

THE 25TH U.N. GENERAL ASSEMBLY AND THE USE OF FORCE

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Did the United Nations General Assembly, in its 25th Anniversary plenary session, make a significant contribution to international law regarding the use of force? The question arises in connection with the Assembly's approval, without formal dissent, of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (the Declaration on Friendly Relations).¹ The present comment will be limited to (a) a brief observation about the role of law in maintaining the peace, (b) the content of the Declaration on the first of the seven principles of international law proclaimed therein,² and (c) the legal status of the Declaration itself.

Is it a waste of time to talk about controlling the use of force through law? Thousands of megatons in the hands of frail human beings impose the highest urgency upon efforts to control the use of force in international relations. The fact that homo sapiens has achieved a quarter century without the firing of a nuclear weapon in anger is encouraging, but it has not removed the danger that the use of such weapons could put in doubt the survival of man. This danger is a brooding preoccupation of decision makers in the principal capitals of the world community. President John F. Kennedy voiced this concern to the United

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¹G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8028 (1970), 65 A.J.I.L. 243 (1971).

²The seven principles are:

[1] The principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations,

[2] The principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,

[3] The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter,

[4] The duty of states to co-operate with one another in accordance with the Charter,

[5] The principle of equal rights and self-determination of peoples,

[6] The principle of sovereign equality of states,

[7] The principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

Nations General Assembly on September 25, 1961:

Today, every inhabitant of this planet must contemplate the day when this planet may no longer be habitable. Every man, woman and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or miscalculation or by madness.³

The problem is not limited to a nuclear exchange. The sobering fact is that, since the end of World War II, armed conflicts have exacted millions of casualties and hundreds of billions of monetary resources desperately needed for other purposes. No continent has been immune and no nation has escaped the direct or indirect effect of this massive diversion of resources to war. Although some conflicts are readily localized (Honduras-El Salvador), too many others have involved serious risk of escalation to a direct engagement among nuclear powers.

The international community must therefore accept as a primary goal the severe restriction or elimination of the use of force in the settlement of international disputes. What might once have been a highly desirable objective becomes in the present era a matter of compelling necessity.

The community of nations has need of all available means of limiting force and strengthening the processes of peaceful settlement. Among these, the norms and processes of international law are primary. Public understanding of international law has suffered from the twin illusions of cynicism and utopianism. The author, however, concluded almost twenty years' service as a decision maker at various levels of government with a profound respect for the pervasive reality of international law. The simple truth is that the overwhelming majority of international boundaries are peaceful, the overwhelming majority of treaties are observed, the overwhelming majority of disputes are settled by peaceful means. That this is not a prevailing public impression may be largely due both to the occasional dramatic and tragic exceptions and to the fact that news media pay less attention to normality, agreement and serenity than to controversy and violence.

This is not the place to examine at length the role of international law in maintaining the peace. Dean Acheson has said, in commenting on the Cuban Missile Crisis, "[t]he power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power The survival of states is not a matter of law."⁴ I would place alongside his statement the view

³1961 PUBLIC PAPERS OF THE PRESIDENTS, JOHN F. KENNEDY 620 (1962).

⁴Remarks by the Honorable Dean Acheson, 57th Annual Meeting, American Society of International Law, 1963 A.S.I.L. PROCEEDINGS 13, 14.

that the survival of states in a nuclear age may, indeed, depend upon more effective norms and processes of law. Law provides a means for resolving questions which might otherwise become matters of international conflict. Some treaties remove major issues from national rivalry, for example: the Antarctic Treaty,⁵ the Treaty on Outer Space,⁶ and the rapidly evolving law about the deep oceans and sea beds. "What does international law say about it?" is an important question on the check list of policy officers of many governments, including that of the United States, when policy decisions are being considered. The expectations of international law have a considerable bearing upon the anticipated acceptance or rejection of a given action by the world community and this, in turn, plays an important role in policy decisions. In many societies, the lawfulness of an action affects the support which a government may obtain or fail to obtain from its own people. In general, one may observe that the American people expect their government to act in accordance with law, both national and international.⁷ Finally, international law helps to identify and to record the common interests of nations and organizes cooperation to achieve common goals. At the top of the list of such common interests is the avoidance of a nuclear holocaust, cutting across ideological, cultural, economic and psychological differences.⁸

