

# LEGAL STATUS OF U.N. RESOLUTIONS†

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In the past twenty years or so the literature of international law has become well endowed with a variety of commentaries and articles on the working of the United Nations and other international organizations. The legal status of these bodies, descriptions of their operation in the international community and other aspects of their work have frequently been examined closely and exhaustively. At the same time, however, it is one of the interesting twists of contemporary legal scholarship that there is a remarkable dearth of comment on the nature of the legal obligations created by the United Nations Charter and the organic instruments which have created other international organizations. From the point of view of many states this may well be understandable. As one recent commentator has suggested, "States, like individuals, prefer to emphasize their rights rather than their duties"<sup>1</sup>. Nevertheless, for those who examine the workings of international organizations the lack of studied appreciations of the legal obligations created in the formation and operation of these bodies can prove to be a serious barrier in attempting to assess the full impact of international law on today's international community. This becomes particularly apparent when even a cursory glance at the proceedings of a United Nations organ like the Trusteeship Council soon reveals that in most major debates in such a body reliance is placed upon the "principles" of international law by one or more states. International law is in fact, it would seem, one of the favourite weapons in the arsenal of diplomacy. It is used freely and regularly, as it has been for centuries, to maintain controverted political aims on a variety of issues.

In any examination of the operation of the United Nations and other international organizations this lack of legal analysis of the obligations which can be created by these bodies becomes particularly crucial when discussions are raised on the legal effect which should be accorded to the "declarations", "resolutions" and other manifestations of opinion which are recorded by the deliberative bodies of these organizations. It is one of the well-acknowledged features of the present-day operation of the United Nations, for example, that many of the new nations which have joined the organization in recent years place great reliance upon the United Nations *Repertory of Practice*<sup>2</sup>, which summarises the resolutions of the United Nations' main organs, to find the "law" on the Charter. This is in contrast to the position of many of the western

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† The substance of this article was originally the text of a paper delivered to the Eighth Annual Conference of the Australasian Political Studies Association in September 1966.

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1. Harry: "Australia's Commitments under the United Nations Charter", *International Law in Australia* (1966), 65.

2. 1-5 *Repertory of Practice of U.N. Organs*, and Supps.

powers and sometimes the eastern European powers, too, who turn to the Charter itself and to the debates at San Francisco to determine the "law" which they seek to apply to determine the nature of their obligations under the Charter. As a result of this, in attempting to assess the legal effect of such United Nations resolutions as the "Declaration on Colonialism", for example, there seems to be an unbridgeable gulf between many states on the status which is to be accorded to such manifestations of opinion by the General Assembly. On the one hand, there are those who contend that the declaration has raised self-determination to the status of an international legal right<sup>3</sup>. On the other hand, however, it is often said that the Declaration is no more than a "recommendation" and as such it is no more than a repository of political exhortation to the world at large, which is necessarily void of any legal effect, even though its political effect may be well acknowledged<sup>4</sup>.

So long as states have a vested political interest in maintaining such differences of opinion in particular fields of international examination, like colonialism, it is hardly likely that any generally accepted consensus will emerge on the exact legal status of the resolutions of international organizations. By recourse to "legal principles" states can avail themselves of the opportunity of using the mystique of "law" as a justification for their actions, both on the international scene and in municipal politics as well. When many of these "legal arguments" are stripped of their political motivations and their political content, however, it becomes apparent that the divergence of attitudes on such questions as the legal effect of the resolutions of international organizations is often much more apparent than real. There may be in fact a considerable measure of tacit agreement on the rôle that such resolutions can play in the legal ordering of international relations.

This measure of agreement is not to be found so much, however, in the application of legal rules and standards of the traditional type, which apply in the well-ordered sovereign state with its reasonably sophisticated organs of government and its legal procedures for making, applying and enforcing the law. By comparison with a national state, the international community is in a stage of development where it lacks generally any coherent lines of demarcation between legislative, executive and other organs of authority. As a general rule, too, the international community has no effective means of enforcing its precepts in the same way. This does not mean, however, that there is no international legal order which can be developed through existing international organizations. The very existence of these bodies assumes and encourages the development of such an order and acknowledges that the international community considers that it has a vested interest in maintaining a system of rules to regulate international relations. As yet, however, in their present state, the institutions which have been created to assist in maintaining and developing the legal regulation of international relations do not have generally, except in an embryonic form, the capacity to define with certainty, through recognized procedural forms, when they are translating political demands into legal rules. The result is that the manifestations of opinion by many of these bodies which appear in the form of resolutions may in many

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3. Higgins: *The Development of International Law through the Political Organs of the United Nations* (1963), 100.

