application was questionable – see the Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and Elaraby, *ibid.*, at 4, para. 12.

⁸⁹ See P. Tavernier, *Recherches sur l'application dans le temps des règles en droit international public* (1970), at 63–88. On the temporality of substantive effects, see Marin and Sator, ‘Time in Legal Norms: A Computable Representation’, in F. Ost and M. van Hoecke (eds), *Temps et droit. Le droit a-t-il pour vocation de durer? / Time and Law. Is It the Nature of Law to Last?* (1998), at 425; Combacau, *supra* note 16.

⁹⁰ *Northern Cameroons*, Preliminary Objection, *supra* note 30, at 32–33.

⁹¹ See *supra*, at 889.

⁹² *Nauru*, Preliminary Objection, *supra* note 30, at 251, para. 23 (italics added).

⁹³ An effect is either instantaneous (operates at time A), successive (operates at times A, B, C . . .), or continuous (operates at time A and onwards). See Combacau, *supra* note 16, at 97–98, para. 20.

other hand, make itself irreversible since such a stipulation would have no greater legal force than the future stipulation that would reverse it. Irreversibility applies if the resolution itself disempowers the adopting body in the matter or if a non-Charter instrument empowers it to create a specific effect but not to take it back.

F Conclusion

The jurisprudence of the ICJ is particularly rich on the binding effect of GA and SC decisions. No definitive differentiation has been made as to the force of the binding effect in each case. Determinations of facts and legal situations made in decisions are also binding. The scope of the binding effect is remarkably broad for both organs, though each within its specific sphere of competence. Whereas the GA's Charter-based powers of decision are organizational, only the SC has operational powers of decision based on its responsibility for the maintenance of international peace and security. But one may doubt whether the SC's sphere of competence constitutes any real limitation.

Somewhat less rich are the Court's discussions of authorizing, empowering or disempowering effects. Decisions may have all of these. Less explicitly, the Court has recognized that recommendations may also have at least some kind of authorizing effect. In these cases, the Court dealt with authorizations that created generalized reciprocal obligations not to interfere with the exercise of the given right, rather than a specific reciprocal duty of action. So maybe recommendations cannot possess the full authorizing effect of creating a right that implies an affirmative duty on some specific addressee(s). In any event, it seems that recommendations do not contain binding determinations or have (dis)empowering effects.

Declarations have none of these effects. Declarations have not been discussed yet, primarily because they were not foreseen by the Charter and have no effect based on it. They either interpret the Charter or reflect the state of international law, in which case they have no effect of their own; or they add provisions of *lex ferenda*, in which case they have no Charter authority to influence general international law. But international customary law may provide an extrinsic basis for their effects.⁹⁴

2 Extrinsic Legal Effects

In the previous section, the basis of the legal effects of the resolutions was conventional and they acted upon the internal UN legal order. In this section, the legal effects operate on general international law⁹⁵ and are based on customary law. They are

⁹⁴ The *instrument* would necessarily find its basis within the UN legal order, through some kind of interpretation or informal revision of the Charter (Sloan, *supra* note 6, at 46), but the *substance* of the declaration may find a basis in customary international law as an expression of *opinio juris* and/or practice, and I have chosen a substantive classification of resolutions (see *supra*, at 880).

⁹⁵ The ICJ has never recognized extrinsic effects on customary law internal to the UN order. The *Certain Expenses* opinion accepted resolutions not explicitly supported by the Charter, but rather on the basis of Charter interpretation than the subsequent practice of the parties to a treaty (*Certain Expenses*, *supra* note 4, at 162, on which see Basak, *supra* note 1, at 185–187; *Certain Expenses*, *supra* note 4, at 163–165).

extrinsic because, although it is declarations that have legal effects, these are directly based on international customary law. Between the two there is no intermediary instrument providing the adopting body with intrinsic powers.

The ICJ has dealt with three main issues concerning the effects on general (customary) international law: whether there are any such effects; on which of the two constitutive elements of customary law – *opinio juris* and practice – any such effects operate; and on the basis of which criteria they do so.

A Impact on International Customary Law?

If a UN resolution merely interprets pre-existing substantive international norms, it may be helpful for understanding and applying them. If it restates existing international norms, it may have an evidentiary value for establishing these. But in neither case does the resolution have any impact on the state of the law. Granted, in practice it can be hard to draw the line between what, on the one hand, is merely interpretative or declaratory and what, on the other hand, is truly creative. The Court has often been vague in separating the impact of UN resolutions on customary law from their interpretative or evidentiary value. After having been entirely unclear in the 1970s, the Court gained in clarity in the 1980s and then retreated again in the 1990s.

