BYU Law Review

Volume 1985 | Issue 3 Article 2

9-1-1985

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I. Introduction: Distinguishing Law and Politics

International law has traditionally been regarded as a "body of rules and principles . . . binding upon . . . states in their relations with one another."[1] In contrast, Weston, Falk, and D'Amato suggested that international law should be viewed not as a set of rules applicable to states but rather as "a configurative *process* of authoritative *and* controlling decision which, through an interpenetrating medley of command and enforcement structures, both internal and external to nation-states, effects value gains and losses across national and other equivalent political boundaries."[2]

The first definition has the advantage of simplicity. The second, though weighed down with professional jargon,[3] is more consistent with the growing complexity of contacts within the global system and the normative structures that have developed to regulate those contacts. States are still the principal subjects of international law, but they are not the only subjects. In addition to states, intergovernmental organizations, and, for some purposes, individuals[4] and nongovernmental organizations, are

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1. J. Brierly, The Law of Nations 1 (H. Waldock ed. 1963).

2. B. Weston, R. Falk & A. D'Amato, International Law and World Order 14 (1980).

3. The definition has much in common with concepts and terminology found in the work of Myres McDougal and David Easton. *See, e.g.*, D. Easton, A Framework for Political Analysis 50 (1965); D. Easton, The Political System 129, *passim* (1953); McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S.D.L. Rev. 25, 34-35 (1959).

4. For a discussion of individuals and private organizations as subjects of international law, focused on a recent refusal by U.S. courts to take jurisdiction of a damages action against the Palestine Liberation Organization arising from a 1978 terrorist attack

juridical persons with rights and duties under international law. The International Centre for the Settlement of Investment Disputes, for example, was established precisely because of the need for judicial settlement procedures not subject to the control of any government and applying equally to governments and private entities.[5]

This article adopts a concept of international law, like the Weston definition, that embraces a variety of principles, rules, and cross-national decision processes applied to a variety of subjects ranging from states to individuals. Use of the term "law" will differ in one important respect from that of Weston and his colleagues, however. They treat law as a *process* of effecting "value gains and losses." I will retain the more traditional notion of law as a body of *principles, rules,* and *norms* having some obligatory or binding character.[6] Legal rules affect the process of distributing rewards and benefits, but they are not synonymous with it. Among political scientists, "the authoritative allocation of values for a society" has long been accepted as a definition of politics, not of law.[7] Defining law as a process for effecting

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in Israel, see the concurring opinions in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied,* 105 S. Ct. 1354 (1985); see also the exchange of comments by Anthony D'Amato and Alfred P. Rubin in D'Amato & Rubin, *Agora: What Does Tel-Oren Tell Lawyers?,* 79 AM. J. INT'L L. 92 (1985).

5. A. LOWENFELD, INTERNATIONAL PRIVATE INVESTMENT 150 (International Economic Law No. 2, 1976).

6. Weston, Falk, and D'Amato are not alone in their aversion to the traditional definition. As Gaetano Arangio-Ruiz has observed:

> The unpopularity of the notion of law as "rules" or "norms" is a recurrent phenomenon explainable partly as a reaction against narrow-minded, formalistic and conservative notions of the legal system and the legal system's operation—within or without the Courts—partly as the understandable "satiété" of any lawyer with the law he continuously lives with. The truth remains that law is essentially made of rules.

G. ARANGIO-RUIZ, THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW (1979); see also H. HART, THE CONCEPT OF LAW 78 (1961), which states that the idea of rule is essential "to elucidate even the most elementary forms of law."

7. D. EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 50 (1965). Another modest problem of definition sometimes arises from subsuming all authoritative decision-making processes within the broad rubric of "politics." When courts resolve disputes by applying legal rules to the facts of a case, we often speak of the "legal" or "judicial" process at work. Yet an authoritative allocation of values has occurred, which makes the process political. Fortunately the problem here is semantic rather than conceptual. The law consists of norms and rules, but the act of applying them—whatever the label—is political in the broad sense. The judicial process is simply a specialized means of authoritative value allocation in which the principal actors are judges and lawyers rather than legislators or lobbyists. The process may be "judicial" because judges do it, but it is still a

"value gains and losses" obliterates the distinction between law and politics and invites analytical confusion. The essential distinction between the two is preserved by treating law as norm or rule and letting politics refer to the processes of authoritative value allocation.

Although law and politics are not identical, the Weston focus on law as a process draws attention to their close interconnection.[8] As a product of the political process, law is the medium that defines and legitimizes certain value allocations. Once enunciated, law affects subsequent value allocations by inhibiting some political actors and extending the reach of others in their efforts to influence policy formulation. Law, moreover, is virtually meaningless without reference to its origin and application within the political process. Principles and rules standing alone are mere abstractions. They gain meaning and specificity only when applied to concrete situations.

Knowledge of process is also essential to evaluate claims that particular principles, rules, or decisions have the status of law. Political actors frequently invoke "law" in support of their positions because law has an authoritative quality lacking in other rules. Law is law because it has legitimacy—those to whom it is addressed recognize an obligation to comply. If a rule can be characterized as "law" it becomes a more effective resource for those interested in the rule's acceptance and application. The rule's origin is crucial because the credibility of the claim that the rule is law generally depends on the process from which the rule emerged. This is true in national legal systems, in which rules that are regarded as law have been produced by accepted procedures, most commonly by judicial or legislative action in accordance with constitutional norms. It is also true in international law.

II. The United Nations and the Global Lawmaking Process

UN agencies affect the development of international law in a variety of ways. Treaty and custom have traditionally been the

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subset of the political.

8. Perhaps this is what Weston and his colleagues had in mind, since their formulation relied heavily upon McDougal, who stressed the importance of both "rules" and "operations" to an understanding of international law. McDougal, *supra* note 3; *see also* C. Schreuer, Decisions of International Institutions Before Domestic Courts 1-2 (1981).

primary means for creating binding international obligations,[9] and the UN has contributed to both. In addition, UN agencies and other intergovernmental organizations have added something distinctive to the norm-creating process through the use of majority rule to amend their constitutive documents as well as for ordinary decision making.[10] This article briefly examines UN contributions to international law through custom and treaty, and then considers at greater length the legal effects of other forms of rulemaking by UN agencies.[11]

A. The United Nations and Traditional Modes of Norm Creation

The UN role in producing multilateral treaties is easy to document. Its contribution to international customary law is probably of equal significance, though less obvious because solidifying state practice into a customary legal norm is always beset with uncertainties. Frequently the two processes—forming treaties and developing customary law—are interrelated.

A treaty creates legal obligations among the parties to the instrument but does not, of itself, establish rules of general international law. It applies to all states only if all states are parties. Even a widely ratified multilateral convention does not create legal obligations for the minority of states that do not ratify it. Nonratification need not be conclusive, however. Over a period of time, if third parties observe the rules embodied in a treaty, those rules can obtain the status of customary interna-

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9. Statute of the International Court of Justice, Aug. 14, 1946, art. 38, para. 1, 59 Stat. 1055, 1060, T.S. No. 993, includes "general principles of law recognized by civilized nations," judicial decisions, and "the teachings of the most highly qualified publicists" along with treaty and custom as sources of international law. Each of these "sources" undoubtedly has contributed to the development of new international law through iteration by domestic and international tribunals or by governments groping for an applicable rule of law. Such rules do not become general international law, however, until states generally accept them, presumably through operation of custom or inclusion in international conventions. Obviously, no judge or legal writer, however highly qualified, has authority to legislate for the international community.

10. With respect to the United Nations, majority rule in the Security Council and in the UN Charter amendment process is qualified by the permanent member veto.

11. For a similar classification of "lawmaking" processes, see C. ALEXANDROWICZ, THE LAW-MAKING FUNCTION OF THE SPECIALIZED AGENCIES OF THE UNITED NATIONS (1973). Alexandrowicz divides UN lawmaking functions into three types: (1) "law-making by treaty or treaty-like processes," (2) "law-making by legislation or quasi-legislative acts which are entirely outside treaty law," and (3) "generation . . . of usages and customary rules as adopted in their international practice." *Id.* at 11.

tional law. The point at which this transformation occurs may not be readily identifiable. But when it does occur, states previously not obligated to comply with the treaty become bound by the rule as embodied in customary international law. The interrelationship also runs in the opposite direction. If a treaty embodies existing rules of customary law, nonsignatories are not obligated by the treaty, but may nevertheless remain subject to the same or a similar obligation under customary international law.

As sources of international law, treaty and custom share a common respect for the principle of consent. However, their modes of consent are different. With treaties, formal ratification is the act of consent. With customary law consent is manifest by conforming to a general practice in the *belief* that conformity is a matter of legal obligation or, in the case of a newly developing norm, a *claim* that a state has acted as a matter of legal right. The psychological *belief-claim* element of consent is commonly referred to by the Latin term *opinio juris*.

Reliance upon sometimes ambiguous state behavior and the need to discover "heliefs" make consent to customary law more difficult to ascertain than consent to treaties.[12] This difficulty is compounded by the question of how much consent is required and who is bound by the rule. A treaty is binding upon the parties, however few or numerous, as soon as all, or a specified number, have ratified. Custom, by contrast, does not ripen into a binding legal norm until it has been accepted by most states.[13]

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12. The practice of states is often observable, and much can be learned from official records of states as they are made available. But how is a state's belief in the existence of legal obligation expressed? This presents no problem if an official statement accompanies the act. D'Amato suggests that the "simplest objective view of *opinio juris* is a requirement that an objective claim of international legality be *articulated* in advance of, or concurrently with," the act that constitutes conformity to the practice. A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 74 (1971). Articulation under such circumstances would undoubtedly he good evidence. More often the sense of obligation is deduced from the practice itself, which seems justifiahle as long as the stata actor ie aware of the claimed legal consequences of the act and makes no disavowal of those consequences. *See* Onuf, *Global Law-Making and Legal Thought*, in LAW-MAKING IN THE GLOBAL COMMUNITY 1, 18 (N. Onuf ed. 1982).

13. Or at least among states to whom the custom might apply, such as members of an international organization or states within a region having distinctive regional norme. See, *e.g.*, E. MCWHINNEY, UNITED NATIONS LAW MAKING 8-20 (1984), which discusses "the spatial dimeneion of international law." *Id.* at 8.

Professor Prosper Weil describes the "classic theory" of customary law as dependent on a delicate, indeed precarious, equilibrium hetween two opposite concerns: on the one hand, to permit customary rules to emerge without demanding the

As forums in which the vast majority of states interact regularly, the UN and its related agencies have performed a catalytic function in the development of both treaty and customary law. Customary law includes not only general international law governing the conduct of states but also rules defining the role of international organizations within the international system. Actions of states in the UN system and in activities fostered by the UN are legal acts that may serve as evidence of emerging international custom. UN resolutions, for example, which have only recommendatory force in themselves, are sometimes cited by domestic courts as evidence of customary international law.[14] The UN is also continuously engaged in lawmaking through drafting multilateral treaties, some of which may be ratified by a substantial majority of UN members and thus provide a uniform rule of law for many states. Some treaties achieve still wider application through operation of custom.[15]

> individual consent of every state; on the other hand, to permit individual states to escape being bound by any rule they do not recognize as such.

Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 433 (1983). The first concern is met by requiring "general" or "settled" but not "unanimous" or "universal" acceptance of a practice as prerequisite to the formation of a customary rule. The second is satisfied by permitting a state to escape the obligation of the rule by making known its rejection in time. "It is this opportunity for each individual stata to opt out of a customary rule that constitutes the acid test of custom's voluntarist nature." *Id.* at 434.

Of course, a question often exists whether the custom at issue is law at all. Again quoting D'Amato:

> There is no international "constitution" specifying when acts become law. Rather, states resort to international law in claim-conflict situations. In such instances, counsel for either side will attempt to cite *as many acts as possible.* Thus we may say that persuasiveness in part depends upon the number of precedents.

A. D'AMATO, *supra* note 12, at 91.

14. Notable illustrations in the United States are Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), which found torture committed by an official of a foreign state against a national of that state to be a violation of international law, and Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981), which reached a similar conclusion with respect to arbitrary, prolonged detention of an alien by the United States government. In each instance the court cited the Universal Declaration of Human Rights, although the court of appeals in *Wilkinson* affirmed the lower court decision on the basis of domestic rather than international law. On the general subject, see Schreuer, *The Relevance of United Nations Decisions in Domestic Litigation*, 27 INT'L & COMP. L.Q. 1 (1978); Skubiszewski, *Recommendations of the United Nations and Municipal Courts*, 46 BRIT. Y.B. INT'L L. 353 (1975); Note, *The Role of the United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876.

15. Here, of course, the usual criteria for customary law would apply to the third parties. The comments of Professor Jennings, with special reference to the law of the sea,

The UN has used a variety of forums in the drafting, or encouraging the drafting, of lawmaking treaties. The Sixth Committee of the UN General Assembly, a sessional committee on legal matters, drafted the widely ratified Convention on Genocide. The UN Committee on the Peaceful Uses of Outer Space has done the initial work on a number of treaties relating to outer space. The Commission on Human Rights of the UN Economic and Social Council has served as the primary drafting agency for numerous human rights treaties, including the comprehensive International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Special conferences convened by the UN General Assembly have drafted other treaties. Perhaps the most notable is the UN Convention on the Law of the Sea, which was approved and signed in 1982 by a UN conference that had met periodically for nearly a decade. A UN Commission on International Trade Law has been drafting rules since 1966 for international commercial transactions and a UN Commission on Transnational Corporations has labored for a decade on a draft code on multinational corporations. The International Labor Organization, UNESCO, the International Maritime Organization, and virtually every intergovernmental organization within the UN system have also produced treaties within their respective fields of competence.

Even though lawmaking activities are widely dispersed throughout the UN system, one body is exclusively concerned with international law questions. The UN International Law Commission (ILC) was established specifically to assist the assembly in discharging its UN Charter responsibility of "encouraging the progressive development of international law and its codification."[16] Originally a collegial body of fifteen members,

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are apropos:

> [T]here has been a tendency, not least in relation to the law of the sea, to assume that a new treaty could in some way legislate for States generally, without their cooperation. But there are no short cuts. The ultimate test is always that of effectiveness. Not complete effectiveness, but sufficient effectiveness.

Jennings, *Treaties as Legislation*, in JUS ET SOCIETAS: ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMAN 159, 168 (G. Wilner ed. 1979) [hereinafter cited as Wilner]; *see also* Lee, *The Law of the Sea Convention and Third States*, 77 AM. J. INT'L L. 541 (1983).

16. U.N. CHARTER art. 13, para. 1. For detailed discussions of the commission and its work, see H. BRIGGS, THE INTERNATIONAL LAW COMMISSION (1965); M. EL BARADEI, T. FRANCK & R. TRACHTENBERG, THE INTERNATIONAL LAW COMMISSION: THE NEED FOR A NEW DIRECTION (1981); B. RAMCHARAN, THE INTERNATIONAL LAW COMMISSION (1977). The UN publishes an annual report on the work of the commission as a supplement to the

the ILC now consists of thirty-four legal specialists elected by the General Assembly for five-year terms.[17] Each is supposed to be a person "of recognized competence in international law."[18] In recent years foreign office lawyers have become more numerous than the university professors who once dominated the commission. Seats are distributed by agreed formula among the political-geographic regions of the world, and each permanent member of the Security Council by tacit agreement always has one of its nationals on the ILC.[19] The ILC thus combines the expert with the political. Legal expertise is essential to effective performance, but the ILC's work must also be politically acceptable to win the consent of states necessary to convert its draft proposals into binding obligations.

The ILC has drafted many multilateral treaties designed to codify, clarify, and, in some instances, modify specific areas of international law. Several treaties have been ratified and are currently in force, including treaties dealing with ocean law, the immunities of diplomats, the reduction of statelessness, consular relations, and the law of treaties, among other subjects.[20] When the ILC completes its work on a draft treaty, its normal procedure is to submit the draft to the General Assembly for approval and for convening of a conference of plenipotentiaries to negotiate the final document. The ILC is currently working on drafts relating to jurisdictional immunities of states and their property, state responsibility, international liability for injurious consequences of acts not prohibited by international law, the status of the diplomatic courier and diplomatic bag, the nonnavigational uses of international watercourses, relations between states and international organizations, and a code of "offences against the peace and security of mankind."[21] The last mentioned code, an attempt to specify in greater detail the principles of interna-

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Official Records of the General Assembly. A summary of each annual session, from the perspective of the American participant, is published in the *American Journal of International Law*. *See, e.g.*, McCaffrey, *The Thirty-Fifth Session of the International Law Commission*, 78 AM. J. INT'L L. 457 (1984).

17. E. MCWHINNEY, *supra* note 13, at 100-02.

18. Statute of the International Law Commission, Nov. 21, 1947, art. 2(1), *reprinted in* THE WORK OF THE INTERNATIONAL LAW COMMISSION 103, U.N. Sales No. E.80.V.11 (3d ed. 1980) [hereinafter cited as WORK OF ILC].

19. E. MCWHINNEY, *supra* note 13, at 102.

20. For a collection of these treaties, see WORK OF ILC, *supra* note 18.

21. Report of the International Law Commission, 39 U.N. GAOR Supp. (No. 10), U.N. Doc. A/39/10 (1984).

tional law set forth in the Nuremberg Charter, has been on the ILC agenda since its first session in 1949. So also has the question of state responsibility for internationally wrongful acts. Viewed as a whole, the ILC's record in developing international law is one of solid but unspectacular achievement. It represents a "low-profile, technical-legal approach"[22] that concentrates on matters of little urgency and secondary political importance. The larger, highly charged issues of global lawmaking find their way to other arenas more universal in membership and less conservative in outlook.

B. Other United Nations Rulemaking: Law Without Consent?

UN agencies engage in much rulemaking outside the treaty process. While most of the rules are not generally applicable international law, many are legally binding upon some or all UN member states. The latter include rules governing the internal operations of international organizations and, in some instances, rules of external application.

1. Internal rules of international organizations

Internal rules govern the structure and process of an international organization, while rules of external application set standards for state conduct outside the organizational setting. The requirement of a two-thirds majority to adopt "important" resolutions in the UN General Assembly is an example of an internal rule. Another example is a resolution calling for the creation of a subsidiary UN body, such as a special commission on Namibia. The subsequent acts of the commission may have some impact on the world outside, just as a resolution adopted by a two-thirds majority may have an external application, but creating the commission is still an internal matter. In contrast, a resolution urging termination of hostilities between Iran and Iraq is external in its application. The principal types of internal rules are rules of procedure for assemblies, councils, committees, and other deliberative bodies; rules for budgeting, program planning and expenditure of funds; regulations governing staff and UN property; rules for the internal operations of field missions; and decisions on organizational matters such as creating subsidi-

22. E. McWHINNEY, *supra* note 13, at 104.

ary organs, electing officers, designating members of UN organs, and admitting or expelling members.[23]

Internal rules, as a class, have the attributes of law. States and other persons subject to the rules recognize their legitimacy and usually comply with them. In theory and in common practice, they are binding on their subjects. Nearly three decades ago, Philip Jessup called attention to the legal character of procedural rules, asserting that within the scope of their operation they are in fact binding rules of law. "It is submitted," he said, "that the rules of procedure, or what we may call the parliamentary law of an international organization, may properly be considered as part of international law of the same general binding character as treaty law and therefore legally binding upon the state members of the organization."[24] That judgment is widely accepted today and is supported by the general practice of international organizations.[25]

One can explain the legal quality of procedural rules by referring to the political circumstances surrounding their origin. Some such rules are authoritative because they have been written into the organization's constitution and legitimized by adoption through the treaty process. Ready examples are voting procedures, which typically are specified in the basic document. Under the UN Charter, each member of the General Assembly has one vote. Important questions are decided by a two-thirds majority of members present and voting; other questions require only a simple majority.[26] In the Security Council each of the five permanent members has a veto of decisions on nonprocedural matters.[27] These and other rules of procedure embodied in the UN Charter are binding upon the parties because they are treaty law, with which members are bound in good faith to comply.[28]

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23. This list leans heavily on H. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW §§ 1052-1071 (1980).

24. P. JESSUP, PARLIAMENTARY DIPLOMACY: AN EXAMINATION OF THE LEGAL QUALITY OF THE RULES OF PROCEDURE OF ORGANS OF THE UNITED NATIONS 204 (1956).

25. *See, e.g.*, J. CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 22-26 (1969).

26. U.N. CHARTER art. 18, para. 2.

27. *Id.* art. 27, para. 3.

28. The meaning of the treaty obligations may, however, change over time. For example, article 27 requires "the concurring votes of the permanent members" for adopting nonprocedural decisions. *Id.* Practice and general acquiescence has established that an absence or abstention by a permanent member is not treated as a veto, even though that member obviously has not concurred. Such an interpretation of article 27 is consistent with the international law of treaties. Article 31 of the Vienna Convention on the Law of

Consent by each participating state is the central feature of the treaty-making process and a principal reason for according legitimacy to the treaty. Significantly, however, the UN Charter and most other similar documents permit amendment by less than unanimous consent. Amendments to the UN Charter may be proposed by a two-thirds vote of the General Assembly and ratified by a similar proportion of the total membership, acting through their respective constitutional processes, provided each permanent member concurs.[29] Such new "constitutional law" of the organization is no longer legitimized by unanimous consent, but it is law by virtue of compliance with UN Charter provisions to which each participating state previously consented. Sovereign autonomy and independence are preserved by an objecting state's option to withdraw from the organization, but that possibility takes nothing away from the binding quality of the amendment for those choosing to remain.

