

## U.N. GENERAL ASSEMBLY RESOLUTIONS AND INTERNATIONAL LAW: RETHINKING THE CONTEMPORARY DYNAMICS OF NORM-CREATION

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That the international community is presently passing through a revolutionary time when many of its traditional norms and values are being seriously questioned can hardly be denied. Indeed, given the rather profound political, economic, and technological transformations in the international system over the last three decades, one scarcely could think otherwise.

International law is to an extraordinary extent the normative product of Eurocentric civilization. For most of its existence the law of nations has been a “white man’s law” which evolved in great measure during the 18th and 19th centuries—an era concomitantly earmarked by extensive European expansionism, colonialism, and imperialism. Even so, this epoch began to collapse with World War I, and it ended irretrievably in the aftermath of World War II as various colonial empires disintegrated. This collapse precipitated a world wide rush toward nationalistic self-determination and independence. As patent testimony to this traumatic transition, one only needs to recall that the United Nations was created in 1945 with 51 original members; today in 1981 that organization counts 154 states as members, the majority of which gained independence through the aforementioned dissolution process of de-colonization.

Undoubtedly, these “new states” (which predominantly are in Asia, Africa and Latin America and collectively have been labeled by the misnomer, “Group of 77”<sup>1</sup>) possess ancient histories and dis-

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1. The Group of 77 coalition was formed in 1964 at the first sessional meeting of the United Nations Conference on Trade and Development in Geneva. Today, there are approximately 120 countries comprising this bloc, which has also been labeled variously as “The South,” the “Third World Countries,” the “less-developed countries,” the “poor coun-

tinguished cultures; but, within the context of being sovereign subjects of international law, they are merely adolescents in age. More importantly, while these political products of colonialism were born into a Eurocentric legal system and have since accepted most of its fundamental tenets, they are less than wholly content with a legal status quo that they had little or no part in fashioning. Consequently, efforts have been manifested by these new states to revise certain aspects of international law so that it might more closely comport with their own perceived notions of justice and equity.<sup>2</sup> Put tersely, the Group of 77 states aspire to active participation in the creation and application of contemporary international legal norms, a process which they feel will allow them to share more equitably in the distribution of transnational political, economic, and natural resources. To an appreciable degree the global forum chosen for this ambitious undertaking has come to be the United Nations system in general and its General Assembly in particular.

In retrospect, few would disagree that the General Assembly since the late 1940s has energetically endeavored to modernize international law,<sup>3</sup> although the results has not always been clearly recognized nor universally accepted.<sup>4</sup> Therefore, the aim of this essay is threefold: (1) To assess the current mandated province within which the General Assembly is legally capable of contributing to the formulation of international law, as well as to the law-making process; (2) In so doing, to ascertain the coeval legal nature of General Assembly resolutions by determining whether their legal status has undergone any salient transformation over the past three decades; (3) To evaluate whether formal pronouncements adopted by the General Assembly actually have furnished signifi-

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tries," and the "developing countries." For interesting treatments, see generally B. Gosovic, *UNCTAD: North-South Encounter*, INTERNATIONAL CONCILIATION, No. 568 (1968); B. GOSOVIC, *UNCTAD: CONFLICT AND COMPROMISE* (1972); and D. KAY, *THE NEW NATIONS IN THE UNITED NATIONS, 1960-1967* (1970).

2. For elucidation on this point, see generally, R. ANAND, *NEW STATES AND INTERNATIONAL LAW* (1972); H. BOKER-SZEGÖ, *NEW STATES AND INTERNATIONAL LAW* (1970); Falk, *The New States and the International Legal Order*, 118 RECUEIL DES COURS 7-103 (1966 II); Rudolf, *Neue Staaten und das Völkerrecht*, 17 ARCHIV DES VOLKERRICHTS 1 (1976 I); Syatauw, *Old and New States: A Misleading Distinction for Future International Law and International Relations*, 15 INDIAN J. INT'L L. 153 (1975 II); and Udokang, *The Role of New States in International Law*, 15 ARCHIV DES VOLKERRECHTS 147 (1972 II).

3. A large part of this responsibility for modernizing international law by the General Assembly has been undertaken through the auspices of the International Law Commission. See text *infra*, at notes 20-22.

4. See, e.g., A. YESELMAN & A. GAGLIONE, *A DANGEROUS PLACE: THE UNITED NATIONS AS A WEAPON IN WORLD POLITICS* (1974).

cant contributions to the contemporary corpus of international law. Such a determination hopefully will indicate what import the General Assembly is likely to have upon influencing the law of nations in the remainder of this century.

## I. LEGISLATIVE COMPETENCE OF THE GENERAL ASSEMBLY

The framers of the United Nations Charter extended the purview of that organization to virtually all facets of international relations. This mandate was predicated upon the conviction that maintenance of peace and security—the overarching twin objectives of the United Nations—could best be guaranteed by regularized, predictable interstate interactions which, in themselves, would engender a spirit of global cooperation. To this end, Article 1 of the Charter sets out the purposes of the Organization in an ostensibly natural hierarchy: (1) “To maintain international peace and security . . . ; (2) To develop friendly relations among nations . . . ; (3) To achieve international co-operation on solving international problems of an economic, social, cultural, or humanitarian character . . . ; and (4) To be a centre for harmonizing the actions of nations in the attainment of these common ends.”<sup>5</sup>

Given this holistic approach, both legal and political organs in the United Nations have become intimately concerned with and active in promoting the development of international norms that might engender international peace and stability. While not to disparage the law-making contributions of the International Court of Justice,<sup>6</sup> as well as those of the Security Council,<sup>7</sup> the Secretariat,<sup>8</sup> the Trusteeship Council,<sup>9</sup> or the Economic and Social Council,<sup>10</sup>

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5. U.N. CHARTER, art. 1. 59 STAT. 1031 (1945), T.S. No. 993, 23 Bevans 1153. [hereinafter cited as U.N. Charter].

6. One commentator has suggested, and this author would concur, that the role of the International Court of Justice in law development actually has been impeded by the lack of an *a priori* competence *vis-à-vis* jurisdiction, as well as the reluctance of political organs to request advisory opinions. R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 3 (1963). In the same vein, Hanna Bokor-Szegö contends that, since the Court cannot take into account the position of the international community, its decisions “can only have an indirect effect on the establishment of new norms of international law, insofar as it can influence the intention of member states to create new international rules.” H. BOKOR-SZEGÖ, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* 21 (1978).

7. See Vallet, *The General Assembly and the Security Council of the United Nations*, 29 BRIT. Y.B. INT’L L. 96 (1952).

8. See Schachter, *The Development of International Law Through the Legal Opinion of the United Nations Secretariat*, 25 BRIT. Y.B. INT’L L. 91 (1948).

9. See I. DETTER, *LAW MAKING BY INTERNATIONAL ORGANIZATIONS* 187-201 (1965).

there is little doubt that by virtue of its nearly universal representation and by powers specifically granted in the Charter,<sup>11</sup> it is the United Nation's General Assembly which has most directly influenced the nature and substance of contemporary international law.<sup>12</sup>

### A. Relevant Charter Provisions

The capability of the General Assembly to contemplate legal matters and participate actively in the formulation of international law can be traced to the United Nations Charter, specifically to Articles 10, 11, and 13. Article 10 delegates to the General Assembly power to discuss and make recommendations on any matter within the scope of the Charter, save for those restrictions set out in Article 12.<sup>13</sup> Though the General Assembly's competence here is stated in broad measure, it is clarified and qualified more explicitly in two subsequent provisions. Article 11, paragraph 1, specifies that the General Assembly "may consider the general principles of co-operation in the maintenance of international peace and security," and also provides that the Assembly "may make recommendations to such principles to the members."<sup>14</sup> Article 13 in paragraph 1, fur-

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10. *Id.*, at 49-50.

11. See text's discussion *infra*, at notes 17-22.

12. As early as 1951, the late Judge Alvarez went so far as to posit that:

. . . the [General] Assembly of the United Nations is tending to become an actual legislative power. In order that it may actually become such a power, all that is needed is that governments and public opinion should give it support.

Dissenting opinion, reservations to the Genocide Convention, I.C.J. Reports, 1951, at 53.

Important to note is that nearly universal membership and the practice of sovereign equality in the General Assembly virtually assures that each state will have an opportunity to voice an independent opinion on every decision. Undoubtedly, this is especially significant for the new states who, being absent as participants in the development of traditional international law and the United Nations, now can contribute more actively to the norm-creating process. See also Fatouros, *The Participation of the "New States" in the International Legal Order*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER* 317 (R. Falk & C. Black eds. 1969).

13. This restriction concerns possible encroachment by the General Assembly upon the dispute settlement functions of the Security Council. In relevant part, Article 12 provides:

While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

U.N. CHARTER art. 12, para. 1.

14. U.N. CHARTER art. 11, para. 1. Three learned commentators have underscored the importance of Article 11 *vis-à-vis* the competence of the General Assembly thusly:

The significance of Article 11 cannot be overstressed. Although only infrequently cited, it has been the basis for many of the Assembly's most important actions. By specifically authorizing the Assembly to discuss and make recommendations on

ther defines the duties of the General Assembly as initiating studies and making recommendations for the purpose of:

- a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
- b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>15</sup>

Thus, Article 13, paragraph 1(a) directly associates co-operation in the political field to the “progressive development” and “codification” of international law. As a supplement, Article 13, paragraph 1(b), lists areas of economic, social, and human rights activity in which the General Assembly should strive to promote international co-operation. Accordingly, when viewed in the whole Article 13 plainly endows the General Assembly with recommendatory powers to enhance the norm-creation process of international law, especially by promoting harmony and co-operation over the broad spectrum of international relations. Presumably, then, this situation indirectly can lead to needed legal regulation in diverse fields of human concern.<sup>16</sup>

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questions related to the maintenance of international peace and security, Article 11 provides the basis for the assertion of the Assembly’s right to deal with “threats to the peace, breaches of the peace, and acts of aggression” whenever the Security Council is unable to discharge its primary responsibility for maintaining peace and security.

