SOME NOTES ON THE DEVELOPMENT OF THE SOURCES OF INTERNATIONAL LAW

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Papers in *Scandinavian Studies in Law* generally deal with problems of Scandinavian law,[1] but since international law, both public and private, is growing in complexity and scope and in its importance even for national tribunals, it may be of some interest to discuss in this journal a problem relating to the very foundation of international public law, namely the sources of this law.[2] The purpose of this paper is to examine whether the General Assembly of the United Nations can make contributions to the formation of general international law through codification or through what may be called lawmaking declarations.[3]

[1] There are other papers on subjects of international law in this series. See in particular the profound article on "The legal character and sources of international law" by Torsten Gihl, in 1 *Sc.St.L.*, pp. 5 ff. (1957).

[2] It is impossible—even if the present writer were capable of doing so (which is debatable)—to delve deeply into the mystery of sources of law in this paper. Suffice it to say that the whole paper discusses the sources on the basis of the more current or conservative basis of the enumeration in art. 38 of the Statute of the Court. One of the classics in this field of law is still Max Sørensen, *Les Sources du Droit International,* Copenhagen 1946.

[3] In the extensive literature one may mention particularly: R. Ago, "La codification du droit international et les problèmes de sa réalisation", *Mélanges en hommage à Paul Guggenheim* (Faculté de droit de l'Université de Genève, 1968), p. 508; O. Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations,* The Hague 1966; S. Bastid, "Observations sur une étape dans le développement progressif et la codification des principes du droit international", *Mélanges en hommage à Paul Guggenheim* (Faculté de droit de l'Université de Genève, 1968), p. 132; R. R. Baxter, "The effects of ill-conceived codification and development of international law", *Mélanges en hommage à Paul Guggenheim* (Faculté de droit de l'Université de Genève, 1968), p. 146; H. W. Briggs, *The International Law Commission* (Cornell University Press) Ithaca, New York, 1965; H. W. Briggs, "International Law Commission and other Agencies", 126 *Recueil des cours* 1969-I, p. 233; J. Castaneda, *Legal Effects of United Nations Resolutions* (Columbia University Press, 1969); A. d'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971); T. O. Elias, "Modern Sources of International Law", *Transnational Law in a Changing Society. Essays in Honor of Philip C. Jessup* (Columbia University Press) New York and London 1972, pp. 34 ff.; R. A. Falk, "On the Quasi-legislative Competence of the General Assembly", 60 *A.J.I.L.* 1966, p. 782; Sir Gerald G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", *Symbolae Verzijl,* The Hague 1958, p. 153;

The Charter of the United Nations lays down in art. 13 that the General Assembly shall initiate studies and make recommendations for the encouraging of "the progressive development of international law and its codification".

The vital necessity of this work is amply proved by the "crisis in the law of nations".

The changes in the composition of the international community necessitate an examination of the content of international law.

Few will deny that the international community is passing through a revolutionary period when many values are being questioned. It would be surprising indeed if the character and scope of international law remained untouched by this questioning. It should be remembered that the United Nations started with 51 Members in 1945 and today, in 1972, has 134 Members.[4] Furthermore, one should never forget that most of these Members are so-called "new" states. In culture and history they may be old and distinguished, but in the context of international law they are still young. They have only recently become masters in their own house and gained the right to participate fully in international life.

International law as we know it today is to a very great, indeed to an overwhelming extent the product of the "classical"

R. Higgins, "The Advisory Opinion on Namibia: Which UN Resolutions are Binding under Article 25 of The Charter?", *I.C.L.Q.* April 1972; R. Higgins, *The Development of International Law Through the Political Organs of the United Nations*, Oxford 1963; R. Y. Jennings, "The Progress of International Law Commission: Its Relation to the Sources of International Law", *I.C.L.Q.* 1964, p. 385; B. Krylov, "Codification du droit international", *Hommage d'une génération de juristes au président Basdevant*, Paris 1960, p. 314; M. Lachs, "Le rôle des organisations internationales dans la formation du droit international", *Mélanges Rolin*, Paris 1964, p. 157; M. Lachs, "The Law-making Process for Outer Space", *New Frontiers in Space Law* (Sijthoff/Oceana, 1969), p. 13; Sir Hersch Lauterpacht, "Codification and Development of International Law", 49 *A.J.I.L.* 1955, p. 16; Lord McNair, "International Legislation", XIX *Iowa Law Review* 1934; Lord McNair, *The Development of International Law*, New York 1954; K. Skubiszewski, "Enactment of Law by International Organizations", 41 *B.Y.I.L.* 1965–66, p. 198; K. Skubiszewski, "A New Source of the Law of Nations: Resolutions of International Organizations", *Mélanges en hommage à Paul Guggenheim* (Faculté de droit de l'Université de Genève, 1968), p. 508; H. W. A. Thirlway, *International Customary Law and Codification* (Sijthoff/Leiden, 1972); A. Verdross, "Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?", XXVI *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1966), p. 690.