4. See *infra.*, n. 13.

instances be characterised as "legal" or "political" depending upon the attitude which a state holds to the desirability of the particular resolution. Very often, however, when verbal assertions of this type are treated as what they are in fact, no more than forms of political argumentation, there emerges from the practice of many states, and in the rulings of the International Court of Justice, a body of guidelines which seem to recognize that more legal effect is in fact given to many of these resolutions than these divisions of opinion might suggest. This legal effect may vary in nature and quality according to the particular class of resolution under consideration and the status of the body which has passed it. Sometimes it may come close to being in the nature of "legislation" as we know it. More often than not, however, it cannot be approximated to the emanations of "law" as we recognize them in the national state. As a consequence it is impossible to generalise on the legal effect of these resolutions. At the same time, the international community has as yet failed to devise recognized procedural forms in many fields to translate political demands into "law", and may well have a justifiable and vested interest in not doing so. This means that the legal effect of a resolution will not necessarily be dependent upon the overt political content of a particular ruling. Nevertheless, it can be demonstrated, with few exceptions, that the states in the international community do accept that a law-making function is to be ascribed to many of these resolutions.

The fact that a resolution of an international organisation may not be enforceable is no bar to it being treated as binding under international law. As Sir Gerald Fitzmaurice once pointed out most effectively: ". . . the law is not binding because it is enforced: it is enforced because it is already binding"<sup>5</sup>. Like most aphorisms, however, this one is only good as far as it goes. It fails to point out that there are degrees of enforceability and varying methods of making the law binding in the international community. Penultimately, under the existing structure of international law, the degree of enforceability which exists within the institutional framework of the international community has an important rôle to play in determining the effectiveness of any law-making act. Similarly, the extent to which a law-making act will be recognized as binding by what might be termed the various "law-government" authorities of the international community, determines the extent to which a purported law-making act may be considered to have legal effect in the international community. These "law-government" authorities include the organization itself, the International Court of Justice and other bodies which are empowered to arbitrate on international disputes. Sovereign states, too, are part of the "law-government" structure of the international community. The greater the degree of acknowledged enforceability by these "law-government" authorities, the more widespread the acceptance of the binding nature of a law-making act by the "law-government" authorities of the international community, the more effective this act becomes as an instrument of international legal order. This means, as far as the resolutions of international organizations are concerned that their law-making effect must be considered on a graduated scale; a graduated scale which takes into account the status of the resolution-making body under international law, the particular

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5. Fitzmaurice: "The Foundations of the Authority of International Law and the Problem of Enforcement", (1956) 19 M.L.R. 1.

class of resolution, the degree of enforceability and the extent to which the binding nature of the resolution is acknowledged to be binding by the "law-government" authorities of the international community.

At the top of the scale, so long as the international community has a vested interest in retaining them, there are formal grants of power to international organizations in treaty form which explicitly provide for the enforcement of resolutions under international law and which are clearly considered to be binding by the "law-government" institutions of the world community. Because these powers of resolution-making have been solemnised in treaty form they are also binding on the states which have acceded to the treaty, at least under international law. Not unexpectedly, the number of instances where states have voluntarily limited their sovereignty in this way are few in number. But there are examples of such grants of power to be found in both in the working of the United Nations and other organizations.

The resolution by the Security Council empowering Great Britain to "prevent by the use of force if necessary the arrival at Beira of vessels reasonably believed to be carrying oil destined for Rhodesia" is a good example of a resolution of an international organization which falls into this category<sup>6</sup>. As Ambassador Goldberg of the United States told the Council before it voted on this resolution, it would be "making international law" if it approved of the British plan to authorise the use of force to enforce a sea blockade of Beira<sup>7</sup>. With the passing of this resolution it became immediately enforceable under the United Nations Charter, within the terms of Article 42, and had a direct effect on the legal ordering of international relations. Thus, for example, an international judicial tribunal or a municipal judicial tribunal applying international law would be bound to accept the legality of any British use of force against a tanker, even if, in the normal course of events, such interference would be in violation of the ordinary principles of international law. The finding of the fact, too, upon which this exercise of authority was based, namely that there was in existence a threat to peace, would also not be open to challenge as Article 39 clearly empowers the Council to determine for itself whether such a threat exists. Added to this, the resolution itself laid down a precise method of physically enforcing the will of the Security Council by sanctioning the use of force by Great Britain.

The operation of Chapter VII is the only example to be found in the United Nations Charter where the result of the passing of a resolution creates a legal decision which is virtually equivalent to a legislative act by a municipal law-making authority. Generally, the other decisions which are made by international organizations do not catalyse in the same emanation of authority, the binding nature of a resolution under international law and the enforceability of the resolution. The General Agreement on Tariffs and Trade, however, does contain provisions which can operate in much the same way. If a contracting party is adjudged by the other parties to the agreement to be acting in violation of the articles of the agreement, penalties can be imposed which in effect nullify the benefits which may be enjoyed by the defaulting state

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6. (1966) 3 *U.N. Monthly Chronicle*, (May) 11, 12.

7. *Id.*, 5.

accruing from its accession to the treaty<sup>8</sup>. There are circumstances, too, where states could create, without the backing of treaty obligations, circumstances where the resolution of an international organization could become immediately binding and enforceable, in much the same fashion as the operation of Article 42 of the United Nations Charter. States do not lose the legal rights which they otherwise enjoy when they are members of an international organization. They may, therefore, give consent in advance to a particular resolution being binding upon them and may permit the resolution to make provision for the enforcement of its provisions.