L. GOODRICH, E. HAMBRO, & A. SIMONS, *CHARTER OF THE UNITED NATIONS* 115 (3rd ed. 1969). This, of course, is the foundation upon which the Uniting for Peace Resolution, G.A. RES. 377a, 5 U.N. GAOR, Supp. (No. 20) 10, U.N. Doc. A/1775 (1950) was later adopted. For discussion, see generally Peterson, *The Uses of the Uniting for Peace Resolution Since 1950*, 13 INT. ORG. (1959), 219; Andassy, *Uniting for Peace*, 50 AM. J. INT’L L. 563 (1956); and Woolsey, *The “Uniting for Peace” Resolutions of the United Nations*, 45 AM. J. INT’L L. 129 (1951).

15. U.N. CHARTER art. 13, para. 1.

16. This contention is reinforced by the provisions of Chapter IX of the Charter, specifically in Articles 55 and 60. Article 60 vests responsibility for discharging the functions of this chapter to the General Assembly, including those in Article 55, which read as follows:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

### B. Institutional Arrangements

Aside from the option of appointing *ad hoc* special committees,<sup>17</sup> the General Assembly has utilized two other principal institutional instruments for encouraging the progressive development of international law and its codification. These are, *viz.*, (1) the Sixth (Legal) Committee of the General Assembly, and (2) the International Law Commission.

The Sixth Committee can draft convention texts, which then would be presented to the member states in the General Assembly for their approval. Such a procedure was undertaken to promulgate the Genocide Convention in 1948,<sup>18</sup> but it should be pointed out that since then, this procedure has been infrequently used.<sup>19</sup>

The International Law Commission has been more prominent in the General Assembly's efforts to foster the progressive development and codification of international law. Established and approved by the General Assembly in 1947, the Commission has acted primarily as a study and composition group to design and hammer out draft conventions. These conventions are then submitted for debate in the General Assembly, and if deemed necessary and appropriate, are presented to the international community for ratification as multilateral agreements. Relatedly, as stipulated in Article 1 of its constitutional Statute,<sup>20</sup> the main function of the Commission is "the promotion of the progressive development of international law and its codification."<sup>21</sup> In recent years some nota-

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See also GOODRICH, HAMBRO, & SIMONS, *supra* note 14, at 371-380.

One scholar has gone further than this by assuming that the framers of the Charter intended the provision of Article 13 (1a) "to make codification of international law an explicit, purposeful function of the General Assembly. . . ." H. BOKOR-SZEGŐ, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* 33 (1978). Nevertheless, this reasoning appears faulty, particularly in light of subsequent discussions in the Committee on the Progressive Development of International Law and its Codification. See generally Liang, *The General Assembly and the Progressive Development and Codification of International Law*, 42 AM. J. INT'L L. 66 (1948). Also see note 25 *infra*.

17. GOODRICH, HAMBRO, & SIMONS, *supra* note 14, at 136. A recent example is the 35-nation *Ad Hoc* Committee on the Drafting of An International Convention against the Taking of Hostages.

18. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* by the U.N. General Assembly, December 9, 1948, 78 U.N.T.S. 277 (*entered into force* January 12, 1951).

19. For an informative treatment of the Sixth Committee's law-making functions, see Hambro, *The Sixth Committee in the Law Creating Function of the General Assembly*, REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 387 (1968).

20. G.A. RES. 174 (II), U.N. Doc. A/P.V./123, November 21, 1947.

21. *Id.*, art. 1. In Article 15, an attempt is made to differentiate between these twin tasks:

ble successes have occurred in this area.<sup>22</sup>

Nevertheless, while the International Law Commission's "codification" endeavors certainly are laudatory and meritorious, they also have been time-consuming and ponderous. The treaty-creating process alone may often be prolonged a decade or more, and in this modern era of spectacular scientific and technological advancement, multilateral international agreements are liable to become anachoristic before the final ratification signature is deposited. This realization, coupled with the obvious impatience of the Group of 77 states to participate vigorously in international legal matters, points up and underscores the General Assembly's appeal-

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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 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.

*Id.*, art. 15. Hence, apparently it was thought early on that the Commission would deal separately with issues affecting, (a) the progressive development or, (b) the codification of international law, despite the realization that the terms were not mutually exclusive. However, the Committee on the Progressive Development of International Law and its Codification eventually concluded that "no clear cut distinction between the formulation of the law as it is [i.e., as codified] and as it ought to be [i.e., as progressively developed] could be rigidly maintained in practice." It was further realized that, "in any work of codification, the codifier inevitably has to fill in gaps and amend law in the light of new developments." U.N. Doc. A/AC.10/51, June 17, 1947, para. 10. As a consequence, precise definition of the terms has remained blurred even up to the present. For an evaluation, see H. BRIGGS, THE INTERNATIONAL LAW COMMISSION 139 (1965).

22. Multilateral Conventions sponsored by the United Nations which emanated out of work done by the International Law Commission include, *inter alia*, the following: Convention on the Reduction of Statelessness, done August 30, 1961, U.N. Doc. A/Conf.9/15 (1961); Convention on Fishing and Conservation of the Living Resources of the High Seas, done April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 288; Convention on the High Seas, done April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; The Convention on the Continental Shelf, done April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311; The Convention on the Territorial Sea and the Contiguous Zone, done April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Vienna Convention on Diplomatic Relations, done April 18, 1961, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, done April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261; Vienna Convention on the Law of Treaties, done May 23, 1969, U.N. Doc. A/Conf. 39/27 (1969) (entered into force January 27, 1980). Convention on Special Missions, opened for signature December 8, 1969, G.A. Res. 2530, 24 GAOR, Supp. (No. 30) 99 U.N. Doc. A/7630, (No. 30) (1970); Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons, opened for signature December 14, 1973, G.A. Res. 3166, 28 GAOR, Supp. (No. 30) U.N. Doc. A/9030 (1973); Vienna Convention on the Succession of States in Respect of Treaties, opened for signature August 23, 1978, G.A. Res. 32/47, 32 U.N. GAOR, Supp. (No. 45) 209, U.N. Doc. A/32/45 (1977).

ing role as a potential salient force in affecting and effecting international norm creation.

## II. GENERAL ASSEMBLY RESOLUTIONS AND INTERNATIONAL LAW

### A. *Prefatory Observations*

Within the United Nations system there exists no international law-creating organ, *per se*. That is, the Charter does not confer upon any organ special powers of legislation comparable to those normally vested in the municipal legislatures of states.<sup>23</sup> Although the General Assembly may draft, approve, and recommend international instruments for multilateral agreement, it cannot through its own volition make them binding upon member states. The drafters of the Charter intended the General Assembly to be a "global town meeting" to discuss vital international issues and focus world opinion upon them.<sup>24</sup> Put succinctly, the General Assembly was not intended to be a legislative organ for taking resolute actions or for imposing binding decisions. That this limitation was intentional is unmistakable from the records of the San Francisco Conference.<sup>25</sup> It is also apparent from the stark contrast between use of the word "recommendations"<sup>26</sup> in Articles 10, 11, 12, 13, and 14 of the Charter and the express fiat in Article 25 by which members of the United Nations agree "to accept and carry decisions of the Security Council in accordance with the present

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23. Nevertheless, for an interesting treatment which investigates the possibility of realizing such a situation, *see generally* H. HAN, *INTERNATIONAL LEGISLATION BY THE UNITED NATIONS* (1971).

24. *But see* I. CLAUDE, *SWORDS INTO PLOWSHARES* 175-181 (4th ed., 1971) which explicates the changing role of the General Assembly.

25. At the San Francisco Conference in 1945, the Philippine delegation suggested that the General Assembly should be vested formally with legislative authority to enact rules of international law which would become effective and binding upon members after such rules had been approved by a majority vote of the Security Council. When the resolution was put to a vote in Committee 2 of Commission II at its tenth meeting, it was rejected 26 to 1. For accounts, *see* Doc. 2, G/14(K), at 2-3, 3 U.N.C.I.O. Documents (1945), at 536-37 and Doc. 507, II/2/22, at 2, 9 U.N.C.I.O. Documents (1945), at 70.

26. Nonetheless, caution should be exercised against accepting a perfunctory literal interpretation of the term "recommendation." It is erroneous to reject it outright as being *perforce* non-binding or even legally insignificant in all cases. There do exist provisions in various international organizations' charters in which "recommendation" is unmistakably used to designate a duty of compliance (e.g. art. 14 (3) of the European Coal and Steel Community), an obligation to act (e.g., art. 19(b) of the International Labour Organization and Articles IV(4) and VIII of (U.N.E.S.C.O.), or to denote situations in which non-compliance can trigger adverse responses (e.g., art. 31 (3 and 4) of the European Free Trade Association and art. 33 of the International Labour Organization).



Charter.”<sup>27</sup> Hence, decisions made by the Security Council which are commiserate with the Charter are imbued with obligatory effect. That is, resolutions of the General Assembly are intrinsically optional and do not as a general rule create legal obligations upon member states.

Yet, there remains the need to distinguish between the binding nature of General Assembly resolutions and their legal effects. In this regard, Sir Kenneth Bailey pensively remarked, “[t]o say that a resolution is a recommendation only is undoubtedly to assert that governments are under no legal obligations to comply with it. Does that relegate General Assembly resolutions wholly to the sphere of moral or political precepts, with no relevance to law?”<sup>28</sup> More pertinent for the present purpose, does the non-binding legal character of General Assembly resolutions denigrate or negate them from being considered obligations having moral weight, as well as emergent, potential stimuli for international law’s progressive development? Finally, to take these posers a step further, might the obligatory weight of a General Assembly recommendation vary from case to case, and if so, can it ever approach, through a norm-creating process, the binding quality of a lawful fiat, or perhaps possibly even attain it? It is to these important legal queries that the remainder of this study is addressed.