[4] The members of the international community are even more numerous, of course.

period in the history of legal relations between states. This period started with Hugo Grotius and seemed to be in full flower in the years just before the first world war. It lasted, roughly, from the Peace of Westphalia to the outbreak of the Great War. Those who like dates would say that the period of "classical" international law began in 1648 and ended in 1914.

During this "classical" period of history international law was a white man's law. Nobody asked about the interests of the "natives" in the new territories, which the European explorer, discoverer, pioneer, chose to consider as being without masters. In retrospect, especially when looked at from the viewpoint of the descendants of the "colonial" peoples, these territories seem to have been regarded only as fields for expansion.

It has not escaped the citizens—or rather, the élite—of the new states that these centuries were also the period of European expansion in the wake of the great explorations, the epoch of colonialism and imperialism.[5] And apart from some noble figures among Catholic writers on international law no one cared about the "natives" until a much later date.

This period in history ended irretrievably with the first world war and a new start was made when the old European Concert or Concert of Powers was, or rather was intended to be, replaced by a new world organization; but the years between the two world wars did not bring a rebirth or a new creation in spite of the brave experiment of the League of Nations. Nevertheless, today the more optimistic international lawyers hope that the Charter stands for the beginning of a new epoch and does not merely constitute the death throes of a bygone age.

The fragmentary international society of yesterday is obsolete. We are—the statement is trite but true—in a stage of transition, in a position where it behoves us to look forward to the organized and integrated community of tomorrow. Each nation must learn to accommodate itself to the common interests of the world community, and to realize that our mutual interdependence will demand greater international solidarity in the future.

[5] The "explorations" led to the "discovery" of the "new world" and the "dark continent". History was entirely Europe-orientated. The white man discovered the other continents, which, in his eyes—and logically enough—had no existence before their discovery by him. What was not discovered, was outside geography. An instance of this pariochalism is the fact that the great Chinese expeditions to Africa were entirely ignored in the history books.

International law—like all law—remains a dead letter if it does not correspond to certain ideals or principles of justice.

Our conception of justice is always contained within the realities of a social framework. Justice requires a sharing of certain basic values and a will to observe certain patterns of behaviour. These are necessary prerequisites for the survival of any society. A tradition of observing common habits and shared convictions creates law. But law is not just tradition. It must allow development and must provide the means for change. It must embrace both justice and tradition in order to balance within its system the conflicting desires and interests of competing social forces, and to reconcile them without resort to violence.

The "crisis in the law of nations" is to a great extent due to the fact that a considerable segment of the present international community does not feel that this law is "just".

This feeling of injustice is, of course, especially strong among many of the leaders of the "new" states which were until recently under foreign domination. As soon as these territories either gained their independence or emerged as states, they had questions to ask. It is only natural that the new nations should not accept unreservedly an international law which had tolerated colonialism—having previously for a long time condoned slavery—and which in fact had treated them as inferior races and as uncivilized peoples. They had had no part in formulating this law. Why then should they be bound by it?

The only mitigating aspect of this story is that international law in its formative years was mainly written by scholars and philosphers in such a way that the rules were of universal character and could easily be applied to new states who were "admitted to" or integrated into the community of nations. This goes some way to explain why the new states, while strongly critical of much positive law, do not in fact reject it *in toto*.

They are born into the system and they accept that fact. They mostly become sovereign and independent states—whatever that may mean today—in conformity with the rules of international law. At the moment of independence they nearly all apply for membership of the United Nations, duly declaring that they accept the obligations under the Charter, *inter alia*, "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". They succeed to many of the treaties concluded on their behalf by their previous colonial masters and

take their place around the green table like other nations.

