CARDOZO
Benjamin N. Cardozo School of Law

LARC @ Cardozo Law

Articles

Faculty Scholarship

Summer 1984

Recognition, Use of Force, and the Legal Effect of United Nations Resolutions under the Revised Restatement of the Foreign Relations Law of the United States

Malvina Halberstam
Benjamin N. Cardozo School of Law, halbrstm@yu.edu

Follow this and additional works at: https://larc.cardozo.yu.edu/faculty-articles

Part of the Evidence Commons, and the International Law Commons

Recommended Citation
Malvina Halberstam, *Recognition, Use of Force, and the Legal Effect of United Nations Resolutions under the Revised Restatement of the Foreign Relations Law of the United States*, 19 Isr. Law Rev. 495 (1984).
https://larc.cardozo.yu.edu/faculty-articles/743

This Article is brought to you for free and open access by the Faculty Scholarship at LARC @ Cardozo Law. It has been accepted for inclusion in Articles by an authorized administrator of LARC @ Cardozo Law. For more information, please contact larc@yu.edu.

RECOGNITION, USE OF FORCE, AND THE LEGAL EFFECT OF UNITED NATIONS RESOLUTIONS UNDER THE REVISED RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES

*Malvina Halberstam**

I. *Introduction*

A. *Background*

The prestigious American Law Institute is in the process of promulgating a revised Restatement of the Foreign Relations Law of the United States. The present Restatement on the subjec' was adopted in 1962 and finally promulgated with revisions in 1965.[1] Work on a revised restatement began in the late 1970s and the first tentative draft was submitted to the Institute in 1980. Thus far, five tentative drafts have been presented to the members of the Institute for their consideration and the Restatement as a whole is scheduled for consideration by the members of the Institute at its annual meeting in May 1985.

The American Law Institute is a private organization of jurists, not a legislative body, and the Restatements are not official codifications. However, since the Institute membership includes some of the most noted scholars, judges and practitioners in the United States, the Restatements carry great weight and are often cited by United States courts in their decisions.

* Professor of Law, Benjamin N. Cardozo School of Law, Y.U. Visiting Professor, Hebrew University of Jerusalem. The points discussed in this article were raised by the writer at the annual meetings of the American Law Institute in 1980 and 1981, when these sections were considered by the members of the Institute, and at the annual meeting of the American Society of International Law in 1983, as a member of a Panel on the Restatement. For the writer's critique of another provision of the proposed Restatement, see Halberstam, "Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law" (1985) 79 Am. J. Int'l L. 68.

1 See the American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (Revised) [hereinafter, Restatement], Tentative Draft No. 1, p. xii (1980).

The Restatement of Foreign Relations Law may have an even greater impact than other Restatements. More and more cases involving questions of international law arise in United States courts. Most United States judges do not have an extensive background in this area and there are few, if any, authoritative sources, comparable to those available for resolving questions of domestic law, on international law. The outstanding scholarly reputation of the Reporters[2] will add further to the stature of the present Restatement and the analysis and documentation contained in the Comments and Reporters' Notes will make it an invaluable research tool for anyone working in the area, whatever one's view of the Restatement position on a particular matter. Finally, at the international level, the Restatement does have some official status, since the Statute of the International Court of Justice includes the "teachings of the most highly qualified publicists of the various nations" among the subsidiary means for determining international law.[3]

As presently structured, the Revised Restatement is divided into nine parts: Relation of International Law to United States Law; Persons in International Law; International Agreements; Jurisdiction and Judgements; The Law of the Sea; Protection of Persons (Natural and Juridical); Selected Law of International Economic Relations; and Remedies for Violations of International Law. These are further sub-divided. On each subject, the Restatement sets forth the Black-Letter-Rules, reflecting the Institute's view of the applicable law,[4] followed by Comments and Reporters' Notes, which discuss the issues in greater depth and summarize the decisions of United States courts, as well as those of international and foreign tribunals bearing on the question.

[2] The work was begun under the direction of the late Richard B. Baxter as Chief Reporter. Upon his appointment to the International Court of Justice, Louis Henkin became the Chief Reporter. The associate Reporters are Andreas F. Lowenfeld, Louis B. Sohn and Detlev F. Vagts.

[3] Statute of the International Court of Justice, Article 38, quoted *infra* n. 59. The Restatement itself notes that this includes,

> treatises and other writings of authors of standing, resolutions of scholarly bodies, such as the Institute of International Law (L'Institut de Droit International) and the International Law Comission, national codifications of international law *such as this Restatement*. §103, Reporters' Note 1 (emphasis added).

[4] For a discussion of whether Restatements should state what the law is or what it ought to be, see Wechsler, "The Course of the Restatements", (1969) 55 A.B.A.J. 147. For the approach adopted by the Restatement for determining rules of international law see text accompanying nn. 5–8 and n. 8 *infra*.

B. *Scope of the Restatement*

The introduction states that,

> The Foreign Relations Law of the United States, as dealt with in this Restatement, "consists of (a) international law as incorporated in the law of the United States; and (b) domestic law that has substantial significance for the foreign relations of the United States or has other substantial international consequences"....The international law restated here consists largely of customary international law and international agreements to which the United States is a party.[5]

It goes on to say that:

> The Restatement of this subject, in stating rules on international law, represents the opinion of the American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law.[6]

The only qualification to this last proposition is that "a determination of international law or an interpretation of a U.S. treaty by the Supreme Court of the United States is authoritative foreign relations law of the United States".[7]

Absent a treaty or decision on point by the United States Supreme Court, the Restatement purports to state rules that are or would be accepted by an international tribunal, rather than the United States view of those rules,[8] as reflected in either decisions of United States courts (other than the Supreme Court) or statements of the executive.[9] Thus, notwithstanding that it is a Restatement of *United States* Foreign Relations Law, insofar as it deals

[5] Restatement, Tentative Draft No. 5, p. 1 (1984).

[6] *Ibid.*

[7] *Ibid.*

[8] Whether a Restatement of United States Foreign Relations Law should give what it believes to be the rule that an international tribunal would apply—assuming that can be ascertained—rather than the United States position on the rule, is debatable. Several members of the Institute expressed disagreement with this approach, when the tentative draft was discussed at the annual meeting. See ALI, 1984 Proceeding. Interestingly, in another context, the Reporters' Notes refer to the Restatement as "a national codification of international law". See § 103 Reporters' Note 1, quoted *supra*, n. 3.

[9] The executive has broad powers in the conduct of United States foreign affairs. See *United States* v. *Curtiss Wright Export Corp.*, 299 U.S. 304 (1936). See generally, Henkin, *Foreign Affairs and the Constitution*, (1972) 37–65. Justice Marshall's early characterization of the President as "the sole organ of the nation in its external relations and its sole representative with foreign nations", (1800) 10

with customary international law, which constitutes a major part of international law, the Restatement purports to set forth generally accepted principles of international law.