*B. The Legal Station of General Assembly Resolutions vis-à-vis  
 Article 38 of the Statute of the International  
 Court of Justice*

As indicated above, legislation by the General Assembly is inconsistent with the fundamental constitution of the United Nations and its Charter provisions.<sup>29</sup> Even so, the General Assembly adopts resolutions that purportedly have a prescriptive effect by virtue of Articles 11 and 13. Furthermore, Articles 55 and 60 suggest that this organ possesses the legal competence to vote on resolutions in the broad fields of economic and social co-operation, including human rights. Given this capacity, to what extent can General Assembly resolutions be rationalized as a formal “source”

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27. U.N. CHARTER, art. 25.

28. Bailey, *Making International Law in the United Nations*, PROCEEDINGS AM. SOC’TY INT’L L. 233, 235 (1967).

29. See also Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, in INSTITUT DE DROIT INTERNATIONAL, LIVRE DU CENTENAIRE, 1873-1973 at 270-74 (1973).

of international law?<sup>30</sup>

The most convenient and concise statement regarding the “sources” of international law is contained in Article 38 of the Statute of the International Court of Justice, which reads:

1. The Court, whose function 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.<sup>31</sup>

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30. The notion of “source” with reference to enhancing the corpus of international law is a well-applied metaphor. As one legal publicist interestingly observed nearly five decades ago, “source” is commonly associated with water supplies. Yet, a “source” is not the origin of the water, but merely its outward surface manifestation, i.e., its tangible and utilitarian element. “Sources” presuppose some kind of subterranean hydrology, often unknown or uncertain in both quantity and quality. So it is also with international law, wherein “sources” don’t constitute the whole of a juridical fiat, but only those parts which are immediately usable and socially valid. See Scelle, *Essai sur les sources formelles du droit international*, 3 RECUEIL GENY 400 (1934).

However, there is no need here to enter into the familiar polemics surrounding the adequacy of the concept, “source of law.” Admittedly, this notion can refer to: (a) the sociological or psychological motives behind the law; or (b) the formal act itself which is designed and intended to create law; or (c) the evidence of consensus of opinion concerning what the law might be. For this examination of General Assembly resolutions, “sources” of international law should be construed to mean the manner in which guidelines become actual parts of the legal system. For related studies on sources of international law and their controversial interpretation, see generally Bos, *The Recognized Manifestation of International Law: A New Theory of Sources*, 20 GER. Y.B. INT’L L. 9 (1977); Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in SYMBOLAE VERZIJL 153 (1958); Gihl, *The Legal Character and Sources of International Law*, 1 SCAND. ST. L. 51 (1957); Hambro, *Sources of International Law*, 17 SCAND. ST. L. 77 (1973); Meijers, *How is International Law Made?—The Stages of Growth of International Law and the Use of Its Customary Rules*, 9 NETH. Y. B. INT’L L. 3 (1978); Elias, *Modern Sources of International Law* in TRANSNATIONAL LAW IN A CHANGING SOCIETY 34 (W. Friedmann, L. Henkin, & O. Lissitzyn, eds. 1972); G. FINCH, *THE SOURCES OF MODERN INTERNATIONAL LAW* (1937); and C. PERRY, *SOURCES AND EVIDENCES OF INTERNATIONAL LAW* (1965).

31. Statute of the International Court of Justice, Art. 38, *reprinted in* GOODRICH, HAMBRO, & SIMONS, *supra* note 14, at 707-08.

According to Article 38, the principal sources are posited hierarchically as treaty law, customary law, and “general principles of law,” with judicial decisions and the works of publicists being relegated to a secondary level.<sup>32</sup> In this light, ostensibly the logical deduction to be drawn is that General Assembly resolutions cannot be construed as a formal source of law because any reference to them is absent in Article 38.<sup>33</sup> Such reasoning, however, seems fallacious and somewhat convoluted for three reasons: (1) The notion that Article 38 legally constitutes the “sources of modern international law” is not explicitly stipulated in the Statute itself, nor is it universally accepted; (2) A careful reading of the text indicates that the enumerated inferential sources are to be applied by the Court to settle disputes. Yet nowhere in the text is it specified that these are exclusively the only “sources” of international law and that others might not exist outside the ambit of the court’s purview;<sup>34</sup> (3) Nowhere in Article 38 is it postulated that the Court should eschew from considering other factors as consultative “evidence” in rendering an opinion. In actual practice, in reaching a decision the Court has sought to include non-Article 38 legal factors, counting among them, General Assembly resolutions.<sup>35</sup>

### C. *General Assembly Resolutions As “Sources” of International Law*

In ascertaining the legal status of General Assembly resolutions, one might be persuaded from the preceding discussion that, irrespective of their legal value, resolutions lie outside the ambit of

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32. An intellectually provocative discussion of this point is supplied in Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y. B. INT’L L. 273 (1974-75).

33. A. Verdross, *Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?*, 26 ZEITSCHRIFT FÜR AUSLÄNDISCHES OFFENTLICHES, RECHT UND VOLKERRECHT 692 (1966). See also Guradze, *Are Human Rights Resolutions of the United Nations General Assembly Law Making?*, 4 HUMAN RIGHTS J. 456 (1971).

34. For example, unilateral acts of states have been accepted as a source of law by some West European lawyers, as have the precepts of “reason,” “equity,” and “natural law.” ROUSSEAU, 1 DROIT INTERNATIONAL PUBLIC 416 (1970); see also J. BRIERLY, *THE LAW OF NATIONS* 66 (6th ed. H. Waldock, 1978); M. AKEHURST, *A. MODERN INTRODUCTION TO INTERNATIONAL LAW* 44 (3rd ed. 1977).

35. Importantly, a searching analysis of substantive resolutions was performed in 1971 by the Court in its Advisory Opinion on Namibia. I.C.J. Reports 1971, at 15, *et seq.* For a commentary and legal assessment, see generally Higgins, *The Advisory Opinion on Namibia: Which U.N. Resolutions are Binding Under Article 25 of the Charter?*, 21 INT’L COMP. L. Q. 270 (1972). A second relevant case in which the International Court of Justice accorded important weight to General Assembly resolutions involved the nonself-governing territory of Western Sahara. See also *Western Sahara*, I.C.J. Reports, at 12, 31-33 (1975).

the "sources of law" contained in Article 38 of the I.C.J. Statute. Yet, interestingly enough, several authors have attempted to link the legal essence of General Assembly resolutions with variant expressions of treaty law, customary law, or "general principles of law."

1. *Resolutions as Treaty Law.* During the past three decades numerous multilateral treaties have been drafted and promulgated under the auspices of the United Nations. These conventions have covered a wide scope of topics, ranging from outer space to the deep seabed, and from obscene publications to social and economic rights. Those General Assembly resolutions which have demonstrated the greatest likelihood of becoming future conventions are often termed "declarations." Declarations operate under a pseudonym because obligation-wise, they are merely recommendations and not legally binding in nature.<sup>36</sup>

This observation aside, some authorities have viewed certain General Assembly declarations as augmenting the modern body of treaty law.<sup>37</sup> This contention apparently carries most weight in the

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36. However, in a memorandum to the Commission on Human Rights in 1962, the following distinction was made between the terms "declaration" and "recommendation:"

In United Nations practice, a "declaration" is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights. A recommendation is less formal.

Apart from the distinction just indicated, there is probably no difference between a "recommendation" and a "declaration" in United Nations practice as far as strict legal principle is concerned. A "declaration" or a "recommendation" is adopted by resolution of a United Nations organ. As such it cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a "declaration" rather than a "recommendation." However, in view of the greater solemnity and significance of a "declaration," it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon States.

Memorandum by the Office of Legal Affairs on the use of the terms "declaration" and "recommendation," 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/CN.4/L.610, reprinted in *Commission of Human Rights Report*, U.N. ECOSOC Council Off. Rec., Supp. (No. 8) 15, U.N. Doc. E./3616/Rev. 1) (1962).

37. See, e.g., J. CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 150, (1969); See also Skubiszewski, *Resolutions of International Organizations and Municipal Law*, 2 POLISH Y. B. INT'L L. 83 (1968-69); Skubiszewski, *Enactment of Law by International Organizations*, 41 BRIT. Y. B. INT'L L. 198, 220 (1965-66); Skubiszewski, *A New Source of the Law of Nations: Resolutions of International Organizations*, RECEUIL D'ITUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM 517 (1968); and Tammes, *Decisions of International Organs as a Source of International Law*, 94 RECUEIL DES COURS 90 (1958 II).

instance of unanimous declaratory resolutions,<sup>38</sup> accepting the caveat that members clearly intimated that they were willing to enter into such a treaty-like obligation.<sup>39</sup> Regrettably, the dearth of examples relevant to this genre of pronouncements<sup>40</sup> tends to preclude any comprehensive explanation regarding the precise legal character of General Assembly declaratory resolutions.<sup>41</sup>

2. *Resolutions as Customary Law.* Customary law is often the backdrop of which treaties are made. Since the establishment and proliferation of international organizations—which have expanded inter-state contact—customary law has been transformed and solidified into convention form. Nevertheless, respect for customary law's legal status remains firmly intact, and such new rules are in a constant state of evolution.

Due to the absence of an international legislature, customary law necessarily expresses the will of states.<sup>42</sup> Being predicated upon state practice, customary norms loom as very flexible, albeit politicized, facets of international law.<sup>43</sup> Nevertheless, any so-

38. In fact, some Soviet scholars have argued that unanimous resolutions should be considered as a new, more simplified procedure for concluding international agreements. See Kozheonikov, *Obschepriznannyye principy i normy mezhdunarodnogo prava*, 12 SOVETSKOE GASUDARSTVO I PRAVO 17 (1957) and G. TUNKIN, *VOPROSY TEORII MEZHDUNARODNOGO PRAVA* 103 (1962). For an excellent overview of Soviet legal opinions on sources of international law, see Osakwe, *Contemporary Soviet Doctrine on the Sources of General International Law*, PROCEEDINGS AM. SOC'TY INTL. L. 310 (1979).

39. Arango-Ruiz, *The Normative Role of the General Assembly in the United Nations and the Declaration of Principles of Friendly Relations*, 136 RECUEIL DES COURS, 419 (1972 III); see generally Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y. B. INT'L L. 97 (1955-56); Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y. B. INT'L L. 1 (1948); O. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* 63 (1966).