In addition to specifying a number of procedural rules, organization charters generally vest authority to make other procedural rules in various deliberative organs that may be established. Thus the UN Charter empowers the General Assembly,[30] the Security Council,[31] the Economic and Social Council,[32] and the Trusteeship Council[33] each to "adopt its own rules of procedure." The General Assembly is also authorized to establish regulations governing the appointment of UN staff. Nothing in the UN Charter expressly specifies that such rules and regulations constitute "law" binding upon members and upon UN employees. Yet no one doubts the obligation to comply or, in the case of staff at least, the organization's right to apply sanctions for non-

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Treaties provides that a treaty is to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty" but that the parties shall also take into account

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; [and]
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . .

U.N. Conference on the Law of Treaties (First and Second Sessions: Vienna, 26 March-24 May 1968 and 9 April-22 May 1969) 289, 293, Doc. of the Conference A/CONF .39/27 (1971).

29. U.N. CHARTER art. 108.

30. *Id.* art. 21.

31. *Id.* art. 30.

32. *Id.* art. 72, para. 1.

33. *Id.* art. 90, para. 1.

compliance.[34] The practice of states within the organization clearly vindicates these expectations.

Consent remains the rationale for treating procedural rules as law, even though unanimous consent is not required to adopt them. As with the amendment process, member states, by approving the UN Charter, consented to the process by which rules would be made. The rule is legitimized by the process, which itself rests upon the consent of member states. A prior question, of course, is why states would consent to such a process, given the prospect that each might at some time find itself in the minority. The simple answer is that it expedites the organization's business. If unanimous consent were required for every decision, including those of a procedural nature, the wheels of the organization would turn very slowly, if at all. The purposes that justify establishing the organization are certain to be frustrated if the organization cannot act, and required unanimity is frequently a formula for inaction.[35]

States thus accept and observe procedural rules as binding for the same reasons of practicality that underlie their initial consent to a charter placing such rulemaking authority in the hands of a majority. Observance is further encouraged by the majority's practical ability to enforce its will in procedural matters. If the majority wishes to consider a resolution adopted, according to a particular rule of procedure, it is, for all practical purposes, adopted. The dissenters can do little about it besides protest. Procedural rules can be enforced as long as a majority is willing to abide by them and accept the consequences.

Occasionally, the consequences of enforcing a procedural rule against a determined and powerful dissenter may not be worth the cost. Article 19 of the UN Charter provides that a state falling the equivalent of two years behind in its assessed contributions to the organization shall have no vote in the Gen-

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34. J. CASTAÑEDA, *supra* note 25, at 51.

35. For similar reasons the principle of majority voting has also been extended to nonprocedural decisions of most international organizations, but such decisions usually lack the character of law. The authority to recommend is much more common than the right to command, and the latter is limited largely to matters that do not threaten the vital interests of states. This point will be examined in greater detail below. The principle of majority vote was well-established before the advent of the United Nations. For the prior development of this practice, see W. KOO, JR., VOTING PROCEDURES IN INTERNATIONAL POLITICAL ORGANIZATIONS (1947); C. RICHES, MAJORITY RULE IN INTERNATIONAL ORGANIZATION (1940); C. RICHES, THE UNANIMITY RULE AND THE LEAGUE OF NATIONS (1933).

eral Assembly.[36] During the UN peacekeeping finance crisis of 1964-65, several states—including the Soviet Union and France—came within this rule because of their persistent refusal to pay for UN peacekeeping operations in the Congo.[37] The assembly probably could have enforced article 19 by a ruling from the chair, sustained by a simple majority vote against a procedural challenge to the ruling. If it were treated instead as an important question, the sanction certainly could have been enforced by a two-thirds vote. But the assembly chose not to enforce article 19 at all for fear of driving the recalcitrant states out of the UN.[38]

Most other types of internal law are authoritative for the same reasons as procedural rules. They have their initial basis in organizational charters, and they can ordinarily be enforced despite minority objections. The UN Charter, for example, expressly authorizes creation of subsidiary organs,[39] election of members of the various organs,[40] admission, suspension, and expulsion of members,[41] approval of a budget,[42] and adoption of rules governing UN staff.[43] Authority to make rules for the internal governance of field missions can be reasonably implied from the power to create subsidiary organs and regulate staff. As to enforcement by the majority, if a subsidiary organ is created over the objection of some members, those objections cannot prevent it from coming into being as long as the states that voted for it are willing to have their representatives serve on the organ. Dissenters may refuse to participate and, judging by a growing UN practice, refuse to contribute financially to its support, but this need not prevent the organ from functioning. Elections, admissions, and expulsions are similarly self-enforcing, and the UN as a corporate entity can enforce its regulations against individual staff as long as it has the support of a majority of members. Expenditures, of course, are well within the organization's power to control. Once title to funds has passed

36. U.N. CHARTER art. 19.

37. J. STOESSINGER, THE UNITED NATIONS AND THE SUPERPOWERS: CHINA, RUSSIA, AND AMERICA 134 (4th ed. 1977).

38. *Id.* at 135-39.

39. *See, e.g.*, U.N. CHARTER arts. 22, 29, 68.

40. *See, e.g., id.* art. 23, para. 2; art. 61, paras. 2, 3.

41. *Id.* arts. 3, 4, 5, 6.

42. *Id.* art. 17.

43. *Id.* art. 101.

from donor to recipient organization, the organization can manage them the same as other property or corporate assets.

2. *Rules and decisions having external application*

The multilateral treaty process is essentially the same, whichever organization may happen to initiate it. Internal rules also are similar from one intergovernmental agency to another. Organizations differ substantially, however, in the nature and legal status of their rules and decisions intended to have external application. For that reason the practice of the UN and a number of specialized agencies will be briefly examined.

a. The United Nations Charter. The UN Charter lays down a number of rules that apply to the conduct of member states. Article 2, paragraph 2, a catch-all provision, requires all members to "fulfill in good faith the obligations assumed by them in accordance with the present Charter."[44] This merely reiterates existing law. Good faith observance of treaties was a preexisting international norm and would have applied to the UN Charter the same as to all treaties, whether or not restated in the Charter. Other paragraphs of article 2 impose upon members a far-reaching obligation to "settle their international disputes by peaceful means" and to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state."[45] Nonuse of force for aggressive purposes may also have been a preexisting principle of international law. The Nuremberg Court assumed that it was, although this was disputed.[46] Whatever the historical status of the rule, it is the law of the UN with its near universal membership. Unfortunately, application of the rule remains far from clear in theory or uni-

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44. *Id.* art. 2, para. 2.

45. *Id.*; see also *id.* art. 33, which urges recourse to specified modes of pacific settlement or to other peaceful means of the parties' choice.

46. *See, e.g.*, Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 25-26 (1947).

form in practice.[47] And self defense, enshrined in article 51, is often used—and abused—in justifying resort to armed force.[48]

The UN Charter also commits members, jointly and individually, to "promote" solutions to world social and economic problems.[49] The commitment is so expansive, however, that it can scarcely constitute a rule of law demanding any particular conduct from a state. Arguably, it might of its own force prohibit gross violations of human rights,[50] but even there the commitment is too amorphous to be very constraining. Such UN Charter provisions have their greatest impact upon international law by providing the basis for drafting treaties and adopting resolutions giving more specific content to the obligations. *Treaties*, of course, become law between the parties. The impact of *resolutions* purporting to expand or specify UN Charter obligations will be discussed below.

Other legal obligations flowing from the UN Charter, most of them governing member relations with the organization, are quite specific. Article 73(e) requires states administering non-

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47. The General Assembly's definition of aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142-44, U.N. Doc. A/9631 (1974), leaves much unclarified and specifically exempts force in aid of the right to self-determination, which itself is a highly flexible concept. John F. Murphy observes: "Even if they are often honored in the breach, the prohibitions of Article 2(4) against the threat or use of force . . . have served the world community well," at least as applied to "traditional violence." They have had less relevance, however, for internal wars and other nontraditional violence. J. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS 126, 135 (1982).

48. Article 51 of the UN Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations . . . ."

49. *Id.* arts. 55, 56.

50. Judge Stephen M. Schwebel has argued, as indeed have many others in and outside the United Nations, that South African apartheid is unlawful by virtue of articles 1, 55, and 56 of the UN Charter, all of which refer to promotion of human rights. *See Contemporary Views on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms*, 1979 AM. SOC'Y INT'L L. PROC. 300, 330 (discussion comments of S. Schwebel). In my opinion, articles 1, 55, and 56 are aspirational and were not intended to impose specific legal obligations upon states. The practice of states since 1945 supports this interpretation. Most states have at one time or another made invidious "distinctions as to race, sex, language, or religion" without, apparently, feeling any UN Charter obligation to desist. Apartheid is more overt, thorough-going, and demeaning than most state-sponsored racial discrimination, but that does not make the Charter more legally binding on South Africa than any other country. Subsequent repeated denunciations of apartheid as unconscionable and illegal, in the General Assembly and elsewhere, do not make law for South Africa. They may make customary law for the states participating in the denunciations, although this is doubtful since many of them also discriminata domestically on the basis of ethnicity, but South Africa clearly has opted out of the custom. See discussions of opting, *supra* note 13.

self-governing territories to report regularly on the economic, social, and educational conditions in those territories. The general observance of this rule has been marred somewhat by frequent controversy over what self-governing status means. Article 94 restates a rule of general international law that parties to a dispute submitted to an international tribunal for judicial settlement (in this case the International Court of Justice) must comply with the court's decision. Article 104 obligates members, within their respective territories, to grant the UN "such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes."[51] Similarly, article 105 guarantees to the organization and its officials "such privileges and immunities as are necessary"[52] for the fulfillment of their functions.

Article 17 also is generally regarded as making the General Assembly's budgetary assessments legally binding upon member states.[53] Over the years, however, the force of the obligation has weakened. As a practical matter, if a state refuses to pay its assessments, no prior or subsequent majority vote can force it to do so. This was demonstrated in the peacekeeping finance crisis of 1964-65 and has since been repeatedly reaffirmed.[54] Currently more than twenty-five countries refuse to support certain UN activities and, in consequence, have withheld a portion of their

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51. Details of these obligations have been specified in international instruments. *See, e.g.*, Agreement Regarding the Headquarters of the United Nations, June 26, 1947, United Nations—United States, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1428, T.I.A.S. No. 6900, 1 U.N.T.S. 15.