Under Article 94(2) of the United Nations Charter judgments of the International Court of Justice may similarly be the subject of enforcement proceedings. Each member state of the organization has undertaken to comply with the decisions of the Court to which it is a party and if it fails to perform any obligations as directed by the Court the Security Council may, "if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment". Thus if the recent proceedings in the International Court of Justice on South West Africa had not proved to be abortive on technical grounds, a decision calling upon South Africa to perform certain obligations would potentially be enforceable by the Security Council under this article of the Charter. If such enforcement proceedings are taken then the operation of the Court may come close to being as effective as the decisions of a court in a national state.

In considering provisions of this type it would be wrong to assume, however, that where there are explicit treaty provisions which provide for the enforceability and operation of certain resolutions of an international organization, these automatically fall into this category. It is only the effective exercise of these resolution-making powers which makes them operative in this sense and in the present legal condition of the international community this will not always be possible. This position is well illustrated by the problems associated with Article 19 (2) of the United Nations Charter in the context of the controversy over the payment of peace-keeping dues assessed by the General Assembly under Article 17. One of the "law-government" institutions in the international community, the International Court of Justice, decided by a majority of nine to five that the expenses relating to the U.N.E.F. and O.N.U.C. forces were "expenses of the organization" within article 17 (2) of the Charter<sup>9</sup>. The Assembly itself, too, had of course already reached the same conclusion by making the particular assessments. These resolutions could therefore be considered to be binding under international law, as the only "law-government" authorities in the international community which were authorised to do so had decided that the assessments were valid. The subsequent impasse in the General Assembly, as the United States abortively attempted to enforce the sanction for non-compliance with Article 17(2) under the terms of Article 19, demonstrated, however, that the General Assembly no longer had a vested interest in using this sanction and therefore the resolutions were binding but not enforceable.

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8. 55 U.N.T.S., in particular Art. XXIII.

9. *Certain Expenses of the United Nations* [1962] I.C.J.R. 151.

Because of the failure of the General Assembly to enforce the resolutions of the General Assembly under Article 19, these particular resolutions of the General Assembly on peace-keeping assessments come within a category of resolutions which are, for the present at least, binding under international law inasmuch as they would be recognized as such by an international judicial tribunal interpreting the United Nations Charter. They continue, too, to be treated as binding by the General Assembly until such time as a new formula is worked out to deal with these assessments. But they do not approximate the legislative act of municipal law-making authorities in the same way as a resolution of the Security Council under Article 42 of the Charter. Although a resolution of this type may not be enforceable it does, like other types of resolution, create a situation, however, in which legal authorization may be obtained by an international organization, a state or even an individual to act in a particular way.

In the working of the United Nations there are a number of situations where resolutions are undoubtedly recognized as having a binding legal effect, even though they do not necessarily create binding legal obligations upon member states nor may they be enforceable. A number of resolutions in this class relate to the basic working of the organization and its various constituent elements. They include, as Judge Lauterpacht pointed out in the *Voting Procedure* case, resolutions which appoint the Secretary-General of the organization, those which determine the rules of procedure, the admission to, suspension from and termination of, membership, and approval of the budget and apportionment of expenses. The full legal effects of these resolutions are, Judge Lauterpacht indicated, quite clearly "undeniable"<sup>10</sup>. To these resolutions listed by Judge Lauterpacht may be added a number of other law-making decisions which seem to fall into this category. These include the election of the non-permanent members of the Security Council and the approval of certain international agreements, like Trusteeship Agreements and agreements between the Specialized Agencies and the United Nations itself. Under the Statute of the International Court of Justice, the resolutions of the General Assembly and Security Council appointing the members of this tribunal clearly have the same type of legal effect as these other resolutions.

Basically, these resolutions relate to the internal ordering of the United Nations and as such will not generally have a direct, overt effect on the ordering of political relationships. But there are resolutions which are of a similar nature and quality which relate to the ordering of an international organization which can have much the same, if not identical, status under the existing norms of international law, and yet they do have a more direct effect upon political relationships. One of the most important resolutions of this type is one which empowers the Secretary-General of the United Nations to be entrusted with various "functions" under the terms of Article 98 of the Charter<sup>11</sup>. The Secretary-General enjoys clear immunities and privileges which are generally recognized under existing international law<sup>12</sup>, and where he is

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10. [1955] I.C.J.R. 120.

11. 5 *Repertory of Practice of U.N. Organs*, 156, 157; Supp. No. 1, vol. 2, 372-380; Supp. No. 2, vol. 3, 415-484.

12. See "Correction of the Privileges and Immunities of the United Nations", 1 U.N.T.S. 15, in particular sections 18, 19.

entrusted with a function such as Dag Hammarskjöld was by the Security Council in the early stages of the Congo crisis, and later by the General Assembly, the resultant exercise of these functions is protected by international law. A resolution vesting such functions in the Secretary-General creates immediately and directly a legal impact upon international relations. The Secretary-General will be immune from any plea of illegality in any international tribunal which might be called on to consider the legality of his actions. The Secretary-General may of course be called upon to answer for his action by either the Security Council or the General Assembly, but whilst he is acting in ostensible fulfilment of these functions he is protected by the existing precepts of international law.