Two proposed sections of the Revised Restatement, one dealing with recognition and the use of force, the other dealing with what constitutes evidence of binding rules of international law, may be of particular interest to Israel. They attribute to the United Nations General Assembly authority it does not have under the Charter and, in this writer's view, do not reflect generally accepted principles of international law.[10]

II. *Recognition and Use of Force: Section 202*

Following the traditional definition of statehood in section 201[11] of the Restatement, section 202(2) provides:

Annals of Congress 613, has been often quoted. The Supreme Court has generally deferred to the executive on questions involving foreign affairs, see e.g., *Ex Parte Republic of Peru,* 318 U.S. 578 (1943), *Republic of Mexico* v. *Hoffman,* 324 U.S. 30 (1945). One of the reasons given by the Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), for its refusal to apply international law was that judicial interpretation of rules of international law might differ from that of the executive, thereby embarrassing the executive in its conduct of foreign affairs. Given the executive's "pre-eminence" in the conduct of foreign affairs, see Henkin, *supra,* at 38, it would seem more appropriate that where there are differing views of what the correct rule of international law is, the Restatement of the Foreign Relations Law of the United States adopt the position of the executive, rather than the Institute's view of what an international tribunal would do, at least where the International Court of Justice has not ruled on the question.

In addition to being inconsistent with the broad authority accorded to the executive in foreign affairs and with the title of the Restatement (Restatement of the Foreign Relations Law of the *United States,* not Restatement of principles of International Law), the formula suggested by the Restatement also injects unneccessary ambiguity. Where there are differing positions on what the international law is on a question, as for example, whether prompt and adequate compensation is required when private property of aliens is nationalized, it is impossible to determine what an international tribunal would do, whereas the executive position on the matter is often clear.

[10] These are, of course, not the only provisions subject to challenge on the ground that they do not accurately reflect international law, United States law, or both. Members of the Institute voiced strong objections to a number of other provisions on these grounds, e.g., §135 (dealing with the effect of rules of customary international law on treaties and United States statutes), §428 (dealing with United States enforcement of foreign acts of state that violate international law), §712 (dealing with expropriation by a state of a foreigner's property).

[11] Sec. 201 provides: "Under international law, a 'state' is an entity which has a defined territory and permanent population, under the control of a government,

> A state is required not to recognize or treat as a state an entity that attained the qualifications of statehood in violation of international law.[12]

Comment (e) to the section states,

> Although an entity satisfies the requirements of § 201, international law requires that the entity not be recognized or treated as a state if it was created by threat or use of force by one state upon another in violation of the United Nations Charter.[13]

The Comment further states,

> Similarly, states are obligated not to recognize or accept the incorporation of a state into another state as a result of conquest in violation of international law.[14]

Section 202(2) and Comment (e) in effect add another requirement to the traditional elements of statehood, i.e., that it not have been created by threat or use of force in violation of the U.N. Charter.

The Reporters' Notes go even further, stating, "international law requires states not to recognize (or accept) a territorial acquisition resulting from the threat or use of force".[15] The statement in the Reporters' Notes does not contain the qualifying "in violation of international law", or "in violation of the United Nations Charter", as does the Black-Letter-Rule and the Comment.[16] It quotes a provision of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,[17] which contains no such

and which engages in, or has the capacity to engage in, formal relations with other such entities". Tentative Draft No. 2 (1981).

[12] *Id.* § 202(2) (1981).

[13] *Id.* Comment (e).

[14] *Id.*

[15] Tentative Draft No. 2 § 202, Reporters' Note 6.

[16] The Reporters' Note states, "that principle has been universally accepted as regards territory conquered by use of force in violation of the U.N. Charter. It is, however, disputed as to territory acquired by use of force which was not unlawful, for example, if a victim of aggression, acting in self-defense in accordance with article 51 of the Charter, conquers territory of the aggressor and proceeds to annex it". Tentative Draft No. 2 § 202, Reporters' Note 6.

[17] G. A. Res. 2625 (xxv), G.A.O.R. 25th Sess. Supp 28 (A/2028) p. 121, reprinted in (1971) 65 Am. J. Int'l L. 243. For an analysis of the legal effect of General Assembly resolutions in general and the Declaration on Principles of Friendly Relations see, Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of (sic) Principles of Friendly Relations", (1972) 137 *Recueil Des Cours* Vol. III, p. 419.

qualifications,[18] and appears to equate the General Assembly Resolutions with international law.[19]

Customary international law defines statehood in terms of a defined territory, a permanent population and a government in control of the population, which engages or has the capacity to engage in foreign relations.[20] That is also the definition set forth in section 201 of the Restatement.[21] That definition makes no reference to the manner in which the State came into existence or acquired territory. Almost every state has either come into being or acquired territory through threat or use of force at some point in its history.[22] Oppenheim, summarizing the traditional view, says,

> The formation of a new State is... a matter of fact and not of law. It is through recognition, which is a matter of law, that such new State becomes a subject of International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of international law, *and it matters not how the territory was acquired before recognition.*[23]

[18] The resolution, and more specifically, the paragraph containing the sentence quoted in the Reporters' Notes (but not the sentence quoted) does refer to use of force in violation of the Charter. The paragraph in full reads,

> The territory of a state shall not be the object of military occupation resulting from the use of force *in contravention of the provisions of the Charter.* The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:
> (a) Provisions of the Charter or any international agreement prior to the Charter regime and valid under international law; or
> (b) The powers of the Security Council under the Charter.

(1971) 65 Am. J. Int'l L. 246–47 (emphasis added).

For the position that even the Declaration preserves the "distinction between lawful use of force and unlawful use of force" and does not apply to use of force in self-defense, see, Stone *infra* n. 32 at 52.

[19] For a discussion of the legal effect of General Assembly Resolutions, see part III.

[20] See e.g., Schwartzenberger, *A Manual of International Law* (5th ed., 1967) 55; Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. 881, 165 L.N.T.S. 19.

[21] See *supra*, n. 11.

[22] "If old roots of title are to be dug up and examined against the contemporary rather than the intertemporal law there can be few titles that will escape without question". Jennings, *The Acquisition of Territory in International Law* (1963) 53.

[23] *Id.*, at 8, quoting Oppenheim, (8th ed., by Lauterpacht) Vol. 1, p. 544 (emphasis added by Jennings).

Jennings agreed:

> [F]or a territorial change coincident with the birth of a new State the law apparently not only fails to provide any modes of transfer but appears to be actually *indifferent as to how the acquisition is accomplished.*[24]

He argues, very forcefully and eloquently, for the rejection of this approach:

> To brand as illegal the use of force against the 'territorial integrity' of a State, and yet at the same time to recognize a rape of another's territory by illegal force as being itself a sort of legal title to the sovereignty over it, is surely to risk bringing the law into contempt... The question is *whether an international crime of the first order can itself be pleaded as title* because its perpetration has been attended with success.[25]

Brownlie argues to the same effect. He writes:

> the essential *criminality of wars of aggression and analogous forms of the use of force* as an instrument of national policy has altered the nature of recognition in such circumstances and given it the character of *complicity in criminal activity*... Thus recognition of annexation would be a delict, *a violation of the sovereignty* of the state which was *a victim* of the use or threat of force.[26]

Brownlie, however, distinguishes between *de facto* and *de jure* recognition and would limit the prohibition to *de jure* recognition.[27]

The argument that now that the use of force other than in self-defense is a violation of the U.N. Charter, and that the acquisition of territory by the wrongful use of force is prohibited, *recognition* of such acquisition of

[24] *Id.*, at 8.

[25] *Id.*, at 54 (emphasis added).

[26] Brownlie, *International Law and the Use of Force by States* (1963) 418–19 (emphasis added).

