The United Nations and the Evolution of Global Values

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UNITED NATIONS DECISION MAKING AS VALUE-BASED DECISION MAKING

1 INTRODUCTION

Global values have been described as globally shared beliefs about a better world. Beliefs are not facts. Beliefs exist only in the world of ideas, and therefore a small group of scientists researching the state of the world and looking for improvements cannot simply draw up a list of global values. Global values can only be discovered through a global discussion which is sufficiently inclusive, in the sense that the entire global community participates in some way. The participants should not all focus on safeguarding their own particular interests, but rather on defining and safeguarding the global interest, defined in terms of globally shared values. The discussion should also be action-oriented. It should inspire those responsible for action to act.

Does the United Nations, and more in particular the UN General Assembly, provide a forum for this global discussion? That is the central question of this chapter. It reveals how the key features of value-based decision making, outlined in rather abstract terms in the previous chapter, have been fleshed out in the framework of the United Nations. The drafting process of the UN Charter (2) and the subsequent continuation of the decision-making process by the General Assembly (3) are analysed and the way in which United Nations allocates the responsibility for realizing the pledges made in this global discussion is examined (4).

2 THE UNITED NATIONS CHARTER: THE RESULT OF GLOBAL DISCUSSION

2.1 Introduction

There was a general sense among the 1,500 participants at the San Francisco Conference that history was being made.[1] Evatt, the leader of the Australian delegation, referred to the conference as "an unforgettable experience for those who

[1] For a list of names of all participants, see Delegates and Officials of the United Nations Conference on International Organization, UNCIO, vol. 1, pp. 13-54.

had the privilege of participating in it."[2] But what was so unforgettable about it? The following sections present the San Francisco Conference as a key discussion about values. The criteria for this discussion, which were outlined in the previous chapter, are applied to the Conference. These are the inclusive and genuine character of the discussion and its capacity to motivate action.

2.2 The drafting of the UN Charter as a global discussion

Where did the drafting of the UN Charter begin?[3] The starting point of the prehistory of the UN Charter is always rather arbitrary. Reference could be made to the drafting of the League of Nations Covenant at the end of the First World War in 1919. However, the delegates in San Francisco hardly mentioned the League.[4] The representatives of the League who were invited to San Francisco were largely ignored and went home after only one month, no more than halfway through the Conference .[5] Their dismissal had great symbolic significance. The aim in San Francisco was to build something new, not to create a successor for the League, which had failed to prevent the Second World War.

But why not go back even further? Was it a coincidence that the UN Charter was signed on the 150th anniversary of the publication of Kant's *Zum Ewigen Frieden*, which described the structure of a world federation similar to the United Nations system?[6] One could go back even further to the Stoics of Ancient Greece, who preached a kind of international community, and claim that the United Nations helped put these ancient philosophical ideas into practice. Referring to the United Nations era and the international community established by it, Tomuschat said that "what was a philosophical postulate in the past, has become a living reality, albeit with many flaws and weaknesses."[7] If Kant's ideas and the ideas of the Stoics influenced the founding fathers of the UN Charter, then this influence was only of a very general nature. Nothing indicates that the drafters of the Charter had any profound knowledge of Kant's work, let alone that they were heavily

[2] Herbert Vere Evatt, *The United Nations* (1948), p. 14.
[3] For a detailed history, see Ruth B. Russell, *A History of the United Nations Charter* (1958).
[4] The name of the founding father of that League, the American President Wilson, was also hardly mentioned in San Francisco. See James, "Wilson Forgotten at San Francisco" (1945). He wrote that "[e]ven though forgotten by the delegates here assembled, who can doubt that the spirit of Wilson hovers over San Francisco?"
[5] *New York Times*, "Old League" Chief Quits Conference" (1945).
[6] See Carl J. Friedrich, "The Ideology of the United Nations Charter and the Philosophy of Peace of Immanuel Kant 1795-1945" (1947).
[7] Christian Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century" (1999), pp. 75.

influenced by it when they drafted the Charter.[8] On the other hand, the delegates were motivated by a cosmopolitan sentiment, *i.e.* a shared intuition that States were not isolated from each other, but lived together like sheep grazing in one and the same field.

The following documents can be considered as *immediate* precursors of the United Nations Charter:

The Atlantic Charter of August 1941;
The United Nations Declaration of January 1942;
The Moscow Declaration of October 1943.[9]

The Atlantic Charter contained a set of principles subscribed to by the United Kingdom and United States of America. These principles included the duty to respect the right of all peoples to choose their own form of government, the duty to promote the access for all States, on equal terms, to trade and to the world's raw materials, and the duty to refrain from the use of force.[10]

Other States subscribed to these principles by signing the United Nations Declaration. In that declaration, the "United Nations," *i.e.* the States united in the fight against the common enemy, stated that "complete victory over their enemies [was] essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands."[11]

The Moscow Declaration, signed only by the Soviet Union, the UK, the US, and China, essentially contained a pledge to continue the "united action." For this purpose, it proposed establishing a general international organization to maintain international peace and security.[12]

The efforts of the States to coordinate their actions at the international level were motivated, more than anything else, by the Second World War.[13] Without this

[8] About "l'influence effective de Kant sur les négociateurs de la Charte de San Francisco" Dupuy remarks that "rien ne dit qu'ils en aient eu une connaissance approfondie." However, despite the lack of any profound knowledge of Kant's philosophy among the San Francisco delegates, Kant may nonetheless have had considerable influence on the drafting of the Charter. After all, "[l]e propre d'une grande philosophie est cependant d'influencer au-delà du cercle, toujours restreint, de ses lecteurs attentifs." Pierre-Marie Dupuy, "L'unité de l'ordre juridique international" (2002), p. 267 (footnote 493).

[9] Almost all overviews of the drafting history start with these declarations. See *e.g.*, United Nations, *Guide to the United Nations Charter* (1947). See also Yearbook of the United Nations 1946-47, pp. 1-51; and Emmanuelle Jouannet, "Les travaux préparatoires de la Charte des Nations Unies" (2005), pp. 3-5.

[10] Yearbook of the United Nations 1946-47, p. 2.

[11] *Idem*, p. 1.

[12] *Idem*, p. 3.

[13] See the Canadian report on the San Francisco Conference, where we can read that "[t]andis que le feu de la guerre brûle encore, la possibilité est donnée à cette Conférence de forger et de façonner, sur ce

war, the distrust and differences between the "United Nations," which were certainly present, would have made it impossible to come to an agreement on essentially all the fundamental problems of international relations.[14]

The declarations listed only some general principles and put forward the idea that an international organization should be established to defend at least some of these principles. They did not contain an actual plan for the post-war world that was fully worked out. Such a plan was first presented in 1943, when a draft charter for a new international organization was presented by the United Kingdom, China, the Soviet Union and the United States of America.[15] As this draft was mainly written at Dumbarton Oaks, a mansion in Washington, it is referred to as the Dumbarton Oaks proposals. The US presented these proposals as a "basis for discussion."[16] They were published and widely disseminated to allow the general public to comment on them.[17] Some non-governmental groups, and even some individuals took advantage of this opportunity.[18] Only States could *formally* submit amendment proposals.[19] Some of these State amendments were implemented by the four sponsors in the *revised* Dumbarton Oaks proposals.[20]

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feu même, l'instrument de la sécurité mondiale." Ministère des affaires ètrangères (Canada), *Rapport sur les travaux de la conférence des Nations Unies* (1945), p. 10.

[14] This is not so say that there was no distrust in San Francisco and before. James B. Reston nicely described these suspicions among the major powers: "[t]he British fear of American 'economic imperialism' is equally as great as our [*i.e.* the American] ancient bogy that in these international deals we always get 'hornswoggled'; and the Russian fear of the capitalistic alliance is equally as real to them as the fear of the Communist bogy is to some Americans." James B. Reston, "Light on Foreign Policy Awaited," in *New York Times* of February 11, 1945.

[15] France only joined the ranks of the Big Powers in San Francisco. See James B. Reston, "France Lining up with Big Powers," in *New York Times* of April 25, 1945.

[16] See James B. Reston, "U.S. Retains Right to Alter Oaks Plan," in *New York Times* of April 7, 1945.

[17] They were published as Department of State (USA), *Dumbarton Oaks documents on international organization* (1944).

[18] For an example of an influential individual commentary, see Hans Kelsen, "The Old and the New League: The Covenant and the Dumbarton Oaks Proposals" (1945). See also some Letters to *The Times*, such as Coudert's "Hope for World Peace," and Kunstenaar's "Revised Morals Urged," which both appeared in the *New York Times* of April 22, 1945. For comments by NGO's, see James B. Reston, "Changes Offered in Oaks Proposals," in *New York Times* of April 23, 1945, and "Jewish Group Asks World Rights Bill," an article in the *New York Times* of April 30, 1945, and "Human Rights Seen Safe in Conference," an article that appeared in the *New York Times* of June 4, 1945.

[19] The Netherlands was one of the few nations to actually publish its amendment proposals. See Netherlands, *Nederland en Dumbarton Oaks*. As a consequence, the Dutch proposals were discussed extensively in the *New York Times*. See *e.g.*, James B. Reston, "Dutch Oppose Idea of Oaks Big 5 Veto," in *New York Times* of February 8, 1945, and James B. Reston, "Dutch to Ask Veto for Small Nations," in *New York Times* of April 24, 1945.

[20] For an overview of the amendments accepted by the sponsors, see James B. Reston, "Oaks Amendments Speed New Charter," in *New York Times* of May 6, 1945.

The last and most important stage in the drafting history of the United Nations Charter was the San Francisco Conference of 1945.[21] The States met and drew up the UN Charter there. No NGOs or other non-State entities were formally invited, but they did influence the drafting from the side-lines. This was a good compromise for the dilemma of including as many people as possible in the drafting process and ensuring an orderly conference, consistent with the rules of international law-making. The aim was "to give the impression that [the people of the world] could come to [the conference] yet not invite them – a difficult thing to do."[22]

Not all the States were invited. Only the "United Nations," *i.e.* States officially at war with the Axis powers, were invited to come to San Francisco.[23] This basically meant that neutral countries,[24] and the Axis nations themselves,[25] were not allowed to participate. The American continent was well represented.[26] There were also a number of delegations from Europe, both Eastern and Western Europe.[27] Europe, the old centre of international affairs, was embarrassed about the Second World War, and was not as outspoken as one might have expected it to be.[28] There were also delegations from Asia, the Middle East and Africa.[29] Poland was

[21] For an overview, see Grayson Kirk & Lawrence Chamberlain, "The Organization of the San Francisco Conference" (1945), and Wilhelm G. Grewe & Daniel-Erasmus Khan, "Drafting History" (2002).

[22] Minutes of Second Meeting (Executive Session) of the United States Delegation, March 23, 1945, in United States Department of State, *Foreign relations of the United States diplomatic papers* ("FRUS"), *1945. General*, Volume I, p. 150.

[23] See Yearbook of the United Nations 1946-47, p. 12.

[24] When the US told Iceland that it had to declare war in order to participate, the Prime Minister of Iceland replied that "such a declaration at this late date would be ridiculous." See Telegram from the Acting Secretary of State to the Minister in Iceland, May 7, 1945, in FRUS, General, Volume I, p. 641.

[25] Italy wanted to join, but the US did not allow it. See James B. Reston, "Italians Protest Parley Exclusion," in *New York Times* of April 26, 1945.

[26] North-America was represented by Canada and the United States of America. From South- and Central-America came Bolivia, Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

[27] Belgium, France, Greece, Netherlands, Luxembourg, Norway, and the United Kingdom sent delegations, and so did the Byelorussian Soviet Socialist Republic, Czechoslovakia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and Yugoslavia.

[28] Anne O'Hare McCormick, "San Francisco: Voice of Europe is Muted at Conference." McCormick points to Belgium and the Netherlands as the leaders of the little countries of Europe during the San Francisco Conference. See also William T. R. Fox, "The Super-Powers at San Francisco" (1946), p. 116.

[29] Asia was represented by China, India, and the Philippine Commonwealth. Of the Middle East came Egypt, Iran, Iraq, Lebanon, Saudi Arabia, and Syria. There were only three African nations in San Francisco: Ethiopia, Liberia, and the Union of South Africa. And then there were Australia and New Zealand.

the only nation that signed with the founding fathers, but did not participate in the Conference.[30]

Most of the delegates of the United Nations came from impoverished and war-torn lands to the peaceful and extravagant city of San Francisco, described by a British delegate as "a fantastic world of glitter and light and extravagant parties and food and drink and constantly spiraling talk."[31] As a contribution, the Soviet Union sent an entertainment ship, loaded with caviar and vodka.[32] The delegates made and signed the constitutive document of the UN in this environment, a long way away from the devastation in most of the rest of the world. The Latin American nations were the most self-confident and influential of the smaller States.[33] The Big Powers, and especially the United States, generally had the most influence.[34]

The *revised* Dumbarton Oaks proposals were the starting point for the San Francisco Conference. Amendments that had not been implemented in these proposals now had to be accepted by a two-thirds majority of the conference's participants.[35] This did not mean that the San Francisco Conference mainly served to fill in the gaps in the revised Dumbarton Oaks proposals.[36] As Molotov, the People's Commissar for Foreign Affairs of the Soviet Union, remarked, "[i]f we did

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[30] This was caused by a "Cold War-type" dispute about which Government should represent Poland. The dispute "hung like a shadow over all deliberations." That quotation is from McNeil, "New Security Charter Seems to be Assured," in *New York Times* of June 24, 1945. And indeed, this dispute was covered extensively in the press, and sometimes took away the attention from what was happening in San Francisco itself. For the coverage of this issue by the *New York Times*, see *e.g.*, James B. Reston, "Pacific War Role for Soviet Hinted"; James B. Reston, "Six Problems Facing Security Conference"; James B. Reston, "46 Nations Ready to Organize Peace: Only Poles Absent"; Porter, "Soviet Action Hit" (all published in 1945). See also Evan Luard, *A History of the United Nations* (1982), pp. 41-42.

[31] Stephen S. Schlesinger, *Act of Creation* (2003), p. 116. For a nice description of the long and perilous journey from Europe to San Francisco, see Jean Dupuy, *San Francisco et la Charte des Nations Unies* (1945), pp. 3-4, and 13-17.

[32] James B. Reston, "Party Ship is Sent to Parley by Soviet," in *New York Times* of April 21, 1945. When Molotov was asked the question, by an American journalist, whether vodka was "safe for Americans to drink it without internal danger," Molotv replied: "I like your accent. Permit me to take leave." See "Transcript of Molotoff Interview," which appeared in the *New York Times* of April 27, 1945.

[33] Anne O'Hare McCormick, "San Francisco: Voice of Europe is Muted at Conference," in *New York Times* of May 14, 1945. See also William T. R. Fox, "The Super-Powers at San Francisco" (1946), p. 116.

[34] President Roosevelt (US) unfortunately died only a few days before all delegates came to San Francisco. Smuts, the leader of the South AfricaSouth African delegation, wrote to his son Japie that with the loss of Roosevelt, the conference was 'no one's baby' anymore." See Jan Christiaan Smuts, "Letter to Japie Smuts", on p. 529 of Jean van der Poel, *Selections from the Smuts Papers*, Volume VI (1973).

[35] In practice, the Big Powers could also veto any amendment to their proposals. See Evan Luard, *A History of the United Nations* (1982), pp. 43, 49; and Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations* (1946), pp. 14-15.

[36] This was suggested in James B. Reston, "Dumbarton 'Gaps' Big Parley Issue," in *New York Times* of April 16, 1945.

not intend to make any amendments, it would be useless to hold the San Francisco Conference."[37] Various amendments to the revised Dumbarton Oaks proposals, proposed by the smaller States, were adopted.[38]

During the first few days of the conference, plenary sessions were held in the San Francisco Opera House, where representatives delivered speeches of a general nature.[39] These speeches, although eloquently worded, were not of any particular use to the drafting of the Charter.[40] The main work took place in the Veterans Building next door to the Opera.[41] There, four commissions, each subdivided into various committees and sometimes-even subcommittees, busied themselves drafting particular sections of the UN Charter.[42] The work was guided by a healthy mix of realism and idealism. The "Little Forty-Five" focused on the idealism, whilst the "Big Five" focused on the realism.[43]

When the delegates of all fifty States unanimously approved the text of the UN Charter on 25 June 1945, the audience "jumped to its feet to cheer and applaud for a full minute."[44] As the local printing shops and bookbinders had not yet managed to publish the Charter in all five of the Organization's official languages, the actual signing took place a day later.[45] At the end of the signing ceremony, where "[g]reat spotlights, focused on the signers and their surroundings, made the scene in the Veterans Building look like a Hollywood movie set," Stettinius, the leader of the US delegation, finally brought the San Francisco Conference to a close

[37] See "Report of V.M. Molotov's Press Conference at San Francisco, on April 26, 1945," published in an official booklet called *Soviet Union at the San Francisco Conference* (1945), p. 19.
[38] See Herbert Vere Evatt, *The United Nations* (1948), p. 4.
[39] In the beginning, there weren"t that many people present to listen to these speeches. See Lawrence E. Davies, "Small Nations Set Goals for Parley," in *New York Times* of April 29, 1945.
[40] Grayson Kirk & Lawrence Chamberlain, "The Organization of the San Francisco Conference" (1945), p. 333. The leader of the Dutch delegation wrote in his diary on the last day of the sequence of plenary sessions: "sick and tired of so much empty rhetoric I went to bed." See: Cees Wiebes, "De oprichting van de Verenigde Naties" (1995), p. 80. Dupuy had a more favourable opinion of the plenary speeches. He saw them as constituting "travail préparatoire." See Jean Dupuy, *San Francisco et la Charte des Nations Unies* (1945), p. 29.
[41] See "Conference Talks Stress Unity Plea," an article in the *New York Times* of May 2, 1945.
[42] See Yearbook of the United Nations 1946-47, p. 13, for an overview. See also Organization, Functions, and Officerships: United Nations Conference on International Organization (Chart), UNCIO, vol. 1, p. 79; Emmanuelle Jouannet, "Les travaux préparatoires de la Charte des Nations Unies" (2005), pp. 5-6.
[43] Betty Jane Davis, *Charter for Tomorrow: the San Francisco Conference* (1945), p. 35. See also Jan Christiaan Smuts' "Letter to Hofmeyr," in Jean van der Poel, *Selections from the Smuts Papers*, Volume VI (1973). The "Big Five" were the four sponsors of the Conference, plus France, which was also allotted a permanent seat at the Security Council.
[44] Lawrence E. Davies, "Historic Plenary Session Approves World Charter," in *New York Times* of June 26, 1945.
[45] Idem.

"with a single heavy rap of the gavel."[46] Because the United Nations did not have a building or Secretariat at the time the Charter was signed, it was agreed that President Truman would keep the document in a safe in the White House for the time being.[47]

Can the drafting of the UN Charter be considered as a form of value-based decision making? Was the San Francisco Conference an example of a discussion between people from different ways of life, with significant authority to speak on behalf of those they claimed to represent?[48] Most of the world was still colonized in 1945 and many oppressed peoples were not represented in San Francisco. For obvious reasons the Axis Powers were not invited and States which refused to declare war against the Axis Powers were not welcome either. Nevertheless, at least some representatives from regions all over the world were present at the conference. The influence of the United States was substantial, but Europe, Latin America, the Arab world, Africa and Asia also played a significant part.