In certain other circumstances, too, the ordering of the "administrative" machine of an international organization may create a legal shield for those who act in pursuance of empowering resolutions, even though the "administrative" functions which they perform are clearly political in character. One of the most important provisions of the Charter which has been used in this way is Article 22, which provides simply that the "General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions". Under the terms of this provision the General Assembly acted to put "teeth" in Chapter XI of the Charter, the "Declaration regarding Non-Self-Governing Territories", which some foundation members of the world organization simply regarded as being hortatory in its content<sup>13</sup>. Through the Committees of Information created under Article 22 it was possible to build up undoubted political pressures against a number of states which governed colonial territories which were not brought into the Trusteeship system. This "pressure" might not in itself have had any legal effect, particularly as these Committees were only subsidiary organs of the General Assembly, but the legal right of the Assembly to create this body as an instrument for assisting in the ordering of international relations was clear and unequivocal<sup>14</sup>. The same is true, too, with respect to the creation of the Committee of Twenty-Four to assist the General Assembly in implementing the Declaration on Colonialism of 1960<sup>15</sup>. Although political factors may also have motivated a country like Australia in voting for Resolution 1654 (XVI) which set up the original committee to implement the Declaration it is notable that this country voted for this resolution when it abstained from voting on the Declaration itself<sup>16</sup>. The General Assembly undoubtedly had the general authority to set up this body and those states, including Australia, which are represented on this committee can rely upon the existing principles of international law to sustain the legality of their actions in taking part in its deliberations.

A resolution of the Security Council dealing with Rhodesia, which was passed soon after the Unilateral Declaration of Independence, provides a good example, too, of a situation where a resolution of an international organization can have a direct and immediate legal effect upon international relations under

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13. Toussaint: *The Year Book of World Affairs* (1954), 142.

14. Castles: "The United Nations and Australia's Overseas Territories", *International Law in Australia* (1966), 389-392.

15. *Id.*, 392, 393.

16. As to the contents of the Declaration and its "legality" see *id.*, 392-395.

the existing principles of international law. In this resolution the Security Council called upon the international community to refrain, *inter alia*, from recognising the "illegal authority" in Rhodesia and for states "to do their utmost in order to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products"<sup>17</sup>. The resolution itself did not call for mandatory action and as such, like the Security Council resolution authorising intervention in Korea, did not create a binding, enforceable obligation in the same sense as a resolution under Article 42. But for these states which accepted the view that they should act in obedience to this resolution a legal situation was created in which they could look to the authority of this resolution to support, under international law, action which they might take in obedience to its dictates. Thus Britain could not be denied the right at international law to take steps to allow the people of Southern Rhodesia to determine their own future. In calling for states "to refrain from any action which would assist and encourage the illegal regime and, in particular, to desist from providing it with arms, equipment and military material, and to do their utmost to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products"<sup>18</sup>, the Council almost certainly provided legal protection for states which nullified legal relationships in obedience to this request. Thus, if a state acted in contravention of the express terms of a trade agreement with Rhodesia, in reliance upon this resolution, the paramountcy of United Nations obligations under international law, catalysed by this resolution, could negative the operation of this agreement.

Where there is no voluntary submission by a state to such a resolution, and it does not fall into one of the preceding categories, the determination of the legal status of a resolution of an international organisation enters an area where much more uncertainty and controversy seems to prevail. Only one thing seems to be clearly accepted with respect to these resolutions. Where they involve attempts to order international relations it cannot be deemed that they have a direct and immediate political impact upon the conduct of international affairs. In some instances the willingness of states to act upon these resolutions does in fact create a situation where these resolutions can be as powerful as any emanation of "law" in the international community. Thus the states ranged on the side of the General Assembly's recommendations" on the Suez crisis and the "*willingness*" they demonstrated to implement the terms of these resolutions contributed to the settlement of this conflict. Aside from this political effect, however, the decisions and commentaries on international law, where they touch on this subject, show a remarkable lack of agreement on the legal effect of these resolutions. In the arena of diplomatic debate, recourse to legal arguments is much more frequent than in the legal treatises. But here again there is a monumental lack of consensus.

As far as the legal debates on the status of these resolutions are concerned, aside from a few relevant comments by members of the International Court of Justice and an extremely limited range of other legal discussions on this topic, there is little guidance to be obtained from the literature of international

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17. (1965) 2 *U.N. Monthly Chronicle*, (December) 25, 26.

18. *Ibid.*

law. Not unexpectedly the most significant discussions that have taken place on the legal status of such resolutions have centred on the recognition to be accorded by international law to "recommendations" of the United Nations General Assembly made under the terms of Articles 13 and 14 of the Charter. In discussing these resolutions the preponderant opinion seems to have fallen on the side of Kelsen's assertion in his *Law of the United Nations* that "recommendations, by their very nature, do not constitute a legal obligation to behave in conformity with them"<sup>19</sup>. One commentary has gone so far as to suggest that these recommendations are merely "goads" which may have their "uses"<sup>20</sup>. Some countervailing arguments have been made, notably by Sloan, who wrote in 1948<sup>21</sup>, that at best it can only be said that "there is a presumption against these recommendations possessing binding legal force". The most quoted sections of the opinions of the Judges of the International Court of Justice which have discussed this matter seem to lean to Kelsen's conservative view, although they are certainly not as extreme as the contention that the resolutions are merely "goads" which have their "uses".

