ON THE QUASI-LEGISLATIVE COMPETENCE OF THE GENERAL ASSEMBLY*

I

The processes of law-creation in international society have never been very clearly understood by international lawyers. It has been traditional to associate the creation of international law with "the sources of international law" contained in Article 38 of the Statute of the International Court of Justice. Such an approach distorts inquiry by conceiving of law-creation exclusively from the perspective of the rules applicable in this one centralized, judicial institution,[1] an institution that expresses the positivistic assumption that international legal obligations must always be shown to rest upon some tangible evidence of consent on the part of the state that is bound.[2] The expansion of international society to include the active participation of the Afro-Asian states and the growth of a global consciousness has produced a situation that calls for a more sociologically grounded re-interpretation of the basis of obligation in international law. One way to attempt this re-interpretation is to complicate the relationship between state sovereignty and the growth of international law by examining the argument that the General Assembly is endowed with, and actually exercises, a limited legislative competence.

The idea of attributing quasi-legislative force to resolutions of the General Assembly expresses a middle position between a formally difficult affirmation of true legislative status and a formalistic denial of law-creating rôle and impact. To affirm the legislative competence of the General Assembly in qualified terms is thus expressive of a certain well-founded uneasiness about how to give an account of the jurisprudential basis for General Assembly competence to develop new law and repeal old law.[3] I propose to consider, first, the jurisprudential basis for at-

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[1] Such a perspective overlooks the rôle of unilateral claims to act posited by nation-states and community prescriptions about action laid down by non-judicial international institutions. For a critical reinterpretation of "the sources of international law" see Parry, The Sources and Evidences of International Law (1965). On the interaction between traditional sources and U.N. resolutions as a source of international law, see Gross, "The United Nations and the Role of Law," 19 International Organization 537, 555–558 (1965).

[2] But see H. Lauterpacht, The Development of International Law by the International Court of Justice 155–223 (1958).

[3] The distinction between the *declaration*, *development*, *creation*, and *repudiation* of rules of international law is not clear-cut. The decentralized quality of international society emphasizes the importance of the self-determined status of legal rules by various national actors. These acts of self-determination may be mutually inconsistent to varying degrees and, in the absence of stronger central institutions, there is no assured way to obtain an authoritative interpretation of the relationship between an "existing" rule and a formulation of a rule in a resolution of the General Assembly.

tributing a limited legislative status to those resolutions of the Assembly that are supported by a consensus of the membership, and, second, some examples of areas wherein this exercise of quasi-legislative competence has made and might continue to make a contribution to world legal order.

In 1945 at San Francisco the Philippines Delegation made the following proposal to endow the General Assembly with legislative authority:

> The General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the members of the Organization after such rules have been approved by a majority vote of the Security Council. Should the Security Council fail to act on any of such rules within a period of thirty (30) days after submission thereof to the Security Council, the same should become effective and binding as if approved by the Security Council.[4]

The Philippine proposal was decisively rejected by a vote of 26–1 at a drafting session of Commission II.[5] If Charter intent is decisive and strictly construed, it becomes impossible to attribute binding legal force to resolutions of the General Assembly or to consider that the Assembly is in any sense an active, potential, or partial legislative organ. This conclusion has been recently reaffirmed by scholarly observers.[6]

But this formally persuasive denial of legislative status is not nearly so relevant to patterns of practice and expectation as one might be inclined to suppose. Increasingly in other legal contexts the characterization of a norm as *formally binding* is not very significantly connected with its *functional operation* as law.[7] A few examples may clarify this assertion. In the Japanese case of *Shimoda and others* v. *Japan,* the Tokyo District Court was trying to assess the extent to which the atomic bombings of Hiroshima and Nagasaki violated international law.[8] In reasoning to a conclusion, the court made virtually interchangeable use of rules contained in fully binding international treaties (Hague Rules of Land Warfare) and those contained in draft rules (Draft Rules of Air Warfare). In the *Shimoda* setting, then, draft rules had the same (or at least an indistinguishable) rôle as did treaty rules in supporting the result. In a similar vein, the Japanese court refrained from inquiring whether the United States was, in fact, bound to observe treaty rules widely adhered to on the subject of poison gas. The elaborately pondered American decision to refrain from ratification of the Protocol Prohibiting in War the Use of Asphyxiating, Poisonous, or other Gases, and of Bacteriological

[4] 9 UNCIO Docs. 316 (1945). [5] *Ibid.* 70.

