II United Nations

By A. C. Castles*

The Status of General Assembly Resolutions

United Nations summaries of speeches in the General Assembly are sometimes too compressed and can provide no substitute for a reading of the original record. This is certainly the case with a report of the address of the former Minister for External Affairs, Sir Paul Hasluck, in the general debate of the General Assembly in October 1967. The United Nations "Monthly Chronicle" makes no mention of one of the key themes adverted to by the Minister.[1] In his speech, the Minister referred to a recurring issue related to the working of the Assembly, the status of General Assembly resolutions. In his address Sir Paul Hasluck outlined the Australian, official attitude to Assembly resolutions;[2] a viewpoint which not only seemingly motivates Australian responses to Assembly resolutions but also influences Australian voting attitudes both in the plenary Assembly and in Assembly Committees.[3]

In essence, the view expressed by the Minister on this occasion, indicated a generally legalistic approach to the status of Assembly resolutions which demonstrated, for the most part, an adherence to the style of thinking on the status of Assembly resolutions at the time of the establishment of the world organization. At the same time, however, the Minister did affirm that in certain, limited circumstances, Assembly resolutions might provide some basis for the development of principles of international law.

Turning to the status of resolutions generally, the Minister contended:—

> "The General Assembly has power under the Charter to make recommendations but it has never had the power to bind the membership by a majority vote. As the United Nations Office of Legal Affairs said in 1962, a resolution of the General Assembly cannot be made binding as such merely by the device of terming it a 'declaration' rather than a 'recommendation'. The General Assembly may indeed entertain an expectation that members of the United Nations will attempt to abide by a resolution supported by a large majority. But this is still in the sphere of expectation rather than of legal duty."[4]

Sir Paul then went on to refer to what he termed "the pretension that international law can be made by a resolution of the General Assembly". This "pretension" as Sir Paul termed it, is one which has

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1 United Nations Monthly Chronicle, November 1967.

2 Current Notes on International Affairs, vol. 38 (1967), p. 418.

3 For an example, see op. cit., at p. 418.

4 Current Notes, op. cit., p. 418.

gained some currency, in recent years, particularly in academic writings.[5] Ingrid Detter, in her "Law Making by International Organisations" has referred to many of the comparatively recent discussions on this issue.[6] She concludes, in this regard, that "international organizations, and the General Assembly of the United Nations in particular, have an important function to crystallize and in a gradual way, create, international law".[7]

As summed up by Sir Paul Hasluck, the Australian official viewpoint would seem to fall short of accepting even this relatively restricted attitude to Assembly resolutions. As the Minister said in his address:—

> "In recent years the General Assembly has adopted in performance of its duty under Article 13 of the Charter, a procedure directed towards eventual additions to the body of general or customary international law. I refer here to the establishment of the Special Committee on the Principles of International Law whose task it has been to study and prepare texts for consideration by the General Assembly as a declaration formulating and elaborating seven Charter principles of international law concerning friendly relations and co-operation between States. Customary international law consists of that body of rules which have been accepted generally by States, as legally binding on them. A rule does not qualify under this heading unless, first, it can be shown to have been accepted generally by the international community and, second that it has been accepted by members of the international community as law."[8]

Turning to the way in which these conditions might be satisfied the Minister affirmed:—

> "It is always open to representatives in the General Assembly to make clear, in the voting on any resolution, how far these two conditions are fulfilled. The mere adoption of a resolution by the General Assembly will not give its terms the character of law. There have been instances in recent years in which the General Assembly, after considering items of a predominantly political character, has adopted resolutions in terms that could be regarded as interpreting, or making explicit what would otherwise be only implicit in certain provisions of the Charter. It is especially necessary, in such instances, that States should make clear not only whether they accept the provisions of the draft resolution but also whether or not they accept them as law."[9]

The relatively broad sweep of the Minister's remarks in this 1967 speech gave few indications, however, of the way in which, in practice, this Australian viewpoint operates in the day to day working of the United Nations. Some months later, however, an indication of the practical application of this attitude was revealed in an address by Sir Kenneth Bailey, serving in the capacity as Australian representative on the Sixth Committee of the General Assembly. On this occasion, Sir Kenneth was concerned to elaborate upon the style of circumstances which might, in the Australian view, make it possible for a

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5 Ibid.