40. But see Castañeda, *supra* note 37, at 162, who argues that the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space of December 13, 1963 [G. A. Res. 1962 (XVIII)], "closely approaches" the "model" of a "multilateral executive agreement-resolution."

41. Notwithstanding this, some scholars have suggested that General Assembly resolutions furnish authoritative insights or guidelines for interpreting existing treaties, especially provisions in the Charter. See e.g., ASAMOAH, *supra* note 38, at 35; see also Bleicher, *The Legal Significance of Re-citation of General Assembly Resolutions*, 63 AM. J. INTL. L. 444, 448 (1969); Castles, *Legal Status of U.N. Resolutions*, 3 ADELAIDE L. R. 69, 82 (1967); and Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 RECUEIL DES COURS 186 (1963 II).

42. H. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 46 (1972); see also MacGibbon, *Customary International Law and Acquiescence*, 33 BRIT. Y. B. INT'L L. 114, 132 (1957); K. WOLFE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 25, 53 (1964).

43. See, e.g. d'Amato, *The Authoritativeness of Custom in International Law*, 53 REVISTA

called customary state practice should possess two cardinal qualities, namely: (1) it must adequately define the nature of the rule; and (2) a sufficient, though unspecified, number of states must accept—either tacitly or explicitly—the said practice. Some writers have asserted that some moral consideration must be present in order to make the practice legally binding,<sup>44</sup> while others have rejected this criterion owing to the difficulty and subjectivity of its determination.<sup>45</sup> The latter school thus argues that a demonstration of state behavior *ipso facto* should be the linchpin of emergent customary law.

Perhaps not surprisingly, the most prevalent perspective regarding the legal station of General Assembly resolutions places them within the context of customary international law. Thus, in developing customary law, the General Assembly speeds up rule formulation by furnishing a global sounding board where disparate positions of states towards new norms can be voiced openly; hence, the normative content of emerging rules is allowed to be more vigorously debated.<sup>46</sup>

In the past, when international intercourse was sporadic and infrequent, customary law evolved only over protracted periods of time. With the institutionalization of international relations, standardized trends have emerged in state interaction. The rule-creating process has been both accelerated and facilitated,<sup>47</sup> and, has led publicists to sometimes aver that from this institutionalized situation has been the sudden emergence of a novel customary norm, namely, an “instant custom.”<sup>48</sup> Relatedly, vote-casting by member states’ delegates has been interpreted as evidencing or veri-

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491 (1970); see generally Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 BRIT. Y. B. INT’L L. 127 (1937).

44. Bailey, *supra* note 28, at 235; and Bokor-Szegö, *supra* note 6, at 40-41.

45. Judge Manfred Lachs, in his dissenting opinion on the Continental Shelf Cases, so indicated when he declared,

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 and be emulated . . . . It is only at a later stage that, by the combined effect of individual or joint action, response and interaction in the fields concerned, i.e., of that reciprocity so essential in international legal relations, there developed the chain reaction productive of international consensus.

I.C.J. Reports 1969, at 231.

46. d’Amato, *On Consensus*, 8 CAN. Y. B. INT’L L. 104, 110 (1970).

47. Bokor-Szegö, *supra* note 6, at 50.

48. Chiang, *United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?*, 5 INDIAN J. INT’L L. 23 (1965); see also Goedhuis, *Reflections on the Evolution of*

fying state practice,<sup>49</sup> or as overtly expressing an *opinio juris*.<sup>50</sup>

Despite the logical appeal of the above hypothesis, that is, the institutionalization through a universal organization produces repetitive interaction sequences, thereby enhancing and facilitating the creation of customary norms, it is taxing, if not impossible, to substantiate it with any viable degree of certitude. Indeed, not even a modicum of concurrence can be found among governments or jurists as to when state practice transcends from national action done casually in transnational concert, to an obligatory legal norm produced by international custom.<sup>51</sup> There is no doubt that the General Assembly affords an invaluable forum for member states to articulate their respective policy postures—an opportunity which surely contributes toward clarifying the content of nascent general law, as well as defines more precisely the positions of states concerning their conduct.<sup>52</sup> However, the fact persists that General Assembly resolutions are not binding, and that a state's vote in favor of any resolution-embodied practice does but little to insure that resolutions' future acceptance and implementation by that state as a customary norm in the international community. To conclude, a more palatable explanation about how General Assembly resolutions influence the evolution of customary norms seems to be that they may stimulate action towards, or provide an incipient step for the genesis of customary international law.<sup>53</sup>

3. *Resolutions as General Principles of Law*. A third explanation sometimes proffered about the legal nature of General Assembly recommendations is that they entail "general principles of law

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*Space Law*, 13 NETHERLANDS TIJDSCHRIFT 113 (1966). Thirlway, *supra* note 42, at 77 and *d'Amato*, *supra* note 46, at 110.

49. Arangio-Ruiz, *supra* note 39, at 471; Asamoah, *supra* note 39, at 52; Bailey, *supra* note 28, at 235; Higgins, *supra* note 6, at 2.

50. Arangio-Ruiz, *supra* note 39, at 478; Bleicher, *supra* note 41, at 450; ASAMOAH, *supra* note 39, at 55; and THIRLWAY, *supra* note 42, at 66.

51. G. VON GLAHN, *LAW AMONG NATIONS* 15 (3rd ed., 1976).

52. In this respect, Professor Rosalyn Higgins has posited,

. . . . [I]nternational custom is to be deduced from the practice of states, which includes their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations, the votes and views of states have come to have legal significance as evidence of customary law . . . . The existence of the United Nations . . . . now provides a very clear, concentrated, focal point for state practice.

HIGGINS, *supra* note 6, at 2.

53. See text accompanying notes 64-100 *infra*.

recognized by civilized nations.”<sup>54</sup> They are thus perceived as convenient expressions of legal notions and precepts common to member states.

A problematic point, however, resides in the meaning of the concept, “general principles of law,” especially as it relates to morality and justice. When used as a “source” of international law, morality and justice must be viewed as subjective qualities: what is moral and just to some might not be moral and just to others. As a consequence, universal acceptance of “general principles of law” is likely to suffer from the same serious deficiency.<sup>55</sup> Upon scrutiny, rules claiming to have originated in domestic or natural law as general principles, clearly reveal that the dividing line separating the source in question and custom (for example, habitual usage) is scarcely discernable.<sup>56</sup> Perhaps then, it would be more appropriate to presume that “general principles of international law” are nearer to being norms consolidated out of customary practice. Respective to General Assembly resolutions, this particular suggestion portends special significance for ascertaining the resolutions’ precise legal relevance.<sup>57</sup>

4. *Resolutions as Declarative Statements of Law.* Lastly, a prominent school of thought believes that General Assembly resolutions assist in specifying and authenticating extant facets of international law. When delegates representing almost all the world’s national governments cast votes on a resolution, they are in effect providing a common confirmation (or rejection) of the presence and acceptance of that issue in international law.<sup>58</sup> That this holds true for declaratory resolutions based on already acknowledged law is scarcely doubted. In other instances, the conclusion is far more nebulous.

The overriding difficulty with this contention is couched in

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54. ASAMOAH, *supra* note 39, at 61; Verdross, *supra* note 33, at 694; *see also* Zamanek, *The United Nations and the Laws of Outer Space*, 19 Y. B. WORLD AFFRS. 1965, 208 (1966).

55. *See generally*, Friedmann, *The Uses of “General Principles” in the Development of International Law*, 57 AM. J. INT’L L. 279 (1963).

56. *See generally* McNair, *The General Principles of Law Recognized by Civilized Nations*, 33 BRIT. Y. B. INT’L L. 1 (1957).

57. *See text infra*, at notes 64-100.

58. ASAMOAH, *supra* note 39, at 47; CASTAÑEDA, *supra* note 37, at 165; DETTER, *supra* note 9, at 213; *see also* GROSS, *The United Nations and the Role of Law*, 19 INT’L ORG. 557 (1965); Johnson, *supra* note 39, at 116; Skubiszewski, *The General Assembly of the United Nations and its Power to Influence National Action*, PROCEEDINGS AM. SOC’TY INT’L L. 156 (1964); and Sloan, *supra* note 39, at 24.



*realpolitick* and the membership composition of the General Assembly. Coalition politics in that organ can and often do obscure the real reasons motivating votes for or against resolutions. Put another way, General Assembly resolutions do not always reflect accurately the genuine opinion of individual states voting on an issue.<sup>59</sup> Moreover, attaining a unanimous vote on a resolution,<sup>60</sup> or for that matter, even having the same recommendation redundantly recited in subsequent resolutions,<sup>61</sup> cannot obviate the fact that such recourses fail to alter its legal station; the resolution remains a non-binding recommendation.<sup>62</sup>

This study thus far has dealt with General Assembly resolutions in order to determine whether or not their legal character might permit them to neatly qualify as a traditional source of international law that is, treaties, custom, or general principles. Apparently, they fall short of comporting satisfactorily with any source of law category enumerated in Article 38 of the I.C.J. Statute.<sup>63</sup> The crux of the issue consequently persists: What, then, is the legal significance of General Assembly resolutions today, and might they inculcate a non-traditional source of international law? The answer to this query rests in the contemporary dynamics of international norm-creation.

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59. HIGGINS, *supra* note 6, at 39. *But compare* H. SCHERMERS, 2 INTERNATIONAL INSTITUTIONAL LAW 491-506 (1972). Professor Schermers goes on to make the following pertinent observation:

Members vote in their capacity as elements of the organization, as contributors to the development of legal rules, not as contracting parties. Their vote only expresses their wish to help establish a rule which is equally applicable to *all* members. It is not a unilateral commitment.

*Id.*, at 494 (emphasis in original). It ought to be noted also that should a member accept a resolution officially as law, such an act of acceptance would thus create a legal obligation. As of this writing, however, no state has ever done so.