The first principle of the Declaration on Friendly Relations declares "that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." This wording is an almost exact quotation of article 2(4) of the United Nations Charter. The exception is found in the substitution of the word "States" for "All Members" as used at the beginning of article 2(4). This change was made deliberately in order to extend the obligation to all states and not only to members of the United Nations.⁹ The idea is reinforced by article 2(6) of the Charter

⁵The Antarctic Treaty, Dec. 1, 1959, [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

⁶Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, [1967] 3 U.S.T. 2410, T.I.A.S. No. 6347.

⁷This is evidenced by the fact that public debate about particular policies of the United States frequently includes a lively discussion of legal issues; a persuasive legal argument carries great weight with public opinion. *See, e.g.*, 1 THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968); 2 THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1969).

⁸For an interesting and realistic discussion of the role of law in decision making, see L. HENKIN, *HOW NATIONS BEHAVE* (1968).

⁹Report of the 1966 Special Comm. on Principles of Int'l L. concerning Friendly Relations and Co-operation among States, 21 U.N. GAOR 37, U.N. Doc. A/6230 (1966).

which provides that the Organization shall ensure that States which are not Members act in accordance with the principles of the Charter "so far as may be necessary for the maintenance of international peace and security."

This first principle is elaborated in thirteen paragraphs, numbered below for convenience.¹⁰ The first paragraph repeats the norm of article

¹⁰[1] Every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

[2] A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

[3] In accordance with the purposes and principles of the United Nations, states have the duty to refrain from propaganda for wars of aggression.

[4] Every state has the duty to refrain from the threat or use of force to violate the existing international boundaries of another state or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of states.

[5] Every state likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

[6] States have a duty to refrain from acts of reprisal involving the use of force.

[7] Every state has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

[8] Every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.

[9] Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

[10] 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 régime and valid under international law; or

(b) The powers of the Security Council under the Charter.

[11] All states shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among states.

[12] All states shall comply in good faith with their obligations under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavor to make the United Nations security system based upon the

2(4) of the Charter and adds that such a threat or use of force "constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues." Such language is reminiscent of the renunciation of war "as an instrument of national policy" of the Kellogg-Briand Pact, but is probably narrower because of the more restrictive language of article 2(4). The word "never" lends some weight to the idea that article 2(4) is *jus cogens*, particularly if it is taken seriously by the Security Council and the General Assembly as a peremptory norm.

Paragraph (2) states that "a war of aggression constitutes a crime against the peace, for which there is responsibility under international law." The effect of this language is to proclaim that article 6(a)¹¹ of the Nürnberg Charter is a part of the law of the Charter of the United Nations. The Nürnberg principles had been unanimously affirmed by the U.N. General Assembly in 1946,¹² and a year later the Assembly directed the International Law Commission to formulate the principles of international law recognized in the Nürnberg Charter and in the judgment of the Tribunal.¹³ This task was merged into the work of the International Law Commission on a draft code of offenses against the peace and security of mankind and this, in turn, has been postponed awaiting the results of the Special Committee on the Definition of Aggression, a task which is still in process. The one-sentence paragraph in the Declaration on Friendly Relations, with no definition of "aggression" or of "responsibility," breaks no new ground in international law. There is little doubt that the governments of the world have put their collective blessing upon the action taken against war criminals at the end of World War II. The framing of these principles in general terms for future application is a more formidable and more uncertain task; their application at the end of World War II depended upon factual circumstances which may or may not be repeated.

Another short paragraph declares that "States have the duty to refrain from propaganda for wars of aggression." A number of delegations, including the U.S.,¹⁴ pointed out that this prohibition can apply

Charter more effective.

[13] Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

¹¹Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1547, E.A.S. 472, 474, 82 U.N.T.S. 279, 288.

¹²G.A. Res. 95, U.N. Doc. A/236 at 1144 (1946).

