TOWARDS NEWER SOURCES IN INTERNATIONAL LAW?

TANIA VELLA

ARTICLE 38 of the Statute of the International Court of Justice invites the Court to apply international law through the four enlisted sources which are traditionally recognised at international law, namely, treaties, custom, general principles of law accepted by civilised nations and the opinions of qualified publicists. What must be determined, however, and is the subject-matter of deep controversy, is whether and to what extent these traditional sources are being supplanted by newer sources in the international sphere. In this regard it would be pertinent to examine the role played by the resolutions of diplomatic assemblies, particularly those of the United Nations, and by the works of the International Law Commission in the codification of international law.

It must be borne in mind that the very enumeration of the sources in the Statute is indicative of the fact that a need for them to be laid down was felt at the time they were created. In the words of H.W.A. Thirlway, 'the enumeration of the source of the law is, as it were, a function of the development of the community, and there is no obstacle of theory to the alteration of that enumeration resulting, as did the original enumeration, from the requirements of that community. As a community develops, the sources of law which it recognises may change not merely in relative importance but in effective existence. New sources may be tapped and old ones cease to flow'.[1]

At the time the sources were formally enumerated in the Statute, such a course of action must have been considered to be the most exhaustive attempt at ensuring stability and certainty of the law in the international field. Time and actual practice have shown however that new sources have been 'tapped' even though the old ones have not, as yet, ceased to flow.

To those who have witnessed the unwieldy process of custom

[1] *International Customary Law and Codification.*

and the interminable conferences subjected to signature and ratification and even possibly to reservations in the making of a multilateral treaty, the idea of resolutions of the General Assembly as being of the nature of 'instant' law is probably a pleasant one. For these, the resolution provides a rapid mode of keeping up with technological and scientific developments in a fast-moving world and is no more than the modern synonym for customary international law as expressing the juridical conscience of peoples as are treaties themselves. However, the very system which hinders the law-making process provides a 'safeguard' procedure before final adoption: something which the resolution is definitely lacking in.

And there are resolutions and resolutions: one must immediately make a distinction between those resolutions made in virtue of Article 17 of the United Nations Charter[2] and those which are of a more general character, and between those resolutions which have been adopted in a unanimous as opposed to a majority form.

It is true that at the San Francisco Conference, convened to set up the Organization, the Phillipine proposal to endow the General Assembly with the power to enact rules of international law was met with much disapproval and that therefore if Charter intent is to be decisively and strictly constructed, it becomes impossible to attribute binding legal force to resolutions of the General Assembly or to consider that it is in any sense an active, potential, or partial legislative organ.

In fact, although within the four corners of the Charter, General Assembly resolutions under Article 17 are necessarily of binding legal character on all member States for they refer to the approving of the United Nations budget and to the apportioning among the members of the payment of United Nations expenses, the extent to which General Assembly resolutions of a more general nature are legally binding on members is doubtful.

As often is the case, the drive towards a legislative solution is often blunted by a very broad and abstract resolution which is operationally irrelevant. One such example can be found in the Resolution on the Permanent Sovereignty over Natural Resources, which embodies broad principles formulated in such a way as to

[2] Article 17(2) of the United Nations Charter reads as follows:

'The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies *with a view to making recommendations to the agencies concerned.*'

receive an affirmative vote from all States. No attempt is made to legislate a solution of a real dispute going on in an international society, presumably because a particular political stand on a debated issue can never hope to be approved by the conflicting ideologies of prominent Powers.

Another resolution, Resolution 1653(XVI) of November 28th, 1961, lacks Great Power consensus. Although it is ineffective in direct terms, it declares that the use of nuclear weapons would constitute 'a direct violation of the Charter of the United Nations, is contrary to the rules of international law and to the laws of humanity and that (a)ny state using nuclear and thermonuclear weapons is acting contrary to the laws of humanity and is committing a crime against mankind and civilization'. The present value of such a resolution is limited to evidence of the legal basis of the rule that an obligation exists to use nuclear weapons only, if at all, in a reprisal against a State that uses them first. At least it shows an attempt to resolve the dispute of the legality or otherwise of nuclear weapons as instruments of warfare by taking a definite stand on the controversial issue.

A resolution of a more optimistic nature is Resolution 1884 (XVIII), which calls upon all nations not to station in outer space 'any objects carrying nuclear weapons or any other kinds of weapons of mass destruction'. It enjoys the backing of the Super Powers and is considered by Government officials as one of the major steps in the area of arms control.

One must further distinguish between those resolutions which have been unanimously adopted and those which have only received a majority acceptance of States. It is easier to argue in the first instance that resolutions are a source of international law, for here the resolution is declaratory of a common stand which States have taken on a fundamental issue. Can it be said, on the other hand, that a resolution of the General Assembly which has only been adopted by a majority of members creates law for the international community as a whole, or does it only regulate the actions of adopting States? If the former is the case, a powerful State in the minority could easily amend the law by the simple process of breaking it, while if the latter proposition is more favourable, it would only lead to two rather than one international community with rules applying to adopting States and different rules applying to non-adopting States. If anything, it is those resolutions which are evidence of an international consensus which should be recognised as material sources of international law. Professor Friedmann holds that 'Without having the character

of a treaty, with all its constitutional implications, resolutions of this kind unquestionably are an important link in the continuing process of development and formulation of new principles in international law'.[3]

However, even here one runs into problems, for if one were to presume that the unanimous adoption of a General Assembly resolution had the effect of changing the law on a certain subject, then the logical extension to this argument would be that such unanimity would also have to be expressed when such resolution had to be amended or revoked in view of changing conditions. Such reasoning also bears the implication that every State, however politically insignificant, would legitimately exercise the veto at the expense of progress and even though the vesting of the 'veto' power in all would give true meaning to the sovereign equality of States as expressed in Article 2(1) of the United Nations Charter, this would hinder more than help the evolution of international law.