In the 1970s, the Court identified GA declarations as a ‘further important stage’ in the development of international law,⁹⁶ or inferred the ‘existing rules of international law’ from them,⁹⁷ but made no mention of how or why this could be done.⁹⁸

The 1986 *Nicaragua* judgment achieved greater clarity. For instance, it found that the description of acts constituting armed attacks annexed to GA Resolution 3314 (XXIX) ‘may be taken to reflect customary international law’.⁹⁹ The word ‘reflect’ indicates that GA resolutions are here used as *evidence* of customary law¹⁰⁰ and are therefore not given any legal effect.

But the *Nicaragua* opinion also took a different approach, this time confirming that UN resolutions may have an impact on customary law. Searching for an *opinio juris* concerning the rule of abstention from the threat or use of force against the territorial integrity or political independence of other states, the Court found that:

The *Wall* opinion followed a similar approach (*Wall*, *supra* note 39, at 15–16, paras 27–28). The *Namibia* opinion arguably gave such internal customary effect to a *mode of adoption* (with abstentions of permanent members) of resolutions, but not to the resolutions themselves (*Namibia*, *supra* note 30, at 22, para. 22).

⁹⁶ *Namibia*, *supra* note 30, at 31, para. 52.

⁹⁷ *Western Sahara* [1975] ICJ Rep 12, at 30–33, paras 52–59.

⁹⁸ Schwebel, ‘The Effect of Resolutions of the U.N. General Assembly on Customary International Law’, 73 *ASIL Proceedings* (1979) 301, at 303; Schwebel, ‘The Legal Effect of Resolutions and Codes of Conduct of the United Nations’, in S. Schwebel, *Justice in International Law – Selected Writings of Stephen M. Schwebel* (1994) 499, at 503; Thierry, *supra* note 1, at 442–444.

⁹⁹ *Nicaragua*, *supra* note 79, at 103, para. 195. See also *ibid.* at 106–107, paras 202–203; *Wall*, *supra* note 39, at 35–36, para. 87.

¹⁰⁰ See Akehurst, ‘Nicaragua v. United States of America’, 27 *Indian J Int’l L* (1987) 357, at 359–360. Compare with the 8th preambular paragraph of GA Res 3232 (XXIX) (5 Nov. 1974), but see also GAOR, 29th session, 6th committee, 1492nd meeting, 5 Nov. 1974, at 166–170.

This *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and 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 Co-operation 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. 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.¹⁰¹

Here, the role of UN resolutions is indeed to participate in the creation of customary law and is neither confined to restatement or interpretation ('reiteration or elucidation') of the Charter, nor to mere evidence of the content of international customary law (since the 'effect of consent to the text of such resolutions' is 'an acceptance of the validity of the rule or set of rules declared by the resolution'). The latter point is also supported by the fact that the Court does not discriminate between provisions based on *lex lata* and those based on *lex ferenda*.

However, the reference to the 'attitude of States' could mean that the effect does not come from the resolutions themselves but rather from the way states receive them. But the Court later adds, on the topic of Resolution 2625 (XXV): 'As already observed, the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question'.¹⁰² This suggests that the previously mentioned 'attitude of States' towards the resolutions boils down to their adoption of them.¹⁰³ So the resolutions themselves do have an effect.¹⁰⁴ However, the Court arguably weakens its statement, firstly, by adding that the resolution offers a mere 'indication' of this *opinio juris* and, secondly, by listing several other vehicles for *opinio juris*, for instance statements by state representatives.¹⁰⁵

Unfortunately, the 1996 *Nuclear Weapons* opinion, while dissipating these lingering doubts, also created new ones. Searching for a customary rule prohibiting recourse to nuclear weapons, '[t]he 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*'.¹⁰⁶ Here, the *Nicaragua* reference to the attitude of states towards certain General Assembly resolutions is gone, as is the blurring statement that this attitude is a source 'inter alia' of *opinio juris*. But the citation also seems to conflate the two *Nicaragua* approaches (evidence of customary law/effect on *opinio juris*) into one by using the resolutions to provide 'evidence' of both, thereby eliminating any legal effect. On the other hand, the Court finds that GA resolutions may have 'normative value'.

