

AN INTERNATIONAL LEGAL OBLIGATION TO ASSIST IN ENERGY DEVELOPMENT ARISES FROM THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

I. INTRODUCTION

In August, 1981, in Nairobi, Kenya, delegates from 125 countries attended the United Nations Conference on New and Renewable Sources of Energy (UNERG).¹ This Conference was a measure of the interest of the world community in assisting developing countries to develop their energy potential. There was broad-based support, including the countries of the Organization of Economic Cooperation and Development (OECD), for taking concrete steps toward creating, implementing and funding an effective program for developing new and renewable energy sources on a global scale.² However, the United States sent its delegates to UNERG with instructions not to support any new institutions or financing for development of new and renewable energy sources in lesser developed countries.³

The Conference accepted a broad Programme of Action that had been drafted by the planning committee and the expert technical committee formed in 1978 at the direction of the United Nations (U.N.) General Assembly.⁴

Most of the discussions at the Conference centered on three basic proposals for implementing the Programme of Action: one presented by the Conference Secretariat,⁵ another by the "Group

¹ U.N. Division for Economic and Social Information, *Round-up of the U.N. Conference on New and Renewable Sources of Energy* (Nairobi, 10-21 Aug. 1981) (mimeographed materials) [hereinafter cited as *Conference Round-up*]. This was the first time in two decades that the representatives from oil-producing, industrialized and developing countries met to discuss energy matters. Norman, *U.N. Grapples with Renewable Energy*, 213 SCI. 418 (1981).

² The Christian Sci. Monitor, Aug. 13, 1981 at 1, col. 1. If there actually had been a vote to finance a program to help developing countries with new and renewable energy sources through a World Bank affiliate, it is estimated that the vote would have been 124 to 1, with the United States dissenting. Telephone interview with David Chatfield, editor of *Renews*, the daily publication at UNERG (Feb. 8, 1982).

³ The Christian Sci. Monitor, Aug. 11, 1981 at 24, col. 1. See also Norman, *U.S. Derails Energy Plan for Third World*, 212 SCI. 21 (1981), which offers a concise background of the United States position on financing foreign energy development.

⁴ G.A. Res. 33/148 (1978), reprinted in [1978] U.N.Y.B. 572. The Programme of Action calls for implementation in five broad policy areas: energy assessment and planning; information flows; research, development and demonstration; transfer, adaptation and application of mature technologies; and education and training. *Conference Round-Up*, *supra* note 1, at 14.

⁵ The Conference Secretariat proposed designating an "appropriate intergovernmental

of 77,"⁶ and a third by the United States.⁷

As early as February, 1981, the United States stated publicly that it could "neither support the creation of nor participate in . . ." a World Bank affiliate concerned with energy issues such as that proposed by former World Bank President, Robert McNamara.⁸ This attitude prevented meaningful compromise discussions, due to the widespread belief that a World Bank affiliate would not work without United States participation.⁹

The Conference concluded, leaving responsibility for the implementation of the Programme of Action to a committee that met in 1982. The committee report, passed by the General Assembly at its 1982 session, calls for the creation of an intergovernmental Committee on the Development and Utilization of New and Renewable Sources of Energy to coordinate the implementation of the Programme of Action.¹⁰

This Note explores the question of whether international law imposes a duty upon the United States to assist less developed countries in finding and developing new and renewable energy sources. It is asserted that this duty arises from article 55(a) of the U.N. Charter, which calls for the promotion of higher social and economic progress and development.¹¹ This duty also arises

body" and a Secretariat unit within the United Nations for "the implementation and monitoring" of the Programme of Action. *Id.* at 12. They made no proposals for financing because during most of the preparations it had been expected that a World Bank affiliate, as proposed by Robert McNamara in August of 1980, would be created. See Norman, *supra* note 1, at 419. For the McNamara proposal see WORLD BANK, ENERGY IN THE DEVELOPING COUNTRIES (Aug. 1980).

⁶ The "Group of 77," representing the developing nations, wanted an intergovernmental committee specifically concerned with new and renewable energy sources and open to all states within the United Nations system to guide and monitor implementation of the Programme of Action. *Conference-Round-Up*, *supra* note 1, at 12. They sought the World Bank as a major source of "additional and adequate resources" to fund the Programme. This money would come primarily from the industrialized countries. *Id.* at 13.

⁷ The United States proposed designating the already-existing Committee on Natural Resources of the Economic and Social Council of the United Nations (ECOSOC) as the intergovernmental body "to monitor and facilitate co-operation in implementing the Programme." *Id.* at 12. Funding would be within each country's discretion, and the use of private investment capital would be emphasized. *Id.* at 13.

⁸ Norman, *supra* note 3, at 21.

⁹ See Fatoyinbo, *Q A on Energy and The World Bank*, 1 THE BANK'S WORLD 10, 11-12 (1982). Ernest Stern, Senior Vice-President of The World Bank, cited three obstacles to a successful energy affiliate without United States support: first, money markets would consider United States participation a major element in the decision to lend money to the World Bank; second, few countries would be willing to pay what would have been the United States share; and third, the general belief that everyone must participate in activities that are of interest to the entire international community. *Id.*

¹⁰ See A/Res/37/250 in U.N. Press Release, GA/6787, 4 Jan., 1983.

¹¹ U.N. CHARTER art. 55(a).

from the Charter of Economic Rights and Duties of States, which seeks to encourage increased development assistance.¹²

The industrialized nations have never considered U.N. resolutions as sources of international legal obligation. The world is changing, however, and a more flexible legal framework that recognizes modified definitions of the sources of international legal obligation is required.¹³

This Note examines as well the expanding role of the United Nations in developing international law. It explores the concepts of consensus agreement among U.N. Member States, evidence of practice of states, General Assembly resolutions as interpretations of the U.N. Charter, and implicit acceptance of resolutions through implementation, in arriving at the conclusion that U.N. resolutions and more specifically the Charter of Economic Rights and Duties of States should in certain circumstances be regarded as codifications of international law.

II. SOURCES OF INTERNATIONAL LAW

International law has been defined as, a "body of rules and principles of action which are binding upon civilized states in their relations with one another."¹⁴ The four primary sources of international law are found in article 38 of the Statute of the International Court of Justice (I.C.J.).¹⁵ They are: (1) international conventions; (2) international custom as evidence of practice of states; (3) general principles of law; and (4) in some cases, judicial decisions and teachings of publicists.¹⁶

The principles enunciated in article 38 emerged in Europe with the formation of states ruled by sovereign monarchs.¹⁷ The law among these states increasingly emphasized voluntary law

¹² G.A. Res. 3281 (XXIX), 29 U.N. GAOR Supp. (No. 31) 50, U.N. Doc. A/9631 (1975), reprinted in BASIC DOCUMENTS OF INTERNATIONAL LAW AND WORLD ORDER 289 (1980). Applicable parts of the resolution include arts. 10, 17, 22, and 25 [hereinafter cited as G.A. Res. 3281].

¹³ See generally W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

¹⁴ J. BRIERLY, THE LAW OF NATIONS 1 (1963).

¹⁵ Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993, 1 U.N.T.S. 9, reprinted in BASIC DOCUMENTS OF INTERNATIONAL LAW AND WORLD ORDER 23 (1980) [hereinafter cited as I.C.J. STAT.]. The provisions of article 38 of the Statute of the International Court of Justice are "generally regarded as a complete statement of the sources of international law." I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (1979).

¹⁶ I.C.J. STAT. art. 38; I.C.J. STAT. art. 59, which provides that decisions of the court have "no binding force except between the parties and in respect of that particular case," must be read coextensively with article 38.

¹⁷ For a detailed discussion of the origins of international law, see C. HENKIN, INTERNATIONAL LAW 1-9 (1980); J. BRIERLY, *supra* note 14, at 1-40.

developed through state practice and custom as distinguished from the earlier philosophy of natural law derived from universal reason.¹⁸ Later, the concept of sovereignty was articulated, embodying principles of equity and mutual respect among sovereigns and the requirement of consent in order to be bound.¹⁹

International codification of customary law by multinational gatherings has occurred since the Peace of Westphalia in 1648. These gatherings first were institutionalized in the ill-fated League of Nations.²⁰ Its demise, followed by World War II, accentuated the need for a new institution that would bring greater stability to the world. This new institution became the United Nations.