The United States was most concerned with ensuring an inclusive drafting process and it believed that this aim was actually achieved. When President Truman opened the San Francisco Conference, he reminded all the participants that they "represent[ed] the overwhelming majority of all mankind," and that they "h[e]ld a powerful mandate from [their] people."[49] This idea of a people's mandate was expressed in the text of the Charter by the use of the words "we the peoples" at the very beginning. These words suggested that the UN Charter reflected the ideas of the peoples of the world.[50] They "express[ed] the democratic basis on which rests our new Organization."[51] The words "we the peoples" are reminiscent of the first words in the US Constitution. The US made this comparison,[52] but other States did too, either in a general sense,[53] or to criticize certain elements in the UN Charter.[54]

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[46] The first quote is from Lawrence E. Davies, "Nation after Nation Sees era of Peace in Signing Charter," in *New York Times* of June 26, 1945. There, we also read that the US was supposed to sign last, but this did not happen because President Truman had to leave early. The last quote comes from an extract of Stettinus" Diary, entry for June 26, 1945, as published in FRUS, *1945. General*, Volume I, pp. 1432.

[47] See Lawrence E. Davies, "Charter is Flown to Washington," in *New York Times* of June 29, 1945, and Sutterlin, "Interview with Alger Hiss" (1990), p. 48. There, Hiss tells the famous anecdote of the parachute: Hiss, who personally took the Charter by airplane from San Francisco to Washington, was not given a parachute, whilst a parachute was attached to the UN Charter. See also Nico Schrijver, "The Future of the Charter of the United Nations" (2006).

[48] See section 3.1 of Chapter II, above.

[49] Verbatim Minutes of Opening Session, April 25, 1945, UNCIO, vol. 1, p. 113.

[50] See Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, p. 391. See also Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, p. 450.

[51] First Session of Commission I, June 14, 1945, UNCIO, vol. 6, p. 19. See also Fifth Meeting of Commission I, June 23, 1945, UNCIO, vol. 6, p. 203, and Report of Rapporteur of Commission I to Plenary Session, UNCIO, vol. 6, p. 245.

[52] President Truman made this comparison when he spoke during the Final Plenary Session, June 26, 1945, UNCIO, vol. 1, pp. 680-683 (see also pp. 715-717). Earlier, US delegate Stettinus had already

The Netherlands pointed out that not all governments represented in San Francisco derived their power directly from the people, and that they could therefore not formally claim to speak in their name.[55] In response, it was suggested that the phrase "we the peoples" should be read in conjunction with another phrase in the preamble, viz. "[t]hrough our representatives assembled at San Francisco."[56] This was considered to be a satisfactory solution, and a more realistic depiction of what was going on at the conference.

Was it a genuine discussion? Did the participants seek to define and protect the global interest, and were they prepared, as Risse believed was essential for a genuine discussion, to change their views in the light of the better argument? There are many indications that the drafters were concerned with the global interest and global values.

According to Dupuy, the intentions of the founding fathers went beyond drawing up a new treaty. They even went beyond the establishment of a new international organization. The UN Charter marked a fundamental break with the system of international relations that existed in the past. It constituted the basis for a new international order.[57] A delegate from Luxembourg even compared the "building" of the United Nations with the building of a new cathedral, as though the

made the same comparison, during the First Plenary Session, April 26, 1945, UNCIO, vol. 1, p. 127. See also Pierre-Marie Dupuy, "L'unité de l'ordre juridique international" (2002), p. 218.

[53] There are some examples. See *e.g.* the speech of the Chinese delegate in the Final Plenary Session, June 26, 1945, UNCIO, vol. 1, p. 660 (see also p. 692). And see Cuba's speech during the Seventh Plenary Session, May 1, 1945, UNCIO, vol. 1, p. 499.

[54] Australia used this comparison to criticize the rigidity of the UN Charter's amendment procedure. The US Constitution was amended very shortly after it was made, and this seemed impossible when it came to the UN Charter. See First Plenary Session, April 26, 1945, UNCIO, vol. 1, p. 178 (see also Corrigendum to Summary Report of Eighteenth Meeting of Committee III/I, June 12, 1945, UNCIO, vol. 11, p. 492). New Zealand did exactly the same during the Fifth Meeting of Commission III, June 20, 1945, UNCIO, vol. 11, pp. 171-172, and once again during the Eighteenth and Nineteenth Meetings of Committee III/1, June 12, 1945, UNCIO, vol. 11, p. 472. Greece is another example, see Corrigendum to Summary Report of Eighteenth Meeting of Committee III/I, June 12, 1945, UNCIO, vol. 11, p. 490. And so is Turkey, see Fourth Meeting of Commission I, June 19, 1945, UNCIO, vol. 6, p. 175. And Mexico, see Twentieth Meeting of Committee III/1, June 13, 1945, UNCIO, vol. 11, p. 531.

[55] The Netherlands, for example, did not. See Thirteenth Meeting of Committee I/1, June 5, 1945, UNCIO, vol. 6, p. 366, and Fifteenth Meeting of Committee I/1, June 11, 1945, UNCIO, vol. 6, p. 421. See also Jean-Pierre Cot & Alain Pellet, "Préambule" (2005), pp. 306-307.

[56] Report of Rapporteur, Subcommittee I/1/A, Section 3, to Committee I/1, June 5, 1945. UNCIO, vol. 6, p. 358. The Coordination Committee agreed. See the Coordination Committee's Summary Report of Seventeenth Meeting, June 13, 1945, UNCIO, vol. 17, pp. 105-106. See also the Minutes of the Seventy-Sixth Meeting of the United States Delegation, June 19, 1945, in FRUS, General, Volume I, pp. 1363-1367.

[57] Pierre-Marie Dupuy, "L'unité de l'ordre juridique international" (2002), p. 217.

delegates at the San Francisco Conference were establishing some kind of a new global religion.[58]

The drafting of the UN Charter was more than an exercise in the codification of existing international law.[59] The drafters therefore had to look elsewhere for their inspiration. Welles suggested that to create the post-war international order the world needed "men who have their eyes on the stars but their feet on the ground."[60] What was achieved was more than merely drafting yet another treaty that codified the existing norms or the existing *status quo*.

2.3 The UN Charter as a value-based document

The text of the UN Charter does not make its value-based character explicit. The word "value" is not found anywhere.[61] The UN Charter refers primarily to "purposes" and "principles." According to the Dumbarton Oaks proposals, the Organization and its members should act in accordance with certain principles in their pursuit of certain purposes.[62] The idea, as explained by Pasvolsky (USA), who was very influential in drafting the Charter, was that "the principles were rules of action, whereas the purposes were the aims of action."[63] This was also how the delegates in San Francisco distinguished the purposes from the principles.[64] This clear and straightforward distinction between purposes and principles, and the very neat description of both these terms, is not reflected in the text of the Charter itself.

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[58] Seventh Plenary Session, May 1, 1945, UNCIO, vol. 1, p. 504.

[59] Not everyone seems to agree with that assessment. For example, according to Dutch Member of Parliament Mr. Beaufort, the aim of the United Nations was "to turn the natural community of nations into a legal community," in other words, to "legalize" the *status quo*. See p. 125, Dutch Parliament, "Meeting of Tuesday 30 October, 1945," in *Handelingen der Staten-Generaal: Tijdelijke Zitting 1945* (II).

[60] Sumner Welles, *The United Nations: their creed for a free world* (1942), p. 3. Welles spoke these words before the Conference, so it was a prescription of what kind of men were needed to put the world back on track, not a description of who in fact did bring the world back on track.

[61] It can be found in the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights."

[62] Dumbarton Oaks Proposals for a General International Organization, UNCIO, vol. 3, p. 3.

[63] See Minutes of Fifth Meeting of the United States Delegation, April 9, 1945, in FRUS*, 1945*, Vol. I, p. 224.

[64] A rather complex definition of the terms can be found in the Report of Rapporteur, Subcommittee I/1/A, to Committee I/1, June 1, 1945, UNCIO, vol. 6, pp. 698-699. See also Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, p. 388. The text is reproduced on p. 17, of Yearbook of the United Nations 1946-47. In that Yearbook, the difference is summarized as follows: "(…) the Purposes constitute the *raison d"être* of the United Nations, and the Principles serve as the standards of international conduct."

The purposes can be found in Articles 1 and 55 of the UN Charter. The principles are formulated in Articles 2 and 56. The purposes of Article 1 consist of one general purpose and three value-based purposes. The general purpose is Article 1(4):

> [One of the purposes of the United Nations is] to be a centre for harmonizing the actions of nations in the attainment of these common ends.

These "common ends" are defined in the value-based purposes of paragraphs 1 to 3 of Article 1:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
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> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

These purposes reflect the values of peace and security, self-determination of peoples, social progress and development, and human dignity. Purposes can also be found in Article 55 of the UN Charter:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> Higher standards of living, full employment, and conditions of economic and social progress and development;
>
> Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

This list reiterates most of the value-based purposes already mentioned in Article 1, including self-determination of peoples, social progress and development, and respect for human dignity and rights.

The list of principles or "rules of action" is more varied. The first principle states that "the Organization is based on the principle of the sovereign equality of all its Members."[65] This should be interpreted to include an obligation for all States to respect the sovereign equality of all other States. In that sense, it is a rule of action.

The other six principles are formulated as rules of action or "norms." Four of those norms bind all Member States. Within that category of norms a distinction can be made between those norms that are directly related to the promotion of a particular purpose/value, and those of a more general character. The general norms are 2(2) and 2(5) UN Charter:

> All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
>
> All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

The value-based norms are 2(3) and 2(4):

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> All Members 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.

Both these norms relate to the value of peace and security. Article 2 does not contain any principles obliging the Member States to protect and defend any of the other purposes outlined in Article 1. This is done by a general principle in Article 56:

> All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

As Article 55 contains a reference to most of the global values, this principle effectively complements the principles and norms in Article 2.

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[65] Article 2(1), UN Charter. See Albrecht Randelzhofer, "Article 2" (2002).

The remaining two norms in Article 2 bind the Organization, and not the Member States. One of those norms can be directly related to a particular value/purpose. This is Article 2(6):

> The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

Once again, the value is peace and security. The other norm binding the Organization has a more general character. This is Article 2(7):

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

This norm can be linked to sovereignty. It obliges the Organization to respect the sovereign independence of its Member States.

To avoid variation in the list of principles, it was suggested that the general principles be separated from the norms,[66] or that all the principles be rephrased as a combination of norm and principle.[67] These suggestions were not adopted.

During the San Francisco Conference a Preamble was added.[68] Smuts, the leader of the South African delegation who drafted this preamble, referred to it as a "statement of ideals and aspirations which would rally world opinion in support of the Charter."[69] To ensure that the Preamble would fulfil its purpose, Gildersleeve (USA) suggested that it "should be hung up in every peasant's cottage throughout

[66] See Eighth Meeting of Committee I/1, May 17, 1945, UNCIO, vol. 6, p. 310.
[67] Revision of Technical Committee Text Suggested by the Secretariat as Submitted to the Coordination Committee, June 14, 1945, UNCIO, vol. 18, p. 117.
[68] The US wanted a preamble from the beginning, but never submitted a draft. See Minutes of the Fifth Meeting of the United States Delegation, April 9, 1945, in FRUS*, 1945, General:* Volume I, p. 219.
[69] Second Meeting of Committee, I/1, May 7, 1945, UNCIO, vol. 6, p. 277. See also Sixth Plenary Session, May 1, 1945, UNCIO, vol. 1, p. 425. Scholars have always been puzzled by the fact that Smuts defended these lofty words in San Francisco, but when he returned to South Africa he continued to support the policies of racial segregation. See *e.g.*, Christof Heyns, "The Preamble of the United Nations Charter" (1995); David Tothill, "Evatt and Smuts in San Francisco" (2007), especially a quote from Smuts himself on p. 186, in which he basically admits that he is both a "humanist" and proud of the "clean society" built by Europeans in South Africa, which should not be "lost in the black pool of Africa." However, on p. 289 of Jean-Pierre Cot & Alain Pellet, "Préambule" (2005), Smuts is detached from the apartheid system.

the world."[70] The Preamble had an ideological rather than a legal importance.[71] It was not intended to legally bind the signatory States.[72] It served as a guideline for the interpretation of the Charter, and to "explain ambiguous statements in the articles which do impose obligations."[73]

Most of the purposes in Articles 1 and 55 can be qualified as expressions of the world's most fundamental values.[74] The purposes are "aims of action"; they oblige the Organization and its members to take action in an attempt to realize certain fundamental values. If peace and security constitute a value, then the *maintenance* of peace and security is a purpose. If human dignity is a value, then the promotion of universal respect for human rights and fundamental freedoms is a purpose. And so on. The principles, or at least most of them, can be considered as value-based norms. If human dignity is a value, then the obligation for all States to take joint and separate action to achieve universal respect for human rights is a principle. These principles can be worked out in more detail in specific legal obligations or "rules." Rules are specific obligations based on a fundamental principle. In this sense, "principles [could] be seen as the link between ideals and duties, between the morality of aspiration and the morality of duty, between values and rules."[75] For example, if human dignity is a value, and the protection of human rights is a principle, then the universal bill of rights contains the specific rules.

Because the United Nations Charter does not clearly and explicitly list the values on which it is based, other values could be added to the list. There are particularly good reasons for adding justice, and perhaps international law itself. The promotion of justice and international law is mentioned in Article 1, as a means to maintain the peace. Moreover, the Preamble states that the United Nations was created, *inter alia*, "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." This phrase ended up in the Preamble, instead of Article 1, because

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[70] Minutes of Twenty-First Meeting of the United States Delegation, April 27, 1945, in FRUS*, 1945, General:* Volume I, p. 478. See also First Session of Commission I, June 14, 1945, UNCIO, vol. 6, p. 19.

[71] Hans Kelsen, "The Preamble of the Charter - A Critical Analysis" (1946), p. 143. See also George A. Finch, "The United Nations Charter" (1950). For a different view, see Mintauts Chakste, "Justice and Law in the Charter of the United Nations" (1948), pp. 594 and 600.

[72] There was some dispute on the legal character of the Preamble in San Francisco. See *e.g.*, the Thirteenth Meeting of Committee I/1, June 5, 1945, UNCIO, vol. 6, p. 367. A Rapporteur gave the impression that the Preamble was binding. See Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, pp. 388-389.

[73] Summary Report of Sixteenth Meeting of Advisory Committee of Jurists, June 19, 1945, UNCIO 17, p. 435. See also Edward R. Stettinius*, Charter of the United Nations* (1945), p. 35; Ministerie van Buitenlandse Zaken (Netherlands), *Het ontstaan der Verenigde Naties* (1950), p. 17; and Alfred Verdross, "Idées directrices de l'Organisation des Nations Unies" (1955), p. 8.

[74] See also Sandra Szurek, "La Charte des Nations Unies constitution mondiale?" (2005), p. 45.

[75] Jonathan M. Verschuuren, *Principles of Environmental Law* (2003), p. 25.

the founding fathers of the UN wanted to establish a new legal order, a United Nations order, as opposed to the traditional order based on traditional international law.[76] In order not to obstruct this metamorphosis in international relations, it was stressed during the drafting of the Charter that the reference to respect for international law should not lead to a "negation of healthy international evolution" or "the crystallization or the freezing of the international *status quo*."[77] Thus the *travaux préparatoires* do not strongly support the addition of justice and particularly international law to the list of values. However, that does not settle the debate once and for all.

In any case, in this study the promotion of justice and international law, and related purposes like the promotion of the rule of law, are not treated as based on a separate value. In this study, international law is treated as the framework and language in which the discussion about values is phrased. This choice is perhaps somewhat arbitrary, and it still does not explain why justice – as opposed to international law – should not be a value. Franck rightly pointed out that international law is a language in which various opinions are expressed, but that justice is not morally neutral, and that "the principles and rules of justice are a moral community's response to perceptions of distributive unfairness, inequality, or lack of compassionate grace."[78] Is justice thus a value? Defined in Franck's broad terms, justice could also be considered as an "umbrella value," in the sense that if the international legal order is based on the values of peace and security, social progress and development, human dignity, and self-determination of peoples, it is a just order.

2.4 The United Nations Charter as a document to motivate action

Although the UN Charter does not use the word "value," and although only part of the world was represented in San Francisco, the conference was as good as it could be at that time. There were objections to the fact that various parts of the world were not represented in San Francisco, but this situation was rectified in later years. Many peoples, unrepresented in San Francisco, later signed and ratified the final outcome of the San Francisco dialogue, the UN Charter.

The one aspect of the global discussion held in San Francisco that has as yet not been assessed is its capacity to motivate action. As law is by definition

[76] See also Witenberg, "New Set of Rules Acceptable to All Nations is Proposed," in *New York Times* of May 13, 1945.
[77] Report of Rapporteur, Subcommittee I/1/A, Section 3, to Committee I/1, June 5, 1945, UNCIO, vol. 6, p. 359. See also Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, p. 451 and p. 461.
[78] p. 239 of Thomas M. Franck, *The Power of Legitimacy among Nations* (1990). See also Thomas M. Franck, *Fairness in International Law and Institutions* (1995).

action-oriented,[79] this criterion can be easily satisfied. The obligations to act, arising from the Charter's values, purposes and principles, were meant to override all other conflicting obligations.

This superiority of the Charter inspired scholars to refer to it as the world's constitution, even in its very early days,[80] and this notion has experienced a revival in recent times. For example, according to Alvarez, the Charter could be considered as constituting the world's "basis for a system of hierarchically superior legal norms and values," and therefore as the world's constitution.[81] According to Fassbender, the UN Charter is a constitution, *inter alia,* because it "has a substantive part, in which common values, goals and principles are set out." [82] Although this qualification of the UN Charter as a "constitution" is popular in the literature,[83] it does not always explain what that qualification entails.[84] The word constitution may mean different things to different people. At the very least it indicates, when reference is made to the UN Charter, that there is something special about that document. One of the special characteristics is its formulation of a set of hierarchically superior values, purposes and principles.

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[79] See section 3.4 of Chapter II, above.

[80] See *e.g.*, Hans Kelsen, "The Preamble of the Charter" (1946), pp. 134-159; p. 307, Georges Kaeckenbeeck, "La Charte de San-Francisco dans ses rapports avec le droit international" (1948); Louis B. Sohn, "The impact of the United Nations on international law" (1952), pp. 106-107. See also p. 187, of Dissenting Opinion of Mr. de Visscher, in ICJ, International Status of South-West Africa, Advisory Opinion of July 11th, 1950.

[81] José E. Alvarez, "Legal Perspectives" (2007), pp. 58-59.

[82] Bardo Fassbender, "The United Nations Charter as Constitution" (1998), p. 589. These two characteristics are most often referred to. See also Bruno Simma, "From Bilateralism to Community Interest" (1994), p. 262 (already quoted above), and Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997).