6 Norstedt and Söners Forlag (Stockholm) 1965, pp. 212-3.

7 Ibid., p. 212.

8 Current Notes, op. cit., p. 318.

9 Ibid.

definition of aggression, if such might ever be achieved, binding under international law in the form of a resolution of the Assembly. In referring to efforts to create a binding definition of "aggression" Sir Kenneth suggested that "a definition could not be regarded as acceptable unless it is supported by all the Permanent Members of the Security Council, at the very least". He added: "Indeed, the view of the Australian delegation was, and is, that a definition of aggression, to be effective for any relevant purpose, would need to represent the general consensus of the United Nations."[10]

If this speech can be regarded as a fair sample of the application of the Australian attitude on the circumstances when a General Assembly resolution might have a law-making quality attached to it, it would seem that there could, in only the most exceptional, generally unattainable situations, be recognition that a resolution can be regarded as being anything more than a mere recommendation. Certainly, this view falls far short of Lauterpacht's view that the Declaration of Human Rights, for example, could be said to be legally binding for United Nations Members because of their obligation to respect human rights under the Charter.[11] It seems to run counter to the opinion expressed by the Office of Legal Affairs of the United Nations Secretariat that the General Assembly may determine, in declarations, through unanimity or qualified majorities what is international law.[12] It seems, too, to fail to account for the possibility that even where Member States disapprove of a resolution, other States may regard themselves as obliged to follow the terms of a resolution, thereby establishing what they regard as norms which may well affect their legal relationships with other countries.[13]

Underlying the Australian practice on the status of Assembly resolutions there would also seem to be something of a dictate of what Sir Paul Hasluck referred to in his 1967 speech to the General Assembly as considerations of a "political character". Implicitly, the Minister seems to have considered that where such considerations were apparent these in some way colour and effect the status of resolutions dealing with matters of "law", thereby removing such resolutions from the realm of law making. If this indeed is the underlying motivation for the Australian viewpoint on Assembly resolutions it could well be hard to sustain. As students of American Constitutional Law know well, the dividing line, if any, between questions "political" and those which are not, is often difficult, if not impossible, to determine. Even when eminent jurists of the calibre of the late Justice Felix Frankfurter have essayed to delimit the "political" from the "non-political", as in Frankfurter's noted dissent in the *Tennessee*

10 Statement of 22 November 1968 on Item 86 of the Agenda of the Sixth Committee.

11 Law and Human Rights (1950), p. 145.

12 Memorandum referred to by Detter, op. cit., p. 212.

13 Castles, *The Legal Status of U.N. Resolutions*, Adelaide Law Review, vol. 3, 68, at p. 73.

Voting Case,[14] it is hard to resist the conclusion that "drawing the line" is itself a political act. *A fortiori*, it might be argued, in the context of the working of the General Assembly, there is less justification for attempting to maintain a juristic distinction of this sort in dealing with the working of a deliberative in contrast to a judicial body.

The Definition of Aggression: The United Nations Charter refers twice only to the word "aggression". Article 1 (1), in setting out some of the purposes of the world organization, details "the suppression of acts of aggression and other breaches of the peace". The other reference to aggression is made in Article 39, the first of the articles in the almost neglected Chapter VII of the Charter. This states, *inter alia*, that the Council can determine "the existence of any threat to the peace, breach of the peace or act of aggression" as a precursor to Council action being taken under the Chapter to deal with such a situation.

There were those at the San Francisco Conference of 1945 who were only too painfully aware of the problem of attempting to define "aggression" in these contexts, in the Charter. In the inter-war years the League of Nations had attempted, albeit unsuccessfully, to define aggression. As early as 1928 during the consideration of the Kellogg-Briand pact, the United States had adopted the position that an all embracing, acceptable definition of the word could not be achieved for international purposes. During the 1945 Conference, largely under the influence of the Soviet Union, which had argued strongly at Dumbarton Oaks for "aggression" being referred to in the Charter, the phrases in Articles 1 and 39 were retained in the Charter in its final draft. At the same time, moves for the inclusion, in the Charter, of a definition of "aggression" were not successful.[15] Since then, and not surprisingly in the light of earlier problems, in the League and elsewhere, the efforts to define "aggression" have become one of the seemingly endless subjects of a legal debate in the United Nations. As Goodrich, Hambro and Simons relate: ". . . the issue has been discussed in the International Law Commission, in the General Assembly, in special committees established to study the question, and in other United Nations bodies."[16]

At its twenty-second session, on 18 December 1967, the General Assembly attempted, once again to advance the consideration of the definition of aggression by establishing a "Special Committee on the Question of Defining Aggression". After meetings in 1968, a report of this Committee was submitted to the Assembly and came up for consideration in the Sixth Committee during the twenty-third session. As before, however, and as again in 1969, the Assembly was unable to reach any real degree of finality on the question, as indeed the

14 *Baker v. Carr*, 369 U.S. 186; 7 L. Ed 2nd, p. 633 (1963).