[27] He says: "The possibility of '*de facto* recognition' of control over territory which has its source in illegality is not to be regarded with distaste, and the British and American practice of distinguishing the legality of the origin and the fact of control is sensible". *Id.*, at 420–21. The Restatement rejects this distinction. While it has decided to avoid the terms "*de jure*" and "*de facto*" recognition, see Tentative Draft No. 2, § 202, Reporters' Note 1, it specifically provides that a State is required "not to recognize *or treat as a state*" an entity that has attained statehood in violation of international law.

territory should also be unlawful, is very appealing. Clearly, where the use of force is, in Jennings' words, "an international crime of the first order", it should not be the basis for lawful title. The difficulty is that in conflicts occurring since the adoption of the Charter, each side has generally claimed of force is, in Jennings' words, "an international crime of the first order", it was a violation of the Charter. Indeed, the Reporters' Notes acknowledge that "whether there has been an unlawful threat or use of force however, may be disputed" and that "in most cases, the issue will not be subject to authoritative determination".[28] They note, for example, that while many states viewed India's intervention in Bangladesh to be a violation of the Charter, other states justified it on the grounds of self-determination and humanitarian intervention and that Bangladesh was generally recognized.[29]

The desirability of a rule requiring states not to recognize as a state an entity that has come into being through the use of force in violation of the Charter is open to question. The aim—condemnation of the unlawful use of force—is, of course, desirable. It is doubtful, however, that this requirement will deter the use of force in violation of the Charter, whereas it will inject ambiguity and uncertainty into the criteria for statehood and provide those that seek to delegitimize certain states with a basis for doing so.[30]

[28] Tentative Draft No. 2, Sec. 202, Reporters' Note 5.

[29] *Id.*

[30] Israel, of course, did not come into existence by the use of force in violation of the United Nations Charter. Quite the contrary, it was established pursuant to a resolution of the General Assembly. Its use of force was in response to an attack upon it by several Arab States at the moment of its establishment and was thus indisputedly in self-defense. Yet, the Arab States and their supporters claim that the very existence of Israel is illegal, "an 'armed attack' on the sovereignty of Palestine". This position is eloquently summarized—and rejected— by Rostow. He states:

> For more than thirty years the Security Council, speaking for the organized international community, has insisted that Israel is a legitimate state, born of the Mandate, and that members of the United Nations are therefore legally and morally bound to make peace with it in accordance with the terms of the Mandate and of the Security Council Resolutions which apply them. Throughout this period, a shifting but important group of States, strongly backed by the Soviet Union, has asserted that the Mandate and all that flowed from it was illegal, and that the existence of Israel is in itself an aggression against the sovereignty of the Palestinian people.

Rostow, *Palestinian Self-Determination: Possible Futures for the Unallocated Territories of the Palestine Mandate,* (Yale Studies in World Public Order, 1979) Vol. 5, p. 167 at 170–171. But see Wright, "The Middle East Problem", (1970) 64 Am. J. Int'l L. 270, 271. Wright stated, "The General Assembly resolution of November 29, 1947, partitioning Palestine and establishing the State of Israel as demanded

Jennings recognizes that the distinction between lawful and unlawful use of force is often unclear.
He states:

> it is submitted that any attempt to draw a legal distinction between situations where conquest can nowadays confer a title and those where it cannot is unrealistic and unworkable in a society where there are as yet few courts with compulsory jurisdiction to decide so nice an issue... The lawfulness or otherwise of the use of force may depend upon such matters as the interpretation of ambiguous Resolutions of organs of the United Nations. The limits and meaning of self-defence are in any case a question of great controversy. Questions of title ought not to depend upon the resolution of questions of such dubiety.

Jennings' solution is to deny recognition to all acquisition of territory by the use of force, whether the use of force was lawful or not. "For all these reasons it seems to me that one is driven to accept the position that conquest as a title to territorial sovereignty has ceased to be part of the law".[31]

This position is both morally and logically untenable. Morally, to equate the victim of aggression with the aggressor is contrary to the most fundamental principles of justice. Logically, the argument that Jennings makes initially, that

> to brand as illegal the use of force against the territorial integrity of a State and yet at the same time to recognize a rape of another's territory by illegal force as being itself a sort of legal title to the sovereignty over it, is surely to risk bringing the law into contempt,

has no application to acquisition of territory by the victim. Or, in Brownlie's terminology, where the acquisition is by the victim, not by the aggressor, there is no "complicity in criminal activity" and no "violation of the sovereignty" of the victim.

Moreover, while a state that engages in aggression should not be permitted to profit thereby, it should not be protected from losses it may suffer as a result of such aggression. Given the absence of an effective international mechanism for preventing aggression, it would be counterproductive to remove the deterrent effect that the possibility of suffering territorial loss as a result of aggression may have. As Stone stated,

by Zionists is difficult to reconcile with this principle [the inadmissibility of the acquisition of territory by war]".

[31] Jennings, *supra* n. 22, at 55–56.

> International law forbids acquisition by unlawful force... It does not so forbid it, in particular when the force is used to stop an aggressor, for the effect of such prohibition would be to guarantee to all potential aggressors that, even if their aggression failed, all territory lost in the attempt would be automatically returned to them. Such a rule would be absurd to the point of lunacy.[32]

E. Lauterpacht similarly stated:

> This proposition [that territorial change as a result of the use of force is impermissible]... is an erroneous distortion of a well-known and well-established principle. The correct principle [is]... *ex injuria jus non oritur*, out of a wrong, no right can arise... Territorial change cannot properly take place as a result of the *unlawful* use of force but to omit the word "unlawful" is to change the substantive content of the rule and to turn an important safeguard of legal principle into an aggressor's Charter.[33]

Schwebel also stressed the need to distinguish between "aggressive conquest and defensive conquest", and between "the taking of territory which the prior holder held lawfully and that which it held unlawfully." He wrote:

> That principle [that the acquisition of territory by war is inadmissible] must be read in particular cases together with other general principles... namely that no legal right shall spring from wrong, and the Charter principle that the Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. So read, the distinctions between aggressive conquest and defensive conquest, between the taking of territory legally held and the taking of territory illegally held, become no less vital and correct than the central principle itself.[34]

He summarizes his views as follows:

> (a) A state acting in lawful exercise of its right of self-defense may seize and occupy foreign territory as long as such seizure is necessary to its self-defense.
> (b) As a condition of its withdrawal from such territory, that state

[32] Stone, *Israel and Palestine: Assault on the Law of Nations* (1981) 52.
[33] Lauterpacht, *Jerusalem and the Holy Places* (1968) 51–52.
[34] Schwebel, "What Weight to Conquest?" (1970) 64 Am. J. Int'l L. 344, 345.

may require the institution of security measures reasonably designed to ensure that that territory shall not again be used to mount a threat or use of force against it.

(c) Where the prior holder of territory has seized that territory unlawfully, the state which subsequently takes the territory in the lawful exercise of self-defense has, against the prior holder better title.[35]

Clearly, the rule advocated by Jennings, that international law should prohibit acquisition of territory by the use of force, even when the use of force is lawful, has not been generally accepted. While the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States appears to so provide,[36] the Declaration is a resolution of the General Assembly which does not have binding authority.[37] The Reporters' Notes acknowledge that it has not been generally accepted "as to territory acquired by use of force which was not unlawful, if a victim of aggression, acting in self-defense in accordance with article 51 of the Charter, conquers territory of the aggressor and proceeds to annex it".[38] Thus, the statement in the Reporters' Notes that "international law" requires states not to recognize or accept territorial acquisition resulting from the threat or use of force, without qualification, is incorrect, or at the very least, ambiguous.[39]

The distinction is of obvious significance for Israel. That Israel's use of force in 1967 was justified self-defense is clear beyond peradventure of

But see Wright, *supra* n. 30 at 270. He argues that the inadmissibility of acquisition of territory by war means "there shall be no territorial fruits from war", and its application "does not depend on determining who was the 'aggressor'."