III. RECENT EVOLUTION OF INTERNATIONAL LAW

With the increase in communication among countries after World War I, international law gradually evolved to accommodate the power shifts in Europe and the need to cooperate rather than simply coexist.²¹ Part of this change was manifested in the increased use of diplomacy, negotiation and conferences.²² Despite these advances, the basic principles of international law remained unchanged until the end of World War II, as developed nations continued to dominate international forums. After World War II, all nations of the world were included in the United Nations rather than just the developed nations.

Following the establishment of the United Nations, international law entered a sharply accelerated transition period, which continues to the present. The number of countries that belong to the United Nations has grown from the original 51 signatories to over 150. Most of these are newly independent countries that had never contributed substantially to the formulation of customs used in "traditional" international law. They had little experience in negotiating treaties and other express agreements.²³ Nonetheless, the United

¹⁸ C. HENKIN, *supra* note 17, at 5.

¹⁹ See generally J. BRIERLY, *supra* note 14, at 7-16.

²⁰ See I. CLAUDE, *SWORDS INTO PLOWSHARES* 22-34, 41-54 (4th ed. 1971). Unfortunately the League was short-lived, being unable to overcome several flaws in its creation. In a pure sense, the League was not truly international because all potential members were not accepted for membership. Also, it was hampered by the requirement of unanimity. In those days, "the first principle of every Conference was that of unanimity." *Id.* at 119 (quoting L. WOOLF, *INTERNATIONAL GOVERNMENT* 109 (1916)).

²¹ C. HENKIN, *supra* note 17, at 9.

²² See I. CLAUDE, *supra* note 20, at 24-31, for a discussion on the Concert of Europe and the Hague Conventions that detail this evolution.

²³ Their ideas on the conduct of international relations vary and are often inconsistent with traditional ideas. See C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 15 (1965).

Nations Charter recognizes, in article 2(1), the principle that each Member State is the "sovereign equal" of all other Member States.²⁴ It extends to each state the right to participate in international forums as an equal to all others.²⁵

Shifts in economic power also have marked this period. With increased consumption of fossil fuels by the United States, the European countries and Japan, there has been an enormous shift of financial power to the oil-exporting states of the Middle East.²⁶

The European nations once controlled these resources through their power over their colonies. Although most of the former colonial powers retain some investment power over these resources, European and United States control has declined considerably because of the many nationalizations²⁷ and increased host-country participation in processing.

Because of the markedly changed composition of the community of nations and the alterations in relative economic power that have taken place in the last forty years, modification of present international legal norm-creation is necessary. It is logical that the United Nations, with its universal membership, should have an expanded role as a source of international law.²⁸

IV. THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LAW

Many observers note that the General Assembly cannot create binding law except in very limited spheres.²⁹ This view holds that

²⁴ U.N. CHARTER art. 2, para. 1.

²⁵ Presumably, all are now considered "civilized nations" as article 38 of the I.C.J. Statute requires. See also J. BRIERLY, *supra* note 14, at 1.

²⁶ At the end of the World War II the United States was the preeminent economic power. The economies of many countries were destroyed by the war and much of the world was totally dependent upon a colonizing power. The United States dollar became the basis for the international monetary and trading systems set up at the United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire in 1944. 3 C. BEVINS, *TREATIES AND OTHER INTERNATIONAL AGREEMENTS* 1351, 1390 (1969). It was United States money that helped to rebuild Europe. Since then, both the European and Japanese economies have flourished. See M. KREININ, *INTERNATIONAL ECONOMICS* 33 (2d ed. 1976); R. MEAGHER, *AN INTERNATIONAL REDISTRIBUTION OF WEALTH AND POWER* 20 (1979).

²⁷ See U.S. Dep't of State Report on Nationalization, Expropriation, and Other Takings of U.S. and Certain Foreign Property Since 1960, reprinted in 11 I.L.M. 84-118.

²⁸ The widespread presence of multinational corporations (MNC) also argues for an expanded role for the United Nations. MNC's are "beyond the traditional bounds of sovereignty." Since no single country can exercise effective control over them, the United Nations is the most appropriate institution to regulate their nongovernmental transnational activities. See Ferguson, *Redressing Global Injustices: The Role of Law*, 33 RUT. L. REV. 412, 417-18 (1981).

²⁹ I. BROWNIE, *supra* note 15, at 14-15, 696; BRIERLY, *supra* note 14, at 110. The Charter does give the General Assembly the power to create binding law on internal procedural matters and the budget. U.N. CHARTER arts. 17, 18.

the function of the United Nations, as described in article 13 of the United Nations Charter, is to "initiate studies and make recommendations."³⁰ According to this contention, resolutions and declarations of the General Assembly have no binding legal effect.³¹

The United Nations Charter was drafted while World War II was raging. Its major emphasis, understandably, was the maintenance of peace and security.³² Of necessity, it focused the grant of law-making powers on these aspects of international relations, and it placed those powers in the hands of the Security Council.³³ However, the United Nations Charter does not exclude the General Assembly from consideration of these issues.³⁴

Often overlooked is the fact that the United Nations was not created to deal exclusively with matters of peace and security. It was designed to consider a comprehensive range of subjects,³⁵ among them the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian character.³⁶ Article 13 of the United Nations Charter gives the mandate for promoting these activities to the General Assembly.³⁷ The Security Council, on the other hand, is given no specific role in fostering international economic and social cooperation. Its main responsibilities stem from the provisions for maintaining peace and security, some of which have fallen into disuse.³⁸ The need for cooperative efforts toward solving social and economic problems has become more pronounced. This has caused a shift in the emphasis of United Nations activity from the Security Council to the General Assembly and the principal organs responsible to it. Today the United Nations deals increasingly with social, economic and humanitarian matters.³⁹

United Nations members willingly have allowed, and even en-

³⁰ U.N. CHARTER art. 13.

³¹ I. BROWNLIE, *supra* note 15, at 14-15.

³² U.N. CHARTER art. 1, para. 1.

³³ *Id.* arts. 39-42.

³⁴ *Id.* arts. 10-15. It is clear that the General Assembly was to "consider the general principles of co-operation in the maintenance of international peace and security . . . and make recommendations . . . to members or to the Security Council or both." *Id.* art. 11, para. 1.

³⁵ I. CLAUDE, *supra* note 20, at 67.

³⁶ U.N. CHARTER arts. 13, 55.

³⁷ *Id.* art. 13, paras. 1(b), 2.

³⁸ *Id.* arts. 43-47. These articles provide for the creation and maintenance of United Nations general forces with a central command. These forces have never come into existence.

³⁹ It is noteworthy that the United Nations has ignored the recent Iraq-Iran war and the Tanzanian invasion of Uganda, but is working actively on the law of the sea, energy problems and human rights issues.

couraged, a shift of responsibility for maintaining peace and security from the Security Council to the General Assembly.⁴⁰ Under articles 10 through 15, the General Assembly can discuss any questions or matters within the scope of the Charter and make recommendations thereon unless the Security Council is exercising its authority over any dispute or any other function assigned to it.⁴¹ Prior to 1950, the usual procedure for transferring a matter from the Security Council to the General Assembly was for the Security Council to remove the matter from its agenda.⁴² With passage of the Uniting for Peace Resolution,⁴³ the General Assembly "assumed the power to reverse the Security Council"⁴⁴ when that body could not act because of the veto power exercised by a permanent member. Most of that resolution was within the authority of the Assembly; but as one authority points out, the sponsors of the resolution intended, and subsequent practice has confirmed, the right of the Assembly to recommend enforcement measures, a right previously held only by the Security Council.⁴⁵

The ability of one body to act in the capacity of another does not imbue the first with all the powers of the second. Furthermore, this shift of responsibility was for peace and security matters that are concededly of much graver concern than issues of social and economic development. Nonetheless, the foundation was laid by the members of the United Nations for an increasing law-making role for the General Assembly.⁴⁶

⁴⁰ For example, in 1947 the Assembly took over the Greek question from the Security Council, which had taken the question off of its agenda and instructed that all records and documents of the case be put at the disposal of the General Assembly. S. BAILEY, *THE PROCEDURE OF THE U.N. SECURITY COUNCIL* 367 (1975).

⁴¹ U.N. CHARTER arts. 10-15. The restriction alluded to appears in art. 12(1).

