COMMENTS

LAW MAKING IN THE UNITED NATIONS*

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That the United Nations makes law is clear at a glance. In fact, the United Nations, in one way or another, is a major, perhaps the major, engine of contemporary international law making. That is not to say that the engine always puffs in the right direction. But puff it does. Let us recall some of the multiple ways in which the United Nations makes law, comment upon them, and then measure the process against the simplistic question: is it a good thing? Among the ways in which the United Nations makes law are these:

1. It interprets treaties, notably, it interprets the Charter of the United Nations.

2. It proposes treaties, as a principal way of "encouraging the progressive development of international law and its codification".[1] These treaties, when they are accepted by States and come into force, of course have the force of law.

3. It adopts declarations of what the Members of the United Nations believe the law to be.

4. It makes recommendations as to what the law should be, if not what it is—a process often not marked by a clear line of demarcation between *lex lata* and *lex ferenda.*

5. It serves as a convenient forum for a capsulated expression of the practice of States, a practice much faster and more easily recorded than the episodic and incomplete exchange of diplomatic notes between States. That is, it serves as a forum for the expression of claims and counter-claims, and acceptance of, acquiescence in or resistance to those claims—a forum for the accelerated growth of customary international law.

6. Through its International Court of Justice, it develops international law through judicial decision, as national courts develop national law through judicial decision.

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[1] Article 13 of the Charter.

And there are other, lesser ways in which the United Nations makes law—for example, when it makes treaties with other international organizations, when the Secretary-General accepts a ratification of a treaty accompanied by a reservation as a ratification sufficient to bring the treaty into force, or when the Administrative Tribunal of the United Nations develops the administrative, staff law of the Organization.

In these remarks, the contribution of the International Court of Justice will not be elaborated. Not because that contribution is unimportant; rather, because its importance has been so fully set forth in familiar works, such as Judge Sir Hersch Lauterpacht's magisterial treatise on *The Development of International Law by the International Court.*

Interpretation of Treaties

The United Nations Charter is a constituent, constitutive instrument. It has given birth to an Organization, a continuing body which is in the continuous process of interpreting that instrument, with, it is submitted, law-making effect. Sometimes the effect is progressive, sometimes it is regressive. But an effect there is.

Two examples may be cited. The Charter provides that—

> Decisions of the Security Council on all other matters [than procedural matters] shall be made by an affirmative vote of seven [now nine] members including the concurring votes of the permanent members . . .[2]

The "plain meaning" of that proviso is that, if a permanent member does not concur—does not vote affirmatively—for a substantive resolution, the resolution does not carry. That is one more illustration of the inadequacy of the rule of plain meaning in the interpretation of treaties. For, from the outset of the history of the Organization, the Security Council has chosen not to interpret the abstention of a permanent member as constituting a veto. By this interpretation of the Charter, and by the consistent subsequent practice of the Council in pursuance of it, the United Nations has made a law: that substantive resolutions can be adopted by the Council without the affirmative, concurring vote of one of the permanent members. In fact, as Portugal has lately complained, a resolution could be adopted by the expanded Security Council without the affirmative, concurring vote of *any* of the permanent members. Portugal has belatedly protested the legality of resolutions of the Council adopted while one or more permanent

[2] Article 27.

members abstain, but neither the Council nor the Secretary-General is willing to admit Portugal's view. This development may be regarded as an exercise in progressive law-making.[3]

A second example concerns the General Assembly's exercise of one of its few binding, dispositive powers: that of approving the budget and apportioning the expenses of the Organization, which "shall be borne by the Members". It will be recalled that the Assembly, in pursuance of these provisions of Article 17, assessed the expenses of peacekeeping operations in the Middle East and Congo, as it had earlier assessed similar if lesser expenses; that, when the binding character of these expenses was challenged, it sought an advisory opinion of the International Court of Justice; that the Court held that they were binding; that the Assembly accepted the Court's opinion—and, after all that, that the Assembly refused to apply the mandatory and automatic provision of Article 19 of the Charter to suspend the votes of Members who were in arrears in their payments within the terms of that article and the intendment of the Court's opinion. In effect, then, the Assembly reversed itself and reversed the Court; it treated the assessments for peacekeeping as not being binding. This was law making, or law destroying; it was an act or non-act of great political and legal effect; and, it is submitted, was an exercise in regressive law making.