[35] Schwebel, *supra* n. 34 at 345-6. And see Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria" (1968) 3 Is.L.R. 279.

[36] See *supra* n. 18.

[37] See Part III *infra*; See also Arangio-Ruiz, *supra* n. 17.

[38] Tentative Draft No. 2, § 202, Reporters' Note 6. The proposition that international law requires states to do (or not to do) something, but that most states haven't accepted the principle as stated seems a contradiction in terms.

[39] The Introductory Note to Part IX contains a similar ambiguity. It states, "international law requires states to refrain from recognizing territorial changes resulting from... aggression". Tentative Draft No. 5, p. 158. When the draft was considered by the Institute, this writer noted that the phrase "territorial change" was ambiguous, and that she assumed what was meant was territorial gain by the aggressor. Professor Henkin, The Chief Reporter, stated that that was correct and that the language would be revised to make it clearer. See ALI proceedings, 1984. This was later confirmed in a letter from Henkin to the writer.

doubt.[40] The evidence was so overwhelming that Falk, who is not known for his defense of Israel, stated that he had decided to revise his earlier views on the law of self-defense "in light of my conviction that Israel was entitled to strike first in June of 1967, so menacing and imminent was the threat of aggression being mounted against her".[41]

A number of prominent scholars, including Higgins,[42] Lauterpacht,[43] Rostow,[44] and Schwebel,[45] have stated unequivocally that Israel's presence in the territories she occupied in 1967 is lawful. Several have expressed the view that Israel has better title to these territories than Egypt or Jordan, which occupied them from 1948 to 1967, since Israel's use of force in 1967 was lawful, whereas the use of force by Egypt and Jordan in 1948 was unlawful. After reviewing the history of the Palestine Mandate, the terms of the Mandate, and the various United Nations Resolutions on Palestine, Rostow states:

> It is obvious that Israel's position in the West Bank and the Gaza Strip is much more than that of a military occupant under international law. According to the reasoning of the *Namibia* decisions, Israel's right under the Palestine Mandate—including its right of close settlement in the West Bank—survived the end of the Mandate and will continue until Jordan and Israel settle what is essentially a territorial dispute between them, make peace, and divide the land in accordance with the provisions of Security Council Resolution 242, which is based on the Mandate.[46]

He concludes that not only Israel's occupation of the West Bank, but "Israel's legal position with regard to its right of settlement in the West Bank is impregnable".[47]

[40] For a summary of the events preceding the 1967 war, establishing that Israel acted in self-defense, see, e.g. Lauterpacht, *supra* n. 33 at 346.

[41] Falk, "Reply to Professor Julius Stone", (1970) 64 Am. J. Int'l L. 162, 163.

[42] Higgins, "The Place of International Law in the Settlement of Disputes by the Security Council", (1970) 64 Am. J. Int'l L. 1, 8 ("until such time as the Arab nations agree to negotiate a peace treaty, Israel is in legal terms entitled to remain in the territories she now holds").

[43] See *supra* n. 33 at 46.

[44] See *supra* n. 30 at 161.

[45] See *supra* n. 34 at 346–47.

[46] Rostow, *supra* n. 30 at 161.

[47] *Id.*

Schwebel states,

> as between Israel, acting defensively in 1948 and 1967, on the one hand, and her Arab neighbors, acting aggressively in 1948 and 1967, on the other, Israel has better title in the territory of what was Palestine, including the whole of Jerusalem, than do Jordan and Egypt.[48]

Lauterpacht writes:

> There was never any legal justification for Jordan's entry into the Old City... Thus, Jordan's occupation of the Old City—and indeed of the whole of the area west of the Jordan river—entirely lacked legal justification; and being defective in this way could not form any basis for Jordan validly to fill the sovereignty vacuum in the Old City. Jordan's prolonged *de facto* occupation of the Old City was protected exclusively by the Armistice Agreement, which prohibited Israel from initiating action to displace Jordan; and Jordan's occupation could last no longer than the protection thus afforded. This bulwark was abandoned when Jordan destroyed the Armistice Agreement by its attack on Israeli Jerusalem on 5th June, 1967.[49]

Others, however, have taken a different position. Wright states that the principle of the inadmissibility of the acquisition of territory by war,

> goes beyond the principle of 'no fruits of aggression'. It says there shall be no territorial fruits from war, using the latter term in the material sense of a considerable use of armed force. Its application, therefore, does not depend on determining who was the aggressor in the 1967 hostilities, a difficult question to determine. There can be no doubt that whether or not Israel was the aggressor, its occupation of territory was achieved by the use of armed force.[50]

Clearly, whether international law prohibits the recognition of the acquisition of territory by the use of force or recognition of the acquisition of territory by the *unlawful* use of force is a question of considerable significance in general and to Israel in particular. The principle generally accepted by states, as the Reporters' Notes acknowledge, and the consensus among

[48] Schwebel, *supra* n. 34 at 346.

[49] Lauterpacht, *supra* n. 33 at 47.

[50] Wright, *supra* n. 30 at 270. Wright questions not only the legality of Israel's presence in the territories it conquered in 1967, but the legality of its establishment. See *supra* n. 30.

most scholars is that it prohibits the recognition of acquisition of territory by the *unlawful* use of force. The statement in the Reporters' Notes that "international law requires states not to recognize or accept a territorial acquisition resulting from the threat or use of force", which, though perhaps not so intended,[51] may be interpreted as supporting the position that international law prohibits the recognition of the acquisition of territory by any use of force, whether lawful or not, is unfortunate. The problem is exacerbated by the citation of the General Assembly Resolution on Friendly Relations[52] and the provision in section 103 of the Restatement that "in determining whether a rule has been accepted as international law... substantial weight is accorded to resolutions of international organizations".[53]

To summarize, the Black-Letter-Rule, dealing with recognition of states, as elaborated by the Comments, prohibits recognition of an entity that has come into being by the unlawful use of force. This was not—and could not have been—a precondition for recognition under traditional international law. While a persuasive argument can be made for such a rule following the Charter proscription of the use of force other than in self-defense, its likely effect will not be to deter the use of force in violation of the Charter, but to inject ambiguity into the determination of statehood.

A Reporters' Note dealing with the recognition of acquisition of territory by the use of force, states that international law requires states not to recognize or accept the acquisition of territory by the use of force. This statement in the Reporters' Notes, as the ambiguous General Resolution on which it relies,[54] may be interpreted as applying to any use of force, whether lawful or not. So interpreted, it does not reflect generally accepted international law and cannot be justified morally or logically.

III. *Resolutions of the General Assembly as Evidence of International Law: Section 103*

Proposed Section 103 of the Revised Restatement puts Resolutions of International Organizations on par with judgments of courts and arbitral tribunals as evidence of international law. It provides,

[51] See *supra* n. 39.
[52] See *supra*, n. 18.
[53] Restatement, Tentative Draft No. 1, Sec. 103. For a discussion of that provision, see part III *infra*.
[54] See *supra* n. 18.