[83] See *e.g.*, André Nollkaemper, *Kern van het Internationaal Publiekrech (2007)*, p. 116; Bruno Simma, "From Bilateralism to Community Interest" (1994), pp. 258-262; Bardo Fassbender, "The United Nations Charter as Constitution" (1998); Thomas M. Franck, "Is the UN Charter a Constitution?" (2003); James Crawford, "Multilateral Rights and Obligations in International Law" (2006), pp. 371-391; Nigel D. White, *The United Nations system* (2002), pp. 14-17; Christian Tomuschat, "Foreword", p. ix; Regis Chemain & Alain Pellet, *La Charte des Nations Unies, constitution mondiale?* (2006); Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 633; Francis Aime Vallat, "The competence of the United Nations General Assembly" (1959), pp. 248-250; Bruno Simma and Andreas L. Paulus, "The "International Community" (1998), p. 274; Krzysztof Skubiszewski, "Remarks on the interpretation of the United Nations Charter" (1983); Blaine Sloan, "The United Nations Charter as a constitution" (1989); Ronald Macdonald, "The Charter of the United Nations in constitutional perspective" (1999); Pierre-Marie Dupuy, "L'unité de l'ordre juridique international" (2002), pp. 215-244; Sandra Szurek, "La Charte des Nations Unies constitution mondiale?" (2005); Michael W. Doyle, "The UN Charter: a Global Constitution?" (2009), and so on.

[84] And thus, as Dupuy pointed out, if we would ask an international lawyer whether the UN Charter is the world's constitution, he might be inclined to answer: "Yes, of course! But, by the way, what was the question?" Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997), p. 2.

The Dumbarton Oaks Proposals had no provision stating that obligations under the UN Charter would prevail over all other obligations under "ordinary" international law in the case of a conflict between the two. Certain States proposed amendments to clarify that the UN Charter had precedence over the rest of international law.[85]

In San Francisco it was decided that when an obligation under the UN Charter was inconsistent with previously existing obligations under international law, these existing obligations should either be automatically abrogated, or States should be obliged to take immediate steps to secure their release from these prior obligations.[86] With regard to future obligations inconsistent with the UN Charter, it was simply decided that States should not undertake such obligations.[87] This sounds reasonable, but as the Soviet Union pointed out, "in some cases a treaty which, considered in the abstract, might seem compatible with the Charter, in practice might be actually incompatible with it."[88] Consequently there was a need to address the important question "how [to] determine[..] that a given obligation was contrary to the Charter."[89] It was suggested that "the Charter should state not only the principle of invalidity of obligations inconsistent with the Charter," but that it should also describe "a procedure by which organs of the Organization, such as the Assembly or the Security Council, could determine in practice what obligations were inconsistent with the Charter."[90] The International Court of Justice was referred to as a potential candidate to resolve such constitutional disputes.[91] In the end "[t]he question of what organ should determine issues of inconsistency […] was raised but not considered."[92]

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[85] See *e.g.,* Australian Amendments, UNCIO, vol. 3, p. 553; Belgian Amendments, UNCIO, vol. 3, pp. 343-344; Egyptian Amendments, UNCIO, vol. 3, p. 463; Ethiopian Amendments, UNCIO, vol. 3, p. 561; Norwegian Amendments, UNCIO, vol. 3, p. 371; Philippines Amendments, UNCIO, vol. 3, p. 540; Venezuelan Amendments, UNCIO, vol. 3, p. 223 and p. 226.

[86] Fourth Meeting of Committee IV/2, May 12, 1945, UNCIO, vol. 13, p. 592. In a later meeting, one delegate summarized the view of the Committee as follows: "that all inconsistent obligations contained in treaties between member states would be abrogated *ipso facto*, the necessary consent having been obtained here at San Francisco." Sixth Meeting of Committee IV/2, May 17, 1945, UNCIO, vol. 13, p. 603.

[87] Fourth Meeting of Committee IV/2, May 12, 1945, UNCIO, vol. 13, p. 592. See also the remarks by the Rapporteur of Committee IV/2 during the First Meeting of Commission IV, May 19, 1945, UNCIO, vol. 13, p. 20.

[88] Fifth Meeting of Committee IV/2, May 15, 1945, UNCIO, vol. 13, p. 598.

[89] Fourth Meeting of Committee IV/2, May 12, 1945, UNCIO, vol. 13, p. 593.

[90] Fifth Meeting of Committee IV/2, May 15, 1945, UNCIO, vol. 13, p. 598.

[91] Sixth Meeting of Committee IV/2, May 17, 1945, UNCIO, vol. 13, p. 603.

[92] Department of External Affairs (Canada), *Report on the United Nations conference on international organization* (1945), p. 61. According to the same report, one suggestion was to make use of advisory opinions of the International Court of Justice.

A Subcommittee was established to consider the issue of inconsistent obligations in more detail.[93] With regard to the obligation of Member States not to sign treaties inconsistent with the UN Charter after its entry into force, it was believed that this rule was so "evident that it would be unnecessary to express it in the Charter."[94] With regard to the more problematical issue of conflicts with already existing treaties, the Subcommittee remarked that there was "a general disposition to accept as evident the rule according to which all previous obligations inconsistent with the terms of the Charter should be superseded by the latter."[95] This did not mean that treaties inconsistent with the UN Charter would automatically be nullified. Rather, it was felt that a practical problem needed a practical solution. If the obligations under the Charter and another norm of international law were in conflict with each other in a specific situation, the latter could be ignored for the time being.[96] In the end, the Subcommittee suggested the following provision:

> In the event of any conflict arising between the obligations of Members of the Organization under the Charter and their obligations under any other international agreement the former shall prevail.[97]

This provision was adopted by the Committee.[98] When the provision came before the Conference Secretariat, the Advisory Committee of Jurists, and the Coordination Committee, a problem arose as to the exact meaning of the term "international agreement." It was suggested that treaties and agreements were two different things, and that this formulation therefore excluded treaties, which was certainly not the intention.[99] Golunsky (USSR), who was both a member of the Subcommittee and the Advisory Committee of Jurists, explained that the term

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[93] To assist the Subcommittee in its work, a number of States proposed new formulations of the desired provision. See Obligations Inconsistent with the Charter: Texts Proposed for Consideration by Subcommittee IV/2/A, May 31, 1945, UNCIO, vol. 13, pp. 800-801. The US, for example, suggested that "[t]he obligations of the Charter shall take precedence over any inconsistent obligation between members."

[94] Report of Subcommittee IV/2/A on Obligations Inconsistent with the Charter, UNCIO, vol. 13, p. 806 (see also p. 812).

[95] *Idem*, p. 805 (see also p. 811).

[96] *Idem*, p. 806 (see also p. 812).

[97] *Idem*, p. 807 (see also p. 813).

[98] See Fourteenth Meeting of Committee IV/2, June 7, 1945, UNCIO, vol. 13, p. 654, and Report of the Rapporteur of Committee IV/2, as Approved by the Committee, UNCIO, vol. 13, pp. 707-708.

[99] See Revision of Technical Committee Text Suggested by the Secretariat as Submitted to the Coordination Committee, June 12, 1945, UNCIO, vol. 18, p. 341; Coordination Committee's Summary Report of Eighteenth Meeting, June 13, 1945, UNCIO, vol. 17, p. 112; Text Revised by the Advisory Committee of Jurists at its Seventh Meeting, June 13, 1945 and Approved by the Coordination Committee at its Eighteenth Meeting, June 13, 1945, UNCIO, vol. 18, p. 342; Summary Report of Seventh Meeting of Advisory Committee of Jurists, June 13, 1945, UNCIO, vol. 17, p. 415; and Second Meeting of Commission IV, June 15, 1945, UNCIO, vol. 13, p. 104.

"agreements" could be used both in a technical sense, in which case it meant "special instruments other than treaties," and in a general sense, in which case it meant "all sorts of international agreements." In this provision it was used in the general sense.[100]

In the end, the following Article (Article 103) was adopted:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This Charter's self-proclamation of being hierarchically superior to other treaties was later accepted in other treaties and legal documents, most notably in the Vienna Convention on the Law of Treaties and the ILC Articles on State Responsibility.[101]

It can be concluded from the text and remarks made during the drafting in San Francisco, that Article 103 proclaims that legal obligations conflicting with obligations arising from the Charter are not automatically annulled. Article 103 UN Charter only becomes relevant when, in an actual situation, a State has to choose between abiding by its obligations under the Charter and those under other legal norms. In that case, the State has to act as prescribed by the Charter.[102] This rule guarantees that the Charter is not regarded as "just another treaty," in the words of Stettinius, but as something hierarchically superior to other legal documents.[103] In this sense it is the world's constitution.[104]

To explain exactly how Article 103 functions, the best comparison is with the rules on non-derogability as codified in the Vienna Convention on the Law of Treaties. Article 53 of that treaty states that "a treaty is void if, at the time of its

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[100] See the Coordination Committee's Summary Report of Eighteenth Meeting, June 13, 1945, UNCIO, vol. 17, p. 112.

[101] See Article 30 of the Vienna Convention on the Law of Treaties, which was drawn up in Vienna on 23 May 1969, and entered into force on 27 January 1980; and Article 59 of the ILC Articles on the Responsibility of States. The latter document simply states that "[t]hese articles are without prejudice to the Charter of the United Nations", which means, according to the ILC Commentary, that "the Articles [on State Responsibility] cannot affect and are without prejudice to the Charter of the United Nations. The Articles are in all respects to be interpreted in conformity with the Charter of the United Nations." See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, p. 365. To appear in Yearbook of the International Law Commission, 2001, vol. II, Part Two.

[102] This is how the Dutch Government interpreted the intentions of the drafters. See Ministerie van Buitenlandse Zaken (Netherlands), *Het ontstaan der Verenigde Naties* (1950),p. 139.

[103]Edward R. Stettinius, *Charter of the United Nations* (1945), pp. 156-157. See also Department of External Affairs (Canada), *Report on the United Nations conference on international organization* (1945), p. 61.

[104] Some authors did not think the qualification of "constitution" could be based solely on Article 103, but others gave the article a prominent place in their "constitutional" theories. For a more skeptical view, see Jean-Marc Thouvenin, "Article 103" (2005).

conclusion, it conflicts with a peremptory norm of general international law." Article 103 UN Charter does not nullify treaties if they conflict with the UN Charter, but functions more like a traffic regulation. When two cars approach an intersection, and one of them happens to be a police car with both its siren sounding and its emergency lights flashing, then the traffic regulation provides that the police car has priority. The ordinary car has to wait, even when this upsets the normal course of events and causes hindrance, or even damage, to other drivers. Article 103 functions in exactly the same way. Whenever there is a conflict between norms, the UN Charter norm has to be given priority, and the ordinary norms have to wait.[105]

It has been suggested that if a particular State objects to the hierarchically superior nature of the Charter, it can simply leave the Organization altogether and "de-ratify" the Charter. The UN Charter does not explicitly provide for the possibility for Member States to leave the organization.[106] According to Article 56 of the Vienna Convention on the Law of Treaties, a treaty which "does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless [..] it is established that the parties intended to admit the possibility of denunciation or withdrawal [or] a right of denunciation or withdrawal may be implied by the nature of the treaty." In San Francisco there was an understanding that it was the sovereign right of States to withdraw in certain cases.[107] States have not done so much in practice. To express its outrage at the election of Malaysia to the Security Council, Indonesia announced that it wished to withdraw from the organization on 20 January 1965. It is generally believed that this was not a good reason to withdraw, but the withdrawal was never formally identified as being either legal or

[105] See also Robert Kolb, *Théorie du ius cogens international* (2001), p. 132. See also *e.g.* Pierre-Marie Dupuy, "L'unité de l'ordre juridique international" (2002), p. 305; Michel Virally, "Réflexions sur le « jus cogens »" (1966), pp. 26-27; Andreas L. Paulus, "Jus Cogens in a Time of Hegemony and Fragmentation" (2005), pp. 317-319 ; Erik Suy, "Article 53" (2006, p. 1913. See also Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6230, adopted 27 June 1966, para. 563. And see para. 41, of the Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, adopted by the International Law Commission at its Fifty-eighth session, in 2006. These conclusions are based on Martti Koskenniemi, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law (Report of the Study Group of the International Law Commission)*, 13 April 2006, UN Doc. A/CN.4/L.682, especially pp. 328-360. See also Sandra Szurek, "La Charte des Nations Unies constitution mondiale?" (2005), p. 39. It must be pointed out that Szurek believed that ultimately most of the UN's purposes and principles were *jus cogens*, and that this – instead of Article 103 - was what made them truly hierarchically superior. See especially pp. 45-49.

[106] Thomas M. Franck, "Is the UN Charter a Constitution?" (2003), pp. 95-97.

[107] See Egon Schwelb, "Withdrawal from the United Nations: The Indonesian Intermezzo" (1967), p. 663.

illegal.[108] Indonesia re-joined voluntarily at the end of September 1966, and the international community simply pretended that nothing had happened.[109]

The values, purposes and principles are therefore both hierarchically superior, and inescapable. This means that they are ideally suited to serve as a vehicle which motivates States to act in pursuance of the principles in their efforts to achieve the value-based purposes for which the UN was established.

2.5 The evolution of the United Nations Charter

Schachter believed that the law of the United Nations should "not be approached as a set of autonomous norms which dictate decisions but as a process through which States and peoples pursue their interests and undertake joint action in accordance with felt necessities and values."[110] The Charter provided the foundation for this process. The provisions of the UN Charter were intended to guide global decision making for hundreds of years. This is what the delegates had in mind when they drafted them. The aim was to draft provisions that were both enduring and at the same time capable of evolution. This is also an important characteristic of global values.[111]

This aim was most clearly described in a report of the Canadian Government about the San Francisco Conference, published around the time of the conference. This suggested that "[a]n international body such as the United Nations cannot work effectively if the constitutional document on which it is based is subject to frequent serious alteration."[112] On the other hand, "the constitution should not be too rigid [and] it must be capable of growth and of adaptation to changing conditions."[113] The Charter was drafted during the Second World War. At that extraordinary moment in world history it was hard to predict what the world would look like in the future.[114] According to the Canadian government: "It was therefore important that the Charter […] should be flexible – capable of growth from within by the development of custom and precedent and by the adoption of regulations – capable of change by formal constitutional amendment when the world had returned

[108] According to one commentator, "with no stretch of the imagination" could the admittance of Malaysia to the Council be regarded as warranting withdrawal. p. 641, Frances Livingstone**,** "Withdrawal from the United Nations: Indonesia" (1965)**.**

[109] See Egon Schwelb, "Withdrawal from the United Nations: The Indonesian Intermezzo" (1967), pp. 665-670.

[110] Oscar Schachter, "The relation of law, politics and action in the United Nations" (1964), p. 169.

[111] See especially section 4.3 of Chapter II.

[112] Department of External Affairs (Canada), *Report on the United Nations conference on international organization* (1945), p. 66.

[113] Idem.

[114] See also Leland M. Goodrich, "San Francisco in retrospect" (1969), especially p. 240.

to a more normal state."[115] It was necessary to find a compromise between its enduring quality and flexibility.

Van Kleffens, the leader of the Dutch delegation in San Francisco, later described this uncertainty about the future with the help of a beautiful metaphor:

> When, in the early summer of 1945, the United Nations Charter was drawn up in San Francisco, it was like the launching of a ship, a ship which a little later put to sea, laden with the hopes and the aspirations for peace of the whole world. She is now sailing the stormy waters she was expected to encounter, and it does not seem probable that most of the time she will run before a light wind.[116]

States chose to board this new ship by signing and ratifying the Charter. The destination of this ship was the realization of a set of generally defined values, which had the capacity to evolve. The States accepted "an entire system which is in constant movement, not unlike a national constitution whose original texture will be unavoidably modified by thick layers of political practice and jurisprudence."[117] This is exactly what has happened since 1945. Despite the virtual impossibility of amending the UN Charter, [118] the UN system has proved that it is able to "grow from within," as described in the Canadian report, and that it is flexible enough to cope with the continuous change of international society.[119] In the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, the General Assembly proclaimed that "the Charter [still gave] expression to the common values and aspirations of humankind."[120]

A constitution like the UN Charter is not a static set of norms. It is a living and growing document, a "living tree."[121] To interpret such an instrument, it is

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[115] Department of External Affairs (Canada), *Report on the United Nations conference on international organization* (1945), p. 66.

[116] Eelco N. van Kleffens, "The United Nations and Some Main Trends of Our Time" (1947), p. 71. See also p. 53 of Dissenting opinion of M. Alvarez to the International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951; and p. 18 of the Dissenting Opinion by M. Alvarez, in the Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of March 3rd, 1950.

[117] Christian Tomuschat, "Obligations arising for states without or against their will" (1993), p. 251. See also James Leslie Brierly, "The Covenant and the Charter" (1946), p. 83.

[118] On Charter amendment, see Articles 108 and 109 of the UN Charter, and Emile Giraud, "*La revision de la Charte des Nations Unies" (1956),* pp. 340-399.

[119] See Nico Schrijver, "The Future of the Charter of the United Nations" (2006); Nico Schrijver, "Les valeurs fondamentales et le droit des Nations Unies" (2006), p. 88.

[120] Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, General Assembly resolution 50/6, adopted 24 October 1995.

[121] The expressions "living document" and "growing document" come from Clark M. Eichelberger, "The United Nations Charter: A Growing Document" (1947), p. 98 and title. See also Hambro Pollux, "The Interpretation of the Charter" (1946), p. 54. The "living tree" metaphor is taken from Thomas M. Franck, "Is the UN Charter a Constitution?" (2003). For a very early example, see F. B. Schick, "Towards a living constitution of the United Nations" (1948).

necessary to look not only at the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," as the Vienna Convention on the Law of Treaties prescribed.[122] One must also take into account the history of ideas and values, as they have evolved within the UN framework set up by the UN Charter.[123]

2.6 Conclusion

The drafting history of the United Nations Charter was characterized as a global discussion about global values. The discussions held in San Francisco were considered to be sufficiently inclusive. Many parts of the world did not send representatives for various reasons. Nevertheless, most regions were included in the discussions in some way. They were also sufficiently genuine. The representatives were concerned with the world's future, not just that of their own particular State. This sense of a common destiny was very strong at the time. All the States had just gone through a horrific collective experience, and there was a strong collective desire to prevent such a thing from recurring in the future. There was also a strong sense of urgency, a shared awareness that there was a need to define global values and global obligations to act on them.

3 GENERAL ASSEMBLY RESOLUTIONS AS THE RESULT OF GLOBAL DISCUSSION

3.1 Introduction

After 1945, the discussion of San Francisco moved to the General Assembly. Thakur described the General Assembly as "the unique forum of choice for articulating global values and norms and the arena where contested norms can be

[122] Article 31, Vienna Convention on the Law of Treaties.