They accept international law. But they are not pleased with the law as it is. They desire to change and develop it. And this is just and right and proper. They demand to participate in the creation and application of international law. And on this particular point the United Nations has a fairly good record.

The General Assembly has worked energetically on the task of modernizing international law and since 1947 has regularly appointed an International Law Commission consisting, at present, of 25 persons of recognized competence in international law. In analogy with the Statute of the International Court of Justice it is laid down not only that the persons appointed to the Commission shall be individually competent but also that "in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured".

The Commission has dealt with a score of subjects of international public[6] law and has prepared some very important conventions.[7] The main task of the Commission has been to act as a codification committee and prepare draft treaties which are

[6] The success of the Commission has been followed by a similar effort in the field of International Trade Law by the creation of UNCITRAL.

[7] Multilateral conventions concluded under the auspices of the United Nations following the consideration of the topics by the International Law Commission:

A. Conventions on the Law of the Sea and Optional Protocol.
1. Convention on the Territorial Sea and the Contiguous Zone.
2. Convention on the High Seas.
3. Convention on Fishing and Conservation of the Living Resources of the High Seas.
4. Convention on the Continental Shelf.
5. Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

B. Vienna Convention on Diplomatic Relations and Optional Protocols.
1. Vienna Convention on Diplomatic Relations.
2. Optional Protocol concerning Acquisition of Nationality.
3. Optional Protocol concerning the Compulsory Settlement of Disputes.

C. Convention on the Reduction of Statelessness.

D. Vienna Convention on Consular Relations and Optional Protocols.
1. Vienna Convention on Consular Relations.
2. Optional Protocol concerning Acquisition of Nationality.
3. Optional Protocol concerning the Compulsory Settlement of Disputes.

E. The Vienna Convention on the Law of Treaties of May, 1969; and

F. The Convention on Special Missions adopted in the General Assembly in December of that year.

as a rule debated in the General Assembly, after which the opinion of Governments is asked, and on the basis of the draft and the answers of Governments[8] international conferences are convened to adopt treaties which are submitted for ratification.

The task of the Commission is according to art. 1 of its Statute "the promotion of the progressive development of international law and its codification".

An attempt is made in art. 15 of the Statute to differentiate between these two tasks:

> In the following articles the expression "progressive development of international law" is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression "codification of international law" is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

However, it was fairly clear from the very start of the work that it was well-nigh impossible to operate on the basis of any real distinction of this kind. All the debates show that the line of demarcation is very blurred indeed.

The work of the Commission is perhaps slow and ponderous, but it does ensure a very solid preparation for the drafts which are later submitted to the General Assembly.

In most cases a Special Rapporteur is appointed. A working plan is drawn up and a questionnaire is circulated to Governments. On the basis of this and of a very full documentation prepared by a competent secretariat, a draft, and later a second draft and perhaps several subsequent drafts, are prepared by the rapporteur and discussed by the Commission. A final draft is adopted and circulated anew to the Governments after discussion in the Sixth Committee.

Only on this basis is a conference called to adopt a treaty.[9]

[8] Once, namely in the case of the last-mentioned of these conventions, the Sixth Committee of the General Assembly was converted into a diplomatic conference, but the experience is not deemed to have been entirely satisfactory.

[9] Recently an exception was made. The General Assembly deemed the protection of diplomats to be of an urgent nature after the recent cases of kidnapping and murders and the Commission prepared by a quicker and

The work of the International Law Commission is considered useful and important, but it is undeniably time-consuming and the new nations are impatient. The treaty-creating process may last a decade or more. In the perspective of world history this is a very short period indeed, but it seems long to ambitious politicians from new states.

The "third world" has today an absolute majority in the General Assembly. It is, therefore, very tempting to use this power in the Assembly to force through changes in international law by making use of the system of *declarations*.

Declarations adopted by the General Assembly are of many kinds and descriptions. What interests us here is to see whether such declarations are legally binding in the same sense as the other formal sources of international law.

In this paper we shall not discuss the binding character of General Assembly resolutions in general, but only those which are aimed at creating general norms of international law.

The question of the binding force of substantive resolutions has recently been the subject of a searching analysis by the International Court of Justice in the Advisory Opinion on Namibia[1] and in legal writing pursuant to the opinion.[2]

The present paper deals only with the question whether resolutions which in form and substance purport to be lawmaking have in fact this character.

The answer from the point of view of classical international law would seem to be in the negative.