Proposition of Treaties

A second large way in which the United Nations makes law is through the process of codification and progressive development. The Secretary-General invited the then Professor Lauterpacht to draw up a list of subjects requiring codification; the International Law Commission accepted items of that list; it has labored over producing drafts of treaties codifying those subjects; those drafts are submitted to governments in the various stages of their production; they are revised in the light of the comments of governments; and finally they are submitted to conferences of plenipotentiaries who further revise them and produce treaties which make a lot of law. So far, there have emerged from this process conventions on the high seas, fishing and conservation of the living resources of the high seas, the territorial sea and the continental shelf; diplomatic relations, consular relations, and, very recently, the first treaty in history endeavouring to codify the law of treaties. Other treaties are in various, predominantly preliminary, stages of

[3] See the article by the Legal Counsel of the United Nations, C. A. Stavropoulos, "The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, paragraph 3, of the Charter of the United Nations" (1967) 61 Am.J.Int.L. 737. A different view is expressed by L. Gross, "Voting in the Security Council: Abstention in the Post-1965 Amendment Phase and its Impact on Article 25 of the Charter" (1968) 62 Am.J.Int.L. 315. South Africa has lent support to Portugal's viewpoint.

preparation—special missions, state succession, state responsibility and so forth. The importance of the process is very great, not only in its clarification and development of areas of the law, but in its association of the newly sovereign states with the process of modernizing and expanding international law.

Proposition of treaties, moreover, is by no means limited to the International Law Commission and its attendant processes. Numbers of treaties are drafted by other U.N. organs, such as the covenants on human rights and racial discrimination, and the treaty on outer space.

Declarations of What the Law Is

It has been noted that the decision-making capacity of the General Assembly is limited. Nevertheless, the Assembly has contributed to international law making by adoption of resolutions, unanimously or virtually so, which declare the understanding of Members as to what the law on a matter is. Thus the General Assembly unanimously approved the Nuremberg principles.[4] It is submitted that, if there is doubt as to whether those principles were the law at the time of the trials—a doubt believed to be unfounded—there is no doubt that they are the law today. Why? Because the members of the international community, or nearly all of them, have unanimously said that they are. Similarly, when all Members of the United Nations vote for a resolution saying that space is the province of all mankind and celestial bodies are not capable of national appropriation, that is the law—even if, later, *ex abundanti cautela,* or out of an abundance of desire to create an impression of political progress without risk—a treaty is thought to be necessary which says the same thing.

Now, strictly speaking, in this last process, the Assembly is not making law, it is declaring what the law already is. Obviously a lot of law-making can creep into that process. But the important point is that if the Assembly, not having the power generally to legislate, is going to declare what the law is, in response to the fact that all or virtually all States are agreed as to what the law is, then all States or virtually all States must in fact so agree. That is to say, the Assembly vote must be unanimous, or, in the least, not characterized by the negative vote of any consequential segment of mankind. The Assembly can only stultify itself if it adopts a resolution which purports to be declaratory of international law, when, say, twenty States, including those having the predominant industrial and military strength of the world, by their votes demonstrate that they do not agree. However, if, for example, twenty or more Western States lack the guts or judgment to vote the way they (at any rate, their legal advisers) think, then a situation of confusion and danger arises. What is the law and what is

[4] General Assembly Resolution 95 (1).

a yielding to the political pressures of the moment become confused, to the detriment both of the law and the longer run political interests of States. It is believed that aspects of the General Assembly's "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty" provide a salient example.[5]

Recommendations as to What the Law Should Be

When the Assembly is split, it may nevertheless properly adopt resolutions which, while not law making, show the direction in which a majority—presumably, a two-thirds majority—of the Assembly believe the law should evolve. This may of course have a law-making influence in the long run, though not a law-making effect in the short run. The "Declaration on Permanent Sovereignty over Natural Resources"[6] may be said to fall into this category. With the abstention of the Soviet bloc and two other Members, and the negative votes of France and South Africa, the Assembly in effect held that contracts between States and aliens are binding and that, where a state takes foreign property, it is obliged to pay "appropriate" compensation—a provision allowing for a range of interpretation, but one which excludes the Communist contention that no compensation is payable. Indeed, it might be argued that this resolution, adopted by a vote of 87 in favour, 2 opposed and 12 abstentions, attracted a consensus sufficiently widespread so as to be declaratory of international law.[7]

The Practice of States

The practice of States may of course be law creative. That practice need not only be expressed unilaterally and treated bilaterally. States are not confined to diplomatic notes, promulgation of laws, and so forth; by their expressions in international organizations, by their views and their votes, they can develop customary international law, provided that