[123] See especially Oscar Schachter, "The relation of law, politics and action in the United Nations" (1964), p. 193 and pp. 196-198. See also Georg Ress, "Interpretation" (2002), pp. 15-16 ; Emmanuelle Jouannet, "Les travaux préparatoires de la Charte des Nations Unies" (2005), especially pp. 21-24. This evolutionary interpretation of the Charter is preferred by a substantial number of scholars. See *e.g.*, James Leslie Brierly, "The Covenant and the Charter" (1946); Benedetto Conforti, "Le rôle de l'accord dans le système des Nations Unies" (1974), p. 210; Clark M. Eichelberger, "The United Nations Charter: A Growing Document" (1947), p. 98; Hambro Pollux, "The Interpretation of the Charter" (1946), p. 54; Nico Schrijver, "Les valeurs fondamentales et le droit des Nations Unies" (2006), pp. 85-88; Nico Schrijver, "The Future of the Charter of the United Nations" (2006), pp. 5-7; Simon Chesterman, Thomas M. Franck & David M. Malone, *Law and Practice of the United Nations* (2008), p. 10; Nigel D. White, *The United Nations system* (2002), especially Chapter 2. See also Yearbook of the International Law Commission, Vol. I (1963), p. 76. For a very short overview of that history, see Jan Pronk, "Een nieuwe jas voor de Verenigde Naties" (2007), pp. 9-11.

debated and reconciled."[124] These global values are articulated in the resolutions of the General Assembly, especially in its so-called "declarations." In contrast with other types of resolutions adopted by the Assembly, such as specific recommendations relating to a particular issue, these declarations contain general norms and principles. The Assembly's declarations read like treaty texts. Both contain rules that elaborate on the general purposes and principles in the Charter.[125] These declarations can therefore justifiably be described as "one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations."[126]

It is certainly true that the General Assembly does not generally describe its own work as a discussion about values. Only one specific project, the dialogue between civilizations, has been presented as such. According to the General Assembly's Global Agenda for Dialogue among Civilizations,

> Dialogue among civilizations is a process between and within civilizations, founded on inclusion, and a collective desire to learn, uncover and examine assumptions, unfold shared meaning and core values and integrate multiple perspectives through dialogue.[127]

The list of objectives of this dialogue included the "development of a better understanding of common ethical standards and universal human values" and the "identification and promotion of common ground among civilizations in order to address common challenges threatening shared values, universal human rights and achievements of human society in various fields."[128] There is no reason to suggest that these objectives apply only to that one particular project, and that the remaining activities of the General Assembly have little or nothing to do with addressing common challenges threatening shared values.

The following sections explain why the Assembly is the "unique forum of choice" for the continuation of the global discussion about global values which started in San Francisco in 1945. Focusing on the General Assembly does not mean that other organs of the United Nations are irrelevant in the creation and interpretation of global values and the norms of the United Nations. This is

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[124] Ramesh Thakur, *The United Nations, Peace and Security* (2006), p. 162. See also Bruno Simma, "From Bilateralism to Community Interest" (1994), pp. 262-263; Vekateshwara Subramanian Mani, "The Friendly Relations Declaration and the International Court of Justice" (1998), p. 532.

[125] See also Jorge Castaneda, "Valeur juridique des résolutions des Nations Unies" (1970), pp. 223-225, who distinguished various types of non-recommendatory resolutions.

[126] Separate Opinion of Judge Lauterpacht, p. 122, to International Court of Justice, Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion of 7 June 1955.

[127] Article 1, Global Agenda for Dialogue among Civilizations, General Assembly resolution 56/6, adopted 9 November 2001.

[128] *Idem*, Article 2.

certainly not the case.[129] Global conferences organized by the United Nations play a key role in this process.[130] In a way, the Assembly itself is such a global conference. It is a "standing international conference in which any UN member State can raise any international issue it regards as deserving global attention."[131]

3.2 The Assembly's competence to discuss UN values, purposes and principles

To continue the global dialogue started in San Francisco, the Assembly first needed a mandate to discuss all global values, purposes, and principles in the UN Charter. The Assembly has such a mandate. According to Article 10 of the Charter, "the General Assembly may discuss any questions or any matters within the scope of the present Charter," and it "may make recommendations to the Members of the United Nations […] on any such questions or matters."

The drafting history of this Article is unusual. At first the text passed without problems from Dumbarton Oaks, through the various Commissions, Committees and Subcommittees, into the Charter. Then at a rather late stage in the drafting process, the Soviet Union intervened, and a new provision had to be made.

According to the Dumbarton Oaks proposals, "[t]he General Assembly should have the right to consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments."[132] The general description of the Assembly's mandate included only peace and security, and not the other UN purposes. This provision was intended to be interpreted in the broadest terms. After all, in subsequent articles in the Dumbarton Oaks proposals, the Assembly was given tasks that were not directly linked to the maintenance of international peace and security.[133]

Certain amendments proposed broadening the general functions and powers of the Assembly. Australia believed that the competence of the Assembly

[129] On the Security Council as promoter of the global interest (world peace), see Jean d'Aspremont, *Contemporary International Rulemaking and the Public Character of International La* (2006), pp. 24-25; and Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997). Somewhat surprisingly, both authors do not mention the role of the General Assembly in defining and promoting the global interest.

[130] For an overview of all the global conferences on development organized by the United Nations since the 1990s, see The United Nations Development Agenda: Development for all (Goals, commitments and strategies agreed at the United Nations world conferences and summits since 1990). Many of the outcomes of these conferences are endorsed in an Assembly resolution.

[131] M. J. Peterson, "General Assembly" (2007), p. 98. See also Jorge Castaneda, "Valeur juridique des résolutions des Nations Unies" (1970), pp. 313-314.

[132] Dumbarton Oaks Proposals for a General International Organization, UNCIO, vol. 3, pp. 4-5.

[133] See *idem*, pp. 6 and 19.

should extend to "any matter affecting international relations."[134] Other delegations did not go that far. They had more modest proposals about what the Assembly's mandate should extend to, often related to the promotion of justice, as well as peace and security.[135]

Australia continued to play a leading role in the debates in San Francisco.[136] Evatt, the Australian delegate, suggested that the Committee dealing with the functions and powers of the General Assembly should address the following question of principle: "Should the Assembly have general power to discuss and make recommendations in respect to any matter affecting international relations?" [137] The Committee's answer to this question was unanimous and affirmative.[138] According to the Rapporteur of the Committee: "There should be no limitation whatsoever upon the right of the General Assembly to discuss any matter in the sphere of international relations at any time [and] the only limitation on the Assembly's power to make recommendations should be in respect of matters relating to the maintenance of peace and security during the period when the Security Council was dealing with such matters." [139] Furthermore, "the

[134] Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia, UNCIO, vol. 3, p. 544. Australia suggested that "[t]he General Assembly may consider, and may make such recommendations as it thinks fit with regard to, any matter affecting international relations." Australia's neighbour, New Zealand, made an identical suggestion. Amendments Submitted to the Dumbarton Oaks Proposals (Document 1 G/1) Submitted by the Delegation of New Zealand, UNCIO, vol. 3, p. 487: "The General Assembly shall have the right to consider any matter within the sphere of international relations." See also Seventh Plenary Session, May 1, 1945, UNCIO, vol. 1, p. 510.

[135] See *e.g.*, Amendments to the Dumbarton Oaks Proposals Presented by the Delegation of Mexico, UNCIO, vol. 3, p. 180: "[t]he General Assembly should be competent to deal with any questions affecting international peace and security." This included (UNCIO, vol. 3, p. 181) the obligation "to examine any principles governing disarmament and the treaties proving inapplicable and any international situation having become unjust." See also the Proposals of the Delegation of the Republic of Bolivia for the Organization of a System of Peace and Security, UNCIO, vol. 3, p. 583. Bolivia suggested that "[t]he General Assembly should have the right to consider the general principles of cooperation in the maintenance of international peace, security, and justice."

[136] See also David Tothill, "Evatt and Smuts in San Francisco" (2007), especially p. 178.

[137] Fourth Meeting of Committee II/2, May 10, 1945, UNCIO, vol. 9, p. 29. A Subcommittee tasked with formulating a list of principle questions that needed to be addressed by the Committee included this general question at the very end of its list, and rephrased it slightly: "Subject to any exceptions specifically provided, should the Assembly have general power to discuss and make recommendations in respect of any matters affecting international relations?" Report of Subcommittee II/2/A, May 11, 1945, UNCIO, vol. 9, pp. 335-336. Almost all the other questions in this list were about the relationship between the Council and the Assembly in the maintenance of peace and security. See also Eighth Meeting of Committee II/2, May 16, 1945, UNCIO, vol. 9, pp. 50-53, where these questions are addressed. See also McCormack, "H.V. Evatt at San Francisco : a lasting contribution to international law."

[138] Ninth Meeting of Committee II/2, May 18, 1945, UNCIO, vol. 9, p. 60.

[139] *Idem*.

interpretation of the expression 'international relations' should be the widest possible."[140]

The Soviet Union objected to this summary of the discussion.[141] It agreed that the question was answered in the affirmative, but felt that this did not have all the implications suggested by the Rapporteur.[142] Attempts were made in a Subcommittee to redraft the provision so that it was satisfactory to everyone, including the Soviet Union.[143] This Subcommittee started with a redrafted proposal of the UK as the basis for discussion. According to this proposal, the General Assembly "should have the right […] to discuss any matter within the sphere of international relations which affects the maintenance of international peace and security."[144]

At the Soviet Union's insistence, the Subcommittee put aside the UK redraft, and used the draft of the Sponsors and France as the basis for discussion.[145] This draft stated that "[t]he General Assembly should have the right to consider the general principles of cooperation in the maintenance of international peace and security."[146] In response, Australia again suggested that "[t]he General Assembly shall have the right to discuss any matter within the sphere of international relations."[147] The discussion was back where it started. The drafting subcommittee could not agree on how to proceed, so it proposed two possible formulations to the committee: the first alternative was that "[t]he General Assembly should have the right to discuss any matter within the sphere of international relations"; the second possibility was that the "[t]he General Assembly should have the right to discuss any matter within the sphere of international relations which affects the maintenance of international peace and security."[148]

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[140] Ninth Meeting of Committee II/2, May 18, 1945, UNCIO, vol. 9, p. 60.

[141] See also Ministerie van Buitenlandse Zaken (Netherlands), *Het ontstaan der Verenigde Naties* (1950), pp. 45-47.

[142] See Communication from Delegate of U.S.S.R. concerning Summary Report of Ninth Meeting of Committee II/2, May 25, 1945, UNCIO, vol. 9, pp. 64-65. See also the Third Meeting of Subcommittee B of Committee II/2, May 23, 1945, UNCIO, vol. 9, pp. 388-389.

[143] See First Meeting of Subcommittee B of Committee II/2, May 21, 1945, UNCIO, 9, p. 375.

[144] See Second Meeting of Subcommittee B of Committee II/2, May 22, 1945, UNCIO, vol. 9, pp. 378-380, and Draft of Chapter V, Section B, Paragraph 1 Agreed upon as Basis for Further Discussion, UNCIO, vol. 9, p. 384. Belgium believed that the additional phrase at the end was welcome, because "[i]t safeguarded the domestic jurisdiction of states, which [was] a matter of capital importance for the small powers just as much as for the great powers." Second Meeting of Subcommittee B of Committee II/2, May 22, 1945, UNCIO, vol. 9, p. 379.

[145] See Fourth Meeting of Subcommittee B of Committee II/2, May 24, 1945, UNCIO, vol. 9, p. 393.

[146] Working Paper for Committee II/2/B: Redraft of Chapter V, Section B, Paragraph 1, UNCIO, vol. 9, p. 371.

[147] Suggestion by the Representative of Australia on Redraft of Chapter V, Section B, Paragraph 1, UNCIO, vol. 9, p. 397. Fifth Meeting of Subcommittee B of Committee II/2, May 25, 1945, UNCIO, vol. 9, pp. 401-402.

[148] Report of Subcommittee B to Committee II/2, UNCIO, vol. 9, p. 407.

The first alternative was defended in the committee with the argument that "the clear authorization to discuss 'any matter within the sphere of international relations', without any limitation, was important in order that the Assembly might truly become the 'town meeting of the world'."[149] Other delegates "objected to the vagueness of the powers which would be given to the Assembly by the unqualified use of the words 'within the sphere of international relations', and held that in practice the result would be to swamp the Assembly with more business than it could discharge at its rare meetings."[150] Nevertheless, the first alternative was preferred.[151] The fact that the General Assembly could now truly be considered as a real "town meeting" in which no subjects related to international affairs would be barred from discussion" was presented as a big victory for the small States over the Big Five.[152]

Almost three weeks later, the Soviet Union once again suggested that the Assembly could only discuss matters "which affect the maintenance of international peace and security."[153] In a meeting of the Executive Committee, Gromyko, the Soviet delegate, remarked that in its attempt at liberalism, the paragraph "concealed an element of danger to the effectiveness of the Organization as a whole, in that it made it possible for any country to raise for discussion in the General Assembly any act of another country which it did not like."[154] According to Evatt, the Soviets

[149] Fifteenth Meeting of Committee II/2, May 29, 1945, UNCIO, vol. 9, p. 108. See also Blaine Sloan, "The binding force of a "recommendation" of the General Assembly of the United Nations" (1948), pp. 1 and 32.

[150] *Idem*, p. 109.

[151] *Idem*, pp. 109-110. When the two possibilities were put to the vote, the first got 27 affirmative votes and 11 negative votes, while the second possibility got 9 affirmative votes and 27 negative votes: this meant that the first possibility was adopted. The draft then went successfully through the Coordination Committee and the Advisory Committee of Jurists. The former only discussed the difference between "has the right" and "may", and decided to stick to the latter. Summary Report of Fifteenth Meeting, June 12, 1945, UNCIO, vol. 17, pp. 92-93. For the Advisory Committee of Jurists, see Summary Report of Ninth Meeting of Advisory Committee of Jurists, June 16, 1945, UNCIO, vol. 17, p. 421.

[152] John H. Crider, "Assembly to Act as "Town Meeting"," in *New York Times* of May 30, 1945. US delegate Vandenberg "invented" this expression. Vandenberg used the expression on various occasions. An example can be found in the Minutes of the Twenty-First Five-Power Informal consultative Meeting on Proposed Amendments, June 13, 1945, in FRUS, *General*, Volume I, pp. 1285. See also John Foster Dulles, "The United Nations: A Prospectus (The General Assembly)" (1945), p. 1; and Fernand Dehousse, *Cours de politique international* (1945), p. 103.

[153] Twenty-Fourth Meeting of Committee II/2, June 16, 1945, UNCIO, vol. 9, pp. 221-222. Earlier, the USSR already raised this issue in a Five-Power meeting. In response, the US told the Soviets that to reopen the debate would be a "terrific error." See Minutes of the Twenty-First Five-Power Informal consultative Meeting on Proposed Amendments, June 13, 1945, in FRUS, *General*, Volume I, pp. 1284-1286. It was especially the timing of the Soviet objection which caused a situation qualified by the *New York Times* as "awkward, but not serious." See James B. Reston, "Russians Demand Curb on Assembly or They Won"t Sign" (1945).

[154] Summary Report of Ninth Meeting of Executive Committee, June 17, 1945, UNCIO, vol. 9, p. 522. Later, the Soviet Union described the attempt to widen the powers of the General Assembly as an attempt "to water it down, to doom it to floods of eloquent prattle to the detriment of speedy and

were most concerned with the interference of the Assembly in the domestic affairs of States; such interference was already prohibited elsewhere in the Charter.[155] The Rapporteur of the Committee in which the draft was first adopted, stood up to defend the text of "his" Committee. He said that the "representatives of the small nations of the Conference ha[d] given up many things they came to the Conference to fight for because they wanted to show that they trusted the big powers." [156] Now the big powers had an opportunity to show they trusted the smaller ones not to abuse the extensive powers of the Assembly. A subcommittee was established, consisting of Evatt, Gromyko, and Stettinius. Evatt came up with the following solution:

> The General Assembly should have the right to discuss any matters covered by the purposes and principles of the Charter or within the sphere of action of the United Nations or relating to the powers and functions of any of its organs or otherwise within the scope of the Charter.[157]

When Evatt presented his draft to the Executive Committee, he explained that the intention was to "[l]et the Charter itself […] be the field over which discussions in the Assembly can and should range."[158] Gromyko was still not satisfied. In his view, the provision "should say that the General Assembly should have the right to discuss any matters relating to the maintenance of peace and security and matters relating to economic, social, and educational cooperation among the nations" because that statement "would properly emphasize the main purpose of the

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decisive actions of the organization as a whole." See p. 5 of the "Introduction" to the booklet the *Soviet Union at the San Francisco Conference* (1945).

[155] Summary Report of Ninth Meeting of Executive Committee, June 17, 1945, UNCIO, vol. 9, pp. 523-525. See also Seventh Meeting of Steering Committee, June 17, 1945, pp. 264-266.

[156] Seventh Meeting of Steering Committee, June 17, 1945, p. 266.

[157] Tenth Meeting of Executive Committee, June 18, 1945, UNCIO, vol. 5, p. 533. According to James B. Reston, this was a Soviet suggestion. See James B. Reston, "Truce is Offered by Soviet on Issue of Assembly Talk." In the Minutes of the Seventy-third Meeting of the United States Delegation, June 16, 1945, in FRUS, *General*, Volume I, p. 1310, we find a US suggestion, which reads somewhat like a compromise between the old and the new: "Within the purposes and in accordance with the principles laid down in the Charter, the General Assembly should have the right to discuss any matter within the sphere of international relations." See also the Minutes of the Twenty-First Five-Power Informal consultative Meeting on Proposed Amendments, June 16, 1945, in FRUS, *General*, Volume I, pp. 1319-1323, where the Russians reject this US proposal because, in view of the Russians, it does not change anything. See further the Minutes of the Seventy-fifth Meeting of the United States Delegation, June 18, 1945, in FRUS, *General*, Volume I, pp. 1340-1343, where delegates express their concern about a newspaper article by James B. Reston, "Russians Demand Curb on Assembly or They Won"t Sign," which appeared in the *New York Times* of June 18, 1945, and in which all details of the discussion are described.

[158] Summary Report of Tenth Meeting of Executive Committee, June 18, 1945, UNCIO, vol. 5, p. 536.

Organization."[159] The Australian suggestion was sent to the Steering Committee, which then sent it back to the Committee it came from.[160] At that moment, it was the only outstanding issue on the agenda, and all the delegates wanted the conference to come to a close.[161] The Committee therefore swiftly and unanimously adopted the Australian draft.[162] To appease the Rapporteur, the US offered him the gavel he had used to chair his meetings, an offer which he gratefully accepted.[163]

When he presented his report to the Commission the Rapporteur referred to the Assembly as "the fortress where human aspirations are going to be defended." He also explained how the Assembly would do this:

> It will not have armies at its disposal, it will not have cannon or prisons; it will instead have something which, though incorporeal, has, in the course of human history, shown itself to be stronger and more invincible than brute force: the power of thought.[164]

Evatt believed that the Assembly's "right of discussion [was] free and untrammelled."[165] The Assembly could therefore justifiably be considered to be the "Town Meeting of the United Nations of the World,"[166] where the "everyday relations" of nations, as described by China, could be discussed.[167] Tunkin, one of

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[159] *Idem*, p. 537. In response, Vandenberg (US) suggested that the Assembly should have the right to discuss any "matter relating to the maintenance of international peace and security, or any other matters covered by the purposes and principles of the United Nations or pertaining to the functions of its organs." See Minutes of the Twenty-Fourth Five-Power Informal Consultative Meeting on Proposed Amendments, June 18, 1945, in FRUS, *General*, Volume I, pp. 1351.

[160] Summary Report of Tenth Meeting of Executive Committee, June 18, 1945, UNCIO, vol. 5, p. 537. See also the discussion in the Steering Committee, where no new arguments were brought forward. When the Steering Committee voted on the decision to send the provision back to Committee II/2, Bolivia cast the only negative vote. This vote was cast by the Rapporteur of that Committee, Andrade. Summary Report of Eighth Meeting of Steering Committee, June 18, 1945, UNCIO, vol. 5, pp. 273-274.

[161] See the article in the *New York Times* entitled "Success at San Francisco" (1945). See also the Minutes of the Twenty-Eighth Five-Power Informal Consultative Meeting on Proposed Amendments, June 20, 1945, in FRUS, *General*, Volume I, pp. 1397-1398.