The best short rule about the sources of law is contained in art. 38 of the Statute of the International Court of Justice.[3]

simpler procedure a draft treaty on the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law.

[1] *I.C.J. Reports,* 1971, pp. 15 ff., and particularly some of the dissenting opinions which throw light on this general problem.

[2] *Inter alia,* Higgins in *I.C.L.Q.* 1972, pp. 270 ff.

[3] "1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations. as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto."

According to this, the two most important sources are treaty law[4] and customary law. A third main source consists of the general principles of law. Since this article is only a stipulation in a treaty it cannot lay down for all time which are the sources of international law; but it may safely be accepted as a codification of a very long practice. It is a good expression of the prevalent opinion in the international community.

If the question is asked whether declarations of the General Assembly are a source of law, it will not be very helpful to examine whether they are covered by art. 38, and to draw the conclusion that they cannot be a source of law because they are not referred to there.

A slightly more thoroughgoing examination is necessary. Particularly it may be asked whether such declarations can be classified under any of the acknowledged categories of sources. But let it be stated at the outset that declarations of international organizations do not figure in art. 38. As a general rule of United Nations law, Members are not bound, legally bound, by declarations or resolutions. But of course Members of an international organization can by treaty (in this case the Charter) assume such an obligation,[5] as the Members of the United Nations have done in art. 25 of the Charter as far as decisions of the Security Council are concerned;[6] and, of course, resolutions of a housekeeping kind like rules of procedure are binding.[7] And—most important of all—so is the resolution adopting the budget of the Organization.

But as a general rule recommendations of the General Assembly are not binding on the Members. Efforts at the San Francisco Conference to confer legislative authority on the General Assembly were unsuccessful.

[4] Treaty means, of course, any agreement between states (and international organizations or between states and organizations) irrespective of form or name.

[5] An interesting example is furnished by the peace treaty with Italy, wherein the Parties agreed to accept as binding the decision of the General Assembly concerning the future of the former Italian colonies.

[6] On this point see the Advisory Case, and separate opinions in the Namibia Case, *I.C.J. Reports*, 1971, pp. 15 ff.

[7] A statement by Chief Justice Elias would seem to imply that recommendations concerning peace and security made by the General Assembly are binding on the members. See p. 46 in the Volume of *Essays in Honour of Philip C. Jessup* and p. 71 in *Africa and the Development of International Law*. It is, however, believed that the learned Chief Justice had in view operative resolutions in concrete cases.

However, it is difficult to accept the rule of law that no recommendation—apart from the ones just mentioned—is ever binding. Certain resolutions, often called declarations, are intended to be binding. Some of them are in the minds of their sponsors meant to be of a lawgiving or law-declaring character. In some cases this can be seen from the fact that when the vote is taken Members make pronouncements to this effect or make reservations showing that the resolutions might otherwise have an ampler scope than they wanted.[8] In other cases the resolution states that it is intended to be binding.

A good example is furnished by the declarations unanimously adopted on October 24, 1970, as the climax of the commemorative Session of the General Assembly to celebrate the first twenty-five years of the life of the Organization.

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations even states in its general part that:

> The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, ...

This must be regarded as a very clear statement that the General Assembly in a most solemn way tries deliberately to create law, and even to create law of a particular kind, namely a law that is above ordinary norms of international law, even though it is doubtful whether such a hierarchy exists in international law apart from the "peremptory norm of general international law (*jus cogens*)" in art. 53 of the Vienna Convention on the Law of Treaties.[9]

From a strict and conservative point of view it cannot yet be accepted that declarations are a source of international law. They are not treaties. They are not custom. They are not general principles of law. Nevertheless, could they not, if they were adopted solemnly enough, be a kind of convention if the delegations so desired? Could they not be powerful agencies for the creation of

[8] A case in point is the Declaration entitled "an International Development Strategy for the Second United Nations Development Decade", which was unanimously adopted by the General Assembly on October 24, 1970, after long and difficult debates in the Second Committee.

[9] The negative attitude of France to this concept is explained in an article in XV *Annuaire Français de Droit International* 1969, p. 14.

customary law? Could they not perhaps be an expression of a general principle?