52. U.N. CHARTER art. 105, para. 1.

53. See L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 154 (1969), which states that article 17 "gives the General Assembly power to apportion expenses of the Organization among members and places upon them the obligation to pay the amounts thus determined." The International Court of Justice has also reached the same conclusion. *See* Certain Expenses of the United Nations (art. 17, para. 2, of the Charter) 1962 I.C.J. 193 (Advisory Opinion of July 20); *see also* Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, 1955 I.C.J. 67, 115 (Advisory Opinion of June 7) (separate opinion of Hersb Lauterpacht). When the peacekeeping finance question was submitted to the International Court of Justice for an advisory opinion, rendered in 1962, the issue was not whether the assembly had any authority to make obligatory assessments upon members, hut whether the costs of peacekeeping could properly be treated as "expenses of the Organization" and thus within the obligatory assessment power derived from article 17. The Court concluded that they were. Certain Expenses of the United Nations, 1962 I.C.J. 193.

54. ISSUES BEFORE THE 39TH GENERAL ASSEMBLY OF THE UNITED NATIONS 159-60 (D. Puchala ed. 1984) [hereinafter cited as Puchala].

assessed contributions.[55] The United States has refused to pay costs associated with the Law of the Sea Conference, the Palestine Liberation Organization, and the South West Africa People's Organization.[56] The Soviet Union has consistently rejected assessments for peacekeeping operations and is again approaching the two years' delinquency that could threaten loss of its General Assembly vote, if members muster the courage to apply article 19.[57]

The tension between legal obligation, on one hand, and lack of practical capacity to enforce payment of contributions, on the other, has made the assembly majority cautious in using its assessment power. When major donors have balked at supporting special programs and projects, the assembly has normally created "voluntary" funds to which members are urged, but not required, to contribute.[58] Most development assistance programs, such as the UN Development Program, fall in this category. The UN regular budget, supported by assessment, includes some funding for technical assistance, but the amounts are relatively meager.[59] For peacekeeping, the problem has been alleviated, but not wholly resolved, by financing some operations through voluntary contributions.

In recent years large donors have raised serious objections to the size of the regular budgets of the UN and its related agencies. Vehement protest by the United States, the Soviet bloc, and most Western industrialized countries persuaded the UN majority to limit budgetary growth for the 1984-85 biennium to about one percent (after adjustment for inflation) over the previous biennium. The United States had pressed for no growth and no adjustment for inflation.[60] At UNESCO, by contrast, the majority voted a three to four percent real increase, after inflation,

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55. *Id.*

56. *Id.*

57. *Id.* at 160.

58. *E.g.*, the United Nations Development Program, the United Nations Fund for Population Activities, the United Nations Relief and Works Agency for Palestine Refugees, the United Nations Childrens' Fund, and the programs of the United Nations High Commissioner for Refugees.

59. Financial Report and Audited Financial Statements for the Biennium Ended 31 December 1983 and Report of the Board of Auditors, 39 U.N. GAOR Supp. (No. 5) at 119-25, U.N. Doc. A/39/5/V.1 (1984).

60. Puchala, *supra* note 54, at 158.

which led some Western members to call for new procedures giving large donors more control over budgetary matters.[61]

Since international law is in part a creature of custom, the behavior of states has implications for the legal status of rules governing financing of UN operations. The principle of binding budgetary assessments, as embodied in article 17, remains intact for the organization's ordinary expenses. Members continue to recognize and generally observe the payment obligation. The experience with peacekeeping finance, however, as well as other occasional withholding of contributions by states, suggests that the obligation becomes attenuated when a state has a strong objection to a particular program within the regular UN budget. This phenomenon could be equated to a situation not uncommon in other areas of international law in which lack of adequate enforcement machinery permits violations of law to go effectively unchallenged. In many such instances, however, the precise nature of the rule and of the alleged violation are sufficiently ambiguous to leave room for a plausible argument that no violation has occurred. Not so with payment of budgetary assessments. No doubt exists when a contribution is due and unpaid. And when delinquency equals or exceeds a state's assessed contributions for two years, a sanction is available—deprivation of a vote in the assembly. If the assembly fails to apply this sanction, it has acquiesced in the delinquency, and a transformation in the rule, or its obligatory character, may well be underway.[62]

Beyond the few obligations arising directly from the UN Charter, do UN organs have authority to bind member states without their consent? Generally speaking, the answer is yes, but only to a limited extent. Except for internal rules, the as-

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61. *Id.* at 157.

62. Article 25 requires members "to accept and carry out the decisions of the Security Council," but the right of the council to "decide"—as contrasted with "recommend"—refers only to enforcement action directed against acts of aggression and other threats to international peace and security. *See also* U.N. CHARTER arts. 48, 49. This was intended to include military measures (article 42) as well as economic and diplomatic sanctions (article 41). Neither has proved very formidable in practice. Military sanctions were dependent on armed forces being made available to the Security Council by special agreements (article 43), and no article 43 agreements were ever concluded. Mandatory economic sanctions against Rhodesia, first initiated in 1966, may have hastened somewhat the transfer of power from the white minority to a black majority regime in 1980, but other pressures were far more important. South Africa has been the only other target of sanctions—an arms embargo made mandatory by the Security Council in 1977—with little noticeable effect on South Africa's economic and military strength or its racial and colonial policies. Full observance of sanctions was not forthcoming against either state.

sembly's power is limited to recommendation. The same is true of every UN organ except the Security Council and the International Court of Justice. The UN Charter appears to confer upon the Security Council substantial power to issue commands in matters relating to international peace and security, but the power has seldom been used and in practice has not been very significant.[63] Decisions of the International Court of Justice are, under general international law and the express terms of the UN Charter, binding upon parties to the case.[64] However, the court has no authority to decide a case unless the affected parties have consented to its jurisdiction, either by agreement to refer the particular case to the court or by prior agreement to accept the court's jurisdiction in a specified class of cases.[65] This preserves the principle of consent and, therefore, adds little to the UN's capacity to bind states against their will.

b. The force of General Assembly resolutions. The legal effect of General Assembly resolutions has been a subject of con-

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63. Advisory opinions, rendered at the request of authorized UN organs, are binding on no one although they may have weight as authoritative restatements of international law.

64. Forty-seven states, with varying reservations, have filed declarations pursuant to article 36 (the "optional clause") of the Statute of the International Court of Justice, *supra* note 9, at 1060, accepting the court's jurisdiction "in relation to any other state accepting the same obligation." The declarations are reproduced in *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, 1983-1984 I.C.J.Y.B. 57 (1984). Except as limited by reservations, article 36 declarations extend to "all legal disputes" dealing with

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact that, if established, would constitute a breach of an international obligation;

(d) the nature or extent of reparation to be made for breach of an international obligation.

65. Not infrequently the court may claim jurisdiction through a previous commitment of one of the parties, over the objection of that party. In such instances the objecting state has sometimes continued to deny jurisdiction and refused to participate further in the proceedings. Concerning United States Diplomatic and Consular Staff in Teheran (United States v. Iran), 1980 I.C.J. 3 (Judgment of May 24) (Iran refused to participate); Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 1 (Judgment of Dec. 19) (Turkey refused to participate); Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), 1974 I.C.J. 175 (Judgment of July 25) (Iceland refused to participate); Fisheries Jurisdiction (United Kingdom v. Iceland), 1974 I.C.J. 3 (Judgment of July 25) (Iceland refused to participate); Trial of Pakistani Prisoners of War (Pakistan v. India), 1973 I.C.J. 328 (Order of July 13) (India refused to participate). More recently, the United States rejected the court's finding of jurisdiction in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1984 I.C.J. 392 (Judgment of Nov. 26). The United States response is discussed in the N.Y. Times, Jan. 19, 1985, at 1, col. 6.

tinuing interest to scholars, as well as to UN members.[66] General legislative power for the assembly was specifically rejected at the San Francisco Conference,[67] but that has not prevented persistent claims that particular assembly resolutions, including some of external application, have legal effects. Four broad types of legal effects have been claimed:

> (1) that resolutions have binding effect as internal rules, a category previously discussed;
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> (2) that resolutions may contribute to the formation of new international law by crystallizing international opinion, redefining old rules in an authoritative way, influencing state practice, or serving as a step in the treaty process;
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> (3) that by purporting to state rules of law, assembly resolutions are evidence that such rules exist;
>
> (4) that some resolutions amount to legislation, creating new international law for member states and possibly for the whole international community.[68]

The binding effect of internal rules, as noted above, is generally conceded, and no one denies that assembly resolutions sometimes influence the formation of new international law. The proposition that resolutions may be evidence of existing law is not in principle contested either, although the credibility of the evidence in particular cases is frequently disputed. On the other

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66. *See, e.g.*, G. ARANGIO-RUIZ, *supra* note 6; O. ASAMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS (1966); J. CASTAÑEDA, *supra* note 25; R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 70-72 (1963); E. MCWHINNEY, *supra* note 13, at 45-46, 55-58; Bleicher, *The Legal Significance of Re-Citation of General Assembly Resolutions*, 63 AM. J. INT'L L. 444 (1969); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); Higgins, *The United Nations and Law-making: The Political Organs*, 1970 AM. SOC'Y INT'L L. PROC. 37; Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97 (1955-56); Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445 (1981); Schreuer, *supra* note 14, at 45-64; Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customory International Law*, 1979 AM. SOC'Y INT'L L. PROC. 301; Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1 (1948); Stone, *Conscience, Law, Force and the General Assembly*, in Wilner, *supra* note 15, at 297-337.

67. A Philippine proposal to vest authority in the assembly to make rules of international law, subject to a majority vote in the Security Council, was defeated by a vote of 26-1. 9 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 70 (1945).

68. The categories are adapted from H. MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 88 (1980).

hand, the claim that resolutions can ever of their own force "legislate" rules of external application is much harder to sustain.

The few occasions when assembly resolutions have imposed binding obligations upon states or have passed directly into general international law can be explained on grounds other than the force of the resolution itself. For example, assembly action on the former Italian colonies of Libya, Eritrea, and Italian Somaliland, taken in 1949 and 1950, was accepted as binding by all the states concerned. But this was because France, the Soviet Union, the United Kingdom, and the United States had agreed in the treaty of peace with Italy to let the assembly dispose of the territories if the powers were unable to agree among themselves by September 1948.[69] On this subject, assembly action was the practical equivalent of legislation but only by virtue of the prior treaty, not through anything inherent in the assembly process.

Resolution 95 of the first General Assembly, endorsing the legal principles contained in the Nuremberg Charter, illustrates another type of assembly "lawmaking." The Nuremberg Charter and resolution 95 defined three types of international offenses: traditional war crimes, crimes against peace, and crimes against humanity. The rules relating to war crimes were based on laws and customs of warfare then generally accepted,[70] but the right to punish individual political leaders for acts of international aggression (crimes against peace) and maltreatment by a government of its own populace (including crimes against humanity) was by no means clearly established as international law before 1945.[71] Since the assembly adopted them in 1946, however, all three categories of offenses have been regarded as part of general international law.[72]

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69. Treaty of Peace, Feb. 10, 1947, United States-Italy, art. 23 & annex XI, 61 Stat. 1245, 1261, 1345, T.I.A.S. No. 1648.