60. THIRLWAY, *supra* note 42, at 67-70.

61. Bleicher, *supra* note 41, at 452-478 and THIRLWAY, *supra* note 42, at 67-70.

62. *See* the discussion in THIRLWAY, *supra* note 42, at 66-79. Also of relevance are commentaries found in Ago, *La codification du droit international et les problemes de sa realisation*, MELANGES EN HOMMAGE A PAUL GUGGENHEIM 508 (1968); Baxter, *The Effects of Ill-Conceived Codification and Development of International Law*, *Id.*, at 146; Castles, *supra* note 41 at 82-83.

63. The difficulties propounded by strict adherence to the pattern of sources contained in Article 38 has prompted much speculation about whether this provision should be accepted as the exhaustive list of procedures through which international prescriptions are created. PARRY, *supra* note 30, at 21; *see also* Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); and Friedmann, *General Course in Public International Law*, 127 RECUEIL DES COURS 142 (1969 II).

### III. CONTEMPORARY DYNAMICS OF NORM-CREATION

International law consists of rules and obligations which prescribe the rights and duties of states in their dealings with each other. As aforementioned, these rules predominantly stem from international agreements and customs of nations which, over time, have been accepted as binding by the international community. However, modifications in international law may become imperative due to shifting community values (for example, protection of human rights and anti-apartheid), the impact of technology (for example, outer space exploration and satellite broadcasting), or obvious lacunae in existing law (for example, protection of diplomats and suppression of hostage-taking). It is in these broad areas that General Assembly resolutions have manifested their greatest noteworthy legal impact.

#### A. *The Norm-Creating Process*

Traditionally, norms of international law emerge through a gradual process of evolution. A practice is developed among states, leading to the formation of habitual compliance, which, after being recognized by the international community, is explicitly (through treaty) or tacitly (through custom) declared as law.<sup>64</sup> Two fundamental elements thus loom as a prerequisite for the emergence of an international norm: (1) evidence of practice (which is a material component); and (2) demonstration of acceptance (which conversely is a subjective component). Given the nature of a norms determination, it is therefore impossible to gauge exactly in an *a priori* fashion when or what sort of practice will eventuate into a legal norm.<sup>65</sup> Furthermore, no identifiable criteria or conditions have been universally adopted for norm creation, save for the general qualification that a norm-producing practice must set a sufficient foundation that induces concerned States to accept it as binding. In sum, to express the norm creation process in equation format, (1) *opinio juris sive necessitatis* (that is, the feeling of doing one's duty or that which is right), when added to (2) such demonstrable state acquiescence that it engenders preponderent international consent, yields (3) a legal norm.<sup>66</sup>

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64. See generally K. WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (1964); C. JENKS, THE COMMON LAW OF MANKIND (1958).

65. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 665 (1953).

66. *Id.* at 666-67. Also see MacGibbon, *Customary Law and Acquiescence*, 33 BRIT.

Two final temporal points merit positing. First, the precise moment a norm is created—and hence, becomes a normative rule, with legally binding effect—cannot be precisely ascertained because of its intangibility; an indefinite period of time must follow when the norm is assimilated into the international legal system and thereafter conceived as such by the world society of states. Second, norms do not enjoy an infinite existence. That is, they evolve and are extinguished as the international community itself evolves. In this manner norm-creation assumes an elastic and dynamic character that can adapt to new conditions and disparate needs in the progress of international life.<sup>67</sup> Within this context General Assembly resolutions interface with contemporary norm creation.

### *B. The General Assembly's Role in Norm-Creation*

That the United Nations General Assembly partakes in contemporary norm-creation is distinctly evident if one reflects and analyzes what has become of certain resolutions passed since the organization's founding. While not *in strictu sensu* a "source" of the law of nations, General Assembly resolutions have nevertheless influenced the law's course and direction by operating as catalytic agents for norm-creation. That is to say, in several instances declaratory resolutions by the General Assembly have functioned as instruments to distill and crystallize into tangible form the international community's consensus regarding a customary norm. Through this distillation-crystallization procedure, the resolution-issue is thus exhibited to the international community for its acceptance or rejection.

If rejected (that is, left dormant or not acted upon), the resolution-issue lapses into desuetude and retains little, if any, legal import. However, if over time the international community comes to perceive the resolution-issue as filling a gap in or supplying a need for international law, recent experience suggests that the resolution-issue will be transformed into a new legal norm or general principle of law.

Following adoption by the General Assembly, resolutions substantively effect norm creation by expressing an expectation of some certain desirable behavior—an expectation which then shapes and guides the practical as well as principled policy postures as-

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Y.B. INT'L L. 115 (1957); MacGibbon, *The Scope of Acquiescence in International Law*, 30 BRIT. Y.B. INT'L L. 143 (1953).

67. Meijers, *supra* note 30, at 311.

sumed by states.<sup>68</sup> As a result, resolutions essentially give rise to demands for new legal regulations or norms. It is further submitted that the margin by which the General Assembly approves a resolution is not at all inconsequential or irrelevant, and that added normative weight is acquired when a resolution receives unanimous support in the General Assembly. Such a contention suggests that resolutions, particularly those of a declaratory nature, posit more emphatically the consensus of "world opinion" on an issue, and thus redounds with greater moral suasion upon state conduct.

This metamorphosis of General Assembly recommendations from non-binding resolutions to inchoate normative principles is neither capricious nor accidental; moreover, during the last twenty years, identifiable resolutions undergoing this conversion process reveal its accomplishment through both customary acquiescence and treaty-making. To illustrate this more clearly, one must examine which General Assembly resolutions were affected and why they specifically came to be translated into norms.

1. *Customary Law*. Respecting customary international law, General Assembly resolutions have demonstrated their value in three broad areas of emphasis: (1) Human Rights, (2) Interstate Dealings and Restraint of Force, and (3) Outer Space.

#### a. *Human Rights*

Several General Assembly resolutions dealing with human rights contain special normative considerations which have been accepted as such by manifold governments. In an early resolution<sup>69</sup> the General Assembly defined genocide and affirmed that genocide was a heinous crime—measures which were subsequently translated into a multilateral convention.<sup>70</sup>

With regard to the general protection of human rights, paramount attention has usually been devoted to the Universal Declaration of Human Rights,<sup>71</sup> adopted by the General Assembly on

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68. For an interesting commentary on this point, see the remarks by Professor McDougal in *Contemporary Views on Emerging Legal Norms*, 79 PROCEEDINGS AM. SOC'TY INT'L L. 327-29 (1979). Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 79 PROCEEDINGS AM. SOC'TY INT'L L. 301 (1979).

69. G.A. Res. 96 (I).

70. *Viz.*, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the U.N. General Assembly Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). Interestingly enough, the United States has yet to ratify this treaty instrument. See generally Kuhn, *The Genocide Convention and State Rights*, 43 AM. J. INT'L L. 498 (1949).

71. G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

December 10, 1948. This declaration enunciates a comprehensive catalogue of human rights and calls for protecting not only individual freedoms<sup>72</sup> and political rights,<sup>73</sup> but also those of an economic,<sup>74</sup> social,<sup>75</sup> and cultural<sup>76</sup> character. To be sure, the Universal Declaration retains only recommendatory force and cannot impose international legal obligations upon states.<sup>77</sup> Yet, one can hardly deny that it has exercised an extremely great influence in promoting worldwide recognition of human rights priorities on both national and international scales.<sup>78</sup>

An indication that human rights resolutions carry substantial normative suasion is the realization that nearly all of them have garnered pervasive support among General Assembly members. Indeed, several such declaratory recommendations have been passed, including *inter alia*, the Declaration on the Promoting among Youth of the Ideal of Peace, Mutual Respect and Understanding between Peoples,<sup>79</sup> the Declaration on the Elimination of Discrimination against Women,<sup>80</sup> the Declaration on Territorial Asylum,<sup>81</sup> the Declaration on the Elimination of all Forms of Racial Discrimination,<sup>82</sup> the Declaration on the Rights of the Child,<sup>83</sup> the Declaration on Social Progress and Development,<sup>84</sup> the Declaration on the Granting of Independence to Colonial Countries and

72. *Id.*, arts. 1-8, 18, 19.

73. *Id.*, arts. 8-15, 20, 21, 30.

74. *Id.*, arts. 17, 23, 24, 25.

75. *Id.*, arts. 16, 22, 25, 28, 29.

76. *Id.*, arts. 18, 26, 27.

77. *See generally*, the discussion presented in Guradze, *supra* note 33.

78. *See e.g.*, Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L & COMP. L. Q. 102 (1976); *see also* INTERNATIONAL PROTECTION OF HUMAN RIGHTS (A. Edie & A. Schon, eds. 1968); *supra* ASAMOAH, note 39, at 186-91.

Directly relevant also is the fact that the Universal Declarations text tends to reinforce the human rights provisions in the U.N. Charter, *viz.*, in the Preamble and Arts. 1, 13, 55, 62, 68, 73, and 76.

79. G.A. Res. 2037, 20 U.N. GAOR, Supp. (No. 14) 40, U.N. Doc. A/6014 (1965). Adopted by acclamation.

80. G.A. Res. 2263, 22 U.N. GAOR, Supp. (No. 16) 35, U.N. Doc. A/6717 (1967). Adopted by acclamation. *See Note The Rights of Working Women: An International Perspective*, 14 VA. J. INT'L L. 729 (1974).

81. G.A. Res. 2312, 22 U.N. GAOR, Supp. (No. 16) 81, U.N. Doc. A/6716 (1967). Adopted unanimously, with no abstentions.

82. G.A. Res. 1904, 18 U.N. GAOR, Supp. (No. 15) 35, U.N. Doc. A/5515 (1963). Adopted unanimously, with no abstentions. *See* ASAMOAH, *supra* note 39, at 192-213.

83. G.A. Res. 1386, 14 U.N. GAOR, Supp. (No. 16) 19-20, U.N. Doc. A/4354 (1959). Adopted unanimously, with no abstentions. *See* ASAMOAH, *supra* note 39, at 214-26.