15 Goodrich, Hambro and Simons, *Charter of the United Nations* (3rd Revised Edition), pp. 298-9.

16 Ibid., p. 299.

Special Committee, whose mandate was extended in both 1968 and 1969, has failed to reach a long sought consensus on the issue.[17]

In the course of the Sixth Committee's deliberations, in November 1968, the Australian position in the continuing, seemingly never ending, debate was set out by Sir Kenneth Bailey, the Australian representative on the Committee. Sir Kenneth opined that Australia does not "think that the formulation of a definition of aggression, however, interesting to the scholar and jurist, is of major current practical importance". As he went on to argue: "It is not really necessary for the performance of any function that is entrusted to the Security Council, or to any other organ of the United Nations, to define aggression or make a determination that an act of aggression has taken place".[18]

Referring more specifically to the references to aggression in the Charter, Sir Kenneth adverted to one of the issues as he saw it, which seemingly militated against the utility of attempts to define the word in these contexts. He suggested that in contrast to the Covenant of the League of Nations, where a power to act could be based on "external aggression", the Charter references were not made to "aggression" as "a concept or general idea" but to "acts of aggression". As a consequence, in the context of the Charter, the phraseology where the word was used served "to emphasize the context of breaches of the peace", and should not, so it would seem, be regarded therefore as laying down any self-sufficient, separate foundation for United Nations action. The implication of this approach, as Sir Kenneth then went on to elaborate, was that the Charter does not "select 'acts of aggression' for specific prohibition". At the same time, this did not mean, in the Australian view, that the Charter permitted acts of aggression. Rather, as Sir Kenneth suggested: "It means only that to commit an act of aggression will always involve violation of one or more specific provisions of the Charter".[19]

Given the long standing impassé on the definition of aggression, the accompanying, continuing pragmatic argument, since 1945, that any definition could retard or impede the Security Council in dealing with breaches of the peace, and the indicia of fundamental East-West conflict on the issue in the past 25 years, it is hard to resist the contention that little of real substance will emerge from the continuing discussions on this topic. In the light of the general practice of the Security Council, it might well be doubted that any definition of "aggression" would really impede or inhibit its work. There remain, nevertheless, deep seated and fundamental disagreements related to the conduct of East-West and other international relationships which

17 For a recent summary of developments concerning the definition of aggression within the United Nations see: Report of the Special Committee on the Question of Defining Aggression, 13 July-14 August 1970, G.A.O.R. 25th Sess., Supp. No. 19 (A/8019) pp. 1-3.

18 These statements are taken from an unpublished mimeographed copy of this speech.

19 Ibid.

make it difficult to conceive of any authoritative, meaningful definition of aggression emerging, at least for the present. Beneath the surface of the debate on aggression, with their "legalisms" and recourse to such possibilities as impeding the work of the Security Council, under a Chapter of the Charter which has generally been ignored, there exists a disparity of views on forms of territorial incursion, such as internal subversion, which seems to make it highly unlikely that any effective consensus will soon emerge on the meaning of aggression in the Charter.