¹³G.A. Res. 177, U.N. Doc. A/505 at 1280 (1947).

¹⁴See Statement by Richard H. Gimer, U.S. Alternate Representative to the U.N. General Assembly, U.S./U.N. Press Release 122, Sept. 24, 1970, at 5, *reprinted in* 63 DEP'T STATE BULL. 623, 625 (1970).

only to governments since nations with strong guarantees of free speech and free press would face formidable constitutional issues if an attempt were made to enforce the obligation against individuals. Further, "propaganda for wars of aggression" has little legal meaning in the absence of a definition of aggression. In any event, the present author is dubious about the desirability or the efficacy of attempts to restrain international debate through law. The language of international intercourse will become more restrained as real issues are resolved; one can hope that such language will be carefully chosen, especially in the presence of dangerous disputes, but the regulation of debate through law appears to have little future.

Paragraph (4) proclaims the duty of every state "to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States." Territorial and boundary disputes continue to be a source of high controversy and armed conflict. Most of them, however, have their origins in other decades or other centuries, and few disclose a need for immediate solution as an emergency matter. It is appropriate, therefore, for the world community to say to the parties to such disputes that the overriding requirement for maintaining the peace imposes a duty to keep such problems within the confines of peaceful settlement and that the use of force in such situations is prohibited. It may be argued by some that this would give an unconscionable advantage to the status quo and would deprive claimants of elementary justice. The same objection can be made against other principles of law, both municipal and international. It may be that the world community, in prohibiting the use of force to settle boundary disputes, should offer a reasonable alternative method of settlement. Parties to such disputes are unlikely to be satisfied by the politically dominated debates of the Security Council and the General Assembly. The International Court of Justice can dispose of certain minor problems, but territorial and boundary issues of major importance have a high political content which the parties are unlikely to submit to that Tribunal. For possible consideration is the establishment of a United Nations commission on international boundaries, composed of men and women who have earned general international esteem for integrity, wisdom, impartiality and diplomatic skill. Such a commission could maintain a register of agreed boundaries and could be available to the parties for advice, inquiry, conciliation, mediation or other forms of peaceful settlement. Having examined the merits of a particular dispute, the commission might advise a party to accept a compromise adjustment or to drop a frivolous or insubstantial claim.

In any event, the Declaration on Friendly Relations appears to have moved constructively in throwing the weight of the United Nations against the threat or use of force in such situations.

Paragraph (5) of the Declaration merits special attention. It proclaims the duty "to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect." This is without prejudice to "the positions of the parties concerned with regard to the status and effects of such lines under their special regimes or as affecting their temporary character." If this language means anything, it has a direct bearing upon the situation of the divided states such as Germany, Korea and Vietnam. The violations of demarcation and armistice lines have resulted in two major conflicts in Korea and Vietnam, and major crises have developed from time to time over Berlin and Germany. It can be assumed that if the Federal Republic of Germany moved several divisions into East Germany to achieve reunification by force, the Soviet Union and its allies would not look upon such action as a family affair among Germans. The Soviet Union charged, however, that the United Nations and United States forces intervened in a civil war in Korea, and the same charge has been made by various and sundry about Vietnam. The Declaration on Friendly Relations appears to say that, whatever the issues between the parties in the divided states, in Kashmir, the Middle East or other places where demarcation and armistice lines are not settled international boundaries, those issues are not to be settled by the threat or use of force. Against the background of the history of the post-World War II period, this is a conclusion of the highest importance. Here again, a principle deriving from the necessity for maintaining the peace may favor the status quo and may tend toward making permanent certain arrangements which were considered to be temporary at their inception. But the price, if it is to be considered a price, is to be paid for an overriding objective.

In a short paragraph (6) the Declaration proclaims the duty "to refrain from acts of reprisal involving the use of force." This formulation emerged from proposals made by Czechoslovakia, a joint proposal by Australia, Canada, the United Kingdom and the United States, another by Chile, and a joint proposal by Italy and the Netherlands.¹⁵

¹⁵The proposals are found in 21 U.N. GAOR, 1966 Special Comm. on Principles of Int'l L. concerning Friendly Relations and Co-operation among States 37, U.N. Doc. A/AC.125/D.C.2 (1966).