[162] Twenty-Fifth Meeting of Committee II/2, June 20, 1945, UNCIO, vol. 9, pp. 233-235.

[163] *Idem*, p. 235. The entire drafting history of the provision is summarized in the Report of the Rapporteur of Committee II/2, UNCIO, vol. 9, pp. 242-243.

[164] Fourth Meeting of Commission II, June 21, 1945, UNCIO, vol. 8, p. 196.

[165] Fourth Meeting of Commission II, June 21, 1945, UNCIO, vol. 8, p. 208. As Dulles later pointed out, all this "is enough to make apparent that the Assembly is given a tempting invitation to chase rainbows." See John Foster Dulles, "The United Nations: A Prospectus (The General Assembly)" (1945), p. 2.

[166] Fourth Meeting of Commission II, June 21, 1945, UNCIO, vol. 8, p. 209.

[167] When explaining the importance of the General Assembly, the Chinese delegate pointed out that while the Security Council essentially deals with emergencies in international relations, the Assembly deals with "everyday relations." Fourth Meeting of Commission II, June 21, 1945, UNCIO, vol. 8, p. 196. See also Clyde Eagleton, "The Charter Adopted at San Francisco" (1945), p. 940: "The Security

the most influential Soviet scholars, later admitted that the Assembly's "competence include[d] practically all the most important questions of international relations."[168] This would satisfy the small States, and the term "town meeting of the world" could be – and was – used to sell the Charter at home.[169]

Evatt later stressed the importance of the general mandate of the Assembly. In his view, "Th[e] broadening of the scope of the General Assembly's powers [was] one of the most important achievements of the San Francisco Conference and one of the main democratic safeguards of the United Nations Organization."[170] Since 1945 the Assembly has used its "*compétence générale*" to the full.[171] It has dealt with all global matters – even at the time that the Security Council was occupied with the same issues – always linking its resolutions to (parts of) the UN Charter.[172]

3.3 The General Assembly as a forum for global discussion

Now that the competence of the Assembly to discuss all the values, purposes and principles proclaimed in the UN Charter has been affirmed, it is time to assess the inclusive and genuine character of the Assembly's discussions and their capacity to motivate action.

Dehousse once referred to the Assembly as "*l'organe démocratique par excellence*."[173] That is an exaggeration,[174] but it is clear that, of all the principal organs of the United Nations, the Assembly comes closest to a World Parliament in

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Council operates only for crises; the General Assembly has a hand in all the current activities of international life."

[168] Grigory I. Tunkin, "The legal nature of the United Nations" (1969), p. 18. According to Tunkin, the emphasis was nonetheless on peace and security.

[169] The expression was used to characterize the General Assembly in the Report of the Foreign Relations Committee of the US Senate. See Foreign Relations Committee (US Senate), "Foreign Relations Committee's Report Urging Ratification of the United Nations Charter" (1945). It was also used in the Dutch Government's "Memorie van Toelichting bij de Goedkeuringswet van het Handvest der Verenigde Naties" (1945), p. 20. There it was translated into "den gemeenteraad der Wereld," or the "city council of the world."

[170] Herbert Vere Evatt, *The United Nations* (1948), p. 20.

[171] Georges Kaeckenbeeck, "La Charte de San-Francisco dans ses rapports avec le droit international" (1948), p. 146. See also p. 251.

[172] See Kofi Annan, *We, the Peoples: the Role of the United Nations in the Twenty-first Century* (2000), para. 319, and, of course, the UN Charter (especially Article 1 and Chapter IV). See also Oscar Schachter, "United Nations law" (1994), p. 2.

[173] Fernand Dehousse, *Cours de politique international* (1945), p. 101. See also Oscar Schachter, "United Nations law" (1994), p. 2, who referred to the "democratization" of the treaty-making process by the Assembly.

[174] See Alain Pellet, "La formation du droit international dans le cadre des Nations Unies" (1995), p. 14, for some objections to seeing the Assembly as a democratic organ.

which the voices of the entire world population are represented,[175] and that the interpretation and elaboration of the constitutional norms of the UN Charter should therefore be concentrated in this organ of the United Nations.[176] In line with his "constitutional" perspective on the work of the principal United Nations organs, Fassbender referred to this on-going process of interpreting the norms of the UN Charter, sometimes *re*interpreting them to accommodate changes in international life, as the "constitutional history" of the international community. Fassbender wrote that this "constitutional history" took place primarily in the UN General Assembly:

> As far as we can speak of a "constitutional history" of the international community since 1945, it has been shaped, and taken place, in the United Nations and, in particular, in its General Assembly. It is sufficient to mention a few key words to make the reader recall the great debates which have profoundly influenced, if not changed, global life: self-determination of peoples, decolonization, human rights, fight against racial discrimination, definition of aggression, nuclear arms, utilization of outer space and the sea-bed ("common heritage of mankind"), global environmental problems, especially the use of non-renewable resources and the protection of particularly vulnerable areas (Antarctica, tropical forests). In all these discussions, the U.N. regarded itself as the "natural forum"; and, indeed, no other body could have claimed a similar legitimacy.[177]

Why can the General Assembly claim to be the "natural forum" for shaping the constitutional history of the United Nations? The most important answer to this question is the inclusive character of the Assembly's discussions. Representatives of virtually all States, each representing the views of a particular population, come together at the United Nations General Assembly to adopt declarations of principles and ideas. In this way they "collaboratively engage each other and other sectors of society in the multilateral management of global affairs."[178] This inclusiveness means that the stream of UN resolutions and declarations is the "closest we are able to get to an authentic voice of humanity."[179]

This inclusiveness, in terms of the participation of States, was not shared by its predecessor, the League of Nations. For a long time the "global discussion"

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[175] Bruno Simma, "From Bilateralism to Community Interest" (1994), pp. 262-263.
[176] This is in fact what happened. Only in recent years has the Security Council contributed to the evolution of global values. See Nico Schrijver, "De Verenigde Naties in de 21ste eeuw" (2007), p. 154. However, as was noted before, this is not to suggest that other organs of the "UN family" are irrelevant when it comes to global value-making.
[177] Bardo Fassbender, "The United Nations Charter as Constitution" (1998), p. 580. In Part II of this study, this "constitutional history" will be looked at in great detail.
[178] See Chapter 1 – A New World, the Concept of Global Governance, in Commission on Global Governance, *Our Global Neighborhood* (1995).
[179] *Idem*, p. 9.

excluded most of the international community by formally distinguishing between civilized and uncivilized nations.[180] The League of Nations explicitly excluded from independent membership nations "inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world".[181] This distinction also surfaced in the infamous dispute between Ethiopia and Italy, a dispute which showed that the League was in fact irrelevant and which eventually led to its end. When Ethiopia notified the League of the Italian aggression committed against it, Italy did not defend its actions. Instead, it claimed that "Italy's dignity as a civilized nation would be deeply wounded were she to continue a discussion in the League on a footing of equality with Ethiopia."[182] This statement suggested that some States were more equal than others, even among those fortunate enough to be admitted to League membership.

Instead of leaving the global leadership to an elite group of "civilized nations," this leadership and the creation of global values that comes with it is now in the hands of the General Assembly of the United Nations, which welcomed the entire world.

Admittedly the UN Charter itself does not reflect this aim of universal membership. The Charter proclaimed that the original Members of the United Nations should be those States that participated in the San Francisco Conference, and that "other peace loving States" could be invited to join later.[183] At San Francisco it was agreed that "peace loving" essentially meant "that a nation [was] ready to accept and fulfil the obligations of the Charter and that it [was] able to accept and fulfil them."[184] In a sense, this requirement of being "peace loving" was therefore rather meaningless. It essentially meant subscribing to the purposes and principles of the Charter. By acceding to the UN Charter a State had already declared its acceptance of these purposes and principles. As time passed, universality of membership became the ultimate goal, and references to being "peace loving" faded into the background.[185]

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[180] See Jean d'Aspremont, *Contemporary International Rulemaking and the Public Character of International Law* (2006), pp. 7-11; and Bert Röling, *International law in an expanded world* (1960).

[181] See Article 22 of the Covenant of the League of Nations, which constituted Part I of the Versailles Peace Treaty, signed on June 28, 1919, to end the First World War.

[182] Situation in Ethiopia, Memorandum by the Italian Government dated September 4th, 1935, and Documents relating thereto, in League of Nations Official Journal, volume 16, issue 11 (November 1935), p. 1137.

[183] Article 3 and 4, UN Charter.

[184] Report of the Rapporteur of Committee I/2 on Chapter III (Membership) (Incorporating Changes Submitted by Delegation for the Approval of Commission I), UNCIO, vol. 7, p. 326 (emphasis added).

[185] Indeed, as Robinson rightly pointed out, since 1945: "The membership of the United Nations has developed from a wartime coalition on the eve of victory against the common Axis enemy, through an organization of 'like-minded' States, to a near-universal but heterogeneous society of nations, presumed to be at peace." Jacob Robinson, "Metamorphosis of the United Nations" (1958), p. 500.

The universal membership of the United Nations, and therefore of the Assembly, is considered crucial, especially by the peoples who were marginalized in the past. As one third world scholar pointed out, it is the dominance of a certain world view, rather than overwhelming military or economic power, that most concerns the marginalized voices. The dominance of ideas is often the result, not of better arguments, but of military power, used to sustain that ideological dominance.[186] The General Assembly aims to remedy this situation by giving one vote to each country, instead of basing voting power on economic or military power, as some other international organizations do.[187] As Morgenthau pointed out, the fact that States have to convince a large majority of their fellow States, rather than only a limited group of the most powerful nations, to have a certain common foreign policy approved, means that different arguments need to be used, appealing to a new perception of common interest.[188] At the same time, it was suggested as early as 1947 that the Assembly should follow the example of the economic organizations and replace its one State, one vote system with a system of "weighted voting under which each member of the United Nations is given in the Assembly an influence and an authority in consonance with its actual influence and authority in the world of today."[189] The one State, one vote system was never without its opponents.

The global discussions of the Assembly are public[190] and are observed and scrutinized by non-governmental organizations, academics, bloggers,[191] global pollsters,[192] and so on.[193] The Member States of the United Nations are reluctant to

[186] Chimni said in his Manifesto for a third world approach to international law: "[p]owerful states [..] exercise dominance in the international system through the world of ideas and not through the use of force. But from time to time force is used both to manifest their overwhelming military superiority and to quell the possibility of any challenge being mounted to their vision of world order." B. S. Chimni, "Third World Approaches to International Law: A Manifesto" (2006), p. 19. This critique may sound convincing, but when Chimni explains how international law is based on a worldview inconsistent with that of the third world, his main objections are to the rules of the international economic system. These rules were established largely outside the UN framework (in fact, UN's Economic and Social Council was supposed to add some values into that largely valueless economic framework).

[187] The IMF and World Bank are examples of international organizations where economic power directly influences the voting-power.

[188] Hans J. Morgenthau, "The New United Nations and the Revision of the Charter" (1954), pp. 12-13.

[189] Sir Carl Berendsen, "The United Nations and international law" (1947), p. 123. Interestingly, at San Francisco, the one-State-one-vote arrangement of the Assembly was hardly discussed. Apparently, it was the self-evident thing to do. See also Francis Aime Vallat, "Voting in the General Assembly of the United Nations" (1954), p. 279.

[190] See rule 60 of the Rules of Procedure of the General Assembly (embodying amendments and additions adopted by the General Assembly up to September 2006), UNDoc. A/520/Rev.16.

[191] For a good example, see: www.invisiblecollegeblog.com (this is my own weblog). See also Global Voices Online (www.globalvoicesonline.org), a project that aims to give the non-Western blogger a bigger audience.

[192] A good example is www.worldpublicopinion.org.

[193] See Mary Kaldor, "The Idea of Global Civil Society" (2003), p. 590.

accept the influence of all these non-State actors. In a 2004 report on this topic the problems were described as follows:

> Governments do not always welcome sharing what has traditionally been their preserve. Many increasingly challenge the numbers and motives of civil society organizations in the United Nations — questioning their representivity, legitimacy, integrity or accountability. Developing country Governments sometimes regard civil society organizations as pushing a "Northern agenda" through the back door. At the same time, many in civil society are becoming frustrated; they can speak in the United Nations but feel they are not heard and that their participation has little impact on outcomes. [194]

The same report suggested that global civil society was here to stay. Instead of regretting or even denying this reality, the Member States ought to look for ways to benefit from the new situation. "The question is not how would the United Nations like to change? But, given how the world has changed, how must the United Nations evolve its civil society relations to become fully effective and remain fully relevant?"[195]

It is not only the formal participants in the debate, *i.e.* the representatives of all Member States, who provide the ideas for discussion. These ideas also come, for example, from the United Nations Secretary-General and the Expert Panels established by him, or from the International Law Commission, or from other (subsidiary) organs and institutions of the United Nations.[196] These new ideas, values and norms can be discussed and adopted by the Assembly.[197] In every case it is the resolutions of the Assembly that must be examined to discover which ideas, whatever their exact origin, were embraced by the United Nations membership as a whole.

This rather optimistic account of the inclusiveness of the Assembly discussions could be viewed with some scepticism. First, the global discussions do not take place during the public sessions of the General Assembly. Only the end results of the discussions can be found in the records of the Assembly.[198] The actual

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[194] We the peoples: civil society, the United Nations and global governance, Report of the Panel of Eminent Persons on United Nations–Civil Society Relations, UNDoc. A/58/817, distributed 11 June 2004, p. 7.

[195] *Idem*.

[196] For example, the Millennium Declaration, resolution adopted by the UN General Assembly, 18 September 2000. UNDoc. A/RES/55/2, is inspired by Kofi Annan, *We, the Peoples: the Role of the United Nations in the Twenty-first Century* (2000). See Ramesh Thakur, Andrew F. Cooper & John English, *International Commissions and the Power of Ideas* (2005).

[197] The power to put something on the agenda for discussion (agenda-setting) is important. See Rule 13 of the Rules of Procedure of the General Assembly, UNDoc. A/520/Rev.15.

[198] Only the majority opinion ends up in an Assembly resolution, whilst dissenting views end up in the record of the Assembly as explanations of the (abstaining or dissenting) vote, if this is the wish of the dissenting state(s).

debates often take place in various committees, or outside the conference halls altogether.[199] The Assembly's public sessions are mainly used to ensure that members' opinions appear in the records, and not to exchange ideas and engage in a discussion on the spot. Obviously this has an effect on the attendance record, which is generally not very impressive.[200]

One could also be sceptical about the representative character of some of the representatives in the Assembly. Those representing dictatorial regimes do not represent anyone and are accountable to no one. Therefore their opinions should not be taken very seriously in the global discussions.[201] When global civil society scrutinizes the Assembly's global discussions, it can challenge the representative character of such a representative, even when he or she is formally mandated to speak on behalf of his or her people. That is at best an *ad hoc* solution. Because of the domestic – and not global – lack of democratic accountability, it is sometimes suggested that a new UN type of international organization should be established, consisting solely of democratic nations: a community of democracies.[202] As this would automatically exclude the voice of a vast number of the world's citizens – those who live in undemocratic countries – other suggestions have also been made to have the voice of all the world's citizens heard. One suggestion is to conduct global polls instead, as a method to find out what "the people" value most, or to establish a General Assembly where the world's citizens are represented by persons directly elected by them.[203] Because of the wide variety of cultures and political preferences, it is impossible to have a representative representation unless an Assembly is created with thousands of representatives.[204] Even if such an immense

[199] Johan Kaufmann, *United Nations Decision Making* (1980), pp. 32-40. On pp. 119-129, Kaufmann, a former representative of the Netherlands at the United Nations, describes in detail how General Assembly resolutions come into being. There is nothing surprising about this process: it particularly involves looking for support among friends and among the major powers. States usually do this in private, not during the Assembly meetings.

[200] Kaufmann noted: "attendance at the general debate tends to be poor, except when a speech is made by the head of delegation of a major power, or when somebody deemed to be a celebrity takes the floor." p. 27 of Johan Kaufmann, *United Nations Decision Making* (1980).

[201] See, *e.g.*, John McCain, speech delivered on the first of May 2007 at the Hoover Institution, Stanford University in Stanford, California. (http://news-service.stanford.edu/news/2007/may2/mccain-050207.html.) See also G. John Ikenberry and Anne-Marie Slaughter, *Forging A World Of Liberty Under Law* (2006).

[202] Such a community actually exists already. This is a brief description of the Community of Democracies: "a global gathering of 106 governments committed to democracy came together to develop and pursue a common agenda. This community of states – drawn from a diverse mix of regions, cultures, and religions – dedicated itself to a core set of democratic principles and to support cooperation among democracies worldwide." Source: http://www.ccd21.org. For more information about this movement, see this website.

[203] In April 2007, a Campaign for the Establishment of a United Nations Parliamentary Assembly was launched. See: http://en.unpacampaign.org/events/index.php.

[204] See M. J. Peterson, "General Assembly" (2007), p. 113.

construction were possible at an affordable price, the "European experience" shows that the establishment of a world parliament does not necessarily solve the problem.[205] The existing institutional arrangement, *i.e.* to have all States represented in the Assembly, may not be so bad after all. The focus should be on promoting democracy *within* States.

The world's population should feel that it is involved in the work of the United Nations in some way, irrespective of the official procedures and institutional rules. In the words of the second United Nations Secretary-General, Dag Hammarskjöld from Sweden: "Everything will be all right […] when people, just people, stop thinking of the United Nations as a weird Picasso abstraction and see it as a drawing they made themselves." Recent surveys show that if this is the goal, the Organization still has work to do. For example, the Global Values Survey of 2004 concluded that the confidence in the United Nations was as low as 54%.[206] This is still better than the confidence people have in their own governments (50%).[207] With regard to various problems of international concern, the survey asked who could handle the problem better, the United Nations, the respective national governments, or both together? In all cases (international peacekeeping, protection of the environment, international development assistance, refugees and the protection of human rights) it was felt that national governments would handle the problem better on their own, without the involvement of the United Nations.[208] According to a Gallup Poll of 2005, nearly half of the people of the world who were aware of the existence of the United Nations had a positive opinion of it (48%), whilst a third (35%) held a neutral and 13% had a negative opinion.[209]

These polls suggest that the world's population as a whole does not identify with the discussions going on at the Assembly. But these are just a few polls, and sweeping conclusions should be avoided. However, if the impression people have of the UN is as negative as these polls suggest, the United Nations must find new ways to reach ordinary people, and make them feel involved in some way. As was the case in the San Francisco Conference in 1945, the aim should once again be to ensure that the people of the world can participate in the Assembly's work, without formally granting them any powers to influence the debates.

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[205] As the former Minister for Foreign Affairs of the Netherlands, Maxime Verhagen, put it: "European citizens view European integration as an elite project, which controls their daily lives but over which they have no control." Verhagen, *Norbert Schmelzer lecture* (2007).
[206] E088 (Table), in Ronald Inglehart, *Human Beliefs and Values* (2004).
[207] *Idem*, E79 (Table). See also E125.
[208] *Idem*, E135-E139 (Table).
[209] Gallup International Association – Voice of the People 2005, poll conducted for BBC World Service by the international polling firm GlobeScan together with the Program on International Policy Attitudes (PIPA) at the University of Maryland. It showed that on average 59 per cent rated the United Nations as having a positive influence, while just 16 per cent rated it as having a negative influence.