⁴² *Id.* art. 12; S. BAILEY, *THE GENERAL ASSEMBLY OF THE UNITED NATIONS* 17 (1964). See also *supra* note 40.

⁴³ G.A. Res. 337A(V), 5 U.N. GAOR, Supp. (No. 20) 10, U.N. Doc. A/1775 (1951).

⁴⁴ I. CLAUDE, *supra* note 20, at 177.

⁴⁵ S. BAILEY, *supra* note 40, at 230.

⁴⁶ Many countries at one time or another have used the General Assembly to achieve ends not otherwise possible. It is ironic that the United States, which now proclaims the ineffectiveness of the General Assembly, was the first to imbue it with law-making powers in the Uniting For Peace Resolution. The Soviets are more reluctant to recognize the powers of any international organization, preferring to view the United Nations as a contractual arrangement. Wesson, *The United Nations in the World Outlook of the Soviet Union and of the United States* in *SOVIET AND AMERICAN POLICIES IN THE UNITED NATIONS* 32 (Rubinstein & Ginsburgs eds. 1971). They have, however, used the General Assembly to win the support of lesser developed countries. *Id.* at 29-31. The "Group of 77," the developing nations, has made the most consistent use of the General Assembly. They have no representative as a permanent member of the Security Council, and the General Assembly is the only forum in which they can express themselves effectively. Major successes within the

Several writers acknowledge the "quasi-legislative competence" of the General Assembly.⁴⁷ At the center of this argument is the idea that the General Assembly produces norms that may function as law although not formally binding.⁴⁸ For example, draft rules sometimes are given the same weight as treaties in support of a court's result.⁴⁹ Professor Friedmann also uses the term "quasi-legislative" in noting that resolutions of the General Assembly "clearly have considerable impact on the development of the law."⁵⁰

There is another functional, albeit indirect, way in which the General Assembly can assist in the creation of law. If a resolution is rejected repeatedly, the participants will be encouraged to modify their positions until agreement can be reached.⁵¹ All actions bearing on a final vote can be seen therefore as law-creating.

International legislation has not been considered a traditional source of international law.⁵² Clearly, however, the creation of international law was a role intended for the General Assembly when the United Nations Charter was written. Article 13 of the Charter calls on the General Assembly to study and recommend "for the purpose of . . . encouraging the progressive development of international law and its codification."⁵³ The General Assembly implemented this provision with the establishment of the International Law Commission (ILC) in 1948.⁵⁴

General Assembly have been the creation of the United Nations Conference on Trade and Development (UNCTAD) and the development of the Charter of Economic Rights and Duties of States, with subsequent efforts to implement it. *See generally* I. CLAUDE, *supra* note 20, at 127-40.

⁴⁷ Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966). He defines quasi-legislative competence as a "middle position between a formally difficult affirmation of true legislative status and a formalistic denial of law-creating role and impact." *Id.* This approach also makes it possible to view each General Assembly action separately and to decide whether it specifically has the force of a legislative pronouncement. *See also* W. FRIEDMANN, *supra* note 13, at 135-41.

⁴⁸ *See* Falk, *supra* note 47, at 783-84, for examples of unratified treaties and draft treaties being used as though they were binding on other parties.

⁴⁹ *Id.*

⁵⁰ W. FRIEDMANN, *supra* note 13, at 138. The example he gives is the Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962), *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL LAW AND WORLD ORDER 259 (West 1980).

⁵¹ C. HENKIN, *supra* note 17, at 97.

⁵² It is not included in the "sources" of article 38 of the I.C.J. Statute. *See supra* notes 15, 16 and accompanying text.

⁵³ U.N. CHARTER art. 13, para. 1(a).

⁵⁴ W. FRIEDMANN, *supra* note 13, at 135-37. Friedmann points out that the ILC performs two main functions. It prepares definite draft conventions for approval by international law-making bodies, and discusses theories and reformulations of parts of international law not yet ready for codification. *Id.* at 136.

It is logical to look upon the General Assembly as having some legislative competence for other reasons as well. It is the center of the administrative system of the United Nations, with budgetary and supervisory powers over the other internal organs. It has broad powers to make recommendations to the Security Council or to members of the United Nations under article 10.⁵⁵ The unique position of the General Assembly has tended to make it the "unrivaled principal organ of the entire system."⁵⁶

Consent, with its corollary of unanimity, is no longer viable as a requirement for binding international legal obligation.⁵⁷ Such a theory was possible of practical application only when the international community was smaller and more homogeneous. Now, in order for international security to function effectively, "it requires a limited legislative authority, at minimum, to translate an overriding consensus into rules of order and norms of obligation despite the opposition of one or more sovereign states."⁵⁸ The United Nations Charter already provides for nonconsensual binding law. Articles 39 through 42 allow the Security Council to make decisions binding on all Members without their consent.⁵⁹

The United Nations Charter also rejects the requirement of unanimity by creating rules for simple or extraordinary majorities in all organs of the system.⁶⁰ One remnant of unanimity is the veto power of the permanent members of the Security Council.⁶¹ It is attenuated, however, by the fact that on votes in which a permanent member abstains, a proposal may pass without unanimity.⁶²

Majority votes can be binding within the General Assembly, but the current dilemma centers upon which questions may be so decided.⁶³ Countries that vote with the majority are inclined to view the action undertaken by that vote as binding; those in the

⁵⁵ U.N. CHARTER art. 10.

⁵⁶ I. CLAUDE, *supra* note 20, at 181.

⁵⁷ For a theory that the basis of international legal obligation lies in the consensual will of the world community, see C. JENKS, *LAW, FREEDOM AND WELFARE* 83-100 (1963).

⁵⁸ Falk, *supra* note 47, at 785.

⁵⁹ U.N. CHARTER arts. 39-42.

⁶⁰ *Id.* arts. 18, 27, 67, 89. In contrast, The Covenant of the League of Nations expressly incorporated the requirement of unanimity for decisions on all substantive issues. LEAGUE OF NATIONS COVENANT art. 5, *reprinted in* I. CLAUDE, *supra* note 20, at 453, 455.

⁶¹ U.N. Charter art. 27, para. 3. Actually this is modified unanimity, as resolutions pass with nine affirmative votes including the five major powers. In fact the major powers need not give an affirmative vote; an abstention by one or all of the permanent members still could result in passage as long as nine members voted affirmatively.

⁶² *Id.*

⁶³ Majority votes on appropriations and budgetary matters clearly are binding on all members. U.N. CHARTER arts. 17, 18.

minority deny that they are so bound.⁶⁴ Although majority rule is uncomfortable for some, the unattainability of unanimity dictates that consensus increasingly be applied.⁶⁵

Whether the majority has reached a consensus will depend upon its size and composition. In *Texaco Overseas Petroleum v. Libyan Arab Republic*,⁶⁶ Professor Dupuy, the arbitrator, concluded that an act "assented to by a great many states representing not only all geographic areas but also all economic systems" is necessary for a legally binding consensus.⁶⁷ Translating this into concrete terms, a declaration or resolution of the General Assembly agreed to by many developed countries and Soviet bloc countries, as well as by most developing countries, would have the necessary consensus to be effective legally.⁶⁸ There is some difference of opinion on this point. Professor Sohn recognizes consensus agreement as an effective and distinct alternative to an "old fashioned treaty" requiring ratification, but cautions that "all the important members of the international community" must accept it as binding.⁶⁹ This implies that if one of the "superpowers" does not accept, there is no consensus.

Professor Falk seems to adopt a sliding scale approach to consensus. The closer an agreement comes to unanimity, especially if it enjoys the backing of both the United States and the Soviet Union, the stronger the consensus. The greater the dissidence or lack of participation, the weaker the consensus.⁷⁰ Given the need

⁶⁴ This fear of "the tyranny of the majority," is at the root of the current attempts to deny the General Assembly powers conceded to it three decades ago when the composition of the General Assembly was very different. R. MEAGHER, *supra* note 26, at 7. Previously the developed countries formed the majority, rather than a heavily outnumbered minority. It has been pointed out that majority rule only works when both the majority and the minority trust one another not to abuse or ignore the other's interests. I. CLAUDE, *supra* note 20, at 125.