¹⁰¹ *Nicaragua*, *supra* note 79, at 99–100, para. 188. See also Judge Ago's separate opinion, at 184, para. 7.

¹⁰² *Ibid.*, at 101, para. 191.

¹⁰³ A similar conclusion is reached by Franck, 'Some Observations on the ICJ's Procedural and Substantive Innovations', 81 *AJIL* (1987) 116, at 118.

¹⁰⁴ The issue here is that the resolutions were adopted, not how they were adopted.

¹⁰⁵ *Nicaragua*, *supra* note 79, at 100, paras 189–190.

¹⁰⁶ *Legality of the Use or Threat of Nuclear Weapons* [1996] ICJ (hereinafter '*Nuclear Weapons*'), at 254–255, para. 70.

The renewed lack of clarity is perhaps linked to persisting doubts about the relevance of UN resolutions for customary law.¹⁰⁷ The remainder of this article will assume the *Nuclear Weapons* opinion to be relevant for the question of legal effect.¹⁰⁸

B *Opinio juris* or Practice or Both?

Scholars have disagreed widely on whether UN resolutions may be constitutive of state practice or *opinio juris*.¹⁰⁹ Although one may argue that what states do is more important than what they say,¹¹⁰ it can be difficult to separate words and actions in state practice.¹¹¹ State practice is sometimes what the state says (for instance, *threatening* to use a nuclear weapon, recognizing a state), sometimes what it does (for instance, *using* a nuclear weapon, abstaining from a vote). The Court has so far settled this issue in favour of *opinio juris*, at the exclusion of state practice.

1 *Opinio juris*

As we have seen, both the 1986 *Nicaragua* decision and the 1996 *Nuclear Weapons* opinion expressly link GA resolutions to *opinio juris*. According to the former, '*opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the parties and the attitude of states towards certain General Assembly resolutions'.¹¹² The latter found '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*'.¹¹³ So GA resolutions may inform *opinio juris*, but may they also constitute state practice?

2 *Not State Practice*

The *Nicaragua* judgment, being extremely brief on the issue of state practice, does not clearly answer whether GA resolutions may also constitute state practice.¹¹⁴ According

¹⁰⁷ See *infra*, at 901–902, on the reality of the *opinio juris*.

¹⁰⁸ A close reading could however support the thesis that the *Nicaragua* decision finds *state attitude* towards UN resolutions to have a direct effect on *opinio juris*, whereas the *Nuclear Weapons* opinion finds the resolutions themselves to be of *evidentiary* value to establish the *opinio juris* or the customary rule. This reading could also find support in the *Nuclear Weapons* opinion's conspicuous absence of reference to the *Nicaragua* decision on this issue. If so, then the ICJ has never given GA resolutions any legal effects on general international law.

¹⁰⁹ For an overview of the proponents of the different opinions, see Skubiszewski, 'Resolutions of the U.N. General Assembly and Evidence of Custom', in *Le droit international à l'heure de sa codification – études en l'honneur de Roberto Ago* (Vol. I) (1987) 503, at 506–507. See also Tunkin, 'The Role of Resolutions of International Organizations in Creating Norms of International Law', 230 *Coexistence* (1987) 5, at 12–15.

¹¹⁰ Schwebel, 'Legal Effects', *supra* note 98, at 500; Schwebel, 'The Effect of Resolutions', *supra* note 98, at 304; Skubiszewski, *supra* note 109, at 508. See also AA D'Amato, *The Concept of Custom in International Law* (1971), at 88.

¹¹¹ See the excellent and detailed analysis by G Cahin, *La coutume internationale et les organisations internationales* (2001), at 95–115. See also Akehurst, 'Custom as a Source of International Law', 47 *BYBIL* (1974–1975) 1, at 1–11.

¹¹² *Nicaragua*, *supra* note 79, at 99–100, para. 188.

¹¹³ *Nuclear Weapons*, *supra* note 106, at 254–255, para. 70.