One could rightly ask what the position in present-day international law is. Today it would seem as though there is a growing tendency to regard resolutions not so much as synonymous with formal treaties as an expression of agreement. Even if one is not prepared to recognise the resolution as a formal source of the law, one must admit that its material effect on the international community is such that even though it does not fulfil the role of legislation as understood in the municipal sense, yet it forms the basis of an international mode of thinking aloud and is therefore, to say the least, a manifestation of an inter-State consensus.

However, some writers are of the opinion that the very authors of a resolution may go one step further and create the law of the international community, thus inferring a transition from the declaratory to the constitutive level.

Rosalyn Higgins properly emphasises the extent to which an assessment of the legal status of General Assembly resolutions is associated with the over-all character of the law-creating process applicable to customary international law:

'Resolutions of the Assembly are not "per se" binding, though those rules of general international law which they embody are binding on member States, with or without the help of the resolutions. But, the body of resolutions as a whole taken as indicative of a general customary law undoubtedly provide a rich source of

[3] *Changing Structure of International Law*

evidence."[4] Higgins also shows that the drafters of a resolution possess an inherent discretion in developing new rules of international law in the guise of declaring old ones. Thus, we witness the blurring of the demarcation between the declaratory and the constitutive element and the subsequent transition from the former to the latter level.

One thing is certain: Assembly resolutions play a crucial role independently of whether their status is to generate binding legal rules or to embody mere recommendations. The degree of authoritativeness that *a particular* resolution will acquire depends on its text, its intended and unintended objective and the distribution of power in an international society. On the other hand, the degree of authoritativeness which the *general* process of law-creating by the Assembly comes to enjoy depends on the extent to which those same particular resolutions influence action and gain notoriety in legal circles and also on the extent to which they become absorbed into an evolving framework of international law.

In the words of Friedmann: 'In some cases they (unanimous resolutions) will be preparatory to formal international covenants; in other cases, they will serve as highly authoritative statements of international law in a certain field. The appreciation of this quality of all declaratory resolutions avoids the rather futile controversy whether they are sources of law or not ... International law is developing and being nourished through a multitude of channels. While it would be absurd to equate them with formal treaties, it would be equally absurd to deny their importance in the continuing process of the articulation and evolution of international law'.[5]

In order to give a more complete picture of the changing structure of international law, it would be relevant to consider the work of the International Law Commission in the course of its evolution and to examine how it fits in with the traditional notions of the sources of international law, especially with reference to the whole procedure under Article 13(a) of the Charter.[6]

[4] *Development of International Law through the Political Organs of the United Nations.*

[5] *Changing Structure of International Law.*

[6] 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.

Despite the original atmosphere of scepticism into which the International Law Commission was born, its comparatively short life has witnessed a courageous attempt at international codification. Its field of operation can be said to be divided into those areas where the rules on the law at a given time are much in doubt and very controversial and those areas where agreed rules of law are already in existence. In the former case, codification usually takes the form of a compromise between the diverging opinions of States and therefore not altogether satisfactory. In the latter case, the Commission's role is more in the nature of elucidation and elaboration of universally accepted principles.

As recently as 1953, a former judge of the International Court of Justice[7] committed himself to the opinion that attempts to codify international law within the larger community of the United Nations constitute a clear menace to the development of international law and that 'the prospects of codification of international law on a universal plane are nil'.

Voices like these are thankfully in the minority; the codification of international law is the only way in which controversial stands as to what the law is on a particular issue can be diminished if not obliterated. In the ultimate analysis, the codifying process is the only way in which we can safeguard the very essence of international law. Professor Jennings' exhortation in 1947 is no less urgent today:

'It is surely evident that the implementing of Article 13 of the Charter is a task, the urgency and importance of which yield place to none of the other problems that face the international lawyer today'.[8]

During its relatively brief existence, the International Law Commission has been responsible for a Geneva Convention on the Law of the Sea, the 1961 Convention on Reduction of Statelessness, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, all of which are heavily based on drafts prepared by the International Law Commission and which provide very real evidence of the law at a particular moment in time.

Some tentative conclusions may be drawn. In asking ourselves whether we are in fact moving towards newer sources in interna-

(b) Charles de Visschee in *Théories et Realités en Droit International Public*

[7]Charles de Visscher in *Théories et Realités en Droit International*

[8]*Progressive Development of International Law and its Codification.*

tional law, we do not seem to have learnt our lesson. For, even though we have, through experience, learnt to deal warily with the municipal law analogy when discussing the very character of international law, it is not always realised how much the very sources of international law rest upon assumptions which emanate from municipal law practice. Thus we refer to law-making as opposed to contract treaties and to the persistent assumption that there is a great need in international law for some procedures for legislation.

It is just possible that the search for what Jennings refers to as 'the statute – substitute' has made us blind to the actual method of law-making which international practice has devised and which is taking place before our very eyes, if only we would recognise and accept it.

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