⁶⁵ It is encouraging to note that the United States attitude may be changing. President Carter's Report on the Reform and Restructuring of the United Nations System concluded that "U.S. efforts might be better directed toward wider use of the consensus procedure" in the General Assembly. LIBRARY OF CONGRESS, CONG. RES. SERV., REFORM OF THE UNITED NATIONS: AN ANALYSIS OF THE PRESIDENT'S PROPOSALS AND THEIR COMPARISON WITH PROPOSALS OF OTHER COUNTRIES 75 U.S. Gov't Printing Off. Y4 F 76/2 UN 35/39 (1979).

⁶⁶ 17 I.L.M. 1 (1978).

⁶⁷ *Id.* at 28.

⁶⁸ The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, is an example of a consensus agreement generally considered binding. G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971), reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 75 (1980).

⁶⁹ Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347, 352-53 (1981).

⁷⁰ Falk, *supra* note 47, at 786-90.

to reconcile majority rule with effective consensus, the formula expressed by Professor Dupuy should prove workable.

The nature of the General Assembly's law-making capacity also can be discerned from articles of the United Nations Charter. Many scholars focus on articles 11 and 13, which purport to describe both the process through which international law can be created and the role of the General Assembly in such a process.⁷¹ Article 11 provides that "the General Assembly may *consider the general principles of co-operation* in the maintenance of international peace and security . . ."⁷² Article 13 states that "the General Assembly shall *initiate studies and make recommendations* for the purpose of (a) *promoting international co-operation* in the political field and encouraging the progressive development of international law and its codification," and "(b) *promoting international co-operation* in the economic [and] social . . . fields . . ."⁷³ One authority states that article 13 gives the General Assembly the function of fulfilling a mission rather than of exercising a power.⁷⁴ It was under the auspices of article 13, therefore, that the International Law Commission was created.⁷⁵ On the other hand, Dr. Bokor-Szegö reads article 13(1)(a) as a whole, and finds that the framers of the United Nations Charter intended to make codification an explicit function of the General Assembly.⁷⁶

A different and more widely accepted reading of article 13 focuses on "recommendations" as only evidence of customary law and the general practice of states.⁷⁷ The General Assembly is an interna-

⁷¹ H. BOKOR-SZEGÖ, *THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION* (1978); P. BRUGIÈRE, *LES POUVOIRS DE L'ASSEMBLÉE GÉNÉRALE DES NATIONS UNIS EN MATIÈRE POLITIQUE ET DE SÉCURITÉ* 32 (1955) *cited in* H. BOKOR-SZEGÖ at 26.

⁷² U.N. CHARTER art. 11, para. 1 (emphasis added).

⁷³ *Id.* art. 13, paras. 1(a), (b) (emphasis added).

⁷⁴ Authors translation, P. BRUGIÈRE, *supra* note 71, at 26. Article 13 extends article 11 provisions, as article 11 provisions do not mention social and economic matters.

⁷⁵ In other words, the United Nations General Assembly was empowered to create an institution with the authority to develop and codify international law progressively. See *supra* note 54.

⁷⁶ Dr. Bokor-Szegö assumes this intention, being convinced that the creation of definite legal regulation of the interstate relations was needed to develop international cooperation in the political field. H. BOKOR-SZEGÖ, *supra* note 71, at 33.

⁷⁷ Dr. Higgins writes:

Resolutions of the General Assembly are not *per se* binding: though those rules of general international law which they may embody are binding on member states, with or without the help of the resolution. But the body of resolutions as a whole, taken as indications of a general customary law, undoubtedly provide a rich source of evidence.

R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 5 (1963).

tional body that meets on a regular basis. The Assembly serves as a focal point for state practice as it is manifest in diplomatic actions, public pronouncements and voting.⁷⁸ The actions and practices of the organization likewise must be considered as evidence of customary law in as much as they form part of the relationship of the states to the organization.⁸⁰

As more states accept a particular practice, as illustrated by their vote on a resolution, the greater will be the moral force attributable to that resolution.⁸¹ All signatories of the United Nations Charter have a duty to make good faith efforts toward compliance with resolutions passed by the General Assembly.⁸² Resolutions of the General Assembly are not treaties.⁸³ Instead, it has been recognized that the General Assembly has been instrumental in promoting diplomatic conferences that often culminate in law-making by treaty.⁸⁴

An additional way to characterize resolutions of the General Assembly as having legal effect is to recognize the United Nations

⁷⁸ *Id.* at 2.

⁷⁹ *Id.* Because the General Assembly and the committees and organs responsible to it meet regularly, the number of occasions for collective action have increased greatly. As much as individual acts can contribute to the development of customary law, "[c]ollective acts of states, repeated by and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law." *Id.*

⁸⁰ C. PARRY, *supra* note 23, at 25.

⁸¹ R. HIGGINS, *supra* note 77, at 7.

⁸² As Judge Lauterpacht wrote:

Whatever may be the content of the recommendation and whatever may be the nature and circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly.

South-West Africa Cases, 1955 I.C.J. 120 (Advisory Opinion of June 7) (Lauterpacht, J., separate opinion). Professor Sohn expresses the same idea a bit differently: "A Member of the United Nations would not be fulfilling in good faith its obligations under the Charter, if it were simply to ignore such recommendations without adducing any plausible reasons for not giving effect to them." Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 1, 23 (1978).

⁸³ See J. CASTANEDA, *LEGAL EFFECT OF UNITED NATIONS RESOLUTIONS* 150 (1969). See also C. PARRY, *supra* note 23, at 28-55 for a critical look at the use of treaties as a source of international law in view of the existence of international organizations.

[I]n assessing its [the United Nations] proceedings as a source of international law there is no need to attempt to force the whole operation into the shape of a function of a treaty, or even to ponder particularly upon the 'binding force' of resolutions of the General Assembly. . . . All falls very adequately into place as part of the practice of States.

C. PARRY, *supra* note 23, at 113.

⁸⁴ The U.N. Conference on the Law of Treaties resulted in the Vienna Convention on the Law of Treaties. U.N. Doc. A/CONF. 39/27, at 289 (1969), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 59 (1980).

Charter as a constitution. Many resolutions can be regarded thereby as interpretations of the Charter.⁸⁵ Article 103 of the United Nations Charter suggests that the Charter is a constitution, as the obligations of Members under the United Nations Charter prevail over conflicting obligations.⁸⁶ Interpretive resolutions and declarations may not be binding immediately, but may require the passage of time before becoming accepted as binding international law.⁸⁷

The role of the United Nations in creating international law is expanding. Since the early years of its existence, Member States have shown their willingness to conform the organization to their needs.⁸⁸ The tendency to accept consensus agreements,⁸⁹ to impute limited legislative competence to General Assembly action,⁹⁰ and to view General Assembly resolutions as interpretations of the United Nations Charter⁹¹ are manifestations of this expansion.

V. LEGALLY BINDING EFFECT OF THE CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

The Charter of Economic Rights and Duties of States was passed by the General Assembly in December, 1974.⁹² This Charter proposes to establish a "New International Economic Order," in which the economic resources of the world will be shared more equally by all nations.⁹³

⁸⁵ Professor Sohn states, "[t]he practice of states in the last thirty-five years has given the [UN] Charter and documents implementing it a status equivalent to that of constitutional law in the domestic legal order." Sohn, *supra* note 69, at 355. See *supra* note 68 and accompanying text in which the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States is viewed as an interpretation of article 2(4) of the United Nations Charter.

⁸⁶ See also article 27 of the Vienna Convention on the Law of Treaties, *supra* note 84, in which a party cannot invoke internal law to justify its failure to observe international law. These interpretive resolutions allow new international law to be created in a shorter time span than was traditionally the case when new principles were being enunciated. Sohn, *supra* note 82, at 17.

⁸⁷ Sohn, *supra* note 82, at 22. See also Bollecker-Stern, *The Legal Character of Emerging Norms Relating to the New International Economic Order* in LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 70 (K. Hossain ed. 1980); Castaneda, *La Charte des Droits et Devoirs Économiques des États* in [1974] ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 31, 35-36.

⁸⁸ See *supra* note 40 and accompanying text.

⁸⁹ See *supra* notes 66-68.

⁹⁰ See *supra* note 47.

⁹¹ See *supra* notes 85-87 and accompanying text.

⁹² G.A. Res. 3281, *supra* note 12.