3.4 The Assembly's rules of communication to ensure genuine discussion

This section examines the genuine character of the Assembly's discussions. Again, there is room for scepticism in this respect. The United Nations, with its General Assembly, has been described as "a battle-ground of particular interests,"[210] or as "simply a meeting place, where the nations of the world attempt to conduct their business in the same competitive, self-serving, and (dare we say it) even deceitful way that they always have and surely always will."[211] This is a sobering thought, and Peterson added that "though a truism, it bears repeating that governments, even more than individuals in domestic political systems, evaluate decisions in terms of what is in the outcome for them," and that a government generally "focus[es] on the interests of [its] own State or of its closest allies."[212] The behaviour of States in the Assembly is above all based on the outcome of a cost-benefit analysis, which includes, but is certainly not restricted to, defending their own principles and values. It is often suggested that only if a State feels very strongly about certain values and principles, that these values and principles could determine the behaviour of that State. For example, the proposal for a New International Economic Order, presented by a large group of developing nations, was claimed to be above all, about values.[213] Western States defeated this proposal by pointing out that it was not based on values at all, but that the developing States were simply disguising a demand for more money in these idealistic proposals.[214] Arguably this effectively shut the door on any value-based discussion of the proposals. In response, reference can be made to the remarks made earlier, that it is pointless to oppose values and interests in this way.[215] Discussions about values and their relative importance are by definition also about the allocation of limited resources. Moreover, no State can persuade another State to join a particular project by

[210] Jacob Robinson, "Metamorphosis of the United Nations" (1958), p. 514.
[211] John Tessitore, "The UN at 60: Still Misunderstood" (2007).
[212] M.J. Peterson, *The General Assembly in World Politics* (1986), p. 208. See also M. J. Peterson, "General Assembly" (2007), p. 102.
[213] Declaration on the Establishment of a New International Economic Order, General Assembly resolution 3201 (S-VI), adopted without a vote during a special session in 1974. It was adopted by the Assembly against the wishes of the Western States, which made the ideas enshrined in these resolutions somewhat unrealistic. See p. 199-211 of Louis Henkin, *How Nations Behave: Law and Foreign Policy* (1979). Henkin remarked that "one can conclude with some confidence [..] that although the developed world holds most of the cards today, the influence of numbers, of rhetoric, of ideas whose time have come – if slowly – will be strongly felt in the politics of economics; and the international economic order at the end of the century, if not new, will be substantially different from what we know today." We have now reached that point, the change of the millennium, and one can judge for oneself.
[214] Andrew F. Cooper and John English, "International Commissions and the mind of Global Governance" (2005), p. 3.
[215] See section 3.3 of Chapter II.

referring to its own self-interest. As Jessup pointed out, to convince other States it is necessary to translate self-serving motives into an argument about values:

> [States] are of course responsive each to [their] own national interest but they recognize and respect a moral stand; you cannot secure the sympathetic support of the General Assembly by ignoring moral values. Pure opportunism and the absence of an underlying theory or principle is not persuasive. The sophisticated outsider mocks at the high-sounding principles enunciated in the United Nations Charter but no competent delegate does so within the United Nations.[216]

The General Assembly's debates cannot be accurately characterized as an abstract, academic or "philosophical" discussion about global values. However, describing them as being opportunistic and self-serving is also a caricature. One of the biggest supporters of the United Nations, Sir Richard Jolly, referred to the process of making resolutions as "UN hypocrisy." As an example of such hypocrisy, he referred to one of the resolutions the United Nations is most proud of – the Universal Declaration of Human Rights – and explained that even though the result was a glorious document protecting the human dignity of all men and women, the resolution was formulated with the greatest hypocrisy, and with various political tensions and provocations.[217] Jolly thought it was an ideal task for global civil society, which he called the "third UN," to constantly remind States of their hypocritical promises.[218]

This "hypocrisy warning" reveals the need for clear rules of communication and realistic expectations about the outcomes of the discussions. In 1957, Jessup made an attempt to do so by comparing the Assembly's rules of procedure with those of domestic parliaments.[219] He concluded that the Assembly's work could

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[216]Philip C. Jessup, "Parliamentary diplomacy" (1957), p. 236. See also Oscar Schachter, "The relation of law, politics and action in the United Nations" (1964), p. 173; Oscar Schachter, "United Nations Law" (1994), p. 9.

[217] Sir Jolly made these remarks as panelists at the 50th Anniversary International Congress of the Society for International Development, Reconciling the Dichotomies of Development: Ways Forward, held 4-7 July 2007, in The Hague, The Netherlands. The summary is based on my own notes; a very brief outline of his remarks can be found in the SID 50th Anniversary Congress Report, p. 6-7 (available on the website of SID: http://www.sidint.org).

[218] *Idem*. Jolly distinguished three different UNs: (1) the United Nations of all Member States combined; (2) the United Nations of all global civil servants; and (3) the United Nations of the ngos, academics, and other "outsiders" checking on the UN from the sidelines, in order to ensure that the Member States genuinely respect the promises they made, even if they generally make them in a state of hypocrisy.

[219] He did not believe that the rules of procedure of domestic parliaments should simply be applied also in the Assembly. Instead, Jessup believed that there were some "general principles of parliamentary law," which were inherent in all such systems, and that the Assembly could adapt them to the international situation with its own peculiarities. See especially p. 225 of Philip C. Jessup, "Parliamentary diplomacy" (1957).

aptly be characterized as a form of "parliamentary diplomacy," a term he borrowed from Rusk, a US representative to the UN. The process of parliamentary diplomacy was characterized by a number of factors, such as:

> On-going discussions, not limited to a specific issue;
> Discussions which are exposed to and scrutinized by world public opinion;
> Discussions governed by clear rules of procedure;
> Formal conclusions as the concrete results of the discussions, adopted by a majority vote.[220]

These rules would not in any way turn the representatives of the self-serving States into cosmopolitan philosophers. That would be an unreasonable expectation in any case. This process, in which various regional value systems and interests meet, sometimes conflicting and sometimes converging, provides the best foundation for defining global values, precisely because States have an interest in the outcome of these discussions. The politics of the discussions therefore add a sense of urgency to the debates. The process increases their relevance in global decision making in a way that a purely philosophical debate about values could never do. At the United Nations General Assembly, at least all States are more or less obliged to participate and vote in all the debates on a wide range of global issues. They are obliged to take these discussions seriously, and take account of their political implications.[221] The Assembly's discussions fall somewhere between a debate based primarily on a struggle for power and the realization of particular interests, and a debate about global values and the realization of the global interest.

Throughout the history of the United Nations it has been the United States that has dominated international relations in terms of power, although its power was to some extent balanced by that of the Soviet Union during the Cold War.[222] At the General Assembly, it is apparent that it is not power that determines dominance, but rather the voice of the majority – the developing States – over a "Western" minority.[223] This is a typical consequence of a democratic system in which every

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[220] Philip C. Jessup, "Parliamentary diplomacy" (1957), p. 185.

[221] Judge Alvarez: "The General Assembly of the United Nations is the meeting place where States discuss political matters of general interest (open diplomacy); in doing so, the Assembly is in a good position to reconcile Law and Politics." Alvarez, Separate Opinion in the International Court of Justice's Reservations to the Genocide Convention Advisory Opinion, ICJ Reports of 1951, p. 52.

[222] This balance of power led to an almost complete paralysis of the Security Council. The relationship between the United Nations and the United States since the end of the Cold War has been the subject of many books. For two examples written by senior United Nations civil servants, see Boutros Boutros-Ghali, *Unvanquished: A U.S. - U.N. Saga* (1999), and Ramesh Thakur, *The United Nations, Peace and Security* (2006).

[223] See Louis Henkin, *How Nations Behave: Law and Foreign Policy* (1979), p. 177. He notes that only in the early stages it was the West that dominated. After a wave of decolonization, the majority shifted to those new states.

State was given one vote.[224] The Assembly often called upon the overruled "Western" minority to carry out the wishes of the majority of developing States.[225] It was partly for this reason that the United States increasingly turned its back on the Assembly, which could, in a worst case scenario, turn the Assembly into a practically irrelevant debating society.[226] The important thing to learn from this was neatly phrased by Peterson:

> The full impact of Assembly resolutions has always depended upon the relation between the ability to muster votes inside the Assembly and the control of resources for taking effective action outside.[227]

The Assembly itself has always been very conscious of this. The affirmative votes of the economic and military superpowers have always been valued more than the one nation, one vote system formally requires.

3.5 The General Assembly resolutions as a motivation for action

3.5.1 Introduction

The language of international law is *par excellence* the language which motivates action in the international community.[228] When a State is bound by a certain legal norm, it is obliged to act in accordance with that norm. Moreover, international law provides various ways to ensure a State's future compliance with the legal principles and provisions it voluntarily subscribed to in the past. Do General

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[224] The one state, one vote principle gives Nauru and China both one vote in that Assembly, despite the fact that the latter country has 100,000 times more inhabitants than the former. This is not very democratic. See also p. 113 of M. J. Peterson, "General Assembly" (2007), and Bruno Simma, "From Bilateralism to Community Interest" (1994), p. 263.

[225] Peterson: "The Third World majority was hobbled by a serious disjuncture between its control of votes inside and lack of resources for action outside, exposing all the weaknesses of a deliberative body that commands no effective and coercive institutions." p. 109 of M. J. Peterson, "General Assembly" (2007). See also p. 51 of M.J. Peterson, *The General Assembly in World Politics* (1986).

[226] However, it must be emphasized that the debate in the US on what to do with the UN General Assembly - to ignore it or to use it for political advantage - has always been a heated debate, and it is not yet settled. See p. 110-112 of M. J. Peterson, "General Assembly" (2007).

[227] M. J. Peterson, "General Assembly" (2007), p. 109**.**

[228] See also section 3.4 of Chapter II, above. Of course, one might think that divine obligations would be even more action-motivating than legal obligations. Many Dutch politicians were annoyed by the fact that the Netherlands delegation had not managed, in San Francisco, to include an explicit reference to God as ultimate source of the purposes and pledges made into the United Nations Charter. See "Voorloopig Verslag Algemeene Beschouwingen bij de Goedkeuringswet van het Handvest der Verenigde Naties," in Handelingen der Staten-Generaal, Tweede Kamer, Bijlagen Tijdelijke Zitting 1945, Bijlage no. 7, p. 45. For the response of the Dutch Government, see "Memorie van Antwoord," in Bijlage no. 8, p. 49.

Assembly resolutions also have this effect? Do they oblige States to act in a certain way? To what extent are States actually invited or compelled to do more than pay lip service to certain values in the General Assembly, and act on them only if convenient and on a piecemeal basis? The legal nature of commitments made by States through the adoption of General Assembly resolutions is assessed below.

Resolutions of the General Assembly do not have the same status as the provisions of the United Nations Charter. Assembly resolutions do not contain constitutional or hierarchically superior law of the international community. The text of the Charter and the *travaux préparatoires* show that it was certainly not the intention to grant the Assembly such extraordinary legislative powers.[229] The Charter does not explicitly give the Assembly any legislative powers.[230] And if an Assembly resolution does not fit the description of any of the recognized sources of international law – treaty, custom, or general principle – it cannot be considered as a source of international law.

Although that is the end of the story according to the most basic legal doctrine, the reality is always much more complex than any doctrine.[231] The central question is not whether Assembly resolutions can be formally qualified as a source of international law, but whether they contain commitments by States to behave in a particular way in the future, and whether these commitments are such that they can be legitimately and justifiably relied upon.[232] In the international legal order, the consequences of the violation of a norm of international law on the one hand, and the breaking of a political pledge on the other hand, are generally not all that different. Therefore it would be artificial to assume that only legal norms have the capacity to motivate behaviour and ensure compliance with certain principles and values.[233]

The debates of the San Francisco Conference in 1945 are examined first. Three discussions are summarized. First, the discussion about whether or not the Organization should have a general purpose to promote international law. Secondly, the discussion about the role of the General Assembly in promoting the progressive development of international law, and thirdly, the discussion about the role of the Assembly in promoting the progressive development of the law of the United Nations.

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[229] See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), pp. 445-452. It is also clear that over time no custom has developed in the sense that the Assembly's lawmaking powers are recognized in practice (pp. 452-460).

[230] See also Christopher C. Joyner, "U.N. General Assembly resolutions and international law" (1981), p. 452; Oscar Schachter, "United Nations law" (1994), p. 1.

[231] See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), pp. 434. See also Alain Pellet, "La formation du droit international dans le cadre des Nations Unies" (1995), especially pp. 3-4.

[232] See also Samuel A. Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions" (1969), p. 446.

[233] See also Jorge Castaneda, "Valeur juridique des résolutions des Nations Unies" (1970), p. 220.

3.5.2 The development of international law as a purpose of the United Nations

Despite the US suggestions to authorize the Organization "to strengthen and develop the rule of law in international relations," [234] and despite China's suggestions to establish an International Law Codification Commission "to study problems of international law," "propose conventions," and "codify existing international law,"[235] the Dumbarton Oaks proposals did not include the promotion of justice and international law in their list of purposes.[236] The Dumbarton Oaks proposals focused on international peace and security. It was the belief, especially of the Soviet delegation, that "any suggestion of [adding] principles of international law as a possible provision in the future Charter seemed to be a deviation from this primary emphasis on security."[237] International law was not necessary to prevent future wars. The united power of the victors of the Second World War would deter any future outbreak of war. Robinson concluded that "the Dumbarton Oaks proposals were based on the principle of security through power, rather than of peace through law."[238]

Some States were not convinced. They suggested adding a reference to justice and/or international law to the list of purposes.[239] Ecuador proposed that the name of the new Organization be changed to "International Juridical Association," or "Juridical Community of States."[240] Egypt believed that it was the Organization's purpose to "determine, define, codify and develop the rules of international law and international morality,"[241] and also to enforce respect for these laws.[242] During the San Francisco conference many States proposed that the list of purposes should contain a reference to international law and justice.[243] Most importantly, as one of

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[234] Plan for the Establishment of an International Organization for the Maintenance of International Peace and Security, published in FRUS*, 1944, General:* Volume I, p. 616.
[235] Tentative Chinese Proposals for a General International Organization, in FRUS*, 1944, General:* Volume I, p. 722. See also Progress Report on Dumbarton Oaks Conversations – Thirty-eighth Day, *idem*, p. 864.
[236] See also Guenter Weissberg, "United Nations movements toward world law" (1975), pp. 460-463.
[237] Yuen-li Liang, "The Progressive Development of International Law and its Codification under the United Nations" (1947), p. 28. Liang was the Director of the UN Secretariat's Division on the Development and Codification of International Law. See also Robert C. Hilderbrand, *Dumbarton Oaks* (1990), p. 88.
[238] Jacob Robinson, "Metamorphosis of the United Nations" (1958), p. 563.
[239] See *e.g.*, The Amendments Submitted by Uruguay, UNCIO, vol. 3, p. 34; Guatemala, *idem*, p. 256; Brazil, *idem*, p. 243; Venezuela, *idem*, p. 224; Mexico, *idem*, p. 179; Cuba, *idem*, p. 494; Australia, *idem*, p. 543; Bolivia, *idem*, pp. 577 and 580.
[240] Amendments submitted by Ecuador, UNCIO, vol. 3, p. 397.
[241] Amendments submitted by Egypt, UNCIO, vol. 3, p. 453. See also Lebanon, *idem*, p. 473.
[242] *Idem*, p. 448.
[243] See the Third Meeting of Committee, I/1, May 9, 1945, UNCIO, vol. 6, p. 282; Fourth Meeting of Committee, I/1, May 11, 1945, UNCIO, vol. 6, p. 286; Fifth Meeting of Committee I/1, May 14, 1945, UNCIO, vol. 6, p. 291; Sixth Meeting of Committee I/1, May 14, 1945, UNCIO, vol. 6, p. 296.

the Organization's purposes, Egypt proposed to "establish the fundamental principles and rules of international law." [244] When it was suggested that international law "evolved partly through codification but largely through jurisprudence" and that it was therefore "unnecessary to imply the codification of it as one of the specific purposes of the Organization," Egypt proposed that the Assembly be mandated to achieve international cooperation in the solution of international problems of a "juridical" character.[245] This compromise proposal was also rejected.[246]

Consequently all the amendments proclaiming the promotion of justice and international law as a general purpose of the Organization were rejected. This did not mean that there were no references at all to international law in the UN Charter. The Preamble's reference to international law is very carefully phrased and proclaims a shared determination of all Member States to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." [247] Following an amendment submitted by Bolivia, Article 2(3) UN Charter obliges all States to "settle their disputes by peaceful means in such a manner that international peace, security, *and justice* are not endangered."[248] Despite objections that "justice" was too vague a term, this reference to justice was finally included in the UN Charter.[249] According

[244] Fourteenth Meeting of Committee I/1, June 7, 1945, UNCIO, vol. 6, p. 382.
[245] *Idem*.
[246] *Idem*.
[247] See Draft Preamble (as Approved by Committee I/1/A), UNCIO, vol. 6, p. 694. See also Draft Preamble to the Charter of the United Nations Proposed by the Union of South Africa, UNCIO, vol. 3, p. 475. It was Belgium that suggested referring in the Preamble to "obligations arising from treaties and other sources of international law." Thirteenth Meeting of Committee I/1, June 5, 1945, UNCIO, vol. 6, p. 367. This text was adopted and became part of the Preamble, despite the fact that the Coordination Committee apparently believed that the phrase was "intricate, complicated, and legalistic, [a phrase] which only lawyers would understand." Summary Report of Eleventh Meeting of Steering Committee, June 23, 1945, UNCIO, vol. 5, p. 307.
[248] Amendments Submitted by Bolivia, UNCIO, vol. 3, p. 582. The Dumbarton Oaks proposals lacked the reference to justice here. See Dumbarton Oaks Proposals for a General International Organization, UNCIO, vol. 3, p. 3. There were also some suggestions to refer to international law, as opposed to justice. See e.g, Amendments Submitted by Ethiopia, UNCIO, vol. 3, p. 558; Chile, *idem*, p. 283; China, *idem*, p. 25; Cuba, *idem*, p. 498.
[249] See Report of Rapporteur of Subcommittee I/1/A, to Committee I/1, UNCIO, vol. 6, p. 720, and Eleventh Meeting of Committee I/1, June 4, 1945, UNCIO, vol. 6, p. 333. See also Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, p. 458, where we read that "[t]he Committee felt, in the light of past experience of some unjust adjustments or settlements, that it is not sufficient to assure that peace and security are not endangered. It added "justice"." Mr. Manuilsky, the Coordination Committee member of the Soviet Union, once again suggested that the word "justice " was a vague term, and that it should be deleted. Summary Report of Twenty-Fourth Meeting, June 16, 1945, UNCIO, vol. 17, p. 164.

to this amendment, disputes endangering the peace have to be settled in accordance with principles of justice.[250]