84. G.A. Res. 2542, 24 U.N. GAOR, Supp. (No. 30) 49, U.N. Doc. A/7630 (1969). Adopted by a vote of 119 in favor, none opposed, with 2 abstentions.

Peoples,<sup>85</sup> and the Declaration on the Rights of Mentally Retarded Persons.<sup>86</sup> Collectively, these resolutions not only underscore the salience of human rights concerns as a composite emergent norm under international law, but they also inculcate three general principles of customary international law which have since 1960 been increasingly recognized in the practice and behavior of states, *viz.*, non-discrimination,<sup>87</sup> self-determination,<sup>88</sup> and decolonization.<sup>89</sup>

*b. Interstate Dealings and Restraint of Force*

These resolutions enunciate principles and guidelines for promoting better relationships among states. Accordingly, the General Assembly has confirmed, restated, or set down rules which in its view facilitate or aid to the maintenance of peaceful and friendly interstate relations.<sup>90</sup> Some of these resolutions stress prevention and limitation of employing armed force, as for example, Resolution 378 (V) A, which sets out the Duties of States in the Event of Hostilities,<sup>91</sup> and Resolution 1653 (XVI), which articulates a prohibition against the use of nuclear and thermonuclear weapons.<sup>92</sup> Correspondingly, given our modern era wherein internal war increasingly typifies the character of modern belligerency, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Dependence and Sovereignty<sup>93</sup> has assumed even greater relevance than when it was first pronounced in 1965.

Not surprisingly, interstate relations since World War II have been repeatedly destabilized by breaches in the peace and national acts of aggression. Pursuant to alleviating these disruptive conditions, the General Assembly in 1970 adopted two resolutions inten-

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85. G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960). Adopted by a vote of 89 in favor, none opposed, with 9 abstentions. See ASAMOAH, *supra* note 39, at 163-85.

86. G.A. Res. 2856, 26 U.N. GAOR, Supp. (No. 29) 93, U.N. Doc. A/8429 (1971).

87. See generally, E. VIERDAG, *THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW* (1973).

88. See generally, Chowdhury, *The Status and Norms of Self-Determination in Contemporary International Law*, 24 NETH. INT'L L. REV. 72 (1977); Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971); and W. OFUATEY-KODJE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* (1977).

89. Y. EL-AYOUTZ, *UNITED NATIONS AND DECOLONIZATION* (1971).

90. See note 14, *supra*.

91. G.A. Res. 378, 5 U.N. GAOR, Supp. (No. 20) 12, U.N. Doc. A/1775 (1950).

92. G.A. Res. 1653, 16 U.N. GAOR, Supp. (No. 17) U.N. Doc. A/5100 (1962). The vote was 55 in favor, 20 opposed, with 26 abstentions.

93. G.A. Res. 2131, 20 U.N. GAOR, Supp. (No. 14) 11, U.N. Doc. A/6014 (1965).

tionally aimed at encouraging greater normative respect for international peace and security, namely, the Declaration on the Strengthening of International Security<sup>94</sup> and the Declaration of Principles of Law concerning Friendly Relations and Co-operation among States.<sup>95</sup> Despite these efforts, attaining world peace and insuring international security have remained elusive goals. This failure surely should not be attributed in any great measure to the non-binding legal nature of these recommendations. Rather, more appropriate seems to be the conclusion that this inability underlines the desperate need for stronger and more effective regulations to govern interstate affairs. To reduce the temporal capriciousness and contextual uncertainty sometimes earmarking customary norms,<sup>96</sup> these resolutions could be arrived at through multilateral treaty-making.

With regard to enhancing interstate relations, the General Assembly in its early years also approved resolutions designed to arrange new political and territorial orders. Aside from its trusteeship responsibilities,<sup>97</sup> the Assembly acted in 1947 to resolve the controversial status of Palestine by proffering a regional partition plan,<sup>98</sup> ostensibly designed to mollify inclusively Jewish, Arab, and indigenous Palestinian claims to the area. Regrettably, this plan fell prey to the parties' politico-ideological antagonisms.<sup>99</sup>

94. G.A. Res. 2734, 20 U.N. GAOR, Supp. (No. 28) 22-24, U.N. Doc. A/8028 (1970).

95. G.A. Res. 2625, 20 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970). In an annex appended to this declaration, the following principles are enumerated and elaborated upon *vis-à-vis* their paramount role in promoting "the realization of the purposes of the United Nations:"

(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,

(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,

(d) The duty of States to co-operate with one another in accordance with the Charter,

(e) The principle of equal rights and self-determination of peoples,

(f) The principle of sovereign equality of States,

(g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.

*Id.*, at 122-24.

96. See the text's discussion *supra*, at notes 42-53.

97. See ASAMOAH, *supra* note 39, at 59-61.

98. G.A. Res. 181 (II).

99. For a historical perspective of the Palestinian situation, see S. SALESBY, *THE PALESTINIAN PROBLEM* (1970).

More successful were the results of the General Assembly's resolution series executing United Nations disposition of the former Italian colonies in Libya and Ethiopia.<sup>100</sup> Lastly, the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>101</sup> adopted by the General Assembly in 1960, is now regarded by numerous governments as the pre-eminent statement of principles for non-self-governing territories to abide by in gaining independence and managing national sovereignty.<sup>102</sup>

### c. Outer Space

As contended by some commentators,<sup>103</sup> perhaps the overriding original achievement rendered by the General Assembly in progressively developing international law rests in its activities for codifying law in outer space.

In late 1961 the General Assembly passed the Resolution on the Peaceful Uses of Outer Space<sup>104</sup> in which it proclaimed: (1) international law should be applicable to outer space and celestial bodies, and (2) both outer space and celestial bodies are exempt from national appropriation and open for use and exploration by all states. Two years later, these normative benchmarks were formally reasserted by the General Assembly in its Declaration on the Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,<sup>105</sup> and were integrated into the dis-

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100. G.A. Res. 289 (IV), 4 U.N. GAOR, Supp. at 10 U.N. Doc. A/1251 (1949); G.A. Res. 387 V, 5 U.N. GAOR, Supp. (No. 20), at 17, U.N. Doc. A/1775 (1950); G.A. Res. 388 (V), *Id.*; G.A. Res. 390 (V) *Id.*, at 20; G.A. Res. 398 (V), *Id.* at 26; G.A. Res. 530 (VI), 6 U.N. GAOR, Supp. (No. 20) 24, U.N. Doc. A/2119 (1952).

101. G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960).

102. For an interesting account of this view, see ASAMOAH, *supra* note 39, at 163-85.

103. See, Chiang, *supra* note 48; ASAMOAH, *supra* note 39, at 129-62; and M. MATTE, AEROSPACE LAW 266-68 (1969).

104. G.A. Res. 1721, 16 U.N. GAOR, Supp. (No. 17) 6-7, U.N. Doc. A/5100 (1962).

105. G.A. Res. 1962, 18 U.N. GAOR, Supp. (No. 15) 15-16, U.N. Doc. A/5515 (1963). Adopted by acclamation. This particular resolution articulated nine specific principles dealing with activities in outer space:

1. "The exploration and use of outer space shall be carried out for the benefit and in the interests of all mankind" (para. 1);

2. "Outer space and celestial bodies are free for exploration and use by all States on a basis of equality and in accordance with international law" (para. 2);

3. "Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means or occupation, or by any other means" (para. 3);

4. "The activities of States in the exploration and use of outer space shall be carried on in accordance with international law . . . in the interest of maintaining international peace and security and promoting international co-operation and understanding (para. 4);

5. "States bear international responsibility for national activities in outer space,



armament realm by Resolution 1884 (XVIII) which exhorted governments to refrain from placing into outer space any nuclear weapons or other weapons of mass destruction.<sup>106</sup> That these General Assembly pronouncements were marked strides towards a legal regime for outer space was confirmed by entry into force, within only a decade of three multilateral treaty instruments, which specifically encapsulated these resolutions' provisions.<sup>107</sup>

In sum, to contend that recommendations of the General Assembly are not binding upon member states does not perforce relegate them to possessing nugatory legal effects. On the contrary, the evolutionary experience of resolutions since 1960 strongly indicates that selected resolutions may have become generally accepted principles of law, or at the very least, they inculcate nascent principles of emerging customary law.<sup>108</sup> This position, notwithstanding the legal significance ascribed to General Assembly resolutions, is made patently more obvious when one examines the degree to which they have fostered conventional normative growth through international treaty law.

2. *Treaty Law.* In a very real sense, treaties are the handmaidens of international law. Very often, they resemble contracts in municipal legal systems, but they can also perform functions which shape and codify the law of nations. General Assembly

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whether carried out by governmental agencies, or by non-governmental entities . . ." (para. 5);

6. "In the exploration and use of outer space, States shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space with due regard for the corresponding interests of other States . . ." (para. 6);

7. "The State on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and any personnel thereon, while in outer space . . ." (para. 7);

8. "Each State which launches or procures the launching of an object into outer space, and each State from whose territory or facility and object is launched, is internationally liable for damage to a foreign State or to its natural or juridical persons by such object or its component parts on the earth, in air space, or in outer space" (para. 8);

9. "States shall regard astronauts as envoys of mankind in outer space, and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of a foreign State or on the high seas . . ." (para. 9). *Id.*

106. G.A. Res. 1884, 18 U.N. GAOR, Supp. (No. 15) 13, U.N. Doc. A/5515 (1963).

107. See the discussion *infra*, at notes 139-148; and ASAMOAH, *supra* note 39, at 129-160.

108. As posited earlier, a principle of customary law is established when a consistent pattern of state conduct is demonstrated, which then is followed by a widespread international conviction that such conduct constitutes law. Yet, because the length of time varies and is dependent upon international circumstances, a profound difficulty arises in ascertaining precisely when a new customary norm of international law actually has been created. Hence, this qualification.

resolutions have unequivocally contributed to the expansion of international treaty law which is roughly divided into three principal areas of concentration: (1) promotion of human rights; (2) measures affecting the use of force; and (3) promulgation of a legal regime for outer space.