⁹³ The proposed "new order" is embodied in two resolutions: The Declaration of the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9553 (1974), reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 273 (1980); and the Programme of Action on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res.

The Charter of Economic Rights and Duties of States was not considered by all states to be a statement of law.⁹⁴ However, there are four grounds supporting the legally binding effect of the obligations it imposes upon Member States. First, the Charter of Economic Rights and Duties of States is evidence of the practice of states prerequisite to creation of customary international law. Second, it was accepted by consensus agreement as defined by Professor Dupuy.⁹⁵ Third, it can be viewed as an interpretation of the United Nations Charter. Fourth, it has been accepted through its implementation in several non-energy and energy-related areas.

A. *Evidence of Practice of States*

The practice of states in assisting developing countries and in the repeated resolutions that preceded the acceptance of the Charter of Economic Rights and Duties of States is evidence of customary international law.

Custom, as Professor Oppenheim defines it, "[is] a clear and continuous habit of doing certain actions [that] has grown up under the aegis of the conviction that these actions are according to International Law, obligatory or right."⁹⁶ In order for a given state practice to contribute to the creation of custom it must be undertaken with the state's knowledge that the act is obligatory. However, this definition ignores the possibility that at some point state practice initially taken without a feeling of obligation evolves through continued practice and acceptability into an obligation. As Judge Lachs pointed out, "to postulate that all states, even those which initiate a given practice, believe themselves to be acting under a legal obligation is to resort to a fiction. . . ."⁹⁷ It seems more logical to recognize that states act for varied reasons, but that when they act consistently and repeatedly on a particular issue, over a period of time, an obligation arises to continue that behavior. Professor

3202 (S-VI), 6 (Special) U.N. GAOR, Supp. (No. 1) 5, U.N. Doc. A/9559 (1974), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 276 (1980).

⁹⁴ The original draft language before the Second Committee (the Standing Committee on Economic and Social Matters) read: "a fundamental purpose of this charter [is] to codify and develop rules for the establishment of the new international economic order. . . ." R. MEAGHER, *supra* note 26, at 45 (quoting A/9946 1974 at 3). Twelve developed countries wanted the italicized words excluded because they would give the document the appearance of being legally binding. The words eventually were replaced by "to promote." *Id.* at 45-46.

⁹⁵ See *supra* text accompanying notes 66-68.

⁹⁶ L. OPPENHEIM, 1 INTERNATIONAL LAW 26 (H. Lauterpacht 8th ed. 1955).

⁹⁷ North Sea Continental Shelf Cases, 1969 I.C.J. 231 (Judgment of Feb. 20) (Lachs, J., dissenting). Surely those states that initiated slave-trading and allowed the institution of slavery in their states did not consider themselves obligated to take such action.

Schachter argues that the concepts of "international entitlement to aid and preferences [to aid] based on need" have been accepted by the industrialized countries.⁹⁸ He finds acceptance through their concurrence with these concepts in international resolutions and in the numerous assistance grants they have made to developing nations.⁹⁹

The practice of providing economic assistance to developing countries as prescribed by the Charter of Economic Rights and Duties of States began even before the decolonization period of the 1950's and 1960's.¹⁰⁰ In laying the groundwork for the United Nations Charter, both the United States and the United Kingdom expressed willingness to encourage cooperation among nations to achieve improved social and economic standards.¹⁰¹ After World War II, the major colonial powers began to give financial aid to their colonies for economic development.¹⁰² As former colonies became independent states, the United States and the Soviet Union began competitive aid programs to capture the allegiance of these new nations.¹⁰³ Aid programs now exist worldwide with virtually every country either a donor or recipient.¹⁰⁴

The Latin American countries were the first to recognize the importance of utilizing an appropriate framework for economic and social development if assistance were to be successful.¹⁰⁵ Their efforts were instrumental in the eventual drafting of the Charter of Economic Rights and Duties of States.¹⁰⁶

The first major General Assembly resolution on economic development was in 1962. It called for the convening of a special conference on trade and development, which became the United

⁹⁸ Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT'L L. 9 (1976).

⁹⁹ *Id.* at 9-10.

¹⁰⁰ R. MEAGHER, *supra* note 26, at 20-21.

¹⁰¹ *Id.* at 16, (quoting R. ASHER, *THE UNITED NATIONS AND PROMOTION OF THE GENERAL WELFARE* 178 (1957)). The manifestation of their concern was the creation of the World Bank and the International Monetary Fund (IMF) a full year before the United Nations Charter Conference was held. *Id.* at 16-17.

¹⁰² *Id.* at 21.

¹⁰³ *Id.*

¹⁰⁴ For a discussion of the economic assistance programs of various donors that provides perspectives on aid strategies, successes and failures, see L. BLACK, *THE STRATEGY OF FOREIGN AID* (1968).

¹⁰⁵ The United Nations Economic Commission for Latin America (ECLA), under the leadership of Raul Prebisch, drafted the first framework in which the nature of international economic relations could be analyzed. R. MEAGHER, *supra* note 26, at 21-24. The 1950 report of ECLA specifically recognized that "planning and setting priorities for the use of scarce resources is an essential aspect of the development process." *Id.* at 23.

¹⁰⁶ *Id.* at 21-24, 30-36.

Nations Conference on Trade and Development (UNCTAD).¹⁰⁷ The first session (UNCTAD I) met for over three months in 1964. As a result of this conference, UNCTAD was established as a permanent institution of the United Nations directly responsible to the General Assembly.¹⁰⁸ The principles of revised trade and economic policy favoring the developing countries that were adopted at UNCTAD I were not unanimously accepted.¹⁰⁹ Nevertheless, they did have an impact by encouraging the addition of Part IV to the General Agreement on Tariffs and Trade (GATT), which placed a high priority on assisting developing countries with trade promotion and development.¹¹⁰

In 1968, UNCTAD II met to negotiate the implementation of the goals and recommendations passed by UNCTAD I. The proposal by the developing countries was not accepted by many nations,¹¹¹ and the only real progress made was the unanimous adoption of a generalized system of preferences (GSP).¹¹²

UNCTAD III met in 1972 in the wake of a major international monetary crisis¹¹³ and resolved to begin work on a charter of economic rights and duties of states.¹¹⁴ The charter was intended

¹⁰⁷ G.A. Res. 1785 (XVIII), 17 U.N. GAOR, Supp. (No. 17) 14, U.N. Doc. A/3217 (1962). In 1963, the Joint Declaration of 75 Developing Countries on UNCTAD was passed to present the issues to be discussed at UNCTAD I. The focus was improved and more equitable trade and economic relations. G.A. Res. 1897 (XVII), 18 U.N. GAOR, Supp. (No. 15) 24, U.N. Doc. A/5515 (1963).

¹⁰⁸ R. MEAGHER, *supra* note 26, at 31. It also framed some generally agreed upon principles for analyzing the situation of developing countries in the world economy.

¹⁰⁹ The pledge of Principle Four states that "all countries . . . pursue internal and external economic policies designed to accelerate economic growth throughout the world . . . in order to narrow the gap between the standard of living in developing countries and that in developed countries." *Id.* The United States voted against this statement. *Id.* at 32 n. 76. The United States abstained on Principle Five, which committed developed countries to help developing countries. *Id.* at 32 n. 77 (quoting *Final Act*, UNCTAD I at 18-19).

¹¹⁰ R. MEAGHER, *supra* note 26, at 33. PROTOCOL AMENDING THE GENERAL AGREEMENT ON TARIFFS AND TRADE TO INTRODUCE A PART IV ON TRADE AND DEVELOPMENT, 17 U.S.T. 1977, T.I.A.S. No. 6139, 572 U.N.T.S. 320, reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 261 (1980).

¹¹¹ The proposal was basically the same as the report Prebisch made to the Conference that did not recognize any beneficial aspects of the existing international order. R. MEAGHER, *supra* note 26, at 33. See Prebisch, Towards a Global Strategy of Development, report to UNCTAD 2d Sess. TD/3/Rev. 1 (1968).

¹¹² Professor Bollecker-Stern points out that the GSP was adopted after "countless resolutions" had been passed in different forums tending toward "a crystallization of new rules." Bollecker-Stern, *supra* note 87, at 72.