It draws support from a Resolution of the Security Council of April 9, 1964 (S.5650), which condemned reprisals as incompatible with the purposes and principles of the United Nations. Although there is very little in the discussions which led to the adoption of the Declaration to throw light on the meaning of "reprisal" as used here, it is clear that it was not intended to apply only in the narrow sense in which it has been used in traditional international law with respect to, for example, the relations between belligerents and neutrals in a war situation. As used here, it includes retaliation, in its broadest sense, against injuries which do not support or require the exercise of a right of self-defense. It seems to declare the policy of the world community that force shall not be used where the injury is of a lower order of criticality, even though violence might be involved, and where peaceful processes ought to have a chance to provide a remedy. Thus, affronts to honor, dignity and prestige, emotions of anger, outrage and revenge are not a basis for a lawful use of force. It would obviously strengthen what would appear to be a constructive development in the law if the Security Council and the General Assembly were to take seriously the lower orders of injury and stand ready to condemn them and to insist upon appropriate amends.¹⁶

Paragraph (7) provides a dramatic example of the influence of the large number of new nations who did not have a chance to participate in the development of traditional international law or, indeed, in the drafting of the United Nations Charter. That paragraph declares that "every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence." In the elaboration of the fifth principle¹⁷ of the Declaration, an effort is made to identify such peoples; there is also added the thought that "such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the [U.N.] Charter." Some 76 nations have entered the United Nations since 1945, and most of them have emerged from colonial status. They are insisting strenuously that the process of decolonization be completed. In the simplest terms, the Declaration seems to say that colonial powers are not entitled to use force to maintain their control over colonial peoples

¹⁶Instructive is the handling of the Eichmann case, brought before the U.N. Security Council by Argentina. The Security Council requested Israel "to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law." 15 U.N. SCOR, Supp. Apr.-June 1960, at 35, U.N. Doc. S/4349 (1960). The matter was closed by a joint communiqué (3 August 1960) by Israel and Argentina in which Israel acknowledged that the actions of Israeli citizens in seizing Eichmann in Argentina had infringed the latter's fundamental rights.

¹⁷Reprinted in note 2 *supra*.

and that the latter are entitled to resist such force and to obtain outside aid in the process. Predictably, this portion of the Declaration evoked widely divergent views, to be found in the discussions in the Assembly's Sixth Committee.¹⁸ A number of the new states expressed the regret that the Declaration did not fully embrace the resolution of the General Assembly of 1960, called the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁹ Portugal said of the entire Declaration on Friendly Relations that "General Assembly resolutions were only recommendations and could not therefore constitute a source of law." The United States Representative supported the United Kingdom view that states are not entitled "under the Charter, to intervene by giving military support or armed assistance in Non-Self-Governing Territories or elsewhere" and that such support was limited by the purposes and principles of the Charter and "was therefore controlled by the over-riding duty to maintain international peace and security." The U.S. Representative added that "the Declaration does not constitute a license for gun-running" and that it does not limit "the right or responsibility of an administering authority to employ appropriate measures of police protection in order to maintain law and order in the territories for which it is responsible." I shall turn in a moment to the legal status of the Declaration as a whole, but it appears that wide divergencies disclosed in the *travaux préparatoires* leave in some confusion the legal aspects of the use of force in colonial situations. A simple political fact of life is, however, that an overwhelming majority of the members of the United Nations are determined to press for decolonization and that the maintenance of colonial relationships will have no significant support in the Security Council or the General Assembly.

In two further paragraphs, the Declaration proclaims a duty to refrain from "organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State" and from "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State" When the United Nations Charter was drafted the central concern was the type of massive and highly organized aggression by conventional forces launched by Japan, Italy and Germany. Since 1945, the use of armed agents, guerillas, "volunteers" and mercenaries has become the more usual form of aggressive action against a neighbor. Such forms of attack are no less deadly in purpose, no less a threat to the territory

¹⁸25 U.N. GAOR, Sixth Comm. 1180-84th meeting, U.N. Doc. A/C.6/SR. (1970).