¹¹⁴ See the analysis by Franck, *supra* note 103, at 118–119.

to a number of authors, the answer is yes.¹¹⁵ This view finds no explicit support in the decision,¹¹⁶ and is rejected by other authors.¹¹⁷ There are indeed other possible explanations why the Court is so brief on the topic of state practice. The Court may have thought it unnecessary and/or too difficult to examine the practice behind rules of abstention of such fundamental importance as non-aggression and non-intervention.¹¹⁸ It does note some material state practice conflicting with the principle of non-intervention, which was not supported by an *opinio juris* capable of creating a new rule or exception.¹¹⁹ Perhaps this shift reflected the practical necessity of examining action rather than abstention. The Court may also have been prevented – or thought itself to be precluded – from further examining state practice, due to most states being non-parties to the proceedings and due to the absence of the USA and hence of any material it could have submitted.¹²⁰ Finally, one may argue that the Court could hardly intend to use a single source for both constitutive elements of custom. This would give the resolutions instant quasi-legislative effect,¹²¹ which finds no explicit support in the Charter and gives the GA and/or the SC an exorbitant power that was never intended.¹²² It would also run the risk of ignoring how states behave in reality.¹²³

The *Nuclear Weapons* opinion interestingly considers that the ‘emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other’.¹²⁴ *Opinio juris* and state practice are clearly separated. The debates in the *Nicaragua* and *Nuclear Weapons* cases concerned conceptually similar rules of abstention, prohibiting

¹¹⁵ Akehurst, *supra* note 100, at 361–362; Charlesworth, ‘Customary International Law and the Nicaragua Case’, 11 *Australian Year Book of Int’l L* (1984–87) 1, at 24; Mendelson, ‘The Nicaragua Case and Customary International Law’, in W.E. Butler (ed.), *The Non-Use of Force in International Law* (1994), at 93–94; Donaghue, ‘Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law’, 16 *Australian Year Book of Int’l L* (1995) 327, at 339. Pellet, *supra* note 10, at 416, para. 20, is more nuanced.

¹¹⁶ *Contra* Charlesworth, *supra* note 115, at 18; Donaghue, *supra* note 115, at 338.

¹¹⁷ Charney, ‘Customary International Law in the Nicaragua Case Judgment on the Merits’, 1 *Hague Yearbook of Int’l L* (1988) 16, at 22; D’Amato, ‘Trashing Customary Law’, 81 *AJIL* (1987) 101, at 102.

¹¹⁸ See Eisemann, ‘L’arrêt de la C.I.J. du 27 juin 1986 (fond) dans l’affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci’, 31 *Annuaire Français de Droit International* (1986) 153, at 173–174. Identifying the *opinio juris* would replace identifying the customary norm itself.

¹¹⁹ *Nicaragua*, *supra* note 79, at 109, paras 206–207.

¹²⁰ *Ibid.*, at 109, para. 207. See the analysis by Charney, *supra* note 117, at 20–21, 25.

¹²¹ See the analysis by Charlesworth, *supra* note 115, at 24. Sloan, *supra* note 6, at 70–75 accepts such ‘instant custom’.

¹²² See *supra* note 21.

¹²³ Both Arangio-Ruiz, ‘The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations’, 137 *Recueil des Cours* (III) (1972) 418, at 476, and Higgins, ‘The United Nations and Law-making: the Political Organs’, 64 *ASIL Proceedings* (1970) 37, at 47, reject the notion that UN resolutions can be the sole source of state practice. Otherwise, it would be a ‘utopian’ approach to customary law (see Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’, 95 *AJIL* (2001) 757, at 768–770). This problem would not be solved by drawing *opinio juris* from the normative content of the resolutions, and state practice from their repetition or from state votes.

¹²⁴ *Nuclear Weapons*, *supra* note 106, at 255, para. 73.

respectively (i) the threat or use of force against the territorial integrity or political independence of other states, and (ii) the threat or use of nuclear weapons. It is therefore submitted that the *Nuclear Weapons* case resolves the *Nicaragua* ambiguity as to whether UN resolutions could constitute not only *opinio juris* but also state practice. The answer is no, since state practice in the former case is confined to the policy of deterrence. But in the future the Court may still look to UN resolutions for State practice concerning rules that involve no material action (for example, state recognition).

C *How Opinio Juris Is Identified*

The *Nicaragua* opinion was very vague on how *opinio juris* may be deduced from one or more General Assembly resolutions,¹²⁵ but the *Nuclear Weapons* opinion substantiated this: ‘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’.¹²⁶

This quote identifies four criteria – conditions of the adoption, content, reality of the *opinio juris* and, perhaps, repetition, to which one more implicit criterion may be added, that the resolution be a *declaration*.