It might anyhow be worth while examining these possibilities since it would—to put it mildly—be rather awkward to claim that declarations of the General Assembly have no force at all. It would be peculiar to assume that a Government can instruct its delegation at New York to vote in favour of a resolution and then after it has been adopted, perhaps unanimously, turn round and state that it had voted in favour of the resolution simply because it knew that it would not be bound by it. Such an attitude would be in contradiction to the principle of good faith which today is an overriding principle of international law.

Such a modern lawyer as Chief Justice Elias[1] seems to be of the opinion that General Assembly resolutions are binding and he argues—if the present writer has understood him correctly—that the Members who have voted in favour are bound on the basis of consent or estoppel whereas those who have abstained are bound by the rule of acquiescence.[2]

It is clear that a state can be bound by a unilateral declaration, as the P.C.I.J. stated in the case concerning the legal status of Eastern Greenland (Ser. A/B No. 53, p. 71):

> The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

Similar questions were debated during the recent cases concerning the delimitation of the North Sea Continental Shelf, where the Court dealt with the Dutch and Danish claim that Germany had—as the Court put it—"by conduct, by public statements and proclamations and in other ways . . . unilaterally assumed the obligations of the Convention . . .".[3]

The Court refused to accept this, pointing out that such a con-

[1] See p. 47 of his article in the *Essays in Honour of Philip C. Jessup.*
[2] *Ibid.* p. 51.
[3] *I.C.J. Reports,* 1969, p. 25.

sequence from German statements could only be based on estoppel, of which there was no question in this case.[4]

However, it should be stated that some of the dissenting judges took another point of view. Judge Morelli[5] stated that the German signature should be interpreted as the expression of an *opinio jusis* although it was not a statement of will. It is submitted that this line of argument may easily lead to the acceptance of a declaration and favourable vote on a General Assembly declaration as a statement of will.

Judge Lachs went considerably further and stated at pp. 235–36:

> The Proclamation is, therefore, as binding upon the Federal Republic today as it was at the time it was made. A value-judgment of so final a nature may not be revoked. It should therefore be viewed as an unequivocal expression of *opinio juris*, with all the consequences flowing therefrom. Indeed, if it may be claimed that the *opinio juris* of certain other States is in doubt or not fully proven, this is certainly not the case of the Federal Republic. This is a decisive point in the present cases.

Admittedly the words spoken at a meeting cannot all be given the same weight. It would indeed be impossible to have any debates at all if this were the case.[6] Many different statements may be made by a foreign minister or by other government spokesmen in the different organs: statements of intention or policy, proposals or counterproposals in a debate. There are also many different kinds of resolutions and they cannot all be treated alike.

Statements must be judged individually; but the least that can be said is that it is not excluded that a delegation may become bound by a declaration put forward by itself and by its vote in the General Assembly. If many, or even a majority of the delegations act in this way, the declarations adopted by Assembly may indeed become documents with binding force.

It might also be asked whether such declarations can be accepted on the basis of customary international law.

[4] *Ibid.* p. 26.
[5] *Ibid.* p. 197.
[6] See, e.g., the statement by Judge Nervo in the North Sea Continental Shelf Cases, *I.C.J. Reports*, 1969, at p. 95.

From the positivist *lege lata* point of view two elements are needed for the formation of custom. The first is the material element.

If states repeatedly give utterance to a legal norm in the General Assembly, can this be regarded as part of practice? The International Court of Justice[7] and Dr Thirlway[8] both seem to deny this. However, in view of the need of the world community to generate new norms, it might be unwise to be too dogmatic on this point.

Another argument which may be used against accepting the declarations of the General Assembly as formative of customary law is the time element. However, it is admitted today both in theory[8a] and in practice that a much shorter time is needed than was formerly claimed by lawyers. The International Court stated in the North Sea Continental Shelf Cases, at p. 43?

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

It cannot be stated that resolutions of the General Assembly form customary law at once. It does not seem reasonable to speak of "spontaneous custom". Picturesque and evocative though this term may be, it seems to contain an inherent contradiction.[9]

It is also unnatural to speak of the formation of customary law where in fact there has been hardly any practice at all outside the declarations in the United Nations.

The question of *opinio juris* likewise gives rise to serious diffi-

[7] *Ibid.* pp. 42 ff.

[8] *Loc. cit.*, pp. 67 ff.

[8a] See, for instance, Monaco in 125 *Recueil des Cours,* at p. 176. He is strongly in favour of accepting such declarations as law, particularly on the basis of their custom-forming character.