¹¹³ One manifestation of the crisis appeared in President Nixon's 1972 decision to release the United States dollar from the gold standard and to impose a 10% surcharge on imports. M. KREININ, *supra* note 26, at 168-92.

¹¹⁴ The vote on Resolution 45 calling for the Charter was: 90 for, 0 against, and 19 abstentions. R. MEAGHER, *supra* note 26, at 38 (quoting *Proceedings* UNCTAD III, vol. I, 35-36).

as a code of principles to guide the international economic system in responding to changed economic and political conditions. The charter was to be presented to the Twenty-eighth General Session of the United Nations (1974).¹¹⁵

Negotiations on the Charter of Economic Rights and Duties of States took place throughout 1973 and 1974 during four sessions of the Working Group,¹¹⁶ the Fourteenth Session of the Trade and Development Board,¹¹⁷ and twenty-two meetings of the Second Committee of the General Assembly. Following this intense two-year negotiation period, the Charter of Economic Rights and Duties of States was passed by a large majority in the General Assembly.¹¹⁸

The practice of states over the past thirty years has shown a willingness to offer economic assistance and trade advantages to less developed and developing countries. Whatever the reasons for that practice, most states presently consider themselves obligated to continue.¹¹⁹

For those scholars who would require more explicit acceptance of a practice as evidence of customary law,¹²⁰ the Charter of Economic Rights and Duties of States may provide the means. It eventually may have the effect of codified customary law as it is accepted by additional countries through the reconsideration process it undergoes every five years.¹²¹

¹¹⁵ *Id.* at 38. That such a short time was allotted to deal with such complex issues reflects the increasing impatience and frustration of the developing countries. That obstacles would have to be overcome was apparent from the "reservations" with no reasons given, expressed by the United States when abstaining on the resolution. *Id.*

¹¹⁶ The Working Group was composed of UNCTAD members who formed a subcommittee to work on the Charter proposals. As of the first session there were complications in the negotiations, because the working group allowed non-group UNCTAD members as well as intergovernmental organizations to participate. This was a major departure from United Nations procedure and irritated many developed countries. R. MEAGHER, *supra* note 26, at 39.

¹¹⁷ The Trade and Development Board draws its 55-member board from UNCTAD members and handles UNCTAD business in the periods between Conferences. It is empowered to review actions and implement Conference decisions. [1964] U.N.Y.B. 208.

¹¹⁸ The vote was 120-6-10. All negative and abstaining votes were OECD or "developed" countries. R. MEAGHER, *supra* note 26, at 6. However, several OECD countries voted for the Charter of Economic Rights and Duties of States, including Australia, New Zealand, and Sweden. *Id.* at 44.

¹¹⁹ Schachter, *supra* note 98, at 9-13.

¹²⁰ 1 L. OPPENHEIM, *supra* note 96, at 25-27.

¹²¹ G.A. Res. 3281, *supra* note 12, art. 34. Bulajic points out that this reconsideration is a step in codification and serves to allow states initially in disagreement to become reconciled to certain emerging principles. It is a step in the process of acceptance required as evidence of customary law. Dr. Bulajic, *Legal Aspects of a New International Economic Order*, in *LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER* 45-51 (K. Hossain ed. 1980). See generally Bollecker-Stern, *supra* note 87, at 70; Castaneda, *supra* note 87, at 35-36.

B. *Consensus Agreement*

The Charter of Economic Rights and Duties of States was accepted by an overwhelming majority of United Nations Member States.¹²² As unanimity is difficult to achieve in a world of diverse interests and values, consensus that represents all geographic and economic systems should be considered a valid means of establishing binding international law.¹²³ In the *Texaco Overseas Petroleum v. Libyan Arab Republic* arbitration, the arbitrator did not look for consensus as to the whole Charter of Economic Rights and Duties of States, but examined the particular article (article 2) applicable to the dispute.¹²⁴ He found article 2 of no use because it lacked binding effect, not because it was embodied in a United Nations resolution, but rather because it had not been accepted by consensus.¹²⁵ It follows that individual provisions, supported by a consensus, can be considered binding, independent of the vote on the resolution as a whole.

Three articles of the Charter of Economic Rights and Duties of States (17, 22, and 25), deal specifically with foreign aid, which is clearly a crucial element in the implementation of any economic development project. Article 17 declares in part that international cooperation for development is the "common duty of all States. Every state should co-operate with the efforts of developing countries to accelerate their economic and social development by providing favorable external conditions and by extending active assistance to them . . . free of any conditions derogating from their sovereignty."¹²⁶

This article clearly imposes a duty upon all states to cooperate and extend active assistance to developing countries.¹²⁷ Although article 17 does not specify the type of assistance to be given, article 22(3) states that development assistance "should include economic and technical assistance."¹²⁸ Article 22(1) speaks of

¹²² See *supra* note 118.

¹²³ See *supra* notes 66-69 and accompanying text.

¹²⁴ See *supra* note 66, at 29. It should be pointed out that the negative votes on the Charter of Economic Rights and Duties of States were a result of the provisions in article 2 on compensation for nationalization of resource development.

¹²⁵ See *supra* note 66, at 29-31. Professor Dupuy relied upon an earlier United Nations Resolution, G.A. Res. 1803 (XVII), 17 U.N. GAOR Supp. (No. 17), U.N. Doc. A/5217 (1962), as reflecting the customary law in the area because it had been "supported by a majority of Member States representing all the various groups." *Supra* note 66, at 30.

¹²⁶ G.A. Res. 3281, *supra* note 12, art. 17. (emphasis added).

¹²⁷ This article is directed to all states. The proposition made here is that this means all states, including developing states that have a duty to help less developed states. (emphasis added).

¹²⁸ G.A. Res. 3281, *supra* note 12, art. 22, para. 3.

increased net flows of economic assistance, the volume of which probably refers to recommendations of UNCTAD and the Development Assistance Committee (DAC) of the OECD, which set target amounts.¹²⁹ Article 17 of the Charter was accepted unanimously by the Second Committee of the General Assembly.¹³⁰ Thus the failure of the United States to cooperate and extend active assistance at Nairobi can be considered a breach of a legal duty derived from this provision.

Article 22 offers more specific means of providing aid, and article 25 establishes priorities for recipients.¹³¹ Article 22 calls for "promoting increased net flows of real resources to the developing countries from *all* sources. . . ." ¹³² These resources "should include economic and technical assistance."¹³³ This is a call to action to which "[a]ll States *should* respond."¹³⁴

Article 25 states that "the international community, especially its developed members, *shall* pay special attention to the particular needs and problems of the least developed among the developing countries. . . ." ¹³⁵

Although the Charter of Economic Rights and Duties of States does not mention energy assistance specifically, it is self-evident that social and economic development are impossible without adequate energy supplies. An obligation to provide development assistance encompasses, *a priori*, energy assistance.

There is a critical lack of accessible energy in most developing countries.¹³⁶ The problem is so severe as to threaten the ability to provide food,¹³⁷ much less provide for economic development.¹³⁸ The failure of the world community to act decisively at UNERG,

¹²⁹ *Id.* art. 22(1); R. MEAGHER, *supra* note 26, at 79.

¹³⁰ R. MEAGHER, *supra* note 26, at 78. Although the Charter of Economic Rights and Duties of States was voted upon as an entirety by the General Assembly, the votes in the Second Committee were provision-by-provision. Most provisions were accepted unanimously in the Second Committee. *Id.* at 6 n.36. Virtually all states were represented in the Second Committee, as evidence by the fact that 121 votes were cast with 10 abstentions. *Id.* at 44.

¹³¹ G.A. Res. 3281, *supra* note 12, arts. 22, 25.

¹³² *Id.* art. 22 (emphasis added).

¹³³ *Id.* art. 22, para. 3.

¹³⁴ *Id.* art. 33, para. 1 (emphasis added).

¹³⁵ *Id.* art. 25 (emphasis added).

¹³⁶ Potential energy is not being used: fuelwood may not be growing near urban areas where it is needed; hydroelectric power is not being harnessed; solar energy is not being utilized in sun-drenched areas.

¹³⁷ Energy is needed to cook foods that cannot be eaten raw and to process agricultural products for storage.