In his opinion in the *Voting Procedure* case<sup>22</sup> Judge Lauterpacht contended that "by way of broad generalization" resolutions of the General Assembly are not legally binding upon the members of the United Nations. While a state was not bound generally therefore to accept a "recommendation" Judge Lauterpacht did assert, however, that a state was bound to give "due consideration in good faith" to a resolution which might "recommend" that it should follow a particular course of conduct, particularly where a resolution, under the Trusteeship system, for example, sought to define the obligation of an administering authority under the United Nations Charter. His duty to consider such a resolution in good faith, Judge Lauterpacht considered, meant that "whatever may be the content of the recommendation and whatever may be the nature and circumstances of the majority by which it was reached, it is nevertheless a legal act of the principal organ of the United Nations which members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly"<sup>23</sup>. Along the same lines as Judge Lauterpacht, Judge Klaested in the same case seems to reach much the same conclusion. Where a state does not comply with a resolution, he contended that the effects of a resolution were "not of a legal nature in the usual sense, but rather of a moral and political character". Like Lauterpacht, Judge Klaested agreed that a state to which a "recommendation" was directed was bound to consider it in good faith, but "a duty of such a nature, however real and serious it may be", he concluded, "can hardly be considered as involving a true legal obligation"<sup>24</sup>.

Fortified no doubt by generalised assertions like this, made in the International Court of Justice and in commentaries on international law, a number

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19. Kelsen: *The Law of the United Nations* (1951), 195, 196.

20. Goodwin: *Britain and the United Nations* (1957), 372.

21. Sloan: "The Binding Force of a 'Recommendation' of the General Assembly of the United Nations", (1948) 25 B.Y.I.L. 1. See also Johnson: "The Effect of the General Assembly of the United Nations", (1955-1956) 32 B.Y.I.L. 97.

22. [1955] I.C.J.R. 66.

23. *Ibid.*, at 120.

24. *Id.*, at 88.

of states, including Australia, have on many occasions adopted the conservative view that most resolutions of an international organization cannot be binding under international law. South Africa, for example, has long relied upon the assertion that it is under no obligation to accord any legal standing to resolutions dealing with apartheid, as these have been passed in violation of Article 2 (7) of the Charter. Portugal with respect to Angola and Mozambique, Britain in countering United Nations resolutions on Rhodesia before the Unilateral Declaration of Independence last November, France with respect to Algeria, and a number of other states in particular circumstances have emphasized that most resolutions impose no obligations on a state under international law. An examination of the Australian attitude towards the resolutions of United Nations organs dealing with colonial questions, particularly with reference to Papua-New Guinea and Nauru, suggests that formalistic legal arguments have long been a feature of our public stand on many of these questions when they have been debated in the United Nations. Just after the Trusteeship system came into existence, Australia was arguing that this country was not bound to give effect to resolutions emanating from United Nations organs which queried the validity of the union between Papua and New Guinea<sup>25</sup>. Through the 1950s, in further discussions on the amalgamation of the two territories, and in other debates on trusteeship, Australia continued to propound similar views. The Minister of Territories, in a recent official statement said, for example, that: "Australia has no obligation to pay regard to resolutions passed by the United Nations in disregard of the situation in the Territory and everything that is known about the wishes of the vast majority of its inhabitants"<sup>26</sup>.

The legal arguments which have been adopted to support views like these include an extreme consensualist approach which has been put forward on occasion by the Soviet Union. At the sixteenth session of the Sixth Committee of the General Assembly the Soviet representative claimed, for example, that alterations in international law "were effected by agreements between states which constituted the only means of creating and changing the norms of international law"<sup>27</sup>. At the following session of the Sixth Committee, Sir Kenneth Bailey of Australia was less restrictive in his attitude to the law-making force of General Assembly resolutions. But the principles which he espoused to ascertain the creative elements in international law showed that his disagreement with the previously expressed Soviet attitude was marginal only. Sir Kenneth stated that there were generally only three circumstances where a resolution could acquire the status of "law" in the international community. These were, he declared:

- (a) when the rule was either embodied in a treaty entered into in accordance with the constitutional processes of the parties to the treaty which created the organization;

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25. Castles: "International Law and Australia's Overseas Territories", *International Law in Australia* (1966), 324, 325.

26. "U.N. Resolutions on Papua and New Guinea and Nauru" (statement by the Minister for Territories, the Hon. C. E. Barnes, M.P.—Department of Territories press release, 66/65).

27. G.A.O.R., Sixth Committee, 16th session, 717th meeting, para. 13.

- (b) the rule was generally acted upon in the practice of states out of a conviction that states were bound so to act;
- (c) the rule was adopted by a judicial or similar tribunal authorized to declare and apply the law<sup>28</sup>.

Applying each of these law-creating principles to resolutions of the General Assembly the Solicitor-General concluded that "the adoption of a resolution did not correspond to any of these three processes and was not, under the Charter, a method of making international law"<sup>29</sup>.