[9] This term has already been used so often that it can hardly be necessary to give any reference, but d'Amato in his recent and interesting book on the *Concept of Custom* refers to Cheng, at p. 50 note 9.

culties. The Court is on this point fairly conservative and states at p. 44:

> 77. The essential point in this connection—and it seems necessary to stress it—is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris;*—for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

It is respectfully submitted that the development of this point by Judge Lachs (pp. 227 ff.) is more progressive and reflects more accurately the needs of the international society. This writer agrees with his conclusion on this point (p. 231):

> Thus at the successive stages in the development of the rule the motives which have prompted States to accept it have varied from case to case. It could not be otherwise. At all events, to postulate that all States, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction —and in fact to deny the possibility of developing such rules. For the path may indeed start from voluntary, unilateral acts relying on the confident expectation that they will find acquiescence or be emulated ; alternatively, the starting point may consist of a treaty to which more and more States accede and which is followed by unilateral acceptance. It is only at a later stage that, by the combined effect of individual or joint action, response and interaction in the field concerned, i.e., of that reciprocity so essential in international legal relations, there develops the chain-reaction productive of international consensus.
>
> In view of the complexity of this formative process and the differing motivations possible at its various stages, it is surely over-exacting to require proof that every State having applied a given rule did so because it was conscious of an *obligation* to do so.

> What can be required is that the party relying on an alleged general rule must prove that the rule invoked is part of a general practice accepted as law by the States in question. No further or more rigid form of evidence could or should be required.
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> In sum, the general practice of States should be recognized as prima facie evidence that it is accepted as law. Such evidence may, of course, be controverted—even on the test of practice itself, if it shows "much uncertainty and contradiction" (*Asylum, Judgment, I.C.J. Reports 1950,* p. 277). It may also be controverted on the test of *opinio juris* with regard to "the States in question" or the parties to the case.

But even though one or two declarations do not form customary international law with immediate effect, it is confidently submitted that they may be a very important element in creating such law.

Lastly, it may be examined whether such declarations can be accepted as an expression of general principles of law. It must first be admitted that such general principles are generally culled from national law. But there is no intrinsic objection to establishing such general principles from international practice also. *A priori* it should not be held impossible to treat declarations of the General Assembly as an indication that a certain rule is an expression of a general principle.

Before we leave this matter, a couple of minor points should be mentioned. The first is of considerable importance. I refer to the vote.

According to the voting rules in the General Assembly important decisions must obtain a two-thirds majority to be adopted. But Members who abstain are not counted. Theoretically a decision could be taken by two votes to one, with 130 abstentions. This has never happened, but it is no rare occurrence for the combined numbers of abstentions and negative votes to be higher than that of the positive votes.

It is obvious that a "declaration" will carry considerably less weight if it is adopted in the teeth of strong objections. A declaration, if not unanimous, should at any rate be based on a very large majority and if possible meet with the substantial approval of most of the "groups" in the General Assembly.[1]

[1] See, for the most recent works on this point, Elias, *loc. cit.*, pp. 47 ff., and Thirlway in his most stimulating book at pp. 61 ff., particularly at pp. 70–71.

And it is fervently to be hoped that no effort will ever be made to develop international law through declarations adopted without a high degree of consensus.

It would also be wise to make sure that the declarations are not contradictory *inter se;* and this has happened.

It is not easy to see the logic in reaffirming the duty of non-interference in the affairs of other states and at the same time endorsing the repeated appeals for rendering assistance to the liberation movements.[2]

The principle of non-interference was reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

In this declaration, which was adopted unanimously on October 24, 1971, it was stated that intervention "directly or indirectly, for any reason whatever" was forbidden. Yet the declaration concerning the "Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples", adopted some days earlier (and not unanimously), asks Member States to "render

[2] For instance, Resolution 2131 (XX) on non-intervention, with the high-sounding title "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty" of December 21, 1965, states:

"1. No state has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

2. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State."

On the very same day the General Assembly adopted Resolution 2107 (XX) on the Question of Territories under Portuguese administration where it

"Appeals to all States, in co-operation with the Organization of African Unity, to render the people of the Territories under Portuguese administration the moral and material support necessary for the restoration of their inalienable rights."