70. See Charter of the International Military Tribunal (Nuremberg Charter), Aug. 8, 1945, art. 6(b), 59 Stat. 1546, 1547, E.A.S. No. 472, 82 U.N.T.S. 279, 288, which defined "war crimes" as "violations of the laws and customs of war."

71. *See* 2 L. OPPENHEIM, INTERNATIONAL LAW 578-80 (H. Lauterpacht 7th ed. 1948); Finch, *supra* note 46, at 28-29. Oppenheim accepted the legality of what was done at Nuremberg, but he cites critics who did not.

72. *See, e.g.*, I BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 546 (2d ed. 1973) ("But whatever the state of the law in 1945, Article 6 of the Nuremburg Charter [defining the three categories of crimes] has since come to represent general international law.").

This case, more than the former Italian colonies case, might suggest some inherent power in the assembly to legislate in appropriate circumstances, or at least to authoritatively restate the law. Resolution 95 did, apparently, perform a catalytic function in transforming specific claims into rules of law. And if it happened once, might not this "resolution 95" phenomenon be repeated for other statements of legal principle adopted by the assembly with little or no opposition? Perhaps in theory it could, but in practice the essential corroborating elements are almost never present with assembly resolutions. Resolution 95 was in many respects unique, evoked as it was by unspeakable atrocities and devastating armed conflict still fresh in the minds of government leaders. Repeated statements by the victorious allies both in and out of the UN provided the requisite evidence of *opinio juris*, and the ongoing war crimes trials were present to put the seal of practice upon the spoken commitment.[73]

Despite the singularity of those circumstances, proponents of the General Assembly's legislative competence see lawmaking by declaration as a repeatable process.[74] Oliver Lissitzyn has insisted that UN declarations of legal principle adopted by a large majority of states may sometimes be an adequate substitute for widespread state conformance to a practice. Customary law arises from common expectations that states will act in a particular way as a matter of legal right or duty, and such "expectations may rest not only on actual conduct, but also on other forms of communication, including the verbal."[75] Treaties obviously create such expectations, and so—in Lissitzyn's view—may UN declarations:

> Statements or declarations not binding as treaties may also give rise to reasonable expectations. If such statements or declarations emanate from a large number of States and purport to deal with a legal matter, they may be regarded in some cir-

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73. L. HENKIN, HOW NATIONS BEHAVE 182 (1979), views the assembly action somewhat more cynically as illustrating the adoption of "resolutions of legislative import which appear idealistic and which no nation sees as directed at its own behavior." If Henkin is right, proscription of crimes against peace and crimes against humanity may apply only to political and military leaders of a defeated enemy state.

74. The kinds of resolutions most likely to contain stetements of legal principles are commonly called "declarations," but they are and will be treated here simply as a species of resolution.

75. O. LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW 35 (1965); see Schwebel, *supra* note 66, at 302-03, for a discussion of contrasting points of view on this issue.

> cumstances as indications of a general consensus amounting to a norm of international law.[76]

If that is true, the "resolution 95" phenomenon undoubtedly is repeatable. But development of customary law is thereby reduced to a claiming procedure without need for validation by confirming state conduct.

Richard Falk has elaborated a somewhat more tentative jurisprudential basis for ascribing "limited legislative competence" to assembly resolutions "supported by a consensus of the membership."[77] According to Falk, the assembly's lack of formal legislative authority is not decisive because "in other legal contexts the characterization of a norm as *formally binding* is not very significantly connected with its *functional operation* as law."[78] Thus courts, national and international, cite treaties and nonbinding declarations almost interchangeably in support of their decisions, while states frequently honor nonbinding understandings[79] and ignore opinions of the International Court of Justice.[80] With such an indefinite line separating "*binding* from *nonbinding* norms governing international behavior . . . the formal limitations of status, often stressed by international lawyers, may not prevent resolutions of the General Assembly, or certain of them, from acquiring a normative status in international life."[81]

Falk is most persuasive in his discussion of the impact of assembly resolutions upon subsequent political behavior, although the thrust of his argument is to emphasize the legitimating effects of subsequent events and of contextual factors that fuel the traditional process of creating customary law. His comments merit quotation at length:

> In a social system without effective central institutions of government, it is almost always difficult, in the absence of for-

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76. O. LISSITZYN, *supra* note 75, at 35-36. J. CASTAÑEDA, *supra* note 25, at 172, similarly calls assembly declarations of principles "persuasive evidence of the existence of the rule of law which they enunciate," which create a "presumption that such a rule or principle is a part of positive international law."

77. R. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 174-75 (1970) (this essay was first published as an article; *see* Falk, *supra* note 66). Falk describes his view as "a middle position between a formally difficult affirmation of true legislative status and a formalistic denial of law creating role and impact." R. FALK, *supra*, at 174. Although not at the extreme, Falk seems clearly oriented toward the lawmaking pole.

78. R. FALK, *supra* note 77, at 175 (emphasis in original).

79. For example, the 1958 moratorium on nuclear testing.

80. For example, the advisory opinion on peacekeeping.

81. R. FALK, *supra* nota 77, at 176 (emphasis in original).

> mal agreement, to determine that a rule of law *exists*. Normativity is a matter of degree, expressive of expectations by national governments toward what is permissible and impermissible. Certainly norm-declaring resolutions are legal data that will be taken into account in legal argument among and within states. A main function of international law is to establish an agreed system for the communication of claims and counterclaims between international actors and thereby to structure argument in diplomatic settings. Diplomats in search of grounds for justification or of objection readily invoke resolutions of the Assembly. These efforts at persuasion do not seem to be influenced by whether resolutions are capable of generating binding legal rules or merely of embodying recommendations. The degree of authoritativeness that a *particular* resolution will acquire depends upon a number of contextual factors, including tbe expectations governing the extent of permissible behavior, the extent and quality of the consensus, and the degree to which effective power is mobilized to implement the claims posited in a resolution.[82]

Thus, limits on the assembly's "quasi-legislative" competence spring less from lack of formal competence than from political constraints imposed by the need to mobilize "effective community power in support of legislative claims."[83]

Falk's analysis has intuitive appeal to students of politics, since it reflects quite accurately the way states use assembly resolutions in the political-diplomatic bargaining process. Implicitly, however, it undermines the concept of law by blurring the distinction between law and nonlaw. Law no longer describes a discrete category of rules distinguished from other rules and principles by their obligatory quality. Instead all rules fit along a continuum, and all are law, to a greater or lesser extent, depending on their placement on the continuum. The *practical* problem of ascertaining whether and when a particular rule has become law is thus transmuted into a denial of any *theoretically meaningful* threshold between law and nonlaw. Should this view be widely accepted, the ultimate consequence would be less to heighten respect for assembly resolutions than to reduce the normative power of the law itself.

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82. *Id.* at 178 (emphasis in original).

83. *Id.* at 181. Falk suggests that a voting majority of two-thirds might satisfy this requirement if both the United States and the Soviet Union were included. *Id.*

Absent some such relativistic theory of the law, the arguments against attributing legislative force to General Assembly resolutions are convincing. Julius Stone has argued that assembly resolutions simply do not deserve such status because, "even when purporting to be 'declaring' or 'interpreting' law," they are likely to be "operations of power politics rather than explorations of truth."[84] Worse still, conferring the status of law upon "whatever precepts serve the interests of States positioned to stack votes in the General Assembly" would tear law from its moorings in "existing constellations of power" and thus threaten "the survival of both the UN and the general international legal order."[85] This point of view is not necessarily confined to persons sharing Professor Stone's obvious contempt for the behavior of assembly majorities. Nicholas Onuf, who is much more sympathetic to the concept of lawmaking by declaration, nevertheless concludes that "the unwillingness of Western states to accept" this new source of law is "an insurmountable obstacle to its actually existing."[86]

A contrary case, indeed, is hard to sustain.[87] The UN Charter, taken together with deliberations of the San Francisco Conference, establishes beyond doubt that assembly resolutions were intended to be only hortatory in nature, with clearly specified exceptions relating primarily to internal organizational matters. Since then this understanding has been repeatedly confirmed in statements by member states, and it has been implicitly affirmed by the practice of following up certain declarations with a treaty-drafting process when legally binding effects are intended.[88]

The law of the UN Charter may be supplemented by customary law, but no serious argument can be made that states have by custom come to accept assembly resolutions as law. The evidence is all to the contrary: states do not recognize any such general legislative power in the assembly. Nor does any basis exist for asserting a rule of customary law that assembly resolutions constitute law in particular instances. Many resolutions command huge majorities; many are even adopted by consensus. But such majorities often include states that voted for the reso-

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84. Stone, *supra* note 66, at 334.
85. *Id.* at 334-35.
86. Onuf, *supra* note 12, at 18.
87. The following analysis relies heavily on G. Arangio-Ruiz, *supra* note 6.
88. *Id.* at 18-20.

lution, or failed to object, to avoid tarnishing their image by voicing opposition. This is not the stuff of which legal rules are made. Quite the reverse: such behavior is possible precisely because states know the resolution will have no legally binding effect.[89]

Denying the legislative competence of the assembly still leaves a place for assembly declarations within the existing law-making processes of the international system. Besides the assembly's role in drafting multilateral treaties, discussed above, weight may be given to assembly resolutions as part of the "practice of states" that contributes to the development of customary international law. UN debates, votes, amendments, and even unadopted resolutions may also be regarded as facts of legal significance to the extent they bear on international law. But these "facts," standing alone, are not sufficient to constitute new customary law. They must be considered with other elements of state practice in determining whether a new customary norm has developed. An assembly declaration may be a catalyst for state conduct that hastens the development of customary law,[90] or it may be a declarative statement of existing international law. In either case the status of the rule as law depends on the totality of state practice, of which the declaration itself is only one element.

Frequently, citation of assembly resolutions by the assembly or other international bodies is offered as evidence of a continuing practice that constitutes international custom.[91] Each citation is undoubtedly an additional legal "fact" to be taken into account, but in totality all such reiterations constitute conclusive proof only of a custom of citing resolutions, not of the obligatory nature of the rules those resolutions contain. The same considerations that leave the original declaration void of legislative effect

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89. For an elaboration of these ideas, see *id.* at 22-30; *see also* Schwebel, *supra* note 66, at 302. Schwebel summarizes this view of the law and observes that

> states often don't meaningfully support what a resolution says and they almost always do not mean that the resolution is law. This may be as true or truer in the case of unanimously adopted resolutions as in the case of majority-adopted resolutions. It may be truer still of resolutions adopted by 'consensus.'