[5] Resolution 2131 (XX). See, in this regard, Sir Kenneth Bailey's account of the subsequent citation of Resolution 2131 in the United Nations Special Committee on the Principles of International Law Concerning Friendly Relations and Co-operation among States, in "Making International Law in the United Nations" (1967) 61 *Proceedings of the American Society of International Law* 233, 238. See also the statement made by the Representative of the United States in explanation of his favourable vote on the resolution, describing it "as a political Declaration with a vital political message, not as a declaration or elaboration of the law governing non-intervention". (United Nations General Assembly, Twentieth Session, First Committee, Verbatim Record of the 143 Meeting, A/C. 1/PV.1422, p. 12).

[6] Resolution 1803 (XVII).

[7] See R. Higgins, "The Development of International Law by the Political Organs of the United Nations" (1965) 59 *Proceedings of the American Society of International Law* 121-122. See also S. M. Schwebel, "The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources" (1963) 49 A.B.A.J. 463.

such practice is repeated, consistent, and reasoned, and provided that, in time, it is accepted by States as expressive of legal obligation.[8] "Collective acts of states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law."[9]

Two controversial examples may be given. When the General Assembly consistently and repeatedly and with virtual unanimity calls for ending colonialism—in terms which state that "All peoples have the right to self-determination"—and when the predominant colonial powers act or are pressured into acting as if they accept that call as in accordance with the law, then it may be argued that the law is that indefinite maintenance of colonialism, where the population in point is not afforded the opportunity for a genuine expression of self-determination, is unlawful.[10]

However, to turn to another case, even though the Security Council and General Assembly recurrently hold that the exercise of armed reprisal is unlawful, it is perhaps questionable whether it is, at any rate because of such declarations,[11] in a situation where the United Nations largely ignores reprisal by great powers and condemns it if exercised by Israel but fails to condemn it if it is exercised by an Arab State. The facts of international life must bear some resemblance to the rhetoric if law is to emerge.

Are the United Nations processes of law creation desirable? For the most part, yes. They have developed the law of the Charter, principally in a direction which strengthens the reach and the reality of the Organization. They have provided a vital means for the expansion of the multilateral treaty network, both through the codification of international law and its progressive development. They have provided a

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[8] See K. Bailey, *op. cit.*, R. Higgins, *op. cit.* and R. Higgins' seminal book, *The Development of International Law through the Political Organs of the United Nations* (1963), especially 1-10.

[9] *Id.*, 2.

[10] Mrs Higgins concludes, after an examination of United Nations practice as of 1962—a practice which has been reinforced since—that it "seems inescapable that self-determination has developed into an international legal right . . ." *Id.*, 103. As of 1962, that conclusion may have been open to question, since, as Mrs Higgins concedes, those Members which abstained on resolution 1514 (XV) did not favour it. (See the review by the writer of Mrs Higgins' book in (1966) Yale L.J. 677, 679.

See also Sir Kenneth Bailey's comments *op. cit.*, 235-236. Sir Kenneth notes that the General Assembly's "Declaration on the Granting of Independence to Colonial Countries and Peoples" (Resolution 1514 (XV) "was so extreme and tendentious in some of its propositions as almost to underline the absence of any obligatory character". While this is right, the resolution subsequently has been repeatedly reaffirmed and relied upon in other General Assembly resolutions which have been supported even by leading States which abstained on the resolution when it was adopted in 1960 by a vote of 89 to none with 9 abstentions.)

[11] It may be maintained that armed reprisals are barred by the provisions of the Charter, notably Article 2, paragraph 4.

channel through which States can accelerate the formation of customary international law. These are contributions of significance, upon which more can be built. But of course the content of change, as well as the process, is critical; the substance of legal change, if it is to be desirable, must be progressive, that is to say, it must promote the interests of the international community at large. By and large, the United Nations has met that test.

But there is one key proviso of the process which is worth reiterating: in the creation of customary international law, States must realize that they are speaking prose all the time. Accordingly, they must vote and speak in the United Nations with the realization that their votes and speeches may be law creative, that they may not be merely transient political expressions. If the processes of United Nations law making are taken seriously, their results should be expressive both of the facts and the aspirations of international life. To the extent that they are, it may be hoped that law making by the United Nations will be increasingly progressive in its direction and significant in its effects.