¹⁹G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

or independence of the victim, and no less a threat to the maintenance of the general peace. The term "indirect aggression" is more properly reserved for aggression by proxy and should not be used, in the interest of clarity, for these informal modes of attack. If the world community makes it clear that these unacknowledged forms of attack are contrary to international law and to the U.N. Charter, an important step forward will have been taken.

Paragraph (10) states that "[t]he 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." It continues, without further reference to the Charter: "The territory of a State shall not be the object of acquisition by another State resulting from the use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal." The comments by the delegates clearly reflected the present preoccupation of a number of them with the situation in the Middle East. The Representative of Iraq, for example, called the Declaration "true rules of *jus cogens*." Israel, on the other hand, gave the Declaration a rather chilly reception. One recalls that the Security Council's important resolution of November 22, 1967, on the Middle East,²⁰ contained a preambular clause reading, "Emphasizing the inadmissibility of the acquisition of territory by war"

On broader grounds, there is merit in making it clear that the right of conquest must give way to the overriding requirement to maintain the peace and that force cannot be used to acquire territory even where the use of force occurs under a claim of individual or collective self-defense. Looking ahead, one can anticipate that burgeoning populations may cause the revival of a claim for "lebensraum." It is not too early to nail down the law and the policy of the world community that, whatever the solutions may be, war is not among them.

The Declaration then contains two hortatory paragraphs which need not detain us here. One refers to "general and complete disarmament," and the other includes a call for an "endeavor to make the United Nations security system based upon the Charter more effective." Both are large and important issues which would lead far beyond the scope of this comment.

A final paragraph concerning the first principle provides that "[n]othing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful." This is, to say the

²⁰S.C. Res. 242, 22 U.N. SCOR, 1382d meeting 8 (1967).

least, a rather curious statement; to a veteran in such matters it appears to reflect the caution of a committee of 31 nations who did not have the time, the inclination or the consensus to spell out in which respects the Declaration might affect "the scope of the provisions of the Charter" about the lawful use of force. It might have given comfort to some who were nervous about "amending" the Charter through a declaration of the General Assembly. It might have reflected the view that the "foregoing paragraphs" simply stated the existing law of the Charter. But if these paragraphs mean anything at all, it appears obvious that they have implications for disputes before the Security Council and the General Assembly involving the lawfulness of the use of force. The Declaration clearly attempts to limit the use of force by a state exercising sovereignty over a colonial territory. There are implications for regional organizations under chapter VIII of the Charter.

More importantly, the Declaration has an impact upon "the inherent right of individual or collective self-defense" referred to in article 51 of the Charter. Proposals made in the Special Committee about paragraph (13) leave the impression that the concern of the delegates was that the Declaration not narrow or inhibit the right of self-defense. But in elaborating the duties of states to refrain from the threat or use of force in certain circumstances, it may well be that the Declaration confirmed the right of self-defense at points at which some writers have questioned it. Surely a movement across demarcation lines is something more than a civil war situation. Similarly, the Declaration would seem to clarify the point that the right of self-defense in article 51 is not limited to formal invasion by large-scale conventional forces, but also applies to prohibited guerilla incursions.²¹

Perhaps all that need be said at the moment is that the Declaration on Friendly Relations leaves some unfinished business. The definition

²¹The author's reflection on the right of self-defense must await another occasion. In general, governments are likely to resist attempts to constrict the right of self-defense even though there may be difficulties in (a) proving the facts, (b) competing assertions as to which party is at fault, (c) inadequate procedures for impartial findings by international bodies such as the Security Council and the General Assembly, (d) the escalatory possibilities of "collective" self-defense and other such issues. The maintenance of peace may require the international community to confirm and strengthen the right of self-defense, as a deterrence to those who might be tempted to initiate a prohibited use of force, and to mobilize international opinion and action more effectively in support of the victim. In the author's view, a serious effort should be made to restrict severely actions taken in the name of "anticipatory" self-defense on the broad ground that it should never be assumed that it is too late to seek a peaceful settlement. A useful discussion and bibliography on the problem of self-defense can be found in M. MCDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961). See also *THE VIETNAM WAR AND INTERNATIONAL LAW*, *supra* note 7.

of aggression is one item. Someday the United Nations might take up the question of the elaboration of the right of self-defense, but the reluctance of governments to circumscribe such rights in any way might leave this topic for continuing dispute among the writers.