Schwebel then adds, "I confess to much sympathy for the foregoing line of analysis, for my personal experience so fully bears it out." However, he admits that "the other pole of this problem also has much to be said for it." *Id.*

90. A strong case can be made that the assembly has hastened norm creation in such areas as human rights, the use of international force, and outer space. *See* Joyner, *supra* note 66, at 464-69.

91. See discussion in Bleicher, *supra* note 66.

are present in each citation. The principles still require validation through confirming state conduct in other contexts.

The sensible controversy is not whether assembly resolutions have the force of law in their external applications; most assuredly they do not. The real issue is wbether a given rule enunciated by the assembly has been adequately validated as customary law by other indices of state acceptance. This is frequently a question on which reasonable people disagree. Thus, an advocate of a new international order can plausibly argue that "the largely hortatory propositions of yesterday contained in such resolutions as those on decolonization, national ownership of natural resources, and the like have really represented law-in-the-making in their execution and development, and now number among the accepted principles of the 'new' international law."[92] This may or may not be correct, depending on the particular proposition being discussed. But stating the argument in that fashion makes reasoned discussion possible by focusing on state acceptance rather than assembly authority as the central issue.

c. *Legislation by United Nations specialized agencies.* Within the UN system, a number of specialized agencies and other intergovernmental organizations cooperate with the assembly and its subordinate organs but are legally independent, subject to their own charters and responsive to their own governing bodies. Like the UN, the specialized agencies "legislate" with respect to their own internal practice, and all have provisions for amending their constituent conventions by less than unanimous consent. Some, in limited substantive areas, have authority to adopt rules that create various kinds of legal obligations for their members.[93]

The nature and status of internal law enacted by these agencies is not essentially different from the internal rules of the

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92. E. McWHINNEY, *supra* note 13, at 58.

> In strictly juridical terms, the General Assembly resolutions on such key subjects as decolonization and independence, on national ownership and control over natural resources, and on a New International Economic Order may not be, in their immediate origins 'hard' law; but as 'soft' law they have a habit of turning out to be the international law-in-action of today and the 'hard' law of tomorrow or the day after tomorrow.

Id. at 46.

93. *See generally* C. ALEXANDROWICZ, *supra* note 11; E. LUARD, INTERNATIONAL AGENCIES: THE EMERGING FRAMEWORK OF INTERDEPENDENCE (1977) (discussing the legislative competence of numerous international agencies).

UN. Their procedures for "constitutional" amendment, despite variations in detail, are also broadly similar.[94] In most of them an amendment may be proposed by a two-thirds vote of the organization's assembly, conference, or congress. The World Bank, the International Development Association (IDA), and the International Monetary Fund (IMF) are exceptions, requiring only a majority of votes cast by their boards of governors.[95] The International Finance Corporation (IFC), another financial institution connected with the World Bank, demands a larger majority, but the amendment process is complete when the IFC board of governors acts.[96] Despite the IFC exception, the general rule is that members, acting individually through their respective governmental processes, must ratify proposed amendments and that two-thirds of member states must accept the amendments.[97]

As is true of treaties, the process of ratifying amendments to the constitutive conventions of international organizations ensures that each ratifying state is genuinely committed to accepting a binding legal obligation. Unlike the usual treaty process, however, the ratification requirements of most agencies leave the possibility that as many as one-third of the members may be bound without their consent. The dissenters might still vindicate their sovereignty by withdrawing from the organization, but such drastic action could only be justified by interests strong enough to outweigh the values of cooperation that initially prompted membership in the organization.

d. Other "legislative" authority. Legislative power, in the sense of authority lodged in an international agency to adopt le-

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94. For a careful, factual comparison of amendment procedures and grants of formal legislative competence, see E. YEMIN, LEGISLATIVE POWERS IN THE UNITED NATIONS AND SPECIALIZED AGENCIES (1969). A somewhat more recent discussion of these and other agencies, focusing more on functions than legal competence, is E. LUARD, *supra* note 93.

95. Articles of Agreement of the International Development Association, Aug. 9, 1960, art. VI(3)(b), art. IX(a), 11 U.S.T. 2284, 2297, 2307, T.I.A.S. No. 4607, 439 U.N.T.S. 249, 270, 286, 288 [hereinafter cited as IDA Agreement]; Articles of Agreement for the International Bank for Reconstruction & Development, *opened for signature* Dec. 27, 1945, art. V(3)(b), art. VIII(a), 60 Stat. 1440, 1451, 1459, T.I.A.S. No. 1502, 2 U.N.T.S. 134, 162, 184 [hereinafter cited as IBRD Agreement]; Articles of Agreement of the International Monetary Fund, *opened for signature* Dec. 27, 1945, art. XII(5)(d), art. XVII(a), 60 Stat. 1401, 1419, 1423, T.I.A.S. No. 1501, 2 U.N.T.S. 39, 88, 98 [hereinafter cited as IMF Agreement].

96. Articles of Agreement for the International Finance Corporation, Dec. 5, 1955, art. VII(a), 7 U.S.T. 2197, 2217, T.I.A.S. No. 3620, 264 U.N.T.S. 117, 146 [hereinafter cited as IFC Agreement].

97. Amendments to the constitutive conventions of the FAO, UNESCO, and WMO need not be ratified unless they impose new obligations upon member states.

gally binding rules on all matters within the purview of the organization, without further reference to the membership, is nowhere to be found within the UN system. Several agencies, however, have limited authority within specified substantive areas to impose legal obligations upon their members without the consent of each affected state. These include the International Telecommunications Union (ITU), the Universal Postal Union (UPU), the International Civil Aviation Organization (ICAO), the World Meteorological Organization (WMO), the World Health Organization (WHO), and the Global Financial Agencies.

(1) The International Telecommunications Union.[98] The ITU's authoritative rulemaking activity might well be treated in connection with the amendment of constitutive conventions, since that is where its lawmaking authority lies. Its convention, however, like that of the UPU, discussed below, is intended to be much more than a constitutional document setting forth basic principles, organizational powers, structures, and procedures. The convention also contains fundamental rules governing telecommunications and, in its annexes, more detailed regulations.[99] It is intended to be changed periodically in response to new technology and changing political conditions. The convention is revised by the Plenipotentiary Conference, the supreme organ of the ITU, at each of its meetings, which occur every five to eight years as decided at the previous meeting.[100] Hence, revising the convention is the organization's primary legislative process.

The ITU has very limited authority to impose binding obligations on states without their consent, and deliberations of the Plenipotentiary Conference are pointed toward accommodation and consensus rather than decisions by majority vote. At the time the conference approves a revised convention, each member is entitled to enter reservations to any provision of the convention or to the annexed administrative regulations; no state is definitively bound by any revised convention until it has assented through subsequent ratification.[101] This suggests the absence of

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98. For discussion of the organization and functioning of the ITU, see G. CODDING & A. RUTKOWSKI, THE INTERNATIONAL TELECOMMUNICATION UNION IN A CHANGING WORLD (1982); D. LEIVE, INTERNATIONAL TELECOMMUNICATIONS AND INTERNATIONAL LAW: THE REGULATION OF THE RADIO SPECTRUM (1970).

99. Convention of the International Telecommunications Union, *done* Oct. 25, 1973, 28 U.S.T. 2495, T.I.A.S. No. 8572.

100. *Id.* arts. 6(2)(i), 53, at 2514, 2539-40.

101. *Id.* arts. 42(3), 47, at 2533, 2536.

any legislative effect at all. However, ITU practice complicates this evaluation.

Revised conventions enter into force at a date specified in the convention, and entry into force does not depend on any minimum number of ratifications. Since many states are dilatory in depositing instruments of ratification, the conventions provide a two-year grace period during which states whose representatives have signed the new convention may enjoy the rights of membership without ratification. Even after the two-year period a nonratifying state retains all rights under the convention except the right to vote in meetings of ITU organs. In practice, these provisions have been treated as placing the convention provisionally in force for nonratifying states, a practice now well enough established to be regarded as customary law.[102] Of course any state thus subject to provisional application of the convention and its annexed regulations could terminate both rights and duties by denouncing the convention, but that almost never happens.[103]

(2) The Universal Postal Union.[104] The principal lawmaking body of the UPU is its congress, which meets every five years to revise postal regulations. As in the ITU, the political process is aimed at consensus, but many controversies still must be resolved by vote. A two-thirds majority of all members is required for amendments to the UPU constitution, while a simple majority of those present and voting suffices for amendments to the rules governing the international letter post.[105] Reservations derogating from any of the proposed rules may be submitted at the time of adoption but, unlike the ITU, the reservations are inef-

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102. E. YEMIN, *supra* note 94, at 71-77.

103. Revision of regulations by administrative conferences during the interim between meetings of the plenipotentiary body creates a similar situation. Although formal binding effect depends on subsequent approval by signatory states, such revisions are also treated as provisionally entering into force for signatories that have not yet submitted notice of approval.

104. The most complete treatment of the Universal Postal Union is still G. CODDING, THE UNIVERSAL POSTAL UNION: COORDINATOR OF THE INTERNATIONAL MAILS (1964).

105. The UPU's principal function is maintaining among its members a single postal territory governed by uniform legal principles, with generally uniform postal charges and national treatment for all international mail. This applies primarily to letter post. Other specialized postal services are governed by separate contractual agreements among members desiring to participate. Such agreements include insured letters and boxes, parcel post, postal money orders and postal travelers' checks, postal checking accounts, collect-on-delivery articles, collection orders, international savings service, and subscriptions to newspapers and periodicals.

fective unless approved by the congress. UPU rules take effect at a time specified in the acts regardless of the number of acceptances or ratifications, and compliance with the rules is obligatory for all members from the time of entry into force. Any noncomplying member retains the option of withdrawing from the UPU, but since this is ordinarily not a feasible or desirable option the rulemaking function of the congress is genuinely legislative in impact.[106]

(3) The International Civil Aviation Organization.[107] Central rulemaking functions in the ICAO devolve upon the ICAO Council, a thirty-three member body elected by the ICAO Assembly.[108] The "legislative" organ thus is a body much smaller than the total membership, but this is tolerable because of the technical nature of ICAO's activities and also because most of the rules the ICAO promulgates are not legally binding. Of the various categories of ICAO rules, those having the most credible claim to status of law are denominated "standards" and approved by a two-thirds vote of the council as "annexes" to the ICAO Convention. They take effect at a date prescribed by the council unless a majority of members submits notice of dissent before that time.[109]

The extent of the legal obligation imposed by the adoption of standards depends on one's interpretation of ambiguous convention provisions. Article 37 sets forth the obligation in general terms:

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106. The rules governing letter post, as well as the specialized agreements, may be altered between congress sessions through a referendum of member postal administrations conducted by correspondence. The required vote ranges from unanimity to a simple majority, depending on the nature of the amendment, and amendments so adopted have the same force as rules adopted by the congress.