[6] J. S. De Yturriaga, "Non-Self-Governing Territories," 1964 Yearbook of World Affairs 178–212, esp. 209–212. For general treatment of these issues see selections, citations, and comments in Falk and Mendlovitz (eds.), The Strategy of World Order, Vol. 3: The United Nations, pp. 37–122, 227–248 (1966).

[7] By "functional operation as law" is meant a perceptible relevance to expectations about the permissibility of behavior, including a reference to the use of legal rhetoric to protest a violation of these expectations.

[8] For the text of the Shimoda decision, see the Japanese Annual of International Law, 1964, pp. 212–252; for an interpretation, see Falk, "The Shimoda Case," 59 A.J.I.L. 759 (1965).

Methods of Warfare (1925) did not exert any influence on the assumption by the Japanese court of an American obligation to comply.[9]

Another example of this tendency to view non-binding undertakings as binding is presented by the moratorium on nuclear testing entered into by the United States and the Soviet Union. Although it was made clear that neither country had renounced its right to test, the resumption of Soviet testing in 1961 was treated in many respects as similar to a violation of a legal duty.[10]

The outcome of the financing controversy has been widely interpreted as undermining or, at least, as diminishing the authority of the International Court of Justice because its analysis of the controversy in the *Expenses* case has been cast aside in the process of searching for a settlement. The neglect by the parties in dispute of the "judgment" has not been considered much less significant because the Court handed down an advisory opinion, and not a decision in a contentious case.

These examples are drawn from recent practice of legal institutions to call attention to the rather indefinite line that separates *binding* from *non-binding* norms governing international behavior. Thus the formal limitations of status, often stressed by international lawyers, may not prevent resolutions of the General Assembly, or certain of them, from acquiring a normative status in international life.[11]

The nature of legal obligation in international relations underlies any inquiry into the status of General Assembly resolutions. This subject is complex and controversial. Some distinguished writers have started to emphasize the will of the international community as the fundamental law-creating energy.[12] Such an emphasis contrasts with the more traditionalist assumption that all obligations in international law can be traced directly (via explicit agreement) or indirectly (via state practice) to the consent of the sovereign state or to some system of natural rights and duties that is valid in all places for all time.[13] The Permanent Court of International Justice lent the weight of its authority to this consensual view of law-creation in the famous majority opinion in the *Lotus* case:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[14]

France, the Soviet Union, and South Africa continue to insist upon a sovereignty-centered conception of obligation in international relations,

[9] *Loc. cit.* at 241–242.

[10] See, *e.g.*, Arthur Dean's testimony before the Senate Foreign Relations Committee, Hearings, Nuclear Test Ban, Exec. M, 88th Cong., 1st Sess., pp. 824–825, August, 1963.

[11] See citations in note 4.

[12] C. W. Jenks, Law, Welfare and Freedom 83–100 (1963).

[13] See, *e.g.*, Brierly, The Basis of Obligation in International Law 1–62 (1958).

[14] P.C.I.J., Ser. A, No. 10, p. 19 (1927).

but there is discernible a trend from consent to consensus as the basis of international legal obligations. This trend reflects an adjustment to the altered condition of international society, especially the growing perception of social and economic interdependence, the increased numbers of states participating in international affairs, the growth of international institutions as focal points for the implementation of the will of the international community and the diminishing willingness to insulate internationally important activity from international legal control by deference to the dogma of domestic jurisdiction. In a world fraught with conflict and instability there is a widely felt need to find ways to adapt the international legal order to the changing character of social and political demands, to develop techniques of peaceful change as an alternative to violence and warfare. This need is given dramatic urgency by the tendency of civil wars to serve as the main arena for international conflict. If international society is to function effectively, it requires a limited legislative authority, at minimum, to translate an overriding consensus among states into rules of order and norms of obligation despite the opposition of one or more sovereign states.[15]

Even the United States Supreme Court recently found occasion in the *Sabbatino* case to rely upon the notion of consensus in the course of assessing the reality of an international legal obligation.[16] In that controversial decision the Court held, *inter alia,* that traditional rules of international law imposing a duty upon an expropriating government to pay an alien investor "prompt, adequate, and effective compensation" were no longer supported by a consensus of sovereign states and, as a result, the validity of such rules was in sufficient doubt as to make them inapplicable to the dispute.[17]

Rosalyn Higgins, in her important study, *The Development of International Law Through the Political Organs of the United Nations,* properly emphasizes the extent to which an assessment of the legal status of General Assembly resolutions is associated with the over-all character of the law-creating process applicable to customary international law:

> Resolutions of the Assembly are not *per se* binding: though those rules of general international law which they may embody are binding on member states, with or without the help of the resolutions. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence.[18]

Mrs. Higgins also calls attention to the inherent discretion enabling the drafters of a resolution to *develop* new rules of law in the guise of

[15] This argument is central to the presentation in Falk and Mendlovitz, "Towards a Warless World: One Legal Formula to Active Transition," 73 Yale Law J. 399 (1964).