These all-too-brief comments can do little more than give an impression of the contents of the Declaration on Friendly Relations, insofar as the use of force is concerned. Many volumes will undoubtedly be written as officials and scholars examine them further; debate on such issues in the United Nations will not be silenced. A question remains as to whether the Declaration is, or was intended to be, a statement of international law. Its full title begins with the words, "Declaration on Principles of International Law." Its final paragraph declares that "[t&]he principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles." This language is somewhat ambiguous, perhaps by design. If the purpose was clearly to assert the Declaration as law, the paragraph might have begun, "This Declaration embodying the principles of the Charter constitutes basic principles of international law," etc.

Let us note certain aspects of the Declaration which have a bearing upon its legal character:

1. *The Declaration was the result of a deliberate process extending over several years.* We do not have here a resolution of the General Assembly developed suddenly in the heat of a particular controversy voted by delegations without an opportunity for full consideration by governments. The work was launched by a General Assembly resolution in 1962; it was reviewed in eight annual sessions of the Assembly, chiefly by its Sixth (Legal) Committee. The Assembly constituted a Special Committee in 1964, expanded to 31 members in 1966, which worked on the Declaration in six meetings in Mexico City, Geneva and at the headquarters of the United Nations in New York.

2. *The Declaration was adopted without a formal vote but without dissent at its 25th Anniversary meeting.* The Special Committee developed the Declaration on the basis of a consensus of its 31 members and rejected proposals that it proceed on the basis of divided votes. The final draft of the Declaration was adopted without objection by the Sixth Committee of the General Assembly after hearing the statements of any delegation who wished to speak over a period of several days.²² The

²²See note 18 *supra*.

plenary session of the Assembly adopted the Declaration without dissent at its formal 25th Anniversary session. One must not read too much into this formal unanimity. The statements of governments in the Special Committee and in the Sixth Committee reflect the understandings of governments about the meaning of the Declaration and must be consulted as *travaux préparatoires*. Formal reservations in the final session were not made, presumably, in reliance upon statements made at earlier stages. Some might have remained silent because of their view that General Assembly resolutions are recommendations and cannot make law. The fact is, however, that no delegate asked to have a negative vote recorded in the Sixth Committee or in the plenary session.

3. *The Declaration was formulated by representatives of diverse legal, ideological, cultural and political systems.* All groups of states were represented on the Special Committee—NATO and Warsaw Pact members, nonaligned Latin Americans, Asians and Africans, developed and underdeveloped, large and small.²³ The Committee clearly represented “the main forms of civilization and of the principal legal systems of the world” referred to in article 9 of the Statute of the International Court of Justice. Protracted negotiations occurred among divergent points of view, but no group can be accused of trying to run rough shod over another.

4. *The Declaration, in the main, reflects existing international law.* To the extent that the Declaration merely embraces well established norms of international law, there is no need to be troubled about the legal character of a General Assembly resolution. In some points the Declaration appears to clarify points of law on which there has been sharp debate. For example, the United States has taken the view that Communist states act illegally if they throw guerilla forces against a neighbor as what they call a “war of liberation” in support of their world revolution. Moreover, the Declaration also comes close to a new international legal norm in what it says about the use of force in colonial situations. In any event, the assertion that the principles elaborated in the Declaration are a part of the law of the Charter has some significance if the Charter is to be treated as a “paramount” source of law.