In determining whether a rule has been accepted as international law . . . substantial weight is accorded to

* * *

b. Resolutions of International Organizations;[55]

The Reporters' Notes add that "What states have done is, of course, more weighty than their declarations or the resolutions they vote for, *but especially in the absence of other practice*, a resolution declaring the law is probative evidence of what the states voting for the resolution regard as the state of international law".[56] While the provision refers to resolutions of international organizations in general, the resolutions primarily intended are those of the General Assembly of the United Nations,[57] and particularly those resolutions "purporting to declare what the law is".[58]

The United Nations General Assembly does not have law-making authority under the Charter, and resolutions of the General Assembly are not included among the sources of international law listed in Article 38 of the Statute of the International Court of Justice.[59] A proposal to give the

[55] Restatement of the Foreign Relations Law of the United States, Tent. Draft No. 1, §103 (1980).

[56] See § 103, Reporters' Note 2 (emphasis added).

[57] See *id.* After referring to "the universal character of these organizations", the Reporters' Note continues "[i]f such a resolution is adopted by an overwhelming majority, and the *General Assembly* continues to reaffirm the resolution, . . ." and all the resolutions cited are resolutions of the General Assembly. Reporters' Note 2 (emphasis added). This paper deals only with the provision insofar as it is intended to apply to resolutions of the General Assembly. The legal effect to be accorded to resolutions of other organizations would, of course, depend on their constitutive instruments. It is clear, however, that the Restatement was not dealing here with resolutions of bodies that have law-making authority under their constitutive instruments since these are discussed in the section dealing with sources of international law. See §102, Comment (g).

[58] § 103, Comment (c).

[59] Article 38 of the Statute of the International Court of Justice provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

General Assembly law-making authority was overwhelmingly rejected at the San Francisco Conference.[60] A more limited proposal, to permit the Assembly to interpret the provisions of the Charter, was also rejected at the time.[61] Nor have the majority of states changed their position since the adoption of the Charter. A draft resolution on the role of the International Court of Justice, considered by the General Assembly's Legal Committee, which referred in the preamble to "the possibility that in deciding disputes the Court might take into consideration declarations and resolutions of the General Assembly", was rejected by a "wide spectrum of states from all parts of the world".[62] It was criticized as an attempt at "indirect amendment of Article 38 of the Statute of the International Court", and as attributing to the General Assembly "powers which were not within its competence".[63]

Professor (now Judge) Stephen M. Schwebel wrote:

> It is trite but no less true that the General Assembly of the United Nations lacks legislative powers. Its resolutions are not, generally speaking, binding on the States Members of the United Nations or binding in international law at large. It could hardly be otherwise. We do not have a world legislature. If we had one, hopefully it would not be composed as is the General Assembly on the basis of the unrepresentative principle of the sovereign equality of states, states which in

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The Reporters' Notes, while acknowledging that Article 38(1)(d) of the Statute of the International Court of Justice "does not include resolutions of international organizations among the 'subsidiary means for the determination of rules of law'," argues that "nevertheless.. such resolutions may provide important evidence of law". The Reporters' Notes continue:

> A resolution declaring the law is probative evidence of what the states voting for the resolution regard as the state of international law. If such a resolution is adopted by an overwhelming majority, and the General Assembly continues to reaffirm the resolution, the evidence that it reflects the law is strengthened.

§ 103 Reporters' Note 2.

[60] See 9 UNCIO Doc. 316 (1945). See also Stone, *Israel, the United Nations and International Law,* Memorandum of Law, UN Doc. A/35/3/6 S14045 Annex, p. 5. (July, 1980). Arangio-Ruiz, *supra* n. 17 at 447; Russel, *A History of the United Nations Charter,* (1958) 154, 754–776.

[61] See Arangio-Ruiz, *supra* n. 17 at 504, n 83 and accompanying text.

[62] See Stone, *supra* n. 60.

[63] *Id.*

> turn are represented by governments so many of which are themselves not representative of their peoples.[64]

Professor Julius Stone wrote:

> The basic general rule as to the legal effect of General Assembly resolutions is that stated by Sir Hersch Lauterpacht, concurring in the South West Africa Voting Procedure Advisory Opinion of 1955. He there observed that, save where otherwise provided... Decisions of the General Assembly... are not legally binding upon the Members of the United Nations... Resolutions of this body, even if framed as decisions, refer to recommendations... whose legal effect although not altogether absent... appears to be no more than a moral obligation.[65]

Several other judges of the International Court of Justice have also rejected the contention that resolutions of international organizations provided a basis for determining the existence of rules of international law.[66] And in an arbitration involving the Libyan oil nationalization, the arbitrator, Professor René-Jean Dupuy, refused to give legal effect to the United

[64] Schwebel, *The Effects of Resolutions of the U.N. General Assembly on Customary International Law*, Proceedings, Am. Soc. Int. L. (1979) 301. For a discussion of the views of various publicists, see Johnson, "The Effect of Resolutions of the General Assembly of the United Nations", (1955-56) 32 Br. Year Book Int. L. 91; Arangio-Ruiz, *supra* n. 17.

[65] Stone, *supra* n. 60. For a comprehensive discussion and analysis of Lauterpacht's views on the legal effect of resolutions of the General Assembly, see Fitzmaurice, "Hersch Lauterpacht—The Scholar as Judge", Part II, (1962) 38 Br. Year Book Int. L. 1 at 2-12.

[66] Judge Fitzmaurice stressed that the General Assembly is "only empowered to discuss and recommend" and that a resolution "whatever it may be and however the relevant resolution is worded, *can* only operate as a recommendation". *Namibia* Case, [1971] I.C.J. Reports 16, pp. 280-281 (emphasis in original). Judge Jessup wrote,

> at times the argument of Applicants seemed to suggest that the so-called norm of non-discrimination had become a rule of international law through reiterated statements in resolutions of the General Assembly, of the International Labour Organization, and of other international bodies. Such a contention would be open to attack... [S]*ince these international bodies lack a true legislative character, their resolutions alone cannot create law.*

The *South West Africa* Case [1966] I.C.J. Reports 4, p. 432 (dissenting opinion of Judge Jessup) (emphasis added). In a footnote he added, "the literature on this point is abundant". See also, *id.* at 169-170 (separate opinion of *ad hoc* Judge Van Wyk). But see *id.* at 291-293 (dissenting opinion of Judge Tanaka).

Nations Resolution on *The Charter of Economic Rights & Duties of States*,[67] even though it was passed by an overwhelming majority of the General Assembly, but without the affirmative vote of the western states.[68]

Scholars have differed widely in their assessment of the effect of resolutions of the General Assembly, ranging from the view that such resolutions are merely hortatory,[69] to the assertion that the Assembly has legislative or quasi-legislative functions.[70] Moreover, not infrequently the same publicist appears to be saying different things at different points. As Arangio-Ruiz stated in his comprehensive analysis of the various theories on the legal effect of General Assembly Resolutions,

> if we took Leo Gross' continuum to be so arranged that the extreme assertors of the Assembly's legislative powers sat in A while the irreducible deniers were placed in B, too few among the authors of the proposed 'theories' would be easy to situate in a single spot along the segment. In most cases an author seems to be with one foot in one spot and the other foot or a hand in another; and not with regard to different issues or different kinds of resolutions.[71]

Rosalyn Higgins's statement, in the introduction to her excellent book on the development of international law through the political organs of the United Nations, that "with the development of international organizations, the roles and views of states have come to have legal significance as evidence of customary law",[72] is often cited for the proposition that United Nations resolutions are evidence of rules of international law. When read in context, it seems clear, however, that she was not suggesting that resolutions as such, *apart from practice*, are evidence of customary international law. She states:

[67] G.A. Res. 3281 (xxxix) (1974).