Although the promotion of principles of justice and international law was not included in the list of the Organization's purposes, there is a reference to international law in Article 1. This reference obliges the Organization "to bring about by peaceful means, *and in conformity with the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[251] The Organization is therefore required to apply principles of justice and international law when maintaining peace and security. In this way it indirectly promotes international law. It is worth looking at the drafting history of this reference to law, and the consequences it has for the work of the Security Council and International Court of Justice. At an early stage in the drafting process of the Charter, it was suggested that the Organization itself should be bound by some standards of justice when settling disputes, even when maintaining the peace through enforcement measures.[252] The Netherlands, like many other States, believed that the Charter should stipulate the standards which applied to the Organization when it acted to maintain the peace.[253] The Netherlands did not believe that a reference to international law would suffice, as this would "exclude relevant considerations of another nature," and "it may also be doubted whether international law, in spite of its being subject to change and evolution, may be relied upon at all times and in all circumstances to provide a completely satisfactory standard."[254] This distrust of international law was widely shared in San Francisco, but it was difficult to find an alternative yardstick. The Netherlands wondered "whether a reference to those feelings of right and wrong, those moral principles which live in every human heart, would not be enough."[255] In response to these and similar, but less imaginative proposals, the Big Powers accepted that the Organization should be bound by some standard of "justice" when settling

[250] According to Tomuschat, the article just discussed actually introduced a general duty for all States to settle their international disputes, or at least to try and do so. See Christian Tomuschat, "Article 2(3)" (2002), p. 106. Tomuschat speaks of an "obligation of conduct," as opposed to an "obligation of result."
[251] Article 1(1) UN Charter.
[252] Tentative Chinese Proposals for a General International Organisation, August 23, 1944, in FRUS, *1944, General:* Volume I, p. 718. See also Amendments Submitted by France, UNCIO, Vol. 3, pp. 377 and 383; Belgium, *idem*, p. 336; Greece, *idem*, p. 531; Norway, *idem*, pp. 355 and p. 373; Bolivia, *idem*, p. 582; Ecuador, *idem*, p. 410; Egypt, *idem*, pp. 447 and 453; Iran, *idem*, p. 554; Mexico, *idem*, p. 178; Panama, *idem*, p. 265; Turkey, *idem*, pp. 481 and 484. For an overview of this debate, see Department of External Affairs (Canada), *Report on the United Nations conference on international organization* (1945), pp. 16-17.
[253] Amendments Submitted by the Netherlands, UNCIO, vol. 3, p. 312.
[254] *Idem*, p. 313.
[255] *Idem*.

disputes.[256] They did not believe, however, that the Organization should be bound in this way when maintaining the peace through enforcement.[257]

The rejection of all the proposals suggesting "to add after 'peace and security' words which indicate[d] that justice [was] an end that [went] hand in hand with peace and security," was explained by the Rapporteur, as follows:

> None wanted to contend the importance of "justice" as a fundamental element of the purposes of the Organization, or to contend that real and endurable peace can be based on anything other than justice. On the contrary, all affirmed the above-mentioned conception. But it was held by the subcommittee that adding "justice" after "security" brings at that juncture a notion which lacks in clarity after the clearer notion of peace and security, and would thus charge the text by welding together the two notions.[258]

The rather modest role for principles of justice and international law caused Sohn to remark that "international law thus gained an official entrance into the United Nations, but it was clear from the beginning that it should repose quietly in a corner, ready to serve when called upon, but that it was not entitled to play any leading role of its own."[259]

That may be true for enforcement measures, but when it comes to the role of the Organization, and especially its Security Council and Court of Justice, in the maintenance of peace through the facilitation of the peaceful settlement of international disputes, "justice" does have a prominent place. Although the major powers believed that parties to a dispute should first of all try to settle it themselves,[260] they also suggested that the Council "should be empowered, at any stage of a dispute [likely to endanger the peace] to recommend appropriate procedures or

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[256] Amendments Submitted by the United States, the United Kingdom, the Soviet Union and China, UNCIO, vol. 3, p. 622. Somewhat confusingly, a reference to such an obligation was added to the peace-purpose, and not to the list of principles. See Text of Chapter I, as Agreed upon by the Drafting Committee of Committee I/1, UNCIO, vol. 6, p. 684, Text of Paragraph 1, Chapter I, as Agreed upon by the Drafting Committee, UNCIO, vol. 6, p. 654. See also James B. Reston, "46 Nations Ready to Organize Peace; Only Poles Absent," in *New York Times* of April 25, 1945.

[257] The Soviet Union believed that "if it were possible for a state to appeal from the Council to the International Court of Justice […] the Council would find itself handicapped in carrying out its functions." See Seventh Meeting of Committee III/2, May 17, 1945, UNCIO, vol. 12, p. 49. The UK added that "the procedures proposed by the amendment would cause delay, at a time when prompt action by the Security Council was most desirable." See Ninth Meeting of Committee III/2, May 21, 1945, UNCIO, vol. 12, p. 65.

[258] Report of Rapporteur, Subcommittee I/1/A, to Committee I/1, June 1, 1945, UNCIO, vol. 6, p. 702.

[259] Louis B. Sohn, "The impact of the United Nations on international law" (1952), p. 105. See also the Dutch Government's "Memorie van Toelichting bij de Goedkeuringswet van het Handvest der Verenigde Naties," in Handelingen der Staten-Generaal, Tweede Kamer, Bijlagen Tijdelijke Zitting 1945, Bijlage no. 3, p. 18.

[260] See UNCIO, vol. 3, p. 13.

methods of adjustment."[261] Australia believed that if the parties could not settle their disputes, the Council would do it for them and also ensure the implementation of its settlement, acting both as judge and executioner.[262] Australia also suggested that "in general the Security Council shall avail itself to the maximum extent of the services of the Court in the settlement of disputes of a legal character, in obtaining advice on legal questions connected with other disputes, and in the ascertainment of disputed facts."[263] The Court therefore had a role as the Council's legal adviser.

Not all States were equally happy with the central role envisaged for the Council, and this merely advisory role for the Court.[264] Turkey proposed that the Council should not interfere when a dispute had been presented to a judicial body.[265] Many others also believed that the settlement of disputes was usually carried out by judges. To some extent, the major powers agreed. According to the Dumbarton Oaks Proposals, the Security Council "normally" had to refer "justiciable disputes" to the International Court of Justice.[266] In the view of Peru, the word "normally" should be replaced by "obligatorily," leaving the Council no room for discretion.[267] The Security Council could then focus on settling political disputes.[268] Venezuela believed that "an increase of the attributions of the Court as against those of the Council would appear as a strengthening of the principle of law and of the sentiment of international solidarity."[269] Venezuela therefore suggested that "a distinction should be drawn between legal controversies, which the States would bind themselves to refer to the International Court, and the other disputes which the States would refer to the Security Council, with the express and important reservation that, in case of failure to agree, the Court should determine the nature of the dispute."[270]

Other States were not so enthusiastic about this division of labour. Brazil proposed that "non-justiciable disputes," or political disputes, be referred to a Court of Arbitration, and not to the Council.[271] Costa Rica believed that "[s]ome thought might perhaps be given to the possibility of there being submitted to [the International Court] not only questions of a juridical nature but all questions; even

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[261] *Idem*.
[262] Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia, UNCIO, vol. 3, p. 551.
[263] *Idem*.
[264] Amendments and Observations on the Dumbarton Oaks Proposals, Submitted by the Norwegian Delegation, May 3, 1945, UNCIO, vol. 3, p. 370. Norway also suggested an advisory role for the Court.
[265] Turkish Amendments, UNCIO, vol. 3, p. 482. See also p. 485.
[266] UNCIO, vol. 3, p. 14.
[267] Motions of the Peruvian Delegation on the Dumbarton Oaks Proposals, UNCIO, vol. 3, p. 597.
[268] See also the Bolivian Amendments, UNCIO, vol. 3, p. 584.
[269] Venezuelan Amendments, UNCIO, vol. 3, p. 208.
[270] *Idem*, p. 210.
[271] Brazilian Amendments, UNCIO, vol. 3, p. 233. This was also the suggestion of Uruguay, UNCIO, vol. 3, p. 47.

those of a political character, that might affect the general security or peace."[272] Uruguay strongly opposed the distinction between justiciable and non-justiciable – or "legal" and "political" – disputes, and also believed that all international disputes should be decided by the Court:

> [Uruguay] thinks that it should be established that any difference, opposition or conflict between nations, of any character whatever, ought obligatorily to be submitted to the International Court of Justice, if it should not first have been settled by good offices or arbitral procedure. The thesis is based on the assurance that all international differences are matter for a decision by law, and on the fear that the distinction between legal disputes and political disputes, and the exclusion of the latter from the competence of the International Court of Justice, could reinstate intervention by force in the conflicts between peoples.[273]

Similarly, Paraguay believed that if States failed to settle any dispute through other means, they were obliged to go to the International Court of Justice.[274]

For the Court to play such a prominent role, it was necessary that all States recognized its compulsory jurisdiction in all future international disputes.[275] Belgium proposed that

> Members of the Organization should recognize the obligatory jurisdiction of the Permanent Court of International Justice as regards any question of law for which they have not made use of another method of peaceful settlement: they should acknowledge themselves bound by the decisions of the Court.[276]

In 1946, not all States were ready to accept the Court's compulsory jurisdiction. Therefore it was agreed that the States could "at any time [after 1945] declare that they recognize[d] as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court."[277]

What could the role of the Council be, if the Court were granted such a prominent place in the settlement of international disputes? Perhaps the Council

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[272] Comments of the Government of Cost Rica, May 4, 1945, UNCIO, vol. 3, p. 275.
[273] Uruguayan Amendments, UNCIO, vol. 3, p. 29.
[274] See Paraguayan Amendments, UNCIO, vol. 3, p. 346.
[275] It is important to emphasize that the Council can only get involved in the settling of an international dispute when that particular dispute threatens international peace and security. See Report of Rapporteur of Subcommittee I/1/A, to Committee I/1, UNCIO, vol. 6, p. 720, and positive response by Czechoslovakia (UNCIO, vol. 3, p. 468).
[276] Suggestions of the Belgian Government, UNCIO, vol. 3, p. 334. See also *e.g.*, Guatemala, *idem*, pp. 254-255; Netherlands, *idem*, p. 321; Paraguay, *idem*, p. 346.
[277] Article 36(2), Statute of the International Court of Justice (annexed to the UN Charter). In 2011, 66 States have accepted the Court's compulsory jurisdiction.

should act not so much as a judge – that would be a task for the Court – but rather as an enforcer of the law. This is what Venezuela suggested:

> The ideal […] would be to entrust the solution of international controversies to the International Court or an independent arbitration agency, and entrust to the Council the mission of executing such decisions and of imposing on any States in conflict the intervention of the agency mentioned.[278]

According to the Dominican Republic, a UN army, led by the Security Council, could act rather like a global enforcer of the rule of law.[279] Egypt underlined the need for such an enforcer. It pointed out that "[t]he weakness of International Law was that, contrary to all other branches of Law, its rules could not be enforced."[280] This situation would change with the creation of the United Nations:

> Now, finally, military power is put at the disposal of a World Organization which is the latest expression of the Law of Nations, and the climax of a long process of international thought. It is more than ever necessary to determine and define these rules of International Law, now that they are being given that essential element of authority which hitherto they have lacked.[281]

As these discussions show, the role of the Organization, and especially that of the Court and Security Council, was to promote a "just" settlement of any dispute threatening the peace. In this sense, the idea of a "just peace" achieved through a procedure which was itself considered as "just" was defined very precisely. At the same time, these references to "justice" do not mean that the development of international law can be considered to be included in the general list of purposes of the Organization. In fact, the work of the Security Council and of the International Court of Justice only promotes and further develops principles of justice and international law indirectly.[282] Their work cannot be qualified as legislation, drawn up in the name of the international community as a whole, or as a direct contribution to the global discussion about values.

The explanation for this modest role of principles of justice and international law is that there was little faith in public international law in 1945. Perhaps, as a United States delegate commented, the world was "fed up" with international law.[283] The reason for establishing the United Nations was to bring to

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[278] Venezuelan Amendments, UNCIO, vol. 3, p. 208 (see also p. 209).
[279] Amendments submitted by the Dominican Republic, UNCIO, vol. 3, p. 568.
[280] Suggestions of the Egyptian Government, UNCIO, vol. 3, p. 448.
[281] *Idem*.
[282] See also section 3.6 of Chapter III, below.
[283] See Minutes of Fifth Meeting of the United States Delegation, April 9, 1945, in FRUS*, 1945, General:* Volume I, p. 221. The damaged reputation of international law had not affected that of "justice." When American President Harry Truman opened the San Francisco Conference on 25 April,

life a "new" international law, a United Nations legal order to replace the traditional order based on traditional international law.[284] This also explains why the discussions in San Francisco stressed that the reference to treaties and other traditional sources of international law in the Preamble should not be interpreted as a "negation of healthy international evolution" or "the crystallization or the freezing of the international *status quo*."[285]

3.5.3 The development of international law as a purpose of the General Assembly

As the promotion of international law was not included in the list of purposes of the Dumbarton Oaks proposals, it cannot come as a surprise that there was nothing about the role of the Assembly in promoting the development of international law in those proposals.[286] Again, certain States wanted this to be changed, so that the Assembly could be more than a debating society, and truly become a global legislator or a true "parliament of the world."[287]

In its amendments China suggested that "[t]he Assembly should be responsible for initiating studies and making recommendations with respect to the development and revision of the rules and principles of international law."[288]

1945, he focused his speech on promoting justice and saw the achievement of a "just and lasting peace" as the ultimate aim of the new Organization. See Verbatim Minutes of Opening Session, April 25, 1945, UNCIO, vol. 1, pp. 111-113. See also James B. Reston, "Justice Put First," in *New York Times* of April 26, 1945. As Wolfrum explained, the reference to justice was really a reference to natural law type principles, while the reference to international law referred primarily to treaty law. See Rüdiger Wolfrum, "Preamble" (2002), p. 36.

[284] See also Witenberg, "New Set of Rules Acceptable to All Nations is Proposed," in *New York Times* of May 13, 1945. One of the most prominent international lawyers in the 1940s even considered the UN Charter to be inconsistent with international law. See Hans Kelsen, *The Law of the United Nations* (1950), p. 110, cited in Bardo Fassbender, "The United Nations Charter as Constitution" (1998), p. 573. This idea that the UN Charter introduced a "new" international law was also embraced by the President of the ICJ. See p. 13 of the Dissenting Opinion by M. Alvarez, in the Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of March 3rd, 1950. Alvarez later elaborated on this idea of a "new international law," for example on pp. 175-176, Dissenting Opinion of Mr. Alvarez, in International Status of South-West Africa, Advisory Opinion of July 11th, 1950; pp. 132-133, Dissenting Opinion of Judge Alvarez, in the Anglo-Iranian Oil Co. Case (United Kingdom v. Iran), Preliminary Objection, Judgment of July 22nd, 1952.

[285] Report of Rapporteur, Subcommittee I/1/A, Section 3, to Committee I/1, June 5, 1945, UNCIO, vol. 6, p. 359. See also Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, p. 451 and p. 461.

[286] Dumbarton Oaks Proposals for a General International Organization, UNCIO, vol. 3, p. 6.

[287] Porter, "Smaller Countries Rush Amendments," in *New York Times* of May 5, 1945.

[288] Chinese Proposals on Dumbarton Oaks Proposals, UNCIO, vol. 3, p. 25. See also Yuen-li Liang, "The General Assembly and the Progressive Development and Codification of International Law" (1948), p. 66.

Liberia believed that "the General Assembly [should] also initiate studies which should lead to the Codification of International Law." [289] Similarly, in San Francisco, the Egyptian delegate believed that "a new channel or agency [was] needed to accomplish [the development and clarification of international law], either through the General Assembly or through the Economic and Social Council."[290]

Not all States believed this to be a task for the General Assembly itself. Iran, for example, suggested that "[a] Committee of qualified jurists should be established to draw up a code of International Law." [291] Similarly, Lebanon proposed "to create a permanent Committee of Jurists whose function [should] be the periodic codification or consolidation of existing principles of international law together with the modifications thereof which shall be deemed necessary from time to time."[292]

Some States went much further than proposals to grant the Assembly, or some special committee, the right to initiate studies on international law. They essentially suggested that the General Assembly should become a global legislator. The most far-reaching proposal came from the Philippines. It suggested the following law-making procedure:

> The General Assembly should be vested with the legislative authority to enact rules of international law which should become effective and binding upon the members of the Organization after such rules have been approved by a majority vote of the Security Council. Should the Security Council fail to act on any of such rules within a period of thirty days after submission thereof to the Security Council, the same should become effective and binding as if approved by the Security Council. In the exercise of this legislative authority the General Assembly may codify the existing rules of international law with such changes as the Assembly may deem proper.[293]

This was a bit too ambitious for most fellow delegates. Stettinius, the leader of the US delegation in San Francisco, later wrote that, "[i]n the present state […] of world opinion, an international legislative body is out of the question, since several

[289] Memorandum of the Liberian Government on the Dumbarton Oaks Proposals, UNCIO, vol. 3, p. 465.
[290] Third Plenary Session, April 28, 1945, UNCIO, vol. 1, p. 6.
[291] Amendments Presented by the Delegation of Iran to the Dumbarton Oaks Proposals, UNCIO, vol. 3, p. 556. It is not clear what the relationship is between this committee and the General Assembly. The amendment was withdrawn, see Sixteenth Meeting of Committee III/3, May 30, 1945, UNCIO, vol. 12, pp. 400-401.
[292] Lebanon's Suggestions, UNCIO, vol. 3, p. 473.
[293] Proposed Amendments to the Dumbarton Oaks Proposals Submitted by the Philippine Delegation, UNCIO, vol. 3, pp. 536-537.

nations are not willing to sacrifice their sovereignty to the extent of permitting an international legislature to enact laws binding upon them or on their peoples."[294]

Belgium suggested that "[t]he General Assembly may submit general conventions for the consideration of States which form part of the United Nations Organization […] with a view to securing their approval in accordance with the appropriate constitutional procedure."[295] That suggestion was not controversial. The second part of the Belgian suggestion, however, was more in line with that of the Philippines. Belgium proposed:

> If the General Assembly is of the opinion that the obligations involved in any draft general convention are mere corollaries of principles it already recognizes as compulsory, or that the general observance of these obligations is necessary for the maintenance of international peace and security, it may decide that the convention in question will come into force for all States Members of the Organization and, should occasion arise, for third-party States, as soon as it has been ratified under the conditions contemplated for the coming into force of amendments to the Charter.[296]

Ecuador proposed the following "law-making procedure":

> The power to establish or progressively amend the principles and rules of law which are to govern the relations between the States lies with the General Assembly, through a two-third majority of its members. The instruments embodying those principles and rules shall only come into compulsory effect for all members of the Organization when they are ratified by a number equivalent to two-thirds thereof.[297]

Ecuador therefore suggested a two-stage process. First, the Assembly would adopt a certain treaty text with a large majority. Secondly, the States could decide on an individual basis whether to ratify these texts. The radical element of Ecuador's proposal was that a majority could impose a treaty on a reluctant minority. Ecuador later explained that, in its view, the General Assembly, being the "organ directly representing all the States composing it," should be "enabled to lay down the principles and rules of international law or to amend them progressively, thus becoming in a way an international legislative power."[298] Although this procedure was never explicitly adopted in the text of the UN Charter, most of the treaties have

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[294] Edward R. Stettinius, *Charter of the United Nations* (1945), p. 54.
[295] Dumbarton Oaks Proposals concerning the Establishment of a General International Organization: Amendments Submitted by the Belgian Delegation, UNCIO, vol. 3, p. 339 (see pp. 339-340 for the grounds on which this suggestion was based).
[296] Idem.
[297] Delegation of Ecuador to the United Nations Conference on International Organization, UNCIO, vol. 3, p. 427. See also pp. 403-405.
[298] Fifth Plenary Session, April 30, 1945, UNCIO, vol. 1, p. 369.

come into existence with the help of Ecuador's two-stage process.[299] There is one marked difference between Ecuador's ideas and the reality: no State can be bound by any treaty against its consent.