5. *The Declaration did not emerge as a carefully drawn legal instrument.* As the Representative of Finland put it in his remarks to

²³The membership of the enlarged Special Committee consisted of Algeria, Argentina, Australia, Burma, Cameroon, Canada, Chile, Czechoslovakia, Dahomey, France, Ghana, Guatemala, India, Italy, Japan, Kenya, Lebanon, Madagascar, Mexico, Netherlands, Nigeria, Poland, Romania, Sweden, Syria, U.S.S.R., United Arab Republic, United Kingdom, United States, Venezuela, and Yugoslavia.

the Sixth Committee:

The draft Declaration, like all works of man, was open to criticism. The product of a number of compromises, it was somewhat long and the wording left much to be desired. As pointed out in the report, there were many gaps and imperfections, some matters were dealt with solely in the preamble, and the text contained some overlapping, inconsistencies, omissions and redundancies.²⁴

Others expressed similar views. Critical terms such as "aggression" remained undefined. The Declaration was not reinforced by strong procedural provisions about giving practical effect to its principles, not even in the organs of the United Nations itself. It may be said, however, that inartistic, obscure or even contradictory drafting is not unknown to the law, whether municipal or international, and such deficiencies need not be taken as decisive.

6. *The United Nations General Assembly was not given broad legislative responsibility.* It seems clear that those who drafted the Charter did not wish to establish a General Assembly with broad legislative powers. It is equally clear that the Assembly has certain powers which are legislative in character, for example, the financial powers under article 17 and the authority to establish and instruct subsidiary organs under article 22. It is unlikely that the larger members will yield extensive legislative authority to an Assembly in which 10% of the world's population and 5% of the contributions to the U.N. can now cast two-thirds of the votes. Even so, it can be said that some resolutions of the Assembly carry legal weight and that this may be particularly true of those that purport to be an authoritative interpretation of the U.N. Charter itself.²⁵ It is the author's view that the legal status of General Assembly resolutions is in flux and that we may well see a growth in the authority of the Assembly by custom, precedent, acquiescence and other means less formal than Charter amendment. After all, the Assembly is the nations of the world in congress assembled and it would be imprudent to discount their solemn conclusions as a "source" of law, particularly where a high degree of unanimity is present.

7. *The Declaration was not submitted to governments for ratification as a treaty or convention.* In carrying out the provision of article 13 that the General Assembly shall initiate studies and make recommen-

²⁴25 U.N. GAOR, Sixth Comm. 1179th meeting, U.N. Doc. A/C.6/SR. (1970).

²⁵See O. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* (1966); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGAN OF THE UNITED NATIONS* (1963).

dations for the purpose of encouraging the progressive development of international law and its codification, the Assembly has arranged for the development of multilateral treaties recommended to governments for their ratification. In this work it has had valuable assistance from the International Law Commission, the Geneva Disarmament Committee and such bodies as its own Committees on Outer Space and the Seabeds. No such treaty was used for the Declaration on Friendly Relations. This is, of course, a matter of some moment for the United States. In our system international law is, under certain circumstances, a part of the law of the land. Can we permit such law to develop without the participation of our Congress, either through the treaty power of the Senate or by the joint action of both Houses? In the Sixth Committee, the United States Representative was not completely clear on this point.²⁶ He said:

We thus took as our task an "elaboration" of fundamental charter principles; that is, the process of spelling out in important detail the implications of these charter principles, taking into account the experience of the members of the United Nations since this most basic of post-war treaties entered into force in 1945. The declaration does not, under the guise of charter analysis, circumvent the amendment provisions contained in article 108 or the ratification requirements of our own Constitution. Nor does it in effect constitute a revision of the charter by the expedient of a resolution to be adopted by the General Assembly.

When one "elaborates" or spells out the "implications" or proclaims principles which were not reasonably spelled out in the Charter, is one not making law?

Although Senators Javits (R., N.Y.) and Pell (D., R.I.) were members of the U.S. Delegation to the 25th U.N. General Assembly, the author understands that there was no consultation with the Senate Foreign Relations Committee or the House Foreign Affairs Committee before the General Assembly took final action on the Declaration on Friendly Relations. The United Nations Participation Act of 1945 provides in section 3²⁷ that U.S. representatives to the United Nations "shall, at all times, act in accordance with . . . instructions [and] cast any and all votes under the Charter of the United Nations." Many of these votes can help create legally binding obligations upon the United States in the Security Council, the General Assembly and the special-

²⁶See Statement by Richard H. Gimer, *supra* note 14 at 624.