[68] *Texas Overseas Petroleum* v. *Libyan Arab Republic*, reprinted in (1978) 17 Int'l Legal Materials 1–37.

[69] See e.g. Arangio-Ruiz, *supra* n. 17.

[70] See Falk, "On the Quasi-Legislative Competence of the General Assembly" (1966) 60 Am. J. Int'l L. 782; Schachter, "The Evolving International Law of Development", (1971) 15 Colum J. Transnat. L. 1. See also Schachter, "The Quasi-Judicial Roles of the General Assembly and Security Council", (1964) 58 Am. J. Int'l L. 960.

[71] Arangio-Ruiz, *supra* n. 17 at 434–35. He discusses, *inter alia*, the views of Gross, McWhinney, Parry, Friedmann, Sorensen, Higgins, *id.*, at 435–38, 475.

[72] Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963) at 2.

> Customary international law is therefore perhaps the most political form of international law, reflecting the consensus of the great majority of states. The emergence of a customary rule of law occurs when there has grown up a *clear and continuous habit of performing certain actions in the conviction that they are obligatory under international law* . . .
>
> * * *
>
> The political organs of the United Nations, however, are vitally concerned with the development of customary international law. Although they are political bodies, they are nonetheless bound by legal rules—rules which are both specific, reflecting formal consent to the terms of the Charter, and general, being the rules of general international law. The application of these rules of general international law may well lead to the growth of new *practices* and to developments in the customary rules.
>
> The United Nations is a very appropriate body to look to for indications of developments in international law, for *international law is to be deduced from the practice of States* which include their international dealings as manifested by their diplomatic actions and public pronouncements. With the development of international organizations the votes and views of states have come to have legal significance as evidence of customary law. Moreover, *the practice of states* comprises their collective acts as well as the total of their individual acts; and the number of occasions on which states see fit to act collectively has been greatly increased by the activities of international organizations. Collective acts of states, repeated and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law. The existence of the United Nations—and especially its accelerated trend towards universality of membership since 1955—now provides a very clear, very uncomplicated focal point for *state practice.*[73]

The emphasis is clearly on state practice. The word practice appears no fewer than four times in these two paragraphs. Resolutions are evidence of customary international law because they reflect state practice. Thus, she continues,

> The choice of the political organs of the United Nations for a study of international law is thus explained by a belief that they are concerned

[73] *Id.*, at 1-2 (emphasis added).

in a multitude of ways with general international law, and *are likely to provide evidence of state practice, an accepted source of law.*[74]

[74] *Id.*, at 7. (emphasis added). Indeed, the underlying premise of her book is that resolutions of the political organs of the United Nations provide evidence of international law because (notwithstanding a general belief to the contrary, see *id.*, at 7-8) most are consistent with traditional international law. She attempts to substantiate this in each of the areas studied. For example, she states in her conclusion concerning the concept of statehood in United Nations practice,

> The real significance of a discussion of the concept of statehood in United Nations practice can be seen by examining the interaction between two viewpoints which have been advocated throughout this Part. Thus, the main thesis advocated here is that variations in United Nations practice concerning choices of statehood are a result not of an abandonment of traditional legal criteria of statehood but of the proper use of flexibility in interpreting these criteria in relation to the claim in which they are presented. Concomitantly, the basic criteria of population, fixed territory, stable and effective government, and sovereign independence have been—and should be—followed quite closely.

Id., at 54. See also p. 120 (dealing with the concept of domestic jurisdiction in United Nations practice) ("the assumption that United Nations jurisdiction in these matters [South Africa] is a mere political reflection of the governing influence of the Afro-Asian bloc, and devoid of legal basis, must be rejected as facile and inaccurate".).

While one may not agree with Higgins that United Nations resolutions by and large reflect state views concerning rules of international law rather than political expediency (see *infra*, text at nn. 87–89), particularly after 1963 when the book was written, it is clear that she so believed and for that reason considered resolutions as being of "legal significance as evidence of customary law". What is not entirely clear is whether by state practice she means acts and statements by a state reflecting a belief that a legally binding obligation exists, or whether she considers a state's vote for the resolution to be sufficient indication of state practice. Thus, she stated,

> To make clearer my own starting point I will here repeat briefly what I fear I have said on many other occasions: that the political bodies of international organizations are a relevant forum in which to search for acknowledged sources of law, namely, treaties and customs; and further that the United Nations provides a comparatively sharply focused forum for *state practice* by United Nations Members; and that United Nations organs, in their day-to-day work, necessarily contribute to the clarification and creation of law.
>
> The proposition is that the General Assembly and Security Council provide a concentrated forum for the practice of states on a wide range of issues. This state practice comprises the total of their individual acts and of their collective acts. To this extent, therefore, the United Nations political organs provide *sources formelles*—the evidence of a recognized source of law in the form of state practice showing the existence of a custom.

Higgins, "The United Nations and Law Making", Proceedings of the American Society of International Law, 1970, printed in (1970) 64 Am. J. Int'l L. 37, 38. And further,

> Even if one rejects the implication that the official statements of nations are

A number of scholars have argued that some General Assembly resolutions, particularly those purporting to set forth fundamental principles, adopted by large majorities and often re-cited, should be given legal effect as indicative of 'general consensus' or customary international law.[75] That position has, however, not received the support of Legal Counsel to the United Nations. A memorandum of the Office of Legal Affairs makes clear that even declarations, though of "greater solemnity and significance" than other resolutions, do not become binding rules unless "justified by State

> not state practice, the point that Judge van Wyk is making seems to me a very important one; namely, that to ascertain if there exists customary international law prohibiting non-discrimination, we must look not only to what states say in the United Nations, but what their own patterns of behavior reveal.
>
> * * *
>
> ...I feel that national practice which runs counter to votes recorded at the United Nations may indeed make doubtful the claim that the resolutions of the Assembly are, in this particular circumstance, evidence of customary international law. *Id.*, at 47.

However, she criticizes Judge Jessup's and *ad hoc* Judge Van Wyk's position in the *South West Africa* case that applicants could not establish the existence of a non-discrimination norm by citing resolutions of the General Assembly, (Jessup is quoted *supra* n. 66), saying,

> But it seems to me that the legislative character is not what is at issue. What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general *opinio juris*, have created the norm in question.

Id., at 43.

The proposed Restatement is quite clear that it considers resolutions in themselves, even if unconfirmed by state practice, sufficient. It states that the Assembly has "adopted resolutions, declarations and other statements of principles that have contributed to the process of making customary law, *statements and votes of government* being treated *as kinds of state practice or expressions of opinio juris*. §102, Reporters' Note 3 (emphasis added). See also §103, Reporters' Note 2, "*but especially in the absence of other practice*, a resolution declaring the law is probative evidence of what the state voting for the resolution regards as the state of international law".

[75] See e.g., Sohn, "The Universal Declaration of Human Rights", (1957) 8 J. Int. and Comp. Jur. 17; Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions", (1969) 63 Am. J. Int'l L. 444; Asamoah, *The Legal Significance of Resolutions of the General Assembly of the United Nations* (1966); But see Arangio-Ruiz, *supra* n. 17: "The simple repetition of a rule in the Assembly does not by itself 'create'—in spite of overwhelming majorities, similarity (or identity) of content, or length of the period covered by the repetitions—a corresponding customary norm... there still remains to consider the *conduct* and the attitude of states with regard to *actual behaviour*, positive or negative, contemplated as due by the rule". 476 (emphasis added).

practice".[76] Professor Sohn, one of the earliest and strongest proponents of the view that General Assembly resolutions should be given legal effect, takes that position only with respect to General Assembly resolutions that (1) have been accepted unanimously or reflect a general consensus and (2) *were adopted in the belief that they reflect the law on the subject.*[77] Section 103(b) does not contain even these qualifications.