The International Protection of Human Rights: In 1948, during his presidency of the United Nations General Assembly, the late Dr. H. V. Evatt played a significant role in working for the acceptance by the Assembly of the Universal Declaration of Human Rights.[20] As a first step, leading up to the hoped for preparation of International Covenants on Human Rights, the Universal Declaration was warmly endorsed by the Australian government of the day. Since 1948, however, Australia's official enthusiasm for international efforts to better preserve and protect human rights has not always been marked by the same style of energetic, if sometimes over-enthusiastic support given by this country to the preparation and adoption of the Universal Declaration. The style of Australian official thinking on the international protection of human rights, since 1948, has not always been discernible without a close examination of the records of the United Nations bodies concerned with the matter. In 1968, the twentieth anniversary of the Declaration, however, was marked as the International Year for Human Rights and Australia, in common with other members of the United Nations, was drawn into a variety of public discussions, centreing on the possible acceptance and ratification of two International Covenants on Human Rights, approved by the General Assembly.[21] In Australia, as part of a national study of the Covenants, sponsored by an Australian National Committee for Human Rights Year, statements on the current attitude of Australia towards these moves were made by the then Minister for External Affairs, Sir Paul Hasluck, the then Attorney-General, Mr. Nigel Bowen, Q.C., and the then Secretary of the Department of External Affairs, Sir James Plimsoll. Centreing, in particular, on the stance Australia was adopting towards the signing and ratification of the Covenants, the official indications in these statements were that this country was taking a more cautious view on the acceptance of the Covenants compared, for example, with New Zealand, which had, by early 1969, joined 39 other countries in signing both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.[22]

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20 Tennant, Evatt, *Politics and Justice* (1970), p. 211.

21 For a summary of activities on this see: Report of Proceedings of Working Conference on Ratification of International Covenants on Human Rights (Australian Committee for Human Rights Year 1968).

22 Ibid., p. 27, reproducing cable from the Australian Mission to the United Nations.

In January 1968, at a Conference in Melbourne organized by the United Nations Association of Australia, Sir James Plimsoll outlined some of the problems, as he saw them, relating to Australia's signing and ratifying the Covenants. He indicated that "Australia has some special problems". One, he suggested, was the "old question of how far the Commonwealth Government can ratify or accept international obligations in respect of matters that fall under the constitution within the province of the States".[23] A second issue, he explained, "is that the covenants, if ratified, will be applicable to territories that Australia administers as well as to Australia". In this regard he added:—

> "Anything we ratify we have to be prepared to apply equally to New Guinea. There is no lack of desire on the Government's part to observe human rights in New Guinea, but our ability to give effect to some of the provisions is less there than here, simply, because New Guinea is quite a different form of society."[24]

Opening a Seminar conducted by the Western Australian Committee for Human Rights Year in Perth, in September 1968, the then Minister for External Affairs, Sir Paul Hasluck, reiterated that constitutional difficulties and the problems of applying the Covenants to Australia's external territories, as previously outlined by Sir James Plimsoll, placed difficulties in the way of early Australian acceptance of the Covenants. At the same time, the Minister did affirm that:—

> "Speaking broadly and without final commitment of the Government, there would appear to be little if anything in the Covenants that is not in keeping with the principles and practice of Australian law and public administration and I would myself expect that any difficulty in accepting the covenants in due course would arise from the constitutional and technical problems of putting them into effect rather than from any hesitation in accepting the ideas they express."[25]

Attorney-General Bowen, who had led the Australian delegation to the United Nations Conference on Human Rights at Teheran, in 1968, summed up his views on the Covenants in an address to a Conference organized by the Australian National Committee for Human Rights Year held in Canberra in February 1969. In the same fashion as Sir James Plimsoll and Sir Paul Hasluck, the Attorney-General also referred to the "complicating factor" of the "need that often exists [for the Commonwealth] to consult the Australian States on matters coming within their administration".[26] The Attorney, however, returned to another theme which he had advocated strongly at the Teheran Conference and which he referred to, on this occasion, as the "key factor", as he saw it, on the development of the protection of human rights. He said:—

> "Until such time as countries come to accept the authority of supra-national bodies and indeed even after that day, the realization and

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23 Unpublished speech summary issued by the Department of External Affairs.

24 Ibid.

25 Unpublished speech summary release issued by Department of External Affairs.

26 Report of Proceedings of Working Conference on Ratification of International Covenants on Human Rights, op. cit., p. 22.

> protection of human rights will depend largely upon enforcement under domestic laws and in domestic tribunals. The real question is the extent to which existing laws and practices give effect to the requirements of the Covenants."[27]

In a fashion, not unlike the approach of the British jurist, Dicey, to the protection of human rights, the Attorney-General then suggested that Australia had "an authentic human rights tradition that in fact antedates the endeavours made under the auspices of the United Nations, a tradition that has placed the emphasis in practical measures and practical institutional arrangements rather than on solemn declarations and constitutional guarantees". As a result, the Attorney contended: "I think that the most fruitful mode of development in the future would be one that respects this habit or tradition of our people".[28]

27 Ibid., p. 23.
28 Ibid.