²⁷22 U.S.C. § 287a (1970).

ized agencies. The advice and consent of the Senate or of the Congress as a whole is not required with respect to these votes although subsequent action by the Congress may be required, as in the case of assessed dues. It might have been prudent, however, to consult those Committees after the completion of the final draft of the Declaration by the Special Committee and before the discussions in the Sixth Committee in order that the statement by the U.S. Representative in the Sixth Committee could have taken into account the general reactions of the key committees of the Congress. Having said that, an examination of the statement of the U.S. Representative in the Sixth Committee suggests that he probably did, in fact, express the qualifications which might have arisen in discussion with Congressional Committees. Although new international law can come into being without dependence upon the internal constitutional arrangements of each and every nation, the participation of the United States in that process should, on matters of great importance, involve both the Executive and Legislative branches in some appropriate form even though formal treaties are not involved.

What did the delegates to the United Nations say about the legal character of the Declaration? Some 37 of them commented on this point in their statements in the Sixth Committee²⁸ and in plenary session of the Assembly on October 6, 1970.²⁹ Eight of these seemed clearly to affirm their understanding that the Declaration was indeed a statement of international law.³⁰ Two (Portugal and Israel) treated the Declaration as having the status of a recommendation rather than an enactment of law. The great majority (28) used such expressions as "A code of good conduct," "An important contribution," "An important step," "A decisive point," "An important landmark" and a variety of similar judgments. This center group included such important members as the United States, the United Kingdom, France, the U.S.S.R., Japan, Italy, as well as the Legal Counsel of the U.N. Secretariat.

What follows is a personal assessment. The law of the United Nations Charter is not now quite the same as it was before the Declaration on Friendly Relations was adopted. Although not a formal enactment, it

²⁸See note 18 *supra*.

²⁹25 U.N. GAOR , U.N. Doc. A/PV.1860 (1970).

³⁰For example, Ecuador: ". . . contains binding obligations on States concerning their legal and political positions vis-à-vis the principles of the interpretation of international law incorporated in the Charter." Iraq: ". . . they constituted fundamental principles of international law which States were bound to respect and which therefore could be considered as true rules of *jus cogens*." Ethiopia: ". . . the principles outlined in the draft Declaration would be binding on States and . . . their adoption by the General Assembly would sanction their classification under *jus cogens*."

gives more flesh and bone to key articles, such as article 2(4). The Declaration seems at least to be an authoritative interpretation of the Charter by the nations of the world in congress assembled. It can be predicted that the Declaration will receive the respectful attention of the International Court of Justice if cases arise before it to which the Declaration is relevant. It will be difficult for writers to insist that the law is something other than that contained in the Declaration. Governments who will make a judgment about the legal character of a proposed course of action must take the Declaration into account in judging the reaction of the world community to legal issues. The Declaration also provides an agenda for the further codification of international law in more precise terms.

Much will depend, of course, upon the attitudes and action of governments in dealing with specific issues and the influence which the Declaration will have in the consideration of problems brought before the Security Council and the General Assembly. It will be little more than an empty gesture if members do not take it seriously in their own conduct and in the application of the Declaration in United Nations debate. The role of the United Nations in maintaining the peace has been weakened by the abuse of the veto in the Security Council and by the indifference and lack of responsibility of many of its members and, at times, of the Secretariat itself. The United Nations as an organization can do no more to strengthen international law than its members are willing for it to do. The law of the Charter and its elaboration in the Declaration on Friendly Relations will develop strength and vitality only through the determination of the governments of the world to insist upon the norms of international law—especially those which are basic to the maintenance of peace. This is what I referred to earlier as “a matter of compelling necessity.” Did the United Nations General Assembly make a significant contribution to international law regarding the use of force? We shall have to wait and see. On balance, I think it did.