The effect of the Restatement provision comes close to the position of Professor Falk, who advocates "attributing a quasi-legislative force to resolutions of the General Assembly",[78] based on consensus rather than consent. Falk acknowledges, however, that

> [i]f Charter intent is decisive and strictly construed, it becomes impossible to attribute binding legal force to resolutions of the General Assembly or to consider that the Assembly is in any sense an active, potential or partial legislative organ.[79]

He also states that "France, the Soviet Union, and South Africa continue to insist upon a sovereignty centered conception of obligation in international relations".[80] Great Britain and the United States have also made clear that they will not accept as binding resolutions of the General Assembly declaring new legal rules to which they have not consented.[81]

[76] UN Doc. E/C N.4/L. 610, 2 April 1962. Quoted in 34 United Nations ESCOR, supp. No. 8 p. 15 UN Doc. E 3616/Rev.i. (1962). Arangio-Ruiz states, "As no objection has been raised by members to our knowledge, to this statement—according to which Assembly Declarations have, *per se* no more binding force, 'as far as strict legal principle is concerned', than a 'recommendation'—the matter would seem to be settled". Arangio-Ruiz, *supra* n. 17 at 449.

[77] Compare Asamoah, *supra* n. 75 at 242–43 (emphasis added):

> The Resolution affirming the Nurenburg principles was a declaration on the part of the states voting for it that they recognize the principles as valid international law binding upon them. In our view this makes the principles general customary international law. We have tried to show that *what is essential for the validity of a rule is a consensus that such a rule is law.*

But see Arangio-Ruiz, *supra* n. 17.

[78] Falk, *supra* n. 70. For a brief but excellent analysis of the inconsistency of Falk's position, see Onuf, "Professor Falk on the Quasi-Legislative Competence of the General Assembly", (1970) 64 Am. J. Int'l L. 349.

[79] Falk, *supra* n. 70 at 783.

[80] *Id.*, at 784.

[81] The United States has repeatedly taken the position that U.N. Resolutions do not have binding legal force. Eleanor Roosevelt did so in the early days of U.N., with respect to the Universal Declaration, even though she vehemently supported

Admittedly, the Restatement does not include resolutions of international organizations in its listing of sources of international law in section 102,[82] and a Comment distinguishes between *sources* and *evidence* of international law.[83] Although *sources* and *evidence* may be distinguished analytically, as the Restatement does,[84] the distinction becomes blurred, or non-existent, when application is considered. If the existence of a particular rule of international law is determined by reference to a resolution of an international organization, it makes little practical difference whether the resolution is characterized as a *source* or as *evidence* of international law. Assuming the rule in question cannot be established on the basis of a treaty or state prac-

it. Ambassador Richardson did so more recently, with respect to the *Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Suboil Thereof, Beyond the Limits of National Jurisdiction,* which declared these to be "the common heritage of mankind". In response to a statement from the Chairman of the group of 77, that because of its special character and its adoption without dissent, the Declaration was "the authoritative expression of international law as to the regime of the seabed beyond national jurisdiction", Richardson said, "We cannot accept the suggestion that other states, without our consent, could deny or alter our rights under international law by resolutions, statements and the like".

[82] Section 102 provides:

Sources of International Law

(1) A rule of international law is one that has been accepted as such by the international political system

(a) in the form of customary law;

(b) by international agreement; or

(c) by derivation from general principles of law common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create general international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles of law common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be rules of international law, if they are appropriate to international law and are of the kind that the international system has accepted.

[83] See §102, Comment (a).

[84] The Restatement means by sources "ways in which rules become, or become accepted as, international law" and by evidence "whether some rule has in fact been accepted as international law". §102, Reporters' Note 1. Article 38 of the Statute of the International Court of Justice does not distinguish between sources and evidence. It requires the Court to apply international conventions, international custom, general principles of law and "judicial decisions and the teachings of the most highly qualified publicists of various nations, as *subsidiary means for the determination of rules of law*". (emphasis added). The Article is quoted in full *supra*, n. 59.

tice—and the Reporters' Notes state, as indicated above, that "especially in the absence of other practice, a resolution declaring the law is probative evidence"[85]—it is difficult to discern a practical difference between considering the resolution a *source* of international law and considering it *evidence* of international law.[86] The effect of the resolution is substantially the

[85] See *supra* n. 56 and accompanying text.

[86] While the Restatement draws a clear distinction between *sources* and *evidence* of international law, see § 102 Comment (a) and n. 84 *supra*, the distinction between *resolutions as a source of international law and as evidence of international law* is not clear in the Restatement itself.

In its discussion of resolutions as a *source* of law, the Restatement says,

> There is much uncertainty as to the legislative effect of... resolutions of the United Nations General Assembly. Budget and other "housekeeping" arrangements apart, the General Assembly cannot mandate but only recommend to members... The Assembly has, however, adopted resolutions,... that have contributed to the process of *making customary law*, statements and votes of governments being treated as kinds of state practice or expressions of *opinio juris*... The contributions of such resolutions to the law-making process will differ widely, depending on the subject of the resolutions, whether it purports to state legal principles, how large a majority it commands, whether it is supported by the states principally affected, and whether it is later confirmed by other practice.

§ 102, Reporters' Note 3. The implication clearly is that if the resolution purports to state a legal principle, is voted for by a large majority, is supported by the states principally affected, and is later confirmed by other practice, its status as a *source* of law is strengthened.

In its discussion of resolutions as *evidence* of international law, the Reporters' Notes state,

> a resolution declaring the law is probative evidence of what the states voting for the resolution regard as the state of international law. If such a resolution is adopted by an overwhelming majority, and the General Assembly continues to reaffirm this resolution, the evidence that it reflects the law is strengthened.

§ 103, Reporters' Note 2. The criteria for finding that a particular resolution is a *source* of international law and for finding that it is *evidence* of international law are substantially similar, except that the criteria for *source* include "whether it is later confirmed by other practice", whereas the criteria for *evidence* do not. Quite the contrary, the Reporters' Notes state, "What states have done is, of course, more weighty than their declarations or the resolutions they vote for, *but especially in the absence of other practice, a resolution declaring the law is probative evidence* of what the states voting for the resolution regard as the state of international law". *Id.*

The requirement that the resolution be confirmed by state practice if it is to constitute a *source* of law but not if it is to constitute *evidence* of law is puzzling in several respects. First, if it is confirmed by state practice, such practice constitutes a *source* of customary law under traditional doctrine and under § 102 of the Restatement, and it is not necessary to look to the resolution as a source of law. Secondly,

same: To establish as a rule of international law a proposition that would not be accepted as a rule of international law in the absence of the resolution.