1 *Conditions of the Adoption*

The expression ‘conditions of its adoption’ presumably refers to issues such as the resolution’s number of affirmative votes, abstentions or contrary votes, the representative nature of the states voting for or against it, and whether its mode of adoption permits a fair expression of each state’s point of view.

The *Nuclear Weapons* opinion finds that the relevant resolutions ‘fall short of establishing the existence of an *opinio juris*’, because ‘several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions’.¹²⁷ There might still be, according to the Court, an emerging ‘customary rule specifically prohibiting the use of nuclear weapons’, based on factors such as ‘the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI)’.¹²⁸ Large majorities are thus crucial. This satisfies the requirement of a *generalized opinio juris*.

Nothing explicit is said about the importance of the representative quality of the supporting states, but the Court does give weight to the states engaged in a policy of nuclear deterrence.¹²⁹ It is reasonable that those states which are actually engaged in a certain activity have a strong say in how that activity is regulated.

¹²⁵ *Nicaragua*, *supra* note 79, at 99–100, para. 188.

¹²⁶ *Nuclear Weapons*, *supra* note 106, at 255, para. 70.

¹²⁷ *Ibid.*, at 255, para. 71. In comparison, GA Res 2625 (XXV) was adopted unanimously (*Nicaragua*, *supra* note 79, at 101, para. 191).

¹²⁸ *Nuclear Weapons*, *supra* note 106, at 255, para. 73.

¹²⁹ Most clearly when the Court notes ‘that a number of States adhered to [the policy of deterrence] during the greater part of the Cold War and continue to adhere to it’ (*Nuclear Weapons*, *supra* note 106, at 254, para. 67). See the analysis in Coussirat-Coustère, ‘Armes nucléaires et droit international: A propos des avis

The Court did not check whether the mode of adoption of the resolution allowed a fair expression of each state's point of view. Yet this is not always the case, as illustrated by the GA's practice of adopting resolutions by 'false consensus', without putting them to a vote that would reveal abstentions and contrary votes.¹³⁰

2 Content

The *Nicaragua* judgment did not provide any explicit insights into the importance of the content of the resolutions, but one may draw some implicit conclusions. The Court seems to have given little weight to the context of the provisions that it finds to express *opinio juris*. Yet, Resolution 2625 (XXV) was based upon the Charter and not a statement about international customary law.¹³¹ On the other hand, the provisions on which the Court relied used legal and mandatory language.

The *Nuclear Weapons* opinion summarily refers to the criterion of the 'content of the resolution'. This presumably means whether the resolution has normative content and, if so, whether it is couched in legally binding terms. The Court noted normative language in the General Assembly resolutions put before it, some of which was clearly legal ('violation of the Charter').¹³² Moreover, it analysed the legalistic content of Resolution 1653 (XVI) to conclude that there was no *opinio juris* for a specific customary rule prohibiting the use of nuclear weapons.¹³³

Judging from the two cases, the normative and legal language of a resolution's relevant provisions is more important than their context. This is hard to justify – words taken out of context can be made to say many things.

3 Reality of the *Opinio Juris*

The *Nicaragua* decision mostly just checks that the parties to the dispute had supported the given resolutions, without considering whether this is sufficient to constitute an *opinio juris*. But the Court did take into account a US statement that the declaration contained in GA resolution 2131 (XX) was 'only a statement of political intention and not a formulation of law', though the Court ultimately disregarded this because the similar principles in GA Resolution 2625 (XXV) had met with no such US statement.¹³⁴

The *Nuclear Weapons* opinion, on the other hand, states that, in order to find *opinio juris* in a GA Resolution, it is 'necessary to see whether an *opinio juris* exists as to [the resolution's] normative character'.¹³⁵ To transcend the tautology, this must either

consultatifs du 8 juillet 1996 de la Cour internationale de Justice', 41 *Annuaire Français de Droit International* (1996) 337, at 346. Compare with *North Sea Continental Shelf (FRG/Denmark; FRG/Netherlands)* [1969] ICJ Rep 3, at 42–43, paras 73–74. See also the Dissenting Opinion of Judge Schwebel, at 319.

¹³⁰ On this issue, see Schwebel, 'The Effect of Resolutions', *supra* note 98, at 308–309. Cahin, *supra* note 111, at 349–350, shows that consensus decisions are less reliable sources of *opinio juris* than individual votes.

¹³¹ See Eisemann, *supra* note 118, at 174; Mendelson, *supra* note 115, at 93–94.