[16] Banco Nacional de Cuba *v.* Sabbatino, 376 U.S. 398, 58 A.J.I.L. 779 (1964); for interpretation, see Falk, "The Complexity of Sabbatino," 58 A.J.I.L. 935 (1964).

[17] It must be noted, however, that the validity of these traditional rules has been rehabilitated, at least within the confines of the United States, by legislative action. Foreign Assistance Act of 1964, § 301 (d) (4), 78 Stat 1013, 22 U.S.C. § 2370 (e) (2) (1964), 59 A.J.I.L. 368 (1965); see also Cardozo, "Congress vs. Sabbatino: Constitutional Considerations," 4 Columbia Journal of Transnational Law 297 (1966).

[18] P. 5 (1963).

declaring old rules. If declaratory language is used in the resolution, then the problem of acknowledging the formal absence of legislative competence is more or less solved and at the same time the legislative character of the claim is maintained.

In a social system without effective central institutions of government, it is almost always difficult, in the absence of a formal agreement, to determine when a rule of law *exists*. It is a matter of degree and reflects the expectations of states toward what is permissible and impermissible. Certainly norm-declaring resolutions are legal data that will be taken into account in legal argument among and within states. A main function of international law is to establish an agreed system for the communication of claims and counterclaims between international actors and thereby to structure argument in diplomatic settings. In the search for bases of *justification or objection* it is clear that the resolutions of the Assembly play a crucial rôle—one independent of whether their status is to generate binding legal rules or to embody mere recommendations. The degree of authoritativeness that a *particular* resolution will acquire depends upon a number of contextual factors, including the expectations governing the extent of permissible behavior, the extent and quality of the consensus, and the degree to which effective power is mobilized to implement the claims posited in a resolution. The degree of authoritativeness that the *process* of law-creating by Assembly action comes to enjoy depends upon the extent to which particular resolutions influence behavior and gain notoriety in legal circles and the extent to which this process is incorporated into the developing framework of an evolving system and science of international law. Part of the authoritativeness of this process of law-creation is its acknowledgment and serious empirical study by international lawyers.

II

The jurisprudential basis for attributing legislative force to Assembly resolutions is quite distinct from determining the effective limits of Assembly competence to influence behavior through resolutions. To assess the rôle of quasi-legislative competence in Assembly action is a complicated task and only some general directions of inquiry can be stated here.

It is, first of all, essential to classify as accurately as possible the nature of the legislative claim; that is, to identify the claim that is being made and what must be done by whom to comply. In making this assessment, the language of the resolution must be carefully analyzed to see whether it formulates specific duties to be discharged by specific actors. It is also necessary to describe the rights and duties of states in the absence of the resolution. What, in other words, is added by the directive contained in the resolution? In the same respect it is necessary to obtain some insight into the varying objectives pursued by those who supported or opposed the resolution to get a better image of its anticipated impact. The objectives, for instance, of the United States, of the Soviet Union, and of the African states are very different from each other with regard to the

implementation of resolutions "declaring" *apartheid* "illegal," and calling upon states to take appropriate sanctioning action.

It is also essential to clarify the conditions surrounding the vote on a resolution as they bear upon the accuracy of attributing legislative status to it. If the resolution enters a political process that looks toward implementation, then the legislative nature of the claim is more clear-cut, that is, there seems to be some explicit connection between the status of the claim as legislative and the prospects for *effective* implementation: the better the prospects, the more appropriate the label "legislative."