In marked contrast to Sir Kenneth Bailey's views, in this same debate, a number of other delegations strongly disagreed with the Solicitor-General's opinion on the general law-making function of General Assembly resolutions. Representatives from Africa, Asia, South America and the eastern bloc countries, too, demonstrated quite clearly, for the moment at least, and in the particular context, that they attached much greater legal significance to the resolutions of the General Assembly than Australia was prepared to accord to them. The views of many of the delegates from these countries echoed the opinions which have been officially expressed by many of these states in a wide variety of debates in the United Nations in recent years. Joined by delegates from Poland and other eastern bloc countries, representatives from Africa, Asia and South America suggested that the resolutions of international organizations did, in various ways, contribute to the creation and operation of international law<sup>30</sup>. The representative for Panama<sup>31</sup>, for example, acknowledged, as did several other delegates, that the principle of self-determination had matured into a legal concept following successive resolutions in the United Nations on this subject. In other ways, too, delegates from many of these countries pointed to examples of General Assembly resolutions which they considered had broadened or amplified existing rules of international law and in some cases had created new legal principles to regulate international relations.

In the light of this situation, which seems to demonstrate that there is an unbridgeable gulf between significant groupings of states on the legal status of many General Assembly resolutions, it may well be concluded that there is in fact no "law" at the moment which has any meaningful operation in this field. Indeed, this contention seems to be fortified by the fact that many of the participants in this debate in the Sixth Committee, which related to the preparation of a declaration embodying the "legal" principles of co-existence, were no doubt inspired by political motives in strongly adhering to the law-creating function which they ascribed to General Assembly resolutions. There is little doubt that a number of the states which supported the promulgation of this declaration on this occasion would not be prepared in different circumstances to take the same attitude. Many Afro-Asian states, for example, and South American countries, too, have shown that they are not prepared to accept the

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28. G.A.O.R., Sixth Committee, 17th session, 758th meeting, 120, paras. 13-15.

29. *Id.*, para. 14.

30. *Ibid.*, (and also 759th-769th meetings).

31. *Ibid.*

binding force of General Assembly resolutions dealing with minority groups in their own countries<sup>32</sup>. At the same time most of these states have been prepared to support the many resolutions which have been passed by the General Assembly on apartheid. While rationalizations and fine distinctions might be suggested to explain these differences away there is abundant evidence to show that many states have in fact a schizophrenic attitude to the law-making effect of General Assembly resolutions. The condonation of this schizophrenic attitude by the international community suggests that law, in the traditional sense at least, has yet to lay down firm rules to assess the binding nature of many of these resolutions.

To let the matter rest at this level, however, it is suggested, is to misunderstand the special law-making functions which an international organization like the United Nations can be called upon to undertake, under the existing norms of international law. Because each of the "law-government" institutions in the international community, including such bodies as the General Assembly, have a rôle to play in the formation of rules to govern international conduct, the status of many of these controversial resolutions may in fact be greater under existing international law than the disagreements on their law-making authority would seem to suggest. There is in fact considerable support to be found in the existing rules of international law and in the practice of states to demonstrate that "recommendations" like those of the General Assembly should be considered at two levels of operation. On the one hand, when these resolutions emerge in the form of "declarations" or other statements "interpreting" the provisions of the organic instrument which orders the operation of the organization, a good case can be made out for recognizing these declarations or statements as the only definitive "legal" definitions of these instruments, in certain circumstances. At the second level, although a resolution may not purport to interpret the organic instrument of the organization it may, under the existing law creating structure of international law, become a potent source for the establishment of international legal obligations.

In considering the legal status of the interpretive functions which may be carried out by international bodies, like the General Assembly, some of these resolutions which carry out this task may be in fact the only definitive rulings which can set standards with respect to the empowering provisions of a legal instrument like the United Nations Charter. In the case of the General Assembly and with respect to the Security Council, too, neither body is bound by the decisions of the International Court of Justice on the interpretation of the Charter and neither of these bodies is under any obligation to seek the opinion of the Court on the meaning of the Charter<sup>33</sup>. Added to this, in the case of these United Nations bodies there is strong support for the contention that each principal organ of the world body was always intended to carry out its own interpretation of the terms of the Charter which relate to the organ's

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32. Castles: "The United Nations and Australia's Overseas Territories", *International Law in Australia* (1966), 397, 398.

33. 5 *Repertory of Practice of U.N. Organs*, 45-47; Supp. No. 1, vol. 2, 322-326; Supp. No. 2, vol. 3, 379, 380.

sphere of activities, subject to voluntarily seeking "advice" from the International Court on a controversial question<sup>34</sup>.

Even if there was authority vested in the International Court of Justice to make binding and authoritative interpretations of the United Nations Charter there are almost certainly provisions in this instrument which are not susceptible to traditional legal analysis under the existing Statute of the Court. The reasons for this are not hard to find. *First*, the Charter is not a precisely worded document in many places and indeed it would have been difficult, if not impossible, to get agreement at San Francisco on a document which did not contain many ambiguities and references to "aims", "principles" and "purposes". Thus, as Professor Quincy Wright once pointed out "even if some of the operational clauses appear precise in their terms, the symbolic preamble and broad assertions of purposes and principles provide ample opportunity for supplementing, complementing or modifying their apparent meaning"<sup>35</sup>. *Secondly*, even without reference to these aims, principles and purposes, a number of provisions are hortatory in their content and may not be susceptible to traditional legal analysis by bodies such as the International Court of Justice.