*a. Human Rights Treaties*

During the 1960's, a litany of United Nations-derived human rights conventions were adopted, all of which possessed the common feature of having had a General Assembly resolution as their respective sparks of formal gestation. In December 1966, the General Assembly adopted by resolution<sup>109</sup> the Covenant on Economic, Social and Cultural Rights,<sup>110</sup> the Covenant on Civil and Political Rights,<sup>111</sup> and an Optional Protocol to the latter.<sup>112</sup> The two covenants, when placed in concert with their progenitor the Universal Declaration of Human Rights, have come to be regarded as formally constituting an "International Bill of Rights."<sup>113</sup>

Efforts made for insuring human rights have also found overt expression in several special conventions aimed at eradicating those types of discrimination discerned as being distinctly widespread and most pernicious. Chief among the target areas receiving condemnation has been discrimination against women and race.

Undoubtedly, a remarkable transition has occurred in recent decades in regard to fostering equal rights for women throughout the world;<sup>114</sup> a development greatly assisted by United Nations-sponsored treaty law. The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;<sup>115</sup> the Convention on the Political Rights of Women;<sup>116</sup> the Convention on the Nationality of Married Women;<sup>117</sup> the Conven-

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109. G.A. Res. 2200, 21 GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

110. Annex to G.A. Res. 2200, 21 GAOR, Supp. (No. 16) 49, U.N. Doc. A/6319 (1966), entered into force Jan. 3, 1976.

111. Annex to G.A. Res. 2200, 21 GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976.

112. Annex to G.A. Res. 2200, 21 GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1966), entered into force Mar. 23, 1976.

113. See generally, Humphrey, *International Bill of Human Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527 (1976).

114. For detailed examination of the multilateral treaty efforts made on behalf of women, see *International Instruments and National Standards relating to the Status of Women*, U.N. Doc. E/CN.6/552 (1972).

115. 96 U.N.T.S. 271, entered into force July 25, 1951.

116. 193 U.N.T.S. 135, entered into force July 7, 1954.

117. 309 U.N.T.S. 65, entered into force Aug. 11, 1958.

tion on the Recovery Abroad of Maintenance;<sup>118</sup> and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages<sup>119</sup>—all owe their genesis in substantial part to pro-equality provisions of the Universal Declaration of Human Rights, in particular, Articles 2,<sup>120</sup> 16,<sup>121</sup> and 25.<sup>122</sup> However, it can in no way be assumed that discrimination against women has been eliminated by these treaties, a fact subsequently reflected in 1967 by the General Assembly in its Declaration on the Elimination of Discrimination against Women.<sup>123</sup>

Turning to the question of race, the International Convention on the Elimination of all Forms of Racial Discrimination<sup>124</sup> occupies central prominence. Being opened for signature and entering into force on the same day, this Convention particularly condemns racial segregation and *apartheid*,<sup>125</sup> and advocates through “appropriate means” the elimination of racial discrimination in all its forms.<sup>126</sup> Important to recognize is that the Universal Declaration of Human Rights is specifically cited in Articles 4 and 7, as is the Declaration on the Elimination of All Forms of Discrimination in Article 7—a realization that underscores the salience that these General Assembly resolutions had upon the promotion of this Convention. Relatedly, in 1973, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*<sup>127</sup> declared

118. 268 U.N.T.S. 330, *entered into force* May 25, 1957.

119. 521 U.N.T.S. 231, *entered into force* Dec. 9, 1964.

120. In relevant part, Article 2 provides:

Everyone is entitled to all rights and freedoms set forth in this declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Universal Declaration, *supra* note 71, Art. 2.

121. Article 16 states in part,

1. Men and women of full age, without limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled as to equal rights as to marriage, during marriage and at its dissolution.

*Id.* art. 16, para. 1.

122. In part, Article 25 provides that “Motherhood and childhood are entitled to special care and assistance . . .” *Id.*, art. 25, para. 2.

123. G.A. Res. 2263, 22 U.N. GAOR, Supp. (No. 16) 35, U.N. Doc. A/6555 (1967). This resolution was adopted unanimously by the General Assembly.

124. 660 U.N.T.S. 195, *entered into force* March 7, 1966. For discussion, see Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT’L & COMP. L.Q. 996 (1966).

125. *Id.*, art. 3.

126. *Id.*, art. 2.

127. Annex to G.A. Res. 3068, 28 GAOR, Supp. (No. 30) 75, U.N. Doc. A/9030 (1973), *entered into force* July 18, 1976. The vote was 91 in favor, 4 opposed (Portugal, South Africa, the United Kingdom, and the United States) with 26 abstentions. This treaty stemmed from

this extreme form of racial discrimination to be a "crime against humanity," tantamount in effect to genocide.<sup>128</sup>

*b. Use-of-Force Treaties*

The difficulty of reaching agreements between nations on matters of international peace and security is evidenced by the fact that no multilateral instrument regarding political cooperation has yet been concluded under the aegis of the United Nations.<sup>129</sup> Nevertheless, General Assembly resolutions have prompted the negotiation and adoption of several disarmament-related agreements outside its auspices.

For example, following promulgation in August 1963 by the United States, Soviet Union, and United Kingdom of a treaty banning nuclear weapon tests in the atmosphere, in outer space, and under water,<sup>130</sup> the General Assembly in a formal resolution<sup>131</sup> noted that treaty and invited other states to partake in its ratification. Likewise, after successive General Assembly resolutions urging the non-proliferation of nuclear weapons,<sup>132</sup> in August 1967 the United States and Soviet Union culminated a series of negotiations with a draft treaty proposal, which was later adopted in June 1968 by the General Assembly as the definitive international non-proliferation treaty text.<sup>133</sup> A similar pattern also emerged in the evolution of draft conventions denuclearizing the seabed<sup>134</sup> and

G.A. Res. 2922, 27 GAOR, Supp. (No. 30) 63, U.N. Doc. A/8730 (1972). For interesting background, see R. BISSELL, APARTHEID AND INTERNATIONAL ORGANIZATIONS (1977).

128. Apartheid Convention, *supra* note 127, at Preamble and art. 1.

129. The problematic nature of devising treaty instruments to handle politically volatile use-of-force questions is well illustrated by the General Assembly's protracted struggle to come up with an acceptable definition for "aggression". This was accomplished by G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974), though not without considerable controversy and reservations. For an extensive collection of background primary materials, see B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION (1975). For an assessment of the definition, see Garvey, *The U.N. Definition of "Aggression": Law and Illusion in the Context of Collective Security*, 17 VA. J. INT'L L. 177 (1977).

130. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *done* Aug. 5, 1963, 480 U.N.T.S. 43, [1963] 14 U.S.T. 1313, T.I.A.S. No. 5433.

131. G.A. Res. 1910, 18 U.N. GAOR, Supp. (No. 15) 14, U.N. Doc. A/5515 (1963).

132. *Viz.*, G.A. Res. 1632 (XVI); G.A. Res. 1648 (XVI); G.A. Res. 1762 (XVII); G.A. Res. 1767 (XVII); G.A. Res. 1801 (XVII); G.A. Res. 1901 (XVIII); G.A. Res. 2028 (XX); G.A. Res. 2153 (XXI).

133. Treaty on the Non-Proliferation of Nuclear Weapons, *done* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

134. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and the Subsoil Thereof, *done* Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337, 480 U.N.T.S. 43.

prohibiting the development of biological weapons.<sup>135</sup> Negotiations in large part occurred between the United States and the Soviet Union, and once their positions were mollified into agreement, draft convention texts were approved through resolutions by the General Assembly.<sup>136</sup>

Thus, in disarmament and arms control matters, General Assembly resolutions appear to serve a dual function: First, they exhort the major military powers to enact measures for curtailing the production of weapons for mass destruction; and second, they operate as legal vehicles for translating draft treaty texts satisfactory to the United States and Soviet Union into multilateral convention instruments. To conclude, an authoritative United Nations publication lends ample credence to these observations as it avers:

The main responsibility for disarmament naturally falls on the great Powers; and the relationship of the United Nations to any particular measure depends largely on the policy of the major Powers with regard to that measure. At all times, however, the United Nations has taken all possible action to provide the required machinery for negotiations and to facilitate and accelerate them in every way. It has also played a unique role as a permanent forum for disarmament discussions and negotiations; as a focal point for all efforts to achieve disarmament; as a source of recommendations and directives of the international community to the Powers concerned; and finally, as an initiator of authoritative studies, such as those on the economic and social consequences of disarmament, on the effects of the possible use of chemical and biological weapons, which have served to focus the attention of world public opinion on these issues.<sup>137</sup>

### *c. Outer Space Treaties*

Since 1957, when the Soviet Union launched Sputnik I, exploration of outer space has increasingly drawn mankind's attention. Not only have scientists and engineers been preoccupied with outer space activities, but international lawyers have been involved as well.

The General Assembly demonstrated interest in the legal niceties and nuances of outer space as early as December 1958 when it

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135. 26 U.S.T. 583, T.I.A.S. No. 8062 *entered into force* March 26, 1975.

136. *See also*, Treaty for the Prohibition of Nuclear Arms in Latin America, Feb. 14, 1967, 21 U.S.T. 77, T.I.A.S. No. 1838, 634 U.N.T.S. 282; Protocol II to the treaty, 22 U.S.T. 754, T.I.A.S. No. 7137, 634 U.N.T.S. 364; Declaration Regarding an Indian Ocean Zone of Peace, G.A. Res. 2832, 26 U.N. GAOR, Supp. (No. 29) 36, U.N. Doc. A/8584 (1971).