¹³² *Nuclear Weapons*, *supra* note 106, at 255, para. 71.

¹³³ *Ibid.*, at 255, para. 72.

¹³⁴ *Nicaragua*, *supra* note 79, at 107, para. 203.

¹³⁵ *Nuclear Weapons*, *supra* note 106, at 255, para. 70.

concern whether the adopting states believed that the normative content of the resolution was of a legal nature (psychological aspect)¹³⁶ or, perhaps, whether any normative content of the resolution is couched in legally binding terms (material aspect).¹³⁷ The *Nuclear Weapons* opinion provides no express clarification on this issue, but since the Court's treatment of the content criterion is close to the latter alternative, the former seems more likely here.¹³⁸

In any event, the Court has recognized the importance of checking for the reality of the purported *opinio juris*. The GA has the attractive quality of being very broadly representative of the existing states, as well as constituting a centralized, highly convenient means of simultaneously identifying the points of view of all present Member States on a specific topic.¹³⁹ However, the GA is also a political organ, which does not make it an ideal forum for establishing the law.¹⁴⁰ States may indeed have reasons other than legal ones for voting the way they do,¹⁴¹ such as moral, political, or pragmatic (for instance, as part of a bargain deal). Moreover, a state may vote against a resolution because it finds that it goes too far, or not far enough. Besides, it is hardly fair to bind a state to a favourable vote, when states 'act within certain rules and mechanisms that normally affect the legal meaning of their votes' and when resolutions are imputed not to individual members but to the adopting body and organization.¹⁴² Finally, the state representatives who vote in the Assembly usually do not have the power to legally commit their states. The reality of the *opinio juris* is the key criteria, and one may doubt how suitable UN resolutions are to express it.

4 Repetition?

The *Nuclear Weapons* opinion notes that 'a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule',¹⁴³ and stresses the importance of 'the adoption each year by the General Assembly'¹⁴⁴ of resolutions calling for the use of nuclear weapons to be prohibited.

The significance of repeating resolutions is unclear. Certain individual judges have found repetition to be important because the voting and passing of resolutions could

¹³⁶ A criterion preferred by some authors, e.g. Donaghue, *supra* note 115, at 333–334.

¹³⁷ A criterion preferred by other authors, e.g. Akehurst, *supra* note 111, at 37.

¹³⁸ *North Sea Continental Shelf*, *supra* note 129, at 44, para. 77, adopted this approach, albeit not in the context of GA resolutions.

¹³⁹ For a more detailed discussion of this, see Charney, 'International Lawmaking – Art. 38 of the ICJ Statute Reconsidered', in J. Delbruck (ed.), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest* (1996), at 180–183.

¹⁴⁰ Skubiszewski, *supra* note 109, at 519. See also Charney, *supra* note 117, at 23.

¹⁴¹ Schwebel, 'The Legal Effect', *supra* note 98, at 500; Schwebel, 'The Effect of Resolutions', *supra* note 98, at 302; Higgins 1970, *supra* note 123, at 39–40.

¹⁴² Castañeda, *supra* note 3, at 154–155 (italics omitted). See also Detter, *supra* 18, at 391–392; Tunkin, *supra* note 109, at 13.

¹⁴³ *Nuclear Weapons*, *supra* note 106, at 255, para. 70.

¹⁴⁴ *Ibid.*, at 255, para. 73.

be interpreted as state practice.¹⁴⁵ But the *Nuclear Weapons* opinion links repetition to *opinio juris*. Surely a legal conviction is not created by repeated expression. However, repetition may be relevant for determining evolutions within the *opinio juris*, for identifying increasing or decreasing support by various states: in short, for establishing the current *opinio juris*.¹⁴⁶ In this light, it seems more reasonable to interpret the *Nuclear Weapons* reference to repetition as a simple statement that *opinio juris* may evolve, without it being a criterion of any kind. It rather pertains to the modal effects of when a new *opinio juris* replaces the former. This happens whenever a new resolution expresses the *opinio juris* on a given subject.

5 Declarations

All GA resolutions to which the Court has arguably attributed an impact on general international customary law are in fact, in their relevant provisions, declarations. This is illustrated by their titles – the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Resolution 1514 (XV) of 14 December 1960) in the *Namibia* and *Western Sahara* cases, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA Resolution 2625 (XXV) of 24 October 1970) in the *Western Sahara* and *Nicaragua* cases, and the Declaration on the Prohibition of the Use of Nuclear and Thermo-nuclear Weapons (GA Resolution 1653 (XVI) of 24 November 1961) in the *Nuclear Weapons* case. This is hardly a coincidence, since it is precisely declarations that purport to deal with general international law, yet find no Charter authority for having any direct effect on it.