¹³⁸ See Norman, *supra* note 3, at 21.

especially on the deforestation and fuel wood crisis, violates articles 22 and 25.¹³⁹

Another provision that deserves consideration in the area of aid for economic development is article 10 of the Charter of Economic Rights and Duties of States. This article reflects the concern of developing countries over their voting power in international financial organizations, specifically the International Monetary Fund (IMF) and the World Bank.¹⁴⁰ As the developing countries are dependent upon financial support from developed countries, the weighted voting arrangements within international financial organizations are a very delicate matter.¹⁴¹ Article 10 nonetheless was adopted unanimously in the Second Committee.¹⁴² It seeks to have all states treated as equal members, with full and effective participation in the solution of world economic, financial and monetary problems "through the *appropriate international organizations* in accordance with their existing and *evolving* rules."¹⁴³

Further, article 10 provides for the use of appropriate international organizations to implement such solutions. The failure to employ a willing World Bank¹⁴⁴ in a program for developing new and renewable energy sources ignores this provision of the Charter of Economic Rights and Duties of States.

These four provisions unanimously adopted in the Second Committee after lengthy negotiations express the collective views of the international community. They should be considered binding on the Member States.

C. *The Charter of Economic Rights and Duties of States as an Interpretation of the United Nations Charter*

The legally binding effect of the Charter of Economic Rights and Duties of States also may be viewed as an interpretation of

¹³⁹ Wood is one of the primary sources of energy in the developing countries, where nearly 95% of the rural population uses it for cooking, heating and some processing of agricultural products. The critical shortage of fuelwood means that even the most basic energy needs cannot be met. U.N. Division for Economic and Social Information, *ENERGY* 8 (1981) (mimeographed materials).

¹⁴⁰ G.A. Res. 3281, *supra* note 12, art. 10.

¹⁴¹ See R. MEAGHER, *supra* note 26, at 71. In 1964, UNCTAD nearly failed to come into existence because of disagreement over weighted voting, which provides that those who contribute most have the most votes. *Id.*

¹⁴² The article-by-article votes are listed in 29th Plenary Session, U.N.G.A., A/9946 at 24-25 (1974).

¹⁴³ G.A. Res. 3281, *supra* note 12, art. 10. (emphasis added).

¹⁴⁴ See *supra* notes 8-9 and accompanying text.

the United Nations Charter.¹⁴⁵ Chapter IX of the United Nations Charter addresses international economic and social cooperation.¹⁴⁶ Article 55(b) states that "[w]ith a view to the creation of conditions of stability and well-being . . . the United Nations shall promote . . . (b) solutions of international economic, social, health, and related problems. . . ."¹⁴⁷ In article 56, "[a]ll members *pledge* themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in article 55."¹⁴⁸

Professor Sohn points out that although articles 55 and 56 "are general . . . they have the force of positive international law and create basic duties which all Members must fulfill in good faith."¹⁴⁹ Precisely because they are so general, any application of these articles must await further interpretation. The Charter of Economic Rights and Duties of States provides an interpretation of what constitutes "solutions" to international economic problems.¹⁵⁰

As a charter, the Charter of Economic Rights and Duties of States is necessarily very general and serves mainly as a framework for future implementation. Insofar as it refines the provisions of the United Nations Charter, however, it should be considered an interpretation of that document. The Charter of Economic Rights and Duties of States can be viewed as giving more specific meaning to "solutions of international economic [and] social . . . problems."¹⁵¹ It calls on states to consider and use certain approaches in shaping those solutions.¹⁵²

The individual provisions of the Charter of Economic Rights and

¹⁴⁵ See *supra* notes 85-87 and accompanying text.

¹⁴⁶ U.N. CHARTER chap. IX.

¹⁴⁷ *Id.* art. 55, para. b.

¹⁴⁸ *Id.* art. 56 (emphasis added).

¹⁴⁹ Sohn, *supra* note 82, at 18.

¹⁵⁰ *Id.* at 19. Articles 55 and 56 have been interpreted previously. The Universal Declaration of Human Rights, G.A. Res. 217-A, 3 U.N. GAOR, U.N. Doc. A/810, at 71-77 (1948), was the first step in interpreting article 55(c). Because that declaration was adopted unanimously, it was considered an authoritative interpretation of the Charter, and the failure to observe a provision of the Declaration has been considered a violation of the United Nations Charter. Sohn, *supra* note 82, at 19.

¹⁵¹ U.N. CHARTER art. 55, para. b.

¹⁵² During the United Nations Conference in 1945 at San Francisco, a committee expressed the idea that "if an interpretation made by any organ of the Organization . . . is not generally acceptable it will be without binding force." Sohn, *supra* note 82, at 14 (quoting Report of Committee IV/2 of the United Nations Conference on International Organization, San Francisco, June 12, 1945. Doc. 933, IV/2/42(2), 13 *United Nations Conference on International Organization Documents* 703, 709-10 (1945)). Professor Sohn points out that the United Nations has accepted a corollary principle that interpretations that are "generally acceptable (i.e. adopted unanimously or without negative vote)" are binding on all members. Sohn, *supra* note 82, at 14. This principle would prohibit viewing the en-

Duties of States also provide an interpretation of the method of enactment of these solutions. The call by article 10 for greater and more equal participation by all members in appropriate international economic, financial and monetary organizations, is clearly such an interpretation.¹⁵³

Article 17 places a duty upon all states to provide "favourable external conditions" and to extend "active assistance" to developing countries to accelerate their economic and social development.¹⁵⁴ This same article requires that such assistance be based upon "development needs and objectives" and be "free of any conditions derogating from their [developing countries'] sovereignty."¹⁵⁵

Articles 22 and 25 offer more attenuated interpretations. Article 22 declares that all states should respond to the problems of developing countries by promoting increased net flows of real resources from all sources. An often overlooked but important aspect of international cooperation is that *all* states, including the poorer countries, are to assist less developed countries. This gives a fresh interpretation to the method of solution of international problems, as past interpretation seems to have been that only developed countries had such a responsibility.¹⁵⁶

Insofar as the Charter of Economic Rights and Duties of States elaborates upon United Nations principles, its provisions can be viewed as interpretations of the United Nations Charter with legal effect.

D. *Implicit Acceptance through Implementation*

If the Charter of Economic Rights and Duties of States is viewed as a framework for evolving norms of international law,¹⁵⁷ the implementation of its provisions gives it greater legal effect. The implementing acts manifest implicit acceptance of the provisions upon which they were based.

For example, article 10, which recognizes the equality of states

tire Charter of Economic Rights and Duties of States as an interpretation, as it was not accepted unanimously. However, individual provisions, unanimously adopted, arguably may be considered binding as interpretations.

¹⁵³ G.A. Res. 3281, *supra* note 12, art. 10.

¹⁵⁴ *Id.* art. 17.

¹⁵⁵ *Id.*

¹⁵⁶ Article 25 refutes this insofar as it singles out the "developed members" of the United Nations as having a special responsibility to "pay attention to the particular needs and problems of the least developed . . . countries." Arguably, however, as this provision is directed toward assisting developing countries that have particular needs (i.e. landlocked and island countries), it in no way precludes any other countries from contributing just because they are not purportedly developed countries.

¹⁵⁷ See *supra* notes 77-79 and accompanying text.

and their right to full participation in international decision-making on world economic, financial and monetary matters, has been defined and implemented further.¹⁵⁸ In 1975, the General Assembly commissioned a twenty-five member expert committee (consisting of developing countries, Soviet bloc members and industrialized countries) to make recommendations on international monetary reform.¹⁵⁹ This report was adopted unanimously by the expert committee; it called for a revision of the voting rights in the IMF to reflect "the legitimate interest of developing countries in a greater voice in the operation of that institution."¹⁶⁰ Since then, both the IMF and the World Bank have encouraged more members to participate in decision-making.¹⁶¹

The major success story of international cooperation of the type proposed in the Charter of Economic Rights and Duties of States was the adoption of a global food policy by the Second Session of the World Food Council created by the United Nations General Assembly.¹⁶² The Rome Food Conference in 1976¹⁶³ established the International Fund for Agricultural Development (IFAD) as a new United Nations specialized agency, financed by member contributions and committed to making every country self-sufficient for food production.¹⁶⁴

The World Food Council was established at approximately the same time as the Charter of Economic Rights and Duties of States was adopted, and its accomplishments can be viewed as acceptance of article 17 of the Charter of Economic Rights and Duties of States.¹⁶⁵ Article 17 calls for "extending active assistance," which the Rome Food Conference answered in the form of member contributions to the IFAD.¹⁶⁶ It is precisely this kind of coordinated

¹⁵⁸ See *supra* text accompanying note 110.