137. UNITED NATIONS, DISARMAMENT: IMPERATIVE OF PEACE 2 (1970).

established an *ad hoc* Committee on the Peaceful Uses of Outer Space. Late in 1961 the General Assembly adopted its Declaration on the Peaceful Uses of Outer Space which five years later was transformed nearly verbatim<sup>138</sup> into the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space.<sup>139</sup>

The Outer Space Treaty proclaims that “the exploration and use of outer space . . . shall be carried out for the benefit and in the interests of all countries,”<sup>140</sup> and that “outer space . . . is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”<sup>141</sup> The influence of General Assembly Resolution 1884 (XVIII)<sup>142</sup> was also reflected in Article IV, which provided that “States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other matter.”<sup>143</sup> In short, celestial bodies should be used “exclusively for peaceful purposes.”<sup>144</sup>

Closely linked to the 1967 Outer Space Treaty—and also originating from General Assembly resolutions—are three subsequent multinational conventions dealing with outer space. In December 1968, the Treaty on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space<sup>145</sup> was approved by the General Assembly. Relatedly, in 1972, the Convention on International Liability for Damage Caused by Space Objects was concluded,<sup>146</sup> and three years later,

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138. *Viz.*, for paragraphs 1 and 2 of the Declaration, *see* art. I of the Treaty; for paragraph 3, *see* art. II; for paragraph 4, *see* art. III; for paragraph 5, *see* art. VI; for paragraph 6, *see* art. IX; for paragraph 7, *see* art. VIII; for paragraph 8, *see* art. VII; and for paragraph 9, *see* art. V.

139. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S., reprinted in 6 INT'L LEGAL MAT. 386 (1967).

140. *Id.*, Art. I.

141. *Id.*, Art. II.

142. G.A. Res. 1884, 18 U.N. GAOR Supp. (No. 15) 13, U.N. Doc. A/5515 (1963).

143. Outer Space Treaty, *supra* note 139, at art. VI.

144. *Id.*

145. 19 U.S.T. 7570, T.I.A.S. No. 6592, 672 U.N.T.S. 112, entered into force Dec. 3, 1968. For discussion, *see* Hall, *Rescue and Return of Astronauts on Earth and in Outer Space*, 63 AM. J. INT'L L. 197 (1969).

146. 24 U.S.T. 2389, T.I.A.S. No. 7762, entered into force Oct. 9, 1973. In January 1979, the Soviet satellite *Cosmos 954* fell into Canadian territory and this treaty instrument was activated by Canada to secure damages. *See* Galloway, *Nuclear Powered Satellites: The*

the Convention on Registration of Objects Launched into Space was also concluded.<sup>147</sup> Of special significance here is the realization that the need for each of these treaties can be traced initially to the 1962 Declaration of Principles, respectively in paragraphs 9, 5 and 8.<sup>148</sup> As a consequence, within the sphere of outer space law, General Assembly resolutions have been notably salient as catalytic elements of norm-creation, particularly through the treaty-making process.

*C. General Assembly Resolutions and International Law:  
Prospects for the Future*

The title of this article implies that norm-creation in contemporary international law is intrinsically a dynamic process, to which General Assembly resolutions can and do substantially contribute. Basically in the past, the General Assembly's non-binding recommendations have weighed most heavily in the issue areas of human rights, use of force, and outer space activities. Very likely, these orientations will persist in importance. However, standing out today among emergent norms in the process of legal crystallization is one pertaining to jurisdiction and exploitation of natural resources, *viz.*, the notion known as "The Common Heritage of Mankind."<sup>149</sup>

As a legal concept, the "common heritage of mankind" distinctly emanated from the General Assembly, owing to its initial formal enunciation in 1970 by General Assembly Resolution 2749 (XXV), the Declaration of Principles Governing the Sea-Bed and Ocean Floor (and the Subsoil Thereof Beyond the Limits of National Jurisdiction).<sup>150</sup> As articulated in this declaration, the "common heritage of mankind" espouses the following precepts:

(1) that the seabed, the ocean floor, and their resources are "the common heritage of mankind";<sup>151</sup> (2) that this area is immune from appropriation by natural or juridical persons;<sup>152</sup> (3) that this

*U.S.S.R. Cosmos 954 and the Canadian Claim*, 12 AKRON L. REV. 401 (1979); and Christol, *International Liability for Damage Caused by Space Objects*, 74 AM. J. INT'L L. 346 (1980).

147. 28 U.S.T. 695, T.I.A.S. No. 8480, G.A. Res. 3235, 29 U.N. GAOR, Supp. (No. 31) 16, U.N. Doc. A/9631 (1974). The Convention was adopted by the U.N. General Assembly on Nov. 12, 1974 and opened for signature in Jan. 1975.

148. See note 105, *supra*.

149. See Gorove, *The Concept of "Common Heritage of Mankind": A Political, Moral or Legal Innovation?*, 9 SAN DIEGO L. REV. 390 (1972).

150. G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 27) 24 U.N. Doc. A/8027 (1970). Significantly, this resolution was adopted by 108 in favor, none opposed, with 14 abstentions.

151. *Id.*, para. 1.

152. *Id.*, para. 2.

area is to be used exclusively for peaceful purposes;<sup>153</sup> and (4) that exploration and exploitation of this area should be performed for mankind as a whole.<sup>154</sup> As the ongoing United Nations Law of the Sea negotiations amply attest, this General Assembly resolution portends tremendous implications for ocean law;<sup>155</sup> further, as incorporated into the recent Draft Convention on the Law of the Sea,<sup>156</sup> the "common heritage of mankind" concept presumably will be the keystone provision regulating exploitation of the deep seabed, a factor neither supported enthusiastically nor endorsed by Western industrialized Governments and their domestic mining industries.<sup>157</sup> Perhaps even of greater consequence, as an emergent norm of international law, the "common heritage of mankind" notion has been inserted verbatim in the so-called "Moon Treaty" of 1979,<sup>158</sup> which may figure prominently in the event any international negotiations arise regarding the legal status of Antarctica.<sup>159</sup> Thus, what began in 1970 as simply a non-binding pronouncement by the General Assembly has evolved in only a decade, to what many commentators perceive to be an incipient legal norm, or a new principle of law.<sup>160</sup> Such a development clearly highlights the

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153. *Id.*, para. 5.

154. *Id.*, para. 7.

155. See Adede, *The System of Exploitation of the "Common Heritage of Mankind" at the Caracas Conference*, 69 AM. J. INT'L L. 31 (1975); Charney, *The International Regime for the Deep Seabed: Past Conflicts and Proposals for Progress*, 17 HARVARD INT'L L. J. 1 (1976); and see generally, INTERNATIONAL LAW OF THE SEA AND THE FUTURE OF DEEP SEABED MINING (C. Joyner ed. 1975).

156. Draft Convention on the Law of the Sea (Informal Text), 10 Official Records of the Third United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/WP.10/Rev.3/Ad.1. Article 136 simply states, "The [Deep Seabed] Area and its resources are the common heritage of mankind." Articles 137-191 deal with the proposed Authority regime to exploit the seabed.

157. See generally T. KRONMILLER, *THE LAWFULNESS OF DEEP SEABED MINING* (1979). Cf. de Soto, *The Developing Countries and Deep Seabed Mining: Problems, Prospects and Policy Implications* in Joyner, *supra* note 155, at 45, with Dubs, *Law and Policy in Mining the Ocean Floor: The Industrial Perspective*, *Id.*, note 56.

158. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, U.N. Doc. A/AC.105/L.113/Add.4 (1979), opened for signature Dec. 18, 1979. Article XI provides in relevant part that "The moon and its natural resources are the common heritage of mankind . . ." *Id.*, Art. XI, para. 1. See Christol, *The Common Heritage of Mankind Provision in the 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, 14 INT'L LAWYER 429 (1980). For the United States' reaction to the "Common Heritage" provision, see 115 *Time*, Mar. 24, 1980, at 47.

159. See generally, Joyner, *Antarctica and the Law of the Sea: Rethinking the Current Legal Dilemmas*, 18 SAN DIEGO L. REV. — (1981).

160. See de Soto, *supra* note 157, at 47; Christol, *supra* note 158, at 429 and Sohn, *The United Nations and the Oceans, Current Issues in the Law of the Sea*, 23 REPORT, COMM. TO STUDY THE ORGANIZATION OF PEACE (1973).



growingly significant role which General Assembly resolutions play in influencing and shaping the course of international law's contemporary direction.

#### IV. CONCLUSION

In an international community whose legal mechanism operates through co-equal interaction of its members—rather than through domination by a supreme sovereign or legislature—expectations of compliance as linked to prescriptions can assume disparate intensities. In this connection, Josef Kunz astutely observed nearly thirty-five years ago that:

Law is a dynamic system of norms which, in continuous concretization and individualization, develops from the basic norm above to the last act of mere execution below. Law is a normative system which itself regulates the creation of its own norms. The legal order must, therefore, establish norms which give determined organs the power to create, change, abolish, apply, and execute the norms of a particular legal order. Such power we call competence or jurisdiction.<sup>161</sup>

Just as substantive prescriptions of international law are subject to development and revision, so too are the procedures by which law is created. Hence, when classification of legal sources becomes rigid and exclusive, attempts to assess the validity of novel legal expectations in the society could be stifled or rendered anachoristic. Put succinctly, it is submitted here that Article 38 of the Statute of the International Court of Justice should not be interpreted as a petrified authoritative statement for inclusively determining how international law is created, changed or derived. The experience of General Assembly resolutions in the norm-creation process evinces need for more flexibility *vis-à-vis* sources of international law—a flexibility that is not grounded in mutually exclusive sources, but rather in the cognizance that international law's evolution actually inculcates a many-tiered communications' process among governments. Norm-creation should enhance that process, not impede it.

Ours is an increasingly interdependent and multicultural world. Given this, while General Assembly resolutions are not *ipso facto* new sources of international law, they can contribute to the normative process of law-creation by crystallizing both customary

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161. Kunz, *Revolutionary Creation of Norms of International Law*, 41 AM. J. INT'L L. 119 (1947).

behavior and general principles into law within a comparatively short timespan. Moreover, formal recommendations by the General Assembly embody persuasive authority as indicators of the world community's legal desires at a particular time. The overriding difficulties earmarking the nature of General Assembly resolutions reside in determining first, how to minimize politics from intruding into the legal process, and second, how to subsume national interests when they conflict with policies of international justice. Indubitably, resolving these conundrums will remain predominant challenges for international lawyers in the years ahead, as indeed they have been in the years gone by.