The fact that a provision in the Charter may not be susceptible to legal analysis does not mean, however, that the opinions of a political organ in interpreting such a provision cannot be law-making in their effect. Where provisions are interpreted in the light of aims and principles or when they are hortatory in their content, as in Chapter XI of the Charter and to some extent in Chapter XII, political judgment seems to be required by the Charter itself to determine, through resolutions of the appropriate United Nations organs, the meaning to be ascribed to these provisions. These resolutions, *for the time being*, set the standards which are required by the international organization for implementing the terms of its authority. In these circumstances, the judgments of the political bodies which are empowered to do this are paramount and in the case of the General Assembly resolutions and those of the Security Council, these are, in the absence of advice being sought from the International Court of Justice, the only rulings which can be given on the meaning of these provisions.

In view of the implications which arise from this contention, it is not surprising that a number of states, including Australia, in recent times have refused generally to accept the view that the exercise of an interpretive function by an international organization differs in nature and quality from any other resolution. The acceptance of this view means, for example, that the

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34. Report of Rapporteur of Committee IV/2, San Francisco Conference, U.N.C.I.O. Docs. XIII, 646; 92 *Hague Recueil* (1957), ii, 5; Higgins: *The Development of International Law through the Political Organs of the United Nations* (1963), 7. Thus, as was pointed out in the *Expenses* case: "As anticipated in 1945, therefore, each organ must, in the first place, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorisation in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organisation'": [1962] I.C.J.R. 168 (majority opinion). See also the separate opinion of Judge Morelli, *ibid.*, at 233, 234.

35. Wright: *International Law and the United Nations* (1960), 33,34.

General Assembly and Security Council would be accorded the right to decide whether apartheid is a subject within its competence. It means, too, that the Declaration on Colonialism and the Uniting for Peace Resolutions should be granted a more significant legal status than a number of states, at various times, have been prepared to grant to these resolutions. As one South African commentator recently stated, it is not easy to refute the conclusion that United Nations organs have it within their competence to interpret the Charter<sup>36</sup>. Indeed, in the light of the debates at San Francisco, opinions of members of the International Court of Justice and state practice in the United Nations, a strong case can be made out to uphold the view that the interpretive powers of these organs are well recognized under the existing norms of international law. At San Francisco in 1945 proposals were made to give the International Court of Justice the ultimate authority under the proposed Charter to interpret this instrument. These suggestions were not accepted, however, and it is clear from the resulting situation that each of the main organs of the new world organization were empowered, within the framework of their authority, to determine the ambit of their power under the Charter. In the case of the *Certain Expenses of the United Nations* there are at least two judgments which affirm that this is the position<sup>37</sup>. There are other opinions of the Court, too, which support this conclusion<sup>38</sup>. Moreover, the practice of states in the United Nations provides more support for this view than may be apparent at first glance when only one controversial area of discussion in the United Nations is examined. It is instructive, for example, to compare the attitude of some states to the law-making function of the Uniting for Peace Resolutions and the Declaration on Colonialism. In nature and quality, as "interpretations" of powers and functions under the Charter, these resolutions differ little, if at all, and in both instances there were large numbers of states which supported the passing of these resolutions. Australia, however, abstained from voting on the Declaration on Colonialism and the tenor of the Australian delegate's remarks in the General Assembly indicated that even with the passing of the resolution Australia would consider it to be no more than a series of exhortations<sup>39</sup>. On the other hand, this country supported, admittedly with some show of reluctance in the Political Committee, the passing of the Uniting for Peace Resolutions. In the Political Committee Sir Percy Spender pointed out that the Australian delegation "had some misgivings"<sup>40</sup> on the legality of the resolutions. But, echoing sentiments which are not dissimilar to the assertions of a number of delegations which supported the Declaration on Colonialism, Sir Percy affirmed that "the machinery established by the Charter must be put in a position to work . . . the deficiencies in the machinery established by the Charter must be corrected"<sup>41</sup>. The legal authority for passing the Uniting for Peace Resolutions, in the Australian view, was to be found in

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36. Dugard: "The Legal Effect of United Nations Resolutions on Apartheid", (1966) 83 *South African Law Journal* 44, at 54.

37. See n. 34 *supra*.

38. In a modified form this view seems to be accepted by Sir Percy Spender in his judgment in the *Expenses* case: [1962] I.C.J.R. 197. See also the opinion of Judge Alvarez in the *Anglo-Norwegian Fisheries* case: [1951] I.C.J.R. 116.

39. G.A.O.R., Fifteenth Session (Pt. 1), Plenary Meetings, vol 2, 993rd meeting, 1090-1093.

40. G.A.O.R., First Committee, 5th session, 356th meeting, 74, para. 12.

41. *Id.*, 73, paras. 2, 4.