And the next year in Resolution 2151 (XXI) concerning Southern Rhodesia, the Assembly

"Calls upon all States to extend all moral and material support to the people of Zimbabwe in their legitimate struggle to overthrow the illegal racist regime and to achieve freedom and independence."

all necessary moral and material assistance to the people of colonial Territories in their struggle to attain freedom and independence".

By way of conclusion it can be stated that resolutions or declarations of the General Assembly cannot—yet—be characterized as a "new source of international law". It is believed that they will help to create or to crystallize customary law in a shorter time than would otherwise be deemed necessary. They may also contribute to the formation of "general principles of law". They may in certain cases, depending on all the surrounding circumstances, be considered as contractual agreements and may even, again on the basis of a very careful study of all the circumstances, help to generate law on the basis of a number of authoritative unilateral but converging binding declarations of will. This will probably be consistent with the view presented by Thirlway at p. 39 of his very thoughtful book, where he states:

> As a community develops, the sources of law which it recognizes may change, not merely in relative importance (the process we have already examined) but in effective existence; new sources may be tapped, and old ones cease to flow.

According to the views expressed in this paper the declarations of the Assembly can then—again to use a phrase from Thirlway (p. 45)—"prove a genealogical link with one or more of the sources which are so mentioned (viz. in Article 38 of the Statute)".

Whatever doctrinal view one takes of such declarations, it is certain that any court of law will attach great importance to them and that they will have compelling persuasive authority as a proof or at least an indication of the *opinio juris* of the legal community at any given time, but—it is submitted—they establish no irrefutable proof, no *presumptio juris et de jure.*[3]

[3] Ambassador Jorge Castaneda, who is now a valued member of the International Law Commission, goes further than the present writer. He states at p. 172 of his book, *Legal Effects of United Nations Resolutions,* New York and London, 1969:

"The basic foundation for the binding force of rules or principles that are 'declared', 'recognized', or 'confirmed' by a resolution rests, in the final analysis, on the fact that they are customary rules or general principles of law. But the declaratory resolution that incorporates and formulates

It is believed that lawyers should attach the greatest importance to the development of this "source" of law, since it has become an important tool in the hands of those members of the community who want to change and develop the law[4] and will in all probability not diminish in importance in the near future.

them has a fully probative legal value. As Jessup states concerning the Nuremberg principles and the crime of genocide, the declarations in which the principles are embodied 'are persuasive evidence of the existence of the rule of law which they enunciate'. The recognition and formal expression of a customary rule or a general principle of law by the General Assembly constitutes a *juris et de jure* presumption that such a rule or principle is a part of positive international law, that is to say, a legal assumption or fiction that does not allow proof to the contrary, and in the face of which an opposing individual position therefore lacks legal efficacy. Freedom of individual judgment vis-a-vis such a General Assembly resolution would not have greater legal relevance and significance than the opposition of a state to the customary rule incorporated in it; and, as is unanimously agreed, customary laws bind all states whether they have participated in or opposed their development.

"The technical distinction between content (customary rule or general principle of law) and vehicle of expression may help to illustrate the legal value of declaratory resolutions. But this distinction is artificial to a certain extent. In reality, one cannot dissociate the binding force per se of a customary rule or a general principle, incorporated in a resolution, from the resolution's probative legal value. The observer is presented with a resolution as a unitary phenomenon. Therefore, in order to evaluate the legal value of a declaratory resolution, it will be indispensable to consider and analyze it as a whole."

[4] Dr Thirlway has enumerated the most important of them at p. 6 of his book:

General Assembly resolution 95 (I) approving the principles of international law embodied in the Charter of the Nuremberg Tribunal;

Universal Declaration of Human Rights, G.A. resolution 217 (III), 10 December 1948;

Declaration of the Rights of the Child, G.A. resolution 1386 (XIV), 20 November 1959;

Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. resolution 1514 (XV), 14 December 1960;

Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, G.A. resolution 1653 (XVI), 24 November 1961;

Declarations of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, G.A. resolution 1721 (XVI), 20 December 1961 and G.A. resolution 1962 (XVIII), 13 December 1963;

Declaration on Permanent Sovereignty over Natural Wealth and Resources, G.A. resolution 1803 (XVII), 14 December 1962;

Declaration on the Elimination of all Forms of Racial Discrimination, G.A. resolution 1904 (XVIII) 20 November 1963;

Declaration of Principles of International Law Concerning Friendly Relations and Co-operation between States, G.A. resolution 2625 (XXV), 24 October 1970.