While declarations are the only adequate form of GA resolution to address general international law, and repetition rather pertains to modal effects, the three remaining criteria (conditions of the adoption, content and reality of the *opinio juris*) are, it is submitted, only various vehicles for the true test, which is *intent*.¹⁴⁷ Does a large majority of (the most concerned) states intend the resolution to express the current *opinio juris*?

D Conclusion

Declarations in practice contain norms of *lex ferenda* which the Court has seen as a possible source of *opinio juris*. What then are the legal effects of these declarations?

The ICJ has not dealt with causative effect in the context of declarations. GA declarations may make general determinations of *law*, but not, by the nature of declarations, of specific *facts* or *legal situations*.¹⁴⁸ Their effect is then not causative but more akin to

¹⁴⁵ *South West Africa*, *supra* note 24, dissenting opinion of Judge Tanaka, at 292; *Barcelona Traction, Light And Power Company, Limited (Belgium v Spain) (Second Phase)* [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun, at 303.

¹⁴⁶ But see *Nuclear Weapons*, *supra* note 106, Dissenting Opinion of Judge Schwebel, at 319–320. See also Skubiszewski *supra* note 18, at 322–323.

¹⁴⁷ Compare with *ibid.*, at 315–316, for a parallel to the treaty-based effects: see *supra* note 43.

¹⁴⁸ E.g., GA Res 1653 (XVI), 24 Nov. 1961, ‘declares’, in para. 1(b), that the use of nuclear weapons violates international law.

substantive.¹⁴⁹ If a declaration were nonetheless to make a determination of specific facts, there would be no basis for giving it effect since the GA has no power to apply general international law. Such determinations could therefore only trigger substantive effects in general international law if endorsed by a body competent to apply it (for example a state), in which case the legal effect does not flow from the UN body's determination but rather from the later endorsement. Hence, a determination made in a GA or SC resolution cannot have any causative effect on general international law.

Substantive effects exist but are of a particular nature. Because the resolutions only inform the *opinio juris*, while the practice element of customary law is, in current ICJ jurisprudence, extraneous, the resolutions do not have any actual and autonomous substantive effects. Their effects are, one may say, *pre-substantive*, laying the ground for a real substantive effect if the missing element is provided.¹⁵⁰

The only finding concerning the modal effects attached to the above pre-substantive effects is that resolutions may show the evolution of the *opinio juris*. A new resolution that meets all the criteria immediately updates the *opinio juris*. Indeed, the pre-substantive effects on *opinio juris* can neither be deferred (current *opinio juris* cannot be constituted by state belief that a rule will be binding in the future), nor retroactive (the constitution of an *opinio juris* cannot imply that it already existed prior to that moment¹⁵¹). Although an *opinio juris* cannot programme its own limitation in the future, it is by nature reversed by the appearance of a new *opinio juris*, and hence cannot be definitive (an *opinio juris* cannot be that states may not in the future have a new and contradictory *opinio juris*¹⁵²). Summing up, the effects are always immediate, non-retroactive and reversible. They are also murky in practice, but that does not affect the theoretical analysis. While the resolution shows when the pre-substantive effects start, it is impossible to know how long they will last, since the *opinio juris* may change under the impact of other influences.¹⁵³

General Conclusion

There is a dichotomy in the legal effects given by the ICJ to GA and SC resolutions. The legal effects of recommendations and decisions are treaty-based, affect the UN legal

¹⁴⁹ There is little difference between a *lex ferenda* determination that the use of nuclear weapons is contrary to international law and purporting to lay down the international obligation not to use nuclear weapons.

¹⁵⁰ If resolutions were found to provide practice rather than *opinio juris*, then each resolution would have pre-substantive effects first in the sense that other resolutions would be required to provide a sufficiently constant and uniform practice, secondly in the sense that the *opinio juris* element would still have to be provided.

¹⁵¹ If the *opinio juris* were that a certain rule be retroactive, it would not be the *opinio juris* but rather the rule itself which was retroactive.

¹⁵² It would be both practically absurd and theoretically impossible, since a new *opinio juris* could always change the old belief that a new belief could not be formed.