Article 1, paragraph 1 of the Charter, which is of course a repository of "purposes" for the United Nations. In much the same fashion, but perhaps with greater support in the more precise provisions of the Charter, the Declaration on Colonialism depends for its legality upon a collective interpretation of a number of Charter provisions by the General Assembly as well as the purposes of the organization<sup>42</sup>.

In carrying out this rôle of "interpretation" it would seem that the General Assembly's resolutions in this context set legal standards on the interpretation of the Charter and set them in a way which seems to be acknowledged in the constitutional law of Australia and other countries, too. In national legal systems, including the Australian system, albeit in a more modified form, because the institutional framework of government is more sophisticated than in the international community, it seems to be recognised that there are circumstances where political judgment is required to determine the ambit of operation of constitutional powers<sup>43</sup>. There are well recognized occasions where national courts defer to the political organs of government in their interpretation of constitutional provisions. In national legal systems where this interpretive technique is accepted, "law" in the strict sense of judicially determined standards of interpretation defers to "politics". But this does not mean that the nature and quality of such decisions by a political instrument of government differ in their legal effect in the community. They are as legally binding and enforceable as any judicial decision. In the same way, but more frequently because of the present institutional structure of the international community, political decisions create law in the international community, although they often lack the enforceability of such decisions under municipal law.

The fact that international bodies, like the General Assembly, may have a wide discretion to interpret and so determine their legal powers is not the only reason, however, why these and other resolutions which are not interpretive may be considered to have a law-making effect under the existing norms of international law. There are other grounds, too, which suggest that single resolutions and certainly an accumulation of resolutions may set legal standards for the ordering of international relations. Judge Lauterpacht's view that a resolution can only be rejected in "good faith" clearly encompassed the notion that an accumulation of resolutions on the same subject matter could create a situation in which a state could reach a stage where it was acting illegally by its constant rejection of the directives of such resolutions. As he stated in the *Voting Procedure* case with respect to a power administering a colonial territory under an international regime such as trusteeship: "Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and of the System of Trusteeship. An administering state may not be acting illegally by declining to act upon a

42. Castles: "The United Nations and Australia's Overseas Territories", *International Law in Australia* (1966), 392-395.

43. E.g., see Harrison Moore: *The Constitution of the Commonwealth of Australia* (2nd ed. 1910), 208, 209, 492, 493; Harrison Moore: 7 *J. Comp. Leg.* (3rd ser.), 155, 163; *South Australia v. The Commonwealth* (1961-1962) 35 A.L.J.R. 460, at 461, *per* Dixon C.J., Freund, Sutherland, Howe and Brown: *Constitutional Law; Cases and Other Problems* (1954), vol. 1, 57, *et seq*; *Baker v. Carr* (1961), 369 U.S. 186, 7 Law Ed. 663 (judgment of Frankfurter J.); Maunz: *Deutsches Staatsrecht* (5th ed. 1956), 78 *et seq*.

recommendation or series of recommendations on the same subject. But in so doing it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the state in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an administering state which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction"<sup>44</sup>. The law-making force of an accumulation of resolutions on a particular subject may also find legal force from another source of rule-making in the international community. The unanimous or almost unanimous practice of states as exemplified in their consistent support for a series of resolutions on a particular matter may also indicate that a particular practice has become a recognized element of customary international law. It is always difficult, however, to determine when mere usage is translated into a customary rule in the international community. Even so, when there is virtual unanimity in supporting a declaratory resolution like the Declaration on Colonialism, which itself follows a fairly consistent line of decision-making on colonial questions over a period of years, it is hard to deny that such a manifestation of opinion is not a "rule" under this source of international law.

Although a variety of arguments may be advanced therefore to show that many resolutions of a body like the General Assembly may be binding and authoritative under international law, this does not mean of course that they have, in the normal course of events, any marked degree of enforceability. Steps are possible to make them directly enforceable by the Security Council taking up a matter dealt with by the Assembly. But in the ordinary run of cases the enforceability of General Assembly resolutions and many of the Security Council, too, is determined by a variety of factors, operating separately or in combination. These factors may, and often do, lead to compliance with these decisions. A state, for example, may consider itself to be bound legally or morally<sup>45</sup> to accept the rulings of a body like the General Assembly. More often, though a state may argue that it is not bound in either of these ways to obey a resolution, the pressures or needs of international diplomacy frequently dictate compliance with these rulings. This obedience may be for various reasons. One suggested by Higgins is the "sanction of reciprocity". By this sanction, she points out, the international rulings may be widely heeded because a breach might "incur a reciprocal response"<sup>46</sup>. In some instances, there may also be circumstances where states, individually or collectively, may be prepared to take active steps to enforce the terms of these resolutions. Ultimately, the degree of enforceability in these latter two circumstances depends upon the *willingness* of states to demand adherence to these resolutions and the steps that they are prepared to take to implement these decisions.

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44. [1955] I.C.J.R. 120.

45. Higgins: *The Development of International Law through the Political Organs of the United Nations* (1963), 7; Kaplan and Katzenbach: *The Political Foundations of International Law* (1961), 1 *et seq.*

46. Higgins, *op. cit.*, 8.