Unfortunately, resolutions of the General Assembly are all too frequently not a reflection of what states voting for the resolution believe the law to be, contrary to what the Reporters' Notes suggest.[87] Rather, they are evidence of what states believe it is in their interest to vote for either because of their political and economic interests or because the resolution embodies universally recognized ideals, such that a vote against the resolution would hurt the image the state seeks to project.[88] As Schwebel wrote,

> The members of the General Assembly typically vote in response to political not legal considerations.. [S]tates will vote a given way repeatedly not because they consider that their reiterated votes are evidence of a practice accepted as law but because it is politically unpopular to vote otherwise...[89]

Schwebel added that "[t]his may be as true of unanimously adopted resolutions as in the case of majority-adopted resolutions. It may be truer still of resolutions adopted by consensus", as his personal experience "so fully bears it out".[90]

why are resolutions probative *evidence* of a rule of international law *"especially in the absence of other practice"?* Finally, how is that to be reconciled with the immediately preceding statement in the same sentence that "What states have done is, of course, more weighty than their declarations or the resolutions they vote for"?

[87] See § 103, Reporters' Note 2. The Note is quoted *supra* n. 59.

[88] See Arangio-Ruiz, *supra* n. 17 at 457. It is, of course, the latter type of resolution that most scholars who urge giving General Assembly resolutions legal effect, either as a source or as evidence of international law, would like to see interpreted as imposing binding obligations. No doubt some General Assembly resolutions, such as the Universal Declaration of Human Rights, set forth principles that *should be* binding rules of international law. But it doesn't follow that therefore General Assembly resolutions have, or even should have, legal effect. Not all resolutions fit neatly into one category or the other, there may be considerable disagreement with respect to a particular resolution, and there are no clear criteria for distinguishing between the two. But most important, there is no basis in the Charter for attributing legal effect to any resolutions of the General Assembly (other than budget and certain internal resolutions). Although Schachter advocates the position that some General Assembly resolutions should have some legal significance, he recognizes that determining which resolutions and what significance raises very complex questions. See Schachter, "The Evolving International Law of Development" (1976) 15 Colum. J. Transnat. L. 1.

[89] Schwebel, *supra* n. 64 at 302.

[90] *Id.*

In sum, proposals to give the General Assembly law-making authority or even authority to interpret the Charter were rejected at the time of its establishment. A subsequent proposal that would have permitted the International Court to consider General Assembly resolutions in resolving disputes was also rejected. A memorandum of the Office of Legal Affairs of the United Nations concluded that even a declaration, though of greater solemnity than other resolutions and imparting "a strong expectation" that states will abide by it, becomes binding as customary law only "insofar as the expectation is gradually justified by state practice".[91] Recognizing that General Assembly Resolutions do not have binding force, yet wishing to attribute some legal force to some General Assembly resolutions, the revised Restatement draws a distinction between *sources* of international law and *evidence* of international law and provides that while resolutions not confirmed by other state practice cannot be considered a source of international law, "substantial weight" is to be given to such resolutions as evidence of international law. The distinction between resolutions as a source of law and as evidence of law is, as already indicated, very tenuous.

It is clearly not the position of the United States, or of any of the other major powers, or of most other states, that resolutions of the General Assembly are evidence of international law. There is also nothing to indicate that an international tribunal would so hold. Thus, certainly if one takes the position that the Restatement of the Foreign Relations Law of the United States should set forth the views of United States, and probably even if one takes the position that it should set forth the Institute's view of what an international tribunal would do,[92] the provision that in determining whether a rule has been accepted as international law substantial weight is to be accorded to resolutions of international organizations is not a correct statement of the Foreign Relations Law of the United States.[93]

IV. *Conclusion*

The revised Restatement attributes to the General Assembly authority that is not justified by the terms of the Charter, has not been accepted by

[91] See *supra* n. 76.

[92] See *supra* n. 8

[93] Since the Restatement is a subsidiary source under Article 38 of the Statute of the International Court of Justice, see *supra* n. 59, the inclusion of this provision in the Restatement might have the paradoxical result of permitting the International Court to give "substantial weight" to resolutions of the General Assembly as evidence of international law, even though the General Assembly rejected a draft resolution that permitted the Court to consider such resolutions.

states generally, and does not reflect the position of the United States. The statement in the Reporters' Notes that international law requires states not to recognize the acquisition of territory by the use of force, without qualification as to whether the use of force was itself a violation of international law, and the provision that in determining whether a rule has been accepted as international law substantial weight is to be accorded to resolutions of international organizations, are examples of this tendency.

While many had hoped at the time of its creation, that the development and objective application of just principles by the United Nations would replace the use of force as a means of resolving disputes, those hopes have unfortunately not been realized. The General Assembly has become a highly politicized body, whose decisions are all too frequently neither objective nor just[94] but rather reflect a double standard[95] arrived at in a process most

[94] See, e.g., G.A. Resolution 3379 (xxx) (1975); G.A. Resolution 34/65b (1979); Stone, *supra* n. 60 at 9–10.

[95] This is well illustrated by the numerous resolutions concerning Jerusalem, the West Bank, and Gaza after Israel's occupation of these territories in 1967, and the total absence of such resolutions from 1948 to 1967 while Egypt and Jordan occupied these territories, even though Israel's occupation of the territories resulted from the use of force in self-defense, whereas the Egyptian and Jordanian occupation was the result of the use of force in clear violation of the Charter. Compare Franck, "Of Gnats and Camels: Is there a Double Standard at the United Nations?" (1984) 78 Am. J. Int'l L. 811. Prof. Thomas Franck, who believes the double standard charge is false in part, acknowledges that it is only too true insofar as Israel is concerned. He says,

> As is so often the case, the exception to any generalization about the United Nations is the special case of Israel. The Assembly's majority invariably condemns Israel for deploying military force, but without any effort to criticize or inhibit those who use provocative force against it. In 1983, for example, the Assembly condemned "Israel's . . . expansionist and annexationist policies", while uttering no word about the Syrian occupation of large parts of Lebanon. It criticized U.S.-Israeli military cooperation without mentioning the thousands of Soviet military "advisers" operating with Syrian force. ***Whatever claim to principled behavior the political organs of the United Nations may have, crumbles to a double standard whenever Israel is on the agenda.***

Id., at 819 (emphasis added).

In the human rights area, where he believes the double standard claim is true in general, "the treatment of Israel, in both the Commission and the General Assembly, is in a class by itself". Determinations of fact that often began as allegations by the Palestine Liberation Organization and are of "dubious probity",

> are reiterated in General Assembly resolutions and culminate in calls on members to "suspend economic, financial and technological . . . cooperation with Israel" and to "sever diplomatic, trade and cultural relations . . . "

These very serious, if nonmandatory, sanctions voted against Israel for human

reminiscent of *Animal Farm.*[96] Thus, there are no idealistic reasons for attempting to attribute to the General Assembly authority it was denied under the Charter.[97]

> rights violations contrast with the lack of action against far more serious offenders. The Assembly has never been able to bring itself to address the extirpation of entire populations—some seven to nine million persons—in Burundi, Kampuchea and Pakistani Bengal. Nor did the mass murders perpetrated by Idi Amin in Uganda and, more recently, by the Ayatollah Khomeini in Iran bring the United Nations to vote sanctions.

Id., at 824–5. While Israel is a particularly acute example of the General Assembly's double standard, it is by no means the only case in point, as Franck amply demonstrates by comparing the United Nations response to human rights violations in Poland and Chile.

96 George Orwell, *Animal Farm.*

97 Henkin obviously disagrees. He says, "Declarations of law and some interstitial legislation by the General Assembly are inevitable and often desirable". Henkin, "The United Nations and the Rules of Law", (1970) 11 Harv. J. Int'l L. 428, 431.