But a certain caution is needed here. One of the main contributions of the General Assembly in the war/peace area is to help establish a climate of opinion that is favorable to the growth of world order. This contribution cannot be assessed by any measurable impact or by any evidence of specific intent. However, it does not seem extravagant to contend that Assembly resolutions on the subject of nuclear testing and non-proliferation dramatized a global concern that may, at least, have helped keep the nuclear Powers at Geneva, despite a widespread sense of discouragement about the prospects for agreement. Perhaps, one could describe these efforts as creating a "weak" legislative norm that operates to influence marginal decisions about nuclear testing and proliferation. An interesting, more ambitious, attempt to use the Assembly in the war/peace area is *Resolution 1653 (XVI)* that declares that the use of nuclear weapons would constitute "a direct violation of the Charter of the United Nations," "is contrary to the rules of international law and to the laws of humanity," and that "(a)ny State using nuclear and thermonuclear weapons" is "acting contrary to the laws of humanity" and is "committing a crime against mankind and civilization."[19] Such a resolution is a legal datum available to those arguing against the legality of nuclear weapons. The negative votes of several powerful states and abstention of several others suggests the absence of the sort of consensus that is found in the area of racial discrimination or decolonization, but the objective of Resolution 1653 (XVI) is to influence public opinion by positing a weak legislative claim. In the event that nuclear weapons are ever used, one would suppose that the resolution will be invoked by those protesting the use if only to serve as an instrument of persuasion. In the interim the resolution to an imperceptible degree joins with other tendencies that together create some legal basis for the argument that an obligation exists to use nuclear weapons, if at all, only as a reprisal against a state that uses them first (as is the generally accepted status of the use of poison gas). The legislative process at work here can be analogized in some respects to the growth of law in the common law tradition, and the impact of a particular resolution is impossible to anticipate, as its particular effects are so contingent upon unintended consequences.

If we inquire as to the substantive areas wherein quasi-legislative development might be most fruitfully undertaken by the General Assembly,

[19] U. N. General Assembly Res. 1653 (XVI), Nov. 28, 1961.

then we confront an initial limiting factor—the radical split in the world community created by the Cold War.[20] Each side in this struggle has enough strength to resist the claims of the other. That is, unless the consensus formulated in the claim to govern national action transcends the fissures of the Cold War and finds a basis for agreement among the principal states, it does not satisfy the preconditions for legislative action in the United Nations setting. A belated understanding of this precondition may be the most positive legacy of the financing crisis, and the abortive attempt by the United States to impose a binding obligation on states through the exercise of authority by the General Assembly backed up by Article 19. If law is to be effective, its growth must be conjoined with the distribution of effective power, especially to the extent that a legislative claim is posited. International society remains too decentralized to suppose that a voting majority of two-thirds can by itself satisfy the preconditions for quasi-legislative action in the event that either the Soviet Union or the United States is in the dissenting minority. To this extent the veto in the Security Council is expressive of the quality of a *political* consensus needed to support a quasi-legislative claim. To overlook this necessity for a *political,* as well as a parliamentary, consensus is to undermine the authority of the Assembly by over-extending it, and thereby engendering skepticism about its law-creating rôle. Although the ingredients of a politically relevant consensus cannot be laid down usefully in the form of mechanical requirements specifying the requisite quality and quantity of voting support, Resolution 1653 (XVI), for instance, may come to acquire a legislative rôle in restraining recourse to nuclear weapons, even if at the time of its formulation the United States was part of the dissenting minority. Also the need for a political consensus is less important when the objective of a resolution is to promote *in general* the evolution of legislative standards rather than to posit a *specific* legislative claim directed at prohibiting action of a particular nation-state.

To recall earlier points, the limits upon quasi-legislative competence of the Assembly are less a reflection of the absence of the *formal competence* to legislate than they are a consequence of certain *political constraints* arising from the general requirement of mobilizing effective community power in support of legislative claims. In international society this mobilization can normally only take place in the event of converging interests on the part of powerful states, although the convergence may express varying degrees of agreement as to carrying forth the policy designed to influence behavior. It is also relevant—and complicates any interpretation of the locus of effective action on the part of the Assembly that relies too heavily on power as the chief explanatory factor—to take note of the rôle of African and Asian states in providing the formal majority and often the

[20] The continuing reality of intense conflict between the United States and the Soviet Union in the Cold War is now subject to debate. The point remains, however, that a policy disagreement among the super-Powers prevents the assertion by the organs of the United Nations of effective claims to control international behavior.

political impetus for the assertion of legislative claims by the Assembly. It is the Afro-Asian group of states, much more evidently even than the Socialist states, that seek revision in the structure of international order as part of an over-all demand for retribution in the post-colonial period. However, in situations in which either of the super-Powers are not in accord, in terms of policies and practice, with the will of the Afro-Asian group, then the drive toward a legislative solution is often blunted by a very abstract, operationally irrelevant resolution. An example is the celebrated Resolution on Permanent Sovereignty over Natural Resources, in which broad principles are formulated in such a way as to solicit an affirmative vote from all states, but no attempt is made to legislate a solution of a real dispute going on in international society.[21] In the context of Resolution 1803 (XVII) the real dispute concerned the duties of the expropriating states to compensate alien investors. The resolution refers to the duty to pay "appropriate compensation" as determined by international law, but it also refers "the question of compensation" to "national jurisdiction." Interpretations from every ideological angle are possible; conservative United States international lawyers tirelessly point out that even the new states and the Socialist states have now accepted the principle of compensation according to international law. Revisionist international lawyers argue that the resolution was drafted in terms of "appropriate compensation," thereby acknowledging that it was no longer necessary to pay "prompt, adequate, and effective compensation," but that it becomes possible to take account of such factors as the previous unjust enrichment of the investors in assessing the obligations of the expropriator. Furthermore, the reference to settlement via national jurisdiction is said to affirm the argument that the issue of compensation is a matter exclusively within domestic jurisdiction, an interpretation favorable to the views of the new states. Resolution 1803 (XVII), then, provides a way of organizing legal arguments in the setting of a legislative dispute, but it does very little by way of settlement. In this sense it is quite different from Resolution 1653 (XVI), which, however ineffective in direct terms, clearly does try to resolve the dispute about the legality of nuclear weapons as instruments of warfare by taking a definite stand on the controverted issues.