107. For discussion of ICAO rulemaking, see T. BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (1969). For a more politically oriented study, see Y. KIHL, CONFLICT ISSUES AND INTERNATIONAL CIVIL AVIATION DECISION: THREE CASE STUDIES (1971).

108. The ICAO Convention requires representation on the council for states of chief importance in air transport, other states making the largest contribution to civil air navigation facilities, and others as necessary to secure representation from major geographic areas. Convention on International Civil Aviation, *done* Dec. 7, 1947, art. 37, 61 Stat. 1180, 1190, T.I.A.S. No. 1591, 15 U.N.T.S. 295, 320, 322.

109. *See id.* arts. 54, 90, at 1196, 1205, 15 U.N.T.S. at 334, 336, 356.. The ICAO Assembly has defined "standard" as "any specification for physical characteristics, configuration, materiel, performance, personnel, or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Member States will conform in accordance with the Convention." Assembly Res. A1-31, ICAO Doc. 4411 (A1-P/45) (1947).

> Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to [air navigation].
>
> To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures . . . .[110]

Article 38, however, provides that a state "which finds it impracticable to comply in all respects with any such international standard or procedure" may avoid the obligation by giving notice to the organization.[111] With such a ready way out of compliance, standards might be regarded as totally without legal force. Probably a better interpretation is to regard the convention as imposing a "good faith" obligation to comply absent substantial reasons to opt out. The legal obligation is present, but its content is imprecise. Moreover, the practice of states suggests that lack of economic and technical resources, not willful disregard, is at the root of most noncompliance.[112]

In a few subject areas the legal force of ICAO standards is not diluted by the notice requirement. The ICAO Convention confers upon the ICAO the right to adopt air navigation rules pertaining to air space over the high seas and obligates member states, without qualification, to prosecute violators. Of less practical significance, but of similar legal import, are provisions laying down unqualified obligations to implement standards concerning registration of aircraft, collaboration in the search for missing aircraft, and maintenance of aircraft log books. With respect to standards governing airworthiness of aircraft and personnel competence, the notice option is a lawful alternative to compliance, but compliance is supported by decentralized sanctions. Aircraft and personnel not certified as meeting minimum standards may be denied access to the air space of any state.[113]

(4) The World Meteorological Organization.[114] In the WMO

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110. Convention on International Civil Aviation, *supra* note 108, art. 37, at 1190, 15 U.N.T.S. at 320, 322.

111. *Id.* art. 38, at 1191, 15 U.N.T.S. at 322.

112. *See* T. BUERGENTHAL, *supra* note 107, at 121.

113. Convention on International Civil Aviation, *supra* note 108, art. 49(d), at 1194, 15 U.N.T.S. at 330.

114. An excellent survey of WMO history, structura, and functions is found in 1 D. LEIVE, INTERNATIONAL REGULATORY REGIMES: CASE STUDIES IN HEALTH, METEOROLOGY, AND FOOD 153 (1976).

the power to make rules of external application ("technical regulations") is lodged primarily in the WMO Congress, which meets at four year intervals. Because of the frequent need to adapt rules to changing conditions, the WMO Executive Committee is authorized to amend the rules during the interim between congress sessions. The WMO president has also been given power to amend the regulations between annual sessions of the executive committee, subject to confirmation by the committee at its next session.[115] The original reason for delegating such power to the president was to enable the WMO to keep pace with changing ICAO regulations in the field of aeronautical meteorology, but the president has in practice used his authority to approve other regulations as well. This unusual delegation of authority to a single official is acceptable apparently because of the technical nature of the functions performed.[116]

The legal force of the regulations is the same, whether adopted by the congress, the executive committee, or the president.[117] As in the ICAO, only regulations denominated as "standard" practices and procedures (as contrasted with "recommended" practices and procedures) have any claim as binding obligations upon members. And, as in the ICAO, the obligation is one of good faith compliance. All members must "do their utmost to implement" the standards, but any state that "finds it impracticable to give effect to some requirement in a technical resolution" may avoid the obligation by giving notice and explanation.[118] This large loophole undoubtedly takes much away from the obligation to comply, if not the obligation of a state to do its "utmost."

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115. *Id.* at 212-14.

116. E. YEMIN, *supra* note 94, at 171, concludes:

> The readiness of members of WMO to permit the delegation of extensive powers to a single officer acting largely on the advice of the Technical Commissions and Secretariat reflects the fact that the decisions involved are highly technical in nature, and indicates a very substantial reliance on the expertise of the subordinate organs.

117. Article 8 of the WMO Convention, which creates the obligation, refers only to decisions of the congress. By acquiescence and custom, however, all "standards" are treated as having equal effect. Convention of the World Meteorological Organization, *opened for signature* Oct. 11, 1947, art. 8(a), 1 U.S.T. 281, 286, T.I.A.S. No. 2052, 77 U.N.T.S. 143, 152.

118. *Id.* art. 8(a), (b), at 286, 77 U.N.T.S. at 152; *see also* E. YEMIN, *supra* note 94, at 171, 176.

(5) The World Health Organization.[119] The WHO, acting through its assembly, is also empowered to adopt regulations on certain technical matters that may create legal obligations for members.[120] Only a simple majority is required to adopt regulations, although the practice whenever possible is to achieve such widespread agreement that a regulation may be approved without vote and without objection. Once adopted, the regulations are mandatory for every member not objecting within a specified time period.[121] This preserves the right of individual consent, but leaves the possibility that the legal obligation may be accepted through inadvertent failure to give notice of rejection.

(6) The global financial agencies.[122] The World Bank group of agencies (the Bank, the IDA, and the IFC) and the IMF have no formal authority to legislate for their members. Their governing bodies, however, have the power to authoritatively interpret their respective constitutive documents, which in some instances may almost amount to legislation.[123] Some

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119. Extended treatments of the WHO as an institution include R. BERKOV, THE WORLD HEALTH ORGANIZATION: A STUDY IN DECENTRALIZED INTERNATIONAL ADMINISTRATION (1957); P. CORRIGAN, THE WORLD HEALTH ORGANIZATION (1979); 1 D. LEIVE, *supra* note 114, at 1.

120. Constitution of the World Health Organization, *opened for signature* July 22, 1946, art. 21, 62 Stat. 2679, 2685, T.I.A.S. No. 1808, 14 U.N.T.S. 185, 192-93. Article 21 of the WHO Constitution defines these matters as follows:

> (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease;
>
> (b) nomenclatures with respect to diseases, causes of death and public health practices;
>
> (c) standards with respect to diagnostic procedures for international use;
>
> (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce;
>
> (e) advertising and labelling of biological, pharmaceutical and similar products moving in international commerce.

121. *Id.* art. 22, 62 Stat. at 2685, 14 U.N.T.S. at 193.

122. Some recent book-length analyses of the World Bank agencies include B. HURNI, THE LENDING POLICY OF THE WORLD BANK IN THE 1970S: ANALYSIS AND EVALUATION (1980); E. MASON & R. ASHER, THE WORLD BANK SINCE BRETTON WOODS (1973); H. SELIM, DEVELOPMENT ASSISTANCE POLICIES AND THE PERFORMANCE OF AID AGENCIES (1983). For studies of the establishment and early performance of the IDA and the IFC, see J. BAKER, THE INTERNATIONAL FINANCE CORPORATION: ORIGINS, OPERATIONS, AND EVALUATION (1968); J. WEAVER, THE INTERNATIONAL DEVELOPMENT ASSOCIATION (1965). Literature on the IMF and international monetary system is vast. *See, e.g.*, B. COHEN, ORGANIZING THE WORLD'S MONEY: THE POLITICAL ECONOMY OF INTERNATIONAL MONETARY RELATIONS (1977); THE IMF AND STABILISATION: DEVELOPING COUNTRY EXPERIENCES (T. Killick ed. 1984); IMF CONDITIONALITY (J. Williamson ed. 1983); F. LISTER, DECISION-MAKING STRATEGIES FOR INTERNATIONAL ORGANIZATIONS (1984); A. LOWENFELD, THE INTERNATIONAL MONETARY FUND (1977).

123. World Bank Articles of Agreement, art. IX(a), states:

interpretations apply only to specified disputes or member states, but others not so limited are valid for all members of the organization and are considered legally binding.[124] The weighted voting system used by each of the organizations creates at least the theoretical possibility that such decisions could be made by a minority of states casting large blocs of votes.

Like the UN and other UN agencies, the financial institutions can engage in "lawmaking" by promoting formulation and adoption of multilateral treaties. In addition, their daily activities employ contractual techniques intended to create legal obligation. Their business is lending money, and borrowers obtain money only upon conditions specified in binding legal instruments. Whether the loan agreements take treaty form or contract form, lending agencies are careful to assure that the obligation is there. Almost invariably the obligation extends beyond timely repayment. The agreement is likely to cover the objects for which the money may be spent and frequently imposes other economic conditions. Conditions attached to IMF credits, in particular, often demand fiscal and economic discipline that countries would not adopt on their own. Proceeding on a case by case basis, the Bank and the IMF may impose much broader limitations upon a state's freedom of action than other intergovernmental organizations with ostensibly broader powers of legislation could ever hope to do.

III. Legislation by Majorities: Why It Exists Anywhere

Increasing interdependence has caused international organizations to proliferate, but states remain reluctant to entrust legislative authority to majority decision. International law is still a product mainly of treaty and custom. International organiza-

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> Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision. If the question particularly affects any member not entitled to appoint an executive director, it shall be entitled to representation in accordance with Article V, Section 4(h).

IBRD Agreement, *supra* note 95, art. IX(a), at 1460, 2 U.N.T.S. at 186. Article IX(b) permits a member to appeal to the board of governors, whose decision is final. Essentially identical provisions are found in article XVIII of the IMF Agreement, *supra* note 95, at 1423, 2 U.N.T.S. at 100; article X of the IDA Agreement, *supra* note 95, at 2308, 439 U.N.T.S. at 288; and article VIII of the IFC Agreement, *supra* note 96, at 2218, 264 U.N.T.S. at 148.

124. *See* Hexner, *Interpretation by Public International Organizations of their Basic Instruments*, 53 Am. J. Int'l L. 341, 352-56 (1959).

tions have made the treaty process more effective as well as contributing to the development of customary law. This is particularly true of the UN system whose agencies claim near universal membership. But neither function constitutes legislation in the sense of a majority enacting law in disregard of minority objections.

A. Internal Rules

Some such legislative power does exist within the UN system, however, and this must be accounted for. The most pervasive form of legislation is internal law—the rules governing each agency's organization, procedure, and program decisions. As noted earlier, this kind of legislative authority is not hard to explain. If procedure and program decisions depended on unanimous consent, large membership organizations would be virtually immobilized. An organization that cannot act is useless. If the organization is to function effectively, all must follow the same rules. Majority rule in internal matters is the price paid for a viable organization.