¹⁵³ The modal effects on the customary rule itself are entirely impossible to ascertain, due to the 'fluid' nature of customary law (Roberts, *supra* note 123, at 784). One cannot tell exactly when a practice is sufficiently constant and uniform to support the existence of a customary rule. Consequently, one cannot be sure that the customary rule is not in fact being applied retroactively. Nor can one tell exactly when it is replaced by another, incompatible, customary rule.

order and include (i) the causative effect of factual and/or legal determinations; (ii) substantive (binding, authorizing and/or (dis)empowering) effects; and (iii) the modal effects that regulate when and how the substantive effects occur (as a rule, they are immediate, non-retroactive and reversible). The legal effects of declarations, which are based on customary international law and bear upon the international legal order, are more limited. Any determinations would be without causative effect, there are no direct substantive effects but only pre-substantive ones, and these are always immediate, non-retroactive and reversible.

The cause of this dichotomy is neither the type of resolution, nor the customary or conventional basis of the effects, nor the legal order affected. It is the difference between the intrinsic nature of the effects based on special powers and the extrinsic nature of the effects based directly on general international law. This holds true for each category of legal effects.

Determinations made in recommendations and decisions, unlike declarations, may have causative effect. This effect occurs when law is applied on the basis of a determination. Imagine that the ICJ were to acknowledge as an internal UN customary norm that, based on a sufficiently constant and uniform practice of recommendations combined with an *opinio juris*, the GA is not precluded from recommending measures to maintain peace and security when it determines that the SC is paralysed by a lack of unanimity among its permanent members.¹⁵⁴ Any future GA determination that the SC is so paralysed would have a causative effect on the internal customary norm. This is because the customary norm is within the GA's power of application, and the effect is therefore intrinsic. No extrinsic causative effects are possible because general international law does not give the GA or SC any powers of application. Causative effect may only be intrinsic.

Recommendations and, especially, decisions may have substantive effects, while declarations only have pre-substantive effects. The effect operates at different stages of the normative process, either creating the substantive effect itself or merely laying the ground for its creation. UN resolutions can directly create special, usually UN, law, but can only have indirect effects on general international law by acting on one of the constitutive elements of customary law. Consider again the hypothesis discussed in the preceding paragraph – the resolutions given effect would be *recommendations* and would affect the UN legal order. Yet the (pre-)substantive effects would be similar to those encountered in the second section of this article – each recommendation would only contribute a part of the practice necessary, combined with an *opinio juris*, to constitute a substantive effect. This is because the effects would be extrinsic, based on the customary international law of the subsequent practice of the parties to a treaty.¹⁵⁵ On the other hand, if the ICJ were to grant substantive effects on

¹⁵⁴ This is of course the 'Uniting for Peace' (GA Res 377 (A), 3 Nov. 1950) scenario, the legality of which the ICJ implicitly admitted in *Certain Expenses*, *supra* note 4, at 163–165, but on the basis rather of treaty interpretation than internal customary law.

¹⁵⁵ The issue here is the extrinsic *constitution* of the internal customary law which, *once constituted*, may be triggered by intrinsic determinations.

general international law to an SC decision,¹⁵⁶ its effects would be similar to those encountered in the first section of this article. This is because the effects would be intrinsic, based on implicit powers in the UN Charter. Under the existing rules of formation of general international law, only intrinsic effects can be substantive, whereas extrinsic effects can only be pre-substantive.

The modal effects are also different. The modal effects of recommendations and decisions are flexible – immediate or deferred, retroactive or not, definitive or reversible/transient. The modal effects of declarations on *opinio juris* are inflexible – always immediate, non-retroactive and reversible (although murky in practice). In the first case, the adopting body has special powers capable of modulating the substantive effects – the modal effects are intrinsic. In the second case, it has no powers and the effects can only be extrinsic, directly based on the general international law of how customary law is created. This law allows for no modulation. Intrinsic modal effects are flexible; extrinsic legal effects are inflexible.

Let us sum up our conclusions:

| Effects | Intrinsic | Extrinsic |
|---|--|-----------------------|
| Causative effect | Yes. | No. |
| Substantive effects: binding, authorizing or (dis)empowering. | Yes. In decisions; possibly some authorizing effects in recommendations. | Only pre-substantive. |
| Modal effects | Yes. Flexible. | Yes, but inflexible. |

¹⁵⁶ E.g., SC Res 1373, 28 Sept 2001.