Resolution 1653 (XVI) lacks Great-Power consensus, whereas Resolution 1884 (XVIII), calling upon all nations not to station in outer space "any objects carrying nuclear weapons or any other kinds of weapons of mass destruction," enjoyed the active backing of both the Soviet Union and the United States—the states whose policy most obviously was curtailed by the legislative claim. The resolution served to formalize an agreement, and the obligation it imposes has been referred to by government officials as one of the major steps taken in the area of arms control.[22]

[21] U.N. General Assembly Res. 1803 (XVII), Dec. 14, 1962.

[22] *Cf., e.g.*, A. S. Fisher, "Arms Control and Disarmament in International Law," 50 Virginia Law Review 1200 (1964).

The binding quality of the obligation has been questioned, however, by at least one eminent authority.[23]

Big-Power consensus joins with a strong Afro-Asian commitment in the context of proscribing the practice of *apartheid* in South Africa. A series of resolutions has "declared" in increasingly specific terms that *apartheid* is incompatible with the obligations imposed by the Charter and threatens international peace and security. The crystallization of the anti-*apartheid* consensus in these terms constitutes part of the legislative background of the *South West Africa Cases* recently decided by the International Court of Justice.[24] Here quasi-legislative action by the Assembly may contribute to a political process the immediate outcome of which is to provide a firm legal basis for the eventual organization of serious sanctions against South Africa. Without this firm legal basis, the United States and the United Kingdom are unlikely to proceed much beyond the stage of a verbal condemnation of *apartheid.* Thus the Assembly indirectly may contribute to a process of norm-creation that improves the chances for norm-implementation.

The assessment of the possibilities for quasi-legislative action by the Assembly cannot be dealt with in general terms. It is necessary to examine the specifics of the context, especially to determine the relation between the sponsoring majority, the intended and possibly unintended objectives of the resolutions, and the distribution of power in international society. But inquiry cannot even be content with achieving a sophistication about the relevance of power to legislative effectiveness. In certain settings, for instance the status of nuclear weapons, a consensus among the less powerful may create an international atmosphere that exerts an eventual, if indirect, influence on the more powerful. It does not, however, seem extravagant to claim that the Assembly is in a position to play a crucial rôle on a selective basis in adapting international law to a changing political environment; that is, to participate in the essence of the legislative process at work in rudimentary form in international society. But it is artificial to confine the analysis of the legislative role of resolutions of the General Assembly to traditional processes of law-creation (*i.e.,* those premising the validity of the legal prescription upon the evidence of national consent) in international society. The continuous growth of international law has been achieved as a result of "legislative" pressures exerted by such diverse phenomena as war and morality. Even the traditional sources contain a disguised non-consensual element. The legislative content of customary international law is the most dramatic area wherein the myth of consent is frequently supplanted by the reality of an inferred consensus. Professors McDougal and Burke have demonstrated in *The Public Order of the Oceans* that the dominant mode of law-creation in the law of the sea has been of a legislative character.[25] In this crucial respect, the attribu-

[23] J. C. Cooper, "The Manned Orbiting Laboratory: A Major Legal and Political Decision," 51 American Bar Association Journal 1137 (1965).

[24] Judgment in South West Africa Cases, July 18, 1966, [1966] I.C.J. Rep. 6.

[25] McDougal and Burke, The Public Order of the Oceans (1962).

tion of a limited legislative competence to the formal action of the General Assembly is but a special case of the more pervasive processes by which the formation and decay of legal standards have always taken place in international society. The saliency of the General Assembly and its mode of operation by way of norm-positing resolutions merely makes an implicit legislative energy explicit. To take account of this legislative energy and to relate it to other less visible legislative forms is a major creative task confronting international lawyers of our era.

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