The price might be too high for some states if the same majorities consistently outvoted the same minorities. But UN deliberations are often marked by a genuine search for consensus, and when disputes arise the alignments differ enough from one group of issues to another that every state votes sometimes with the majority.[125] Moreover, majority rule is everywhere mitigated by political realities. In a few organizations, such as the World Bank or the UN Security Council, differences in power are recognized by giving greater weight to the votes of some states.[126] Even when each state has an ostensibly equal vote, some states are inevitably "more equal than others."

B. Rules of External Application

Every intergovernmental organization within the UN system also has some authority to legislate external rules through

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125. Chadwick F. Alger was one of the first to note the unifying effect of cross-cutting cleavages in international organization. *See* Alger, *Non-resolution Consequences of the United Nations and Their Effects on International Conflict*, 5 J. CONFLICT RESOLUTION 128-45 (1961). An organization suffers stress when alignments become solidified for a wide range of issues. The East-West cleavage imposed strains upon the United Nations during its early years, as the North-South cleavage does now.

126. U.N. CHARTER art. 27, para. 3; IBRD Agreement, *supra* note 95, art. V(3)(a), at 1451, 2 U.N.T.S. at 162.

amendment of its constitutive document. Many constitutional amendments concern matters of internal structure and procedure, but some deal with rules that apply to the external conduct of states. Permitting amendment by majority action probably reflects an implicit assumption that basic principles should not be forever frozen in a mold the founders thought desirable or expedient. Requiring unanimous consent could have that effect. Since constitutional amendment is an extraordinary process, fundamental change would not be anticipated often in most agencies. Oppressive amendments might conceivably be adopted, but each state has recourse to the ultimate safety valve—withdrawal from the organization if its interests are too seriously threatened. Although no state may individually thwart the collective will of the others, its own sovereign right to escape the obligation is preserved.

The rationale for constitutional amendment by majority decision is obviously persuasive, since every UN related agency has it. The more interesting question is why some organizations, but not others, provide for enactment of legally binding rules as part of the regular order of business. The ITU and the UPU do it through amendment of their basic conventions; the ICAO, the WMO, and the WHO do it through prescribed legislative processes. The UN Security Council has authority, largely unused, to order mandatory enforcement action against states that threaten peace. Most other UN agencies do not purport to make binding enactments at all, relying upon recommendation to induce necessary cooperation.

The Security Council's paper enforcement powers were the product of especially compelling historical circumstances. The exigencies of war, still raging in Europe and the Far East, account for the founders' readiness to entrust such important security decisions to an eleven-member body dominated by the five permanent members. Preventing future world war was an overriding objective at San Francisco, and unified action by the great powers within the framework of a universal security system was the logical way to achieve it. Those assumptions about the desirability of peace and the need for great power unity are still valid, but one may justifiably doubt that any such power would be given to the Security Council if the UN were being created today.

The specialized agencies that regularly exercise significant legislative or quasi-legislative authority are a more fruitful sub-

ject for generalization. They have a number of common features, suggesting that some conditions may be regularly associated with authoritative rulemaking by majorities. Perhaps significantly, each relevant characteristic relates to the function of the organization[127] and not to its structure, decision-making processes, or leadership patterns. The common features may be described as follows:

(1) The organizational function is highly technical in nature and thus dependent upon the advice of trained experts in the relevant scientific fields.

(2) The function is specific in the sense of being limited to a narrow area of public policy.[128] Indeed, within each organization that exercises such authority, legal obligation is attached to rules only in specialized areas of the agency's field of operation.

(3) Technological change makes periodic revision of the rules a requisite to effective performance. Cumbersome, protracted methods of rule change may delay or preclude reaping the benefits of technological advances.

(4) Effective performance requires universal application of uniform rules among states affected by the function. Some rules are undoubtedly better than others but, within the range of options that might win support from bona fide technical specialists, uniformity is generally more important than the technical differences between alternatives. When uniformity is desirable but not necessary, rules generally take the form of recommendations rather than requirements, even within organizations that have legislative or quasi-legislative powers.

(5) The function may be important but the issues it raises are ordinarily low in controversiality. General agreement exists on the broad purposes to be achieved; hence disagreement, though sometimes severe, is likely to center

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127. The emergence of "function" as the central variable inevitably calls to mind the theory of functionalism elaborated by David Mitrany in a number of writings, most notably D. MITRANY, A WORKING PEACE SYSTEM (1966), and in a neo-functionalist variant associated with E. HAAS, BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION (1964). The theory will not be examined here, but a recent discussion of the subject is found in R. RIGGS & I. MYKLETUN, BEYOND FUNCTIONALISM (1979).

128. R. COX & H. JACOBSON, THE ANATOMY OF INFLUENCE (1973), uses the word "technical" to describe an agency "when there is a body of sophisticated professional or scientific knowledge that is necessary to the conduct of its work." The agency is "functionally specific when its work relates to one specialized area of public policy." *Id.* at 420.

more on technical considerations than on vital national interests.

The World Bank and the IMF illustrate one additional variable associated with the capacity to make authoritative decisions: money. Although both institutions received initial infusions of capital from member states and capital subscriptions by members have been increased over the years, neither is in any real sense dependent on members for replenishment of funds. Both are lending institutions that demand and receive repayment with interest.[129] They are, so to speak, independently wealthy. The Bank obtains most of its lending capital through borrowing on world capital markets, just as a commercial bank might do.

The IMF has been more dependent on periodic increases in member capital subscriptions, not as replenishment but as an addition to total capital in order to supply increased liquidity demanded by a rising volume of world trade. Since 1969, the fund also has found a way to augment its resources without cost to members, which has eased if not eliminated the need for periodic increases in capital subscriptions. It has done this by creating a paper asset called Special Drawing Rights that increase the usable reserves of hard currency available to its members without increased member subscriptions. This ready access to and control of massive amounts of funds does not give either agency general power to legislate for member states, but it does augment their capacity to drive hard bargains and impose upon individual states a contractual obligation to fulfill those bargains.

IV. Conclusion

The UN and its specialized agencies have played an important role in developing international law since 1945, primarily through the traditional norm-creating processes of treaty and custom that rely upon consent. True legislative power, in the sense of majorities binding minorities against their will, exists primarily with respect to internal rules and constitutional amendment.

A few agencies within the UN system have limited powers

129. When the IMF makes a loan, the borrower technically uses its own currency to "purchase" another currency more useful for making international payments, and repayment is accomplished by later "repurchasing" its currency. The transaction is the equivalent of a loan, however, and IMF charges are equivalent to interest.

to legislate binding rules of external application without unanimous consent. These grants of power are usually limited to specific, technical activities of low controversiality where effective international cooperation depends on application of uniform rules, and technological change makes periodic revision necessary. Most permit lawful noncompliance upon timely notification that compliance is not practicable. In all such agencies, rulemaking relies heavily on input from technical experts, and the decision-making style is to achieve consensus whenever possible rather than to exercise majority power to override minority objections.

These facts suggest that technological change has been a moving force behind most innovations in lawmaking at the international level. International organizations are themselves a response to technologically induced opportunities for improving the lot of mankind that in previous centuries were nonexistent. When limited legislative powers have been conferred, it has usually been done to secure the benefits of technical advances. But the pressures of technology upon international rulemaking do not all point in the direction of binding legal obligations legislated by majorities. Slouka, for example, has argued that technological change is steering "the international normative process . . . towards the production of an endless multiplicity and diversity of norms distinguished more by their temporariness and flexibility than durability and firmness."[130] The effect is not so much to encourage growth of legislation by majorities as to encourage consensus on practical ways of dealing with problems.[131] This same idea is reflected in Buergenthal's comment that "the real genius" of the ICAO's regulatory system "lies in its noncompulsory character" and that its "complex and sophisticated

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130. Slouka, *International Law-Making: A View from Technology*, in LAW-MAKING IN THE GLOBAL COMMUNITY, *supra* note 12, at 132.

131. Slouka welcomes this development as portending a global normative process more pliable and responsive to social change. He assumes that one undesirable result may be less legal stability because of increasingly soft and uncertain "[e]xpectations and understandings about the substance of norms" and the concomitant "move from consent to consensus as the order-creating energy in the international politics of the technological age." *Id.* at 133. This undesirable side effect might not occur, however, if no one assumed that such shifting rules of action had the force of law, or that international law could be created by "consensus" not firmly grounded in consent. Resort to consensus as a substituta for affirmative consent is often a practical method of making decisions in international organizations. In the absence of a genuine international community, however, it is not an acceptable way of making law. For a discussion of this lack of community, see G. ARANGIO-RUIZ, *supra* note 6, at 199-278.

aviation code," developed over the years "with almost no opposition from the Contracting States, would not be in existence today without this built-in flexibility."[132] It is also reflected in Leive's conclusion, based on detailed study of the WMO, the WHO, and the Joint FAO/WHO (Food and Agricultural Organization/World Health Organization) Codex Alimentarius Commission, that mandatory rules are generally less acceptable to states and often no better observed than nonbinding recommendations.[133]

Four decades of the UN have produced only modest, incremental growth in the legislative powers of international organizations. *Claims* to legislative effects have escalated more markedly, especially on behalf of General Assembly resolutions. But such claims cannot and do not give recommendations the force of law. The General Assembly is not the authoritative voice of a world community. It is only one of many group voices speaking for interests that some or all share. The decentralization of decision making among a multitude of sovereign states within the international system is matched by proliferation of collective decision making among a multitude of international agencies. The complexity of this decentralized system is further heightened by transnational interactions among bureaucratic subsystems of state and organizational actors, where interests are not exclusively bounded by national lines. The feasibility of the system depends on accommodation, not enforced conformity to binding rules. Successful accommodation of interests may promote greater willingness to accept binding rules. But forty years expe-

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132. T. BUERGENTHAL, *supra* note 107, at 121. He continues:

> True, their general level of implementation leaves much to be desired, but the basic cause for this unsatisfactory situation is not the legislative scheme of the Chicago Convention; it is the wide economic and technological gap that separates the developed from the developing nations of the world. Just as domestic laws with all their coercive power cannot force people to do what they cannot do, so no amount of solemn international promise-making will compel states to abide by rules with which they simply cannot comply.

Id.

133. 2 D. LEIVE, INTERNATIONAL REGULATORY REGIMES 584 (1976):

> In practice, standards or other rules of conduct often are more widely acceptable to states if cast in nonbinding form (assuming that the content is otherwise the same). This does not merely reflect the truism that states prefer not to be bound, but that such standards may actually be observed more widely, or at least as widely, when cast as recommendations. There are numerous examples of binding rules widely ignored and nonbinding recommendations closely followed.

rience with the politics of UN lawmaking has demonstrated that accommodation must come first.