¹⁵⁹ R. MEAGHER, *supra* note 26, at 71; A New United Nations Structure for Global Economic Cooperation, Report of the Group of Experts on the Structure of the United Nations System. U.N. Doc. E/AC. 62/9 (1975) [hereinafter cited as Report of the Group of Experts].

¹⁶⁰ Report of the Group of Experts, *supra* note 159, at 56.

¹⁶¹ R. MEAGHER, *supra* note 26, at 72.

¹⁶² *Id.* at 206. See also Ferguson, *supra* note 28, at 415-16.

¹⁶³ This was the second session of the World Food Council created in 1974. G.A. Res. 3348 (XXIX), 29 U.N. GAOR Supp. (No. 31) vol. 1, U.N. Doc. A/9886/Add.1 (1974), *reprinted in* [1974] U.N.Y.B. 501.

¹⁶⁴ Ferguson, *supra* note 28, at 415.

¹⁶⁵ The creation of the World Food Council and the adoption of the Charter of Economic Rights and Duties of States both were envisioned by the Programme of Action on the Establishment of a New International Economic Order, chap. I, sec. 2, chap. VI. See *supra* note 93.

¹⁶⁶ G.A. Res. 3281, *supra* note 12, art. 17. Professor Ferguson points out the fortuitous combination of events that made positive United States participation at the Rome Food Conference politically possible. Ferguson, *supra* note 28, at 415-16.

aid program, already undertaken for food, that was sought at Nairobi for new and renewable energy.

In a further effort to promote international economic cooperation, a new organizational unit was established under the U.N. Secretary-General to assist in the coordination of work in social and economic fields. The office of the Director-General for Development and International Economic Cooperation (DIEC) was created specifically to make the United Nations more responsive to the Charter of Economic Rights and Duties of States,¹⁶⁷ by coordinating all United Nations efforts in its implementation.

Amongst other things, the DIEC has established a program of multilateral development assistance for the exploration of natural resources. The United Nations provides the financing through the United Nations Development Programme (UNDP) to inventory mineral and energy resources in member countries.¹⁶⁸

Additionally, the International Development Strategy for the Third United Nations Development Decade, beginning in January, 1981, provides for the creation of a world development fund with special emphasis upon lending for the development of energy and mineral resources.¹⁶⁹ This fund was an alternative financing arrangement to a World Bank affiliate on energy.¹⁷⁰

There have been numerous attempts to implement the Charter of Economic Rights and Duties of States. There has been significant success regarding the establishment of global food policy.¹⁷¹ Substantial progress also has occurred in assessing mineral and energy potentials in developing countries.¹⁷² These actions imply acceptance of the provisions of the Charter of Economic Rights and Duties of States, which call for the extension of "active assistance"¹⁷³ and the transfer of "real resources to developing countries."¹⁷⁴ This implied acceptance through implementation, combined with the explicit acceptance of the unanimously adopted articles themselves, indicates the legally binding effect of such provisions as principles of international law.

¹⁶⁷ 15 U.N. MONTHLY CHRON. 54-55 (Jan. 1978).

¹⁶⁸ As of June, 1981, forty-four assessment missions had been undertaken. G.A. (36th Sess. Item 69(f) of the provisional agenda) U.N. Doc. A/36/418 at 2 (1981).

¹⁶⁹ G.A. (36th Sess. Item 69(a) of the provisional agenda) U.N. Doc. A/36/572 at 10 (1981).

¹⁷⁰ A World Bank affiliate undoubtedly would be more effective because of the competence of World Bank financial managers and their considerable expertise in providing loans to developing countries.

¹⁷¹ See *supra* text accompanying notes 163-165.

¹⁷² See *supra* text accompanying notes 169-172.

¹⁷³ G.A. Res. 3281, *supra* note 12, art. 17.

¹⁷⁴ *Id.* art. 22, para. 1.

VI. SUMMARY

The rapidity of change in the international community, especially since World War II, has encouraged a reappraisal of the sources of international law, and especially of the legally binding effect of United Nations resolutions.

The nations of the world community must consider using consensus agreements rather than unanimous acceptance to bind nations. It must be recognized that state practice undertaken initially without a sense of obligation can evolve, through widespread, continued practice, into obligatory international law. More weight should be given to United Nations resolutions as legally binding interpretations of the United Nations Charter. Finally, nations must be willing to recognize a limited legislative role for the General Assembly. In a world of divergent views, the United Nations with its universal membership provides an effective forum for developing new international legal norms.

VII. CONCLUSION

The United Nations Expert Group on Rural Energy reported that in 1980 the minimum energy requirements of approximately ninety million rural dwellers were not being met.¹⁷⁵ An additional one billion people, both urban and rural, are using their energy supplies faster than they can be replenished.¹⁷⁶ Most of the developing world's populations live in rural areas without electricity. They depend upon agriculture for their existence, and it is the major activity for which they need energy.¹⁷⁷ Simply put, without increased sources of energy, many of these people will starve.¹⁷⁸

Their energy needs will not be met by fossil fuels. Their inability to pay the mounting prices for oil already has strained their economies and slowed their development severely.¹⁷⁹ They need substantially increased access to energy sources to maintain present living standards.

With a relatively small initial capital investment, specific projects can be initiated. As those projects became self-supporting, aid expenditures would decline. As developing countries became less dependent upon oil, more oil would be available for the

¹⁷⁵ U.N. Division for Economic and Social Information, *Conference News* 6 (mimeographed materials).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* note 137.

¹⁷⁹ See Norman, *supra* note 3, at 21.

developed countries' use during the transition to other energy sources. The decreased demand for oil by the developing countries could lower world oil prices to the benefit of all. An oil boycott might be much less effective when supply exceeds demand.

Any projects for developing new and renewable energy sources will necessitate research and development. The new techniques that would result, although geared primarily to the needs of developing countries, would be adaptable to industrialized country uses and would advance their research and development. These projects would create new jobs both in the host countries and in those countries performing the research, production, and manufacture of the necessary technological equipment.

United States foreign policy would be enhanced considerably by the willingness of the government to carry out its international legal obligations to assist developing countries. United States cooperation on this issue would encourage others to cooperate on other issues.

If the United States were to assist less developed nations in meeting their energy needs, these nations ultimately would have greater control over their own energy sources and economic development. This independence should promote political stability.

Until the change in administrations in 1981, the United States appeared willing to support the creation of a World Bank affiliate to coordinate the efficient development of energy sources in the developing countries. An inter-agency task force coordinated by the National Security Council, found that United States investment in the World Bank affiliate would produce "very large benefits in energy, foreign policy, development, and international trade and finance. It would be among the most cost effective programs in the United States energy budget."¹⁸⁰

The proposed World Bank affiliate does appear to provide the best available solution. Member governments would make a relatively small direct contribution. (The United States share for a \$30 billion fund would be about \$250 million.)¹⁸¹ Member countries also would provide loan guarantees for additional amounts. (The United States loan guarantee would be \$2.5 billion to \$4 billion; as a guarantee it is unlikely ever to be used.)¹⁸² The additional money for the fund would be raised in international money markets on the basis of the loan guarantees.

¹⁸⁰ *Id.* at 23 (citing an unpublished report).

¹⁸¹ *Id.* The World Bank estimates that a fund of at least \$25 billion is needed just to reduce developing country oil imports to a manageable level. *Id.* at 22.

¹⁸² *Id.* at 23.

OPEC countries would be called upon for contributions and those with surplus capital would be a source of loan money, thus recycling petrodollars into energy development.¹⁸³ As with other World Bank activities, the affiliate would loan to developing countries for specific projects, and the recipient countries would provide some of the money themselves.¹⁸⁴

It is clearly in the best interest of the United States to support a World Bank affiliate for new and renewable energy sources. Its relatively low cost would benefit many and further the United States obligations under the United Nations Charter to assist in the social and economic development of less developed nations within the world community.

Vicki A. Breman

¹⁸³ *Id.* at 22. World Bank sources have confirmed that the OPEC countries would support the affiliate on energy. *Id.*

¹⁸⁴ *Id.*