The only thing that the sponsors accepted before the start of the San Francisco Conference, was China's more modest proposal, *viz.* that the Assembly could initiate studies and make recommendations for "the encouragement of the development of international law."[300] The other amendments, including the Belgian proposal, were not dropped completely, but reappeared in San Francisco. The relevant Subcommittee compiled a list of questions which were later used as the basis for the discussion of the Belgian amendment and all related amendments.[301] The San Francisco proceedings only provide the answers to some of those questions, and not the reasons or justifications for those answers. A list of the questions that were answered follows below:

> Q: Should the Assembly be empowered to initiate studies and make recommendations for the *codification* of international law?
> A: Yes.
> Q: Should the Assembly be empowered to initiate studies and make recommendations for promoting the *revision* of the rules and principles of international law?
> A: Yes.
> Q: Should the Assembly be authorized to enact rules of international law which should become binding upon members after such rules shall have been approved by the Security Council?
> A: No. [302]

Thus the Belgian suggestion was clearly and explicitly rejected. Sloan concluded from this that it "was clearly decided [in San Francisco] that the General Assembly should not be given the function of international legislation."[303]

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[299] This quasi-legislative role of the Assembly in codifying global norms was also applauded in scholarship. See *e.g.*, p. 198, Borris M. Komar, "A Code of World Law Now" (1966); Oscar Schachter, "International law in theory and practice" (1982), pp. 111-112; and Grigory I. Tunkin, "International law in the international system" (1975), pp. 144-146.

[300] Third Meeting of Committee II/2, May 9, 1945, UNCIO, vol. 9, pp. 21-22. It was thus due to the insistence of the Chinese that even the most modest proposal about international law, initially also supported by the USA, made it into the Charter. See Louis B. Sohn, "The impact of the United Nations on international law" (1952), p. 105.

[301] See also Ministerie van Buitenlandse Zaken (Netherlands), *Het ontstaan der Verenigde Naties* (1950), pp. 47-48.

[302] Second Report of Subcommittee A, UNCIO, vol. 9, pp. 346-347. The answers to these questions were given during the Tenth Meeting of Committee II/2, May 21, 1945, UNCIO, vol. 9, pp. 69-70. See also Yuen-li Liang, "The General Assembly and the Progressive Development and Codification of International Law" (1948), p. 67.

There was a discussion about what the correct word would be to describe the Assembly's role in promoting international law. Should the Assembly engage in the "codification," "development" or "revision" of the norms of international law?[304] The difference between the "development" and "revision" of international law was explained as follows: development meant "adding to existing rules," whilst revision meant "modifying" existing rules. The term "progressive development" was suggested as a compromise, as this term "would establish a nice balance between stability and change, whereas 'revision' would lay too much emphasis on change."[305] The Committee adopted this latter view, and chose to use "progressive development" and "codification."

The word "revision" was not used in the UN Charter.[306] The Assembly is authorized to "initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international law and its codification."[307] To assist it in its work, the Assembly established the International Law Commission (ILC).[308] To ensure that the Commission was as representative of the international community as the Assembly itself, the Assembly proclaimed that the ILC should be "composed of persons of recognized competence in international law and representing as a whole the chief forms of civilization and the basic legal systems of the world."[309] Therefore as it was the ILC which was granted the prime task of promoting the "progressive development" and "codification" of international law on behalf of the Assembly, it does come as a surprise that this Commission has

[303] See also Blaine Sloan, "The binding force of a "recommendation" of the General Assembly of the United Nations" (1948), p. 6.

[304] About the discussion, see also the Seventh Meeting of Subcommittee B of Committee II/2, June 5, 1945, UNCIO, vol. 9, pp. 423-424; and Third Report of Subcommittee II/2/B, UNCIO, vol. 9, pp. 419-420.

[305] Twenty-First Meeting of Committee II/2, June 7, 1945, UNCIO, vol. 9, pp. 177-178.

[306] France later stressed the importance of the fact that "revision" was "brushed aside." According to France: "If the Assembly were competent to revise treaties at any time, you might have agitation for revision of this or that treaty, and there would never be any stability in the treaties." In response, Egypt remarked that it was exactly the opposite: "if you allow some sort of readjustment by peaceful means, you are really respecting the spirit of this Charter." Fourth Meeting of Commission II, June 21, 1945, UNCIO, vol. 8, p. 202 and p. 212, respectively.

[307] Article 13(1)(a), UN Charter. See also Texts Passed through May 17, 1945, UNCIO, vol. 18, p. 9; Twelfth Meeting of Committee II/3, May 25, 1945, UNCIO, vol. 10, p. 101; Draft Report of the Rapporteur of Committee II/3, UNCIO, vol. 10, p. 233, and p. 239; Provisions Text of Report of the Rapporteur of Committee II/2, UNCIO, vol. 9, p. 204; Report of the Rapporteur of Committee II/2, UNCIO, vol. 9, p. 249

[308] Establishment of an International Law Commission, General Assembly resolution 174(II), adopted 21 November 1947.

[309] Article 8, Statute of the International Law Commission, annexed to General Assembly resolution 174(II).

been struggling with the difference between the two since its very establishment. [310] In an early report the Committee responsible for establishing the ILC described "progressive development" as "the drafting of a convention on a subject which has not yet been regulated by international law or in regard to which the law has not yet been highly developed or formulated in the practice of States." [311] "Codification," on the other hand, was described as "the more precise formulation and systematization of the law in areas where there has been extensive State practice, precedent and doctrine." [312] Even in 1947 it was understood that the two tasks were not "mutually exclusive," in the sense that the ILC had to do both things simultaneously when working on any topic of international law.[313] These views were later reflected in the ILC's constitution.[314]

The UN Charter's *travaux* and its immediate follow-up show that the Assembly's mandate explicitly included guiding the evolution or progressive development of international law. The delegate from Haiti stressed the importance of promoting this evolution. In his view, "it [did] not seem superfluous to us to add here that international law cannot remain static," rather that "it must be capable of adapting itself to the changing conditions of life of the peoples of the world."[315] The Assembly was intended to play the leading role in this development. China, the most important supporter of the quasi-legislative role of the Assembly, also applauded its adoption, calling it of "very great significance to our future."[316] The explanation for China's enthusiasm was interesting. It believed that "while the maintenance of international peace and security [was] a very important task entrusted to the Security Council, it, after all, [could] only constitute an incident or an accident in the course of international life, whereas the normal course of international life [was] bound to be everyday relations," and "if we desire to promote those relations, there can be no better basis than the promotion of respect

[310] For an early article, see Yuen-li Liang, "The General Assembly and the Progressive Development and Codification of International Law" (1948). For a more recent example, see Alain Pellet, "Between Codification and Progressive Development of the Law" (2004).
[311] *Report of the Committee on the Progressive Development of International Law and its Codification on the Methods for Encouraging the Progressive Development of International Law and its Eventual Codification* (1947), para. 7 (p. 20).
[312] *Idem*.
[313] *Idem*. See also para. 10, where the Committee acknowledged that "in any work of codification, the codifier inevitably has to fill in gaps and amend the law in the light of new developments," and that sounds more like progressive development.
[314] Article 15, Statute of the International Law Commission, annexed to General Assembly resolution 174(II). See also Guenter Weissberg, "United Nations movements toward world law" (1975), pp. 461-470.
[315] Sixth Plenary Session, May 1, 1945, UNCIO, vol. 1, p. 443.
[316] Fourth Meeting of Commission II, June 21, 1945, UNCIO, vol. 8, p. 204.

for international law and for its development. It is only thus that we can hope to develop our relations and place them always under the rule of law."[317]

3.5.4 The development of UN norms and values as a purpose of the General Assembly

So far the discussion has focused on the powers of the Assembly to affect the evolution of international law in general. The principal aim of this study is to look at the role of the General Assembly in the evolution, not of international law in general, but of the norms and values of the UN Charter, especially in Articles 1, 2, 55 and 56.

In San Francisco, Belgium proposed that "the General Assembly [should have] sovereign competence to interpret the provisions of the Charter."[318] After an interesting debate about this, it was agreed that each organ should be entitled to interpret its own part of the Charter:

> In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers. It will be manifested in the functioning of such a body as the General Assembly, the Security Council, or the International Court of Justice. Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle.[319]

This meant that the General Assembly, the mandate of which covered all principles and purposes, was the main organ to interpret the UN Charter as a whole. Most parts of the Assembly's mandate were also partly included in the mandates of the Councils, *i.e.* the Trusteeship Council, the Economic and Social Council, and/or the Security Council. Thus the drafters correctly foresaw potential disputes among these principal organs relating to the correct interpretation of certain provisions.[320] Some suggestions were given for means to settle disputes between UN organs, but the idea was basically that all sorts of dispute settlement mechanisms were available to solve disputes about interpretation .[321]

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[317] *Idem*.
[318] Supplement to Annex 2 to Report by the Officers of the Committee on Grouping of Suggested Modifications to Dumbarton Oaks Proposals, UNCIO, vol. 9, p. 319. See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 504.
[319] Report of Special Subcommittee of Committee IV/2 on the Interpretation of the Charter, UNCIO, vol. 13, p. 831.
[320] *Idem*, pp. 831-832.
[321] *Idem*.

Another important issue was the question of dissenters. What would happen if the Assembly decided, with a large majority, to interpret the UN Charter in a particular way, but a small group of States disagreed?[322] To say that General Assembly resolutions are legally non-binding is beside the point, because the binding character of the norm derives from the UN Charter itself. The matter at issue is the extent to which the Assembly's *interpretation* of the norm as contained in the Charter is binding. The Assembly was explicitly granted the authority to interpret the document by the drafters of the UN Charter. So what should be done about the dissenting minority? This is what the drafters had to say:

> It is to be understood, of course, that if an interpretation made by any organ of the Organization [such as the General Assembly] is not generally acceptable it will be without binding force. In such circumstances, or in cases where it is desired to establish an authoritative interpretation as a precedent for the future, it may be necessary to embody the interpretation in an amendment to the Charter. This may always be accomplished by recourse to the procedure provided for amendment.[323]

The aim is to come up with an interpretation of the Charter which is "generally acceptable," and the most suitable organ to do so is the General Assembly, assisted by its subsidiary organs, such as the International Law Commission.[324] The remark quoted above is rather vague, but does suggest that if the Assembly's interpretation is not accepted by consensus, then the best way to overrule the dissenting minority is to follow the formal route of UN Charter amendment. This means, first of all, that two thirds of the members of the General Assembly have to vote in favour of the interpretative declaration. Secondly, two thirds of the Members of the United Nations, including all the permanent members of the Security Council, have to ratify the interpretative declaration as if it were a separate multilateral treaty. This formal process is so cumbersome that it has never been used as a means to interpret the Charter.[325] The Subcommittee only suggested this cumbersome procedure to deal effectively with a very stubborn minority that has to be bound to a particular interpretation of the Charter against its own will. Such a situation was considered to be rare. In practice, however, it has often happened that a minority of States

[322] See also Oscar Schachter, "International law in theory and practice" (1982), pp. 118-123.
[323] Report of Special Subcommittee of Committee IV/2 on the Interpretation of the Charter, UNCIO, vol. 13, p. 832.
[324] Oscar Schachter, "United Nations law" (1994), p. 7.
[325] The only amendments ever adopted expanded the membership of the Security Council (once) and ECOSOC (twice). See Question of equitable representation on the Security Council and the Economic and Social Council, General Assembly resolution 1991(XVIII), adopted 17 December 1963; Enlargement of the Economic and Social Council, General Assembly resolution 2847(XXVI), adopted 20 December 1971; and Amendment to Article 109 of the Charter of the United Nations, General Assembly resolution 2101(XX), adopted 20 December 1965. The last amendment was needed to make Article 109 consistent with the amended Articles.

objected to a particular resolution adopted by a majority in the Assembly, challenging that resolution's "constitutionality." No supranational organ has the authority to overrule such dissenters.[326] The International Court of Justice later noted that such dissent was of particular importance if the dissenters had a specific interest in the norms being discussed.[327] The Court's ruling was about the prohibition of nuclear weapons, but the same could be said any other topic. States with the relevant resources to carry out the norm – or violate it – have a special interest in the recognition – or rejection – of that norm, and this special interest ought to be recognized and respected.[328]

This discussion of the San Francisco proceedings leads to the conclusion that the Assembly's powers to promote the progressive development of international law are restricted to recommending treaty texts and interpreting the Charter in a binding way. The San Francisco proceedings do not explain whether the Assembly could interpret the Charter merely on its own behalf, or also on behalf of all Member States, binding them in this way. In 1945 nothing was said about the role of Assembly resolutions in the development of customary international law. Therefore a few questions remained to be answered. Subsequent practice and discussions in the UN about the legal relevance of Assembly resolutions are examined below, with the aim of finding out whether the conclusions reached in San Francisco are still valid, and to see if some of the open questions have been answered since that time.

3.5.5 Debates during the drafting of the Friendly Relations Declaration

The issue of the legal relevance of Assembly resolutions, especially those interpreting the provisions in the UN Charter, was most intensely discussed in the 1960s when the Assembly busied itself drafting the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations ("Friendly Relations Declaration"). According to Schachter, the resolution was "the international

[326] See Benedetto Conforti, "Le rôle de l'accord dans le système des Nations Unies" (1974), especially pp. 220-235.

[327] Legality of the Threat or Use of Nuclear Weapons, paras. 70-74, ICJ Advisory Opinion of 8 July 1996. Before the Court reached its decision, Henkin already noted the importance of the fact that the US and other nuclear powers (except the Soviet Union, which did vote in favour) never subscribed to these resolutions. See p. 180, 182 of Louis Henkin, *How Nations Behave: Law and Foreign Policy* (1979).

[328] Schachter thus rightly noted that "resolutions [adopted] by majorities on economic matters are likely to remain "paper" declarations without much effect unless genuinely accepted by states with the requisite resources to carry them out." Oscar Schachter, "United Nations law" (1994), p. 4.

lawyer's favourite example of an authoritative UN resolution."[329] It authoritatively interpreted most of the principles in the United Nations Charter.[330]

Drafting the Declaration took almost ten years. It took so long because the drafters wanted a consensus on every single paragraph in the declaration, and ultimately they achieved this. Therefore they avoided the problem of dissenters that was discussed above. A Special Committee was established by the General Assembly in 1963. It was mandated to look at four essential principles of the United Nations Charter, chosen by the Assembly itself. These were :

1. The prohibition on the use of force;
2. The principle that States should settle their disputes peacefully,
3. The non-intervention principle, and
4. The principle of sovereign equality of States.[331]

During the second session of the Committee, three more principles were added to the list: (5) the duty to cooperate, (6) the principle of good faith, and (7) the principle of self-determination of peoples.[332] The global values identified in this study were therefore well represented, except for human dignity. [333] The lack of references to this last value led to serious criticism by the Dutch delegation. Houben, a member of that delegation, believed that the Committee was more concerned with "preserving a country's own […] system as a closed unit" than with "joint efforts for the promotion of human dignity and the freedom and well-being of mankind."[334]

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[329] *Idem*, p. 3.

[330] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), adopted 24 October 1970. See also Sir Ian Sinclair, "The Significance of the Friendly Relations Declaration" (1994). Sinclair was the UK representative in the Special Committee that drafted the Friendly Relations Declaration.

[331] Consideration of principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, General Assembly resolution 1966 (XVIII), adopted 16 December 1963. For the list of principles, see General Assembly resolution 1815 (XVII), adopted 18 December 1962.

[332] *Idem*.

[333] See also Dominic McGoldrick, "The principle of non-intervention: human rights" (1994), p. 91, who described the Declaration as "rather conservative and cautious" because of its sparse reference to human rights. The same conclusion, this time on the sparse references to the environment, was reached in Alan Boyle, "The principle of co-operation" (1994), pp. 120-121. Generally, see Robert Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations" (1971), p. 735.

[334] Piet-Hein Houben, "Principles of International Law Concerning Friendly Relations and Co-Operation Among States" (1967), pp. 731-732. Houben pointed out that the idea of peaceful co-existence was essentially a communist idea, embraced by the "new" States because it emphasized self-determination and independence of peoples and States. See also Special Committee, Sixth Report, para. 166.

The Assembly explicitly asked States to nominate "jurists" as representatives in the Committee. It is not clear what exactly was meant by the word "jurists." It certainly did not result in only academic experts on international law taking a seat in the Committee. Because of its political importance, the Assembly gave the task of drafting the declaration to its own Sixth Committee, which was composed of State representatives. The International Law Commission, which consisted of independent legal experts, was ignored.[335] As McWhinney pointed out, if the Assembly meant academics when it referred to "jurists," it must have been disappointed to see that, at least during the first session, "academic lawyers were a rarity in the final composition of the various national delegations."[336] At the same time, some of the delegates were – or later became – renowned international law scholars. Michel Virally, Gaetano Arangio-Ruiz, Hisashi Owada, Willem Riphagen, Hans Blix and Mohammed el-Baradei all participated in the work of the Committee.

The legal relevance of the declaration was discussed even before the establishment of the Special Committee. The Sixth Committee of the General Assembly suggested that a declaration annexed to a General Assembly resolution would not be binding as a multilateral treaty. However, it would be more than a mere recommendation. It could be considered as the *opinio juris* of the international community as a whole, binding all States whose practice was consistent with the text of the declaration.[337] Alternatively, the Sixth Committee suggested that the declaration could be seen as an authoritative interpretation of the norms of the UN Charter.[338]

Many of the delegates in the Special Committee understood their task to be that of a legislator. Therefore they set out to draft general rules, applicable in as many concrete situations as possible in the future. In the Committee's first report the declaration was envisaged to be like other declarations interpreting parts of the Charter, such as the Universal Declaration of Human Rights, and the Declaration on the Granting of Independence to Colonial Peoples, which were all recognized as having some law-making power.[339] Like those previous declarations, the new declaration should not repeat what was already in the Charter, but should reflect the

[335] See Report of the Sixth Committee, UNDoc, A/5671, adopted 13 December 1963, para. 110.
[336] Edward McWhinney, "The 'New' Countries and the 'New' International Law" (1966), p. 4.
[337] Report of the Sixth Committee, UNDoc, A/5671, adopted 13 December 1963, para. 38. See Rosalyn Higgins, *The development of international law through the political organs of the United Nations* (1963), especially pp. 2, 4-5. This book was published in 1963, and it has clearly had an influence on the debates at the Committee. According to Grigory I. Tunkin, "International law in the international system" (1975), pp. 146-149, the General Assembly resolution should be seen as the first expression of a new norm, but not as *opinio juris* or as part of State practice; it was thus only the first step in the formation of customary law.
[338] *Idem*, para. 46.
[339] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/5746, adopted 16 November 1964 ("First Report"), para. 21.

evolution in international law since the adoption of the constitutive document. It should therefore give new meaning to the UN Charter's principles.[340] At the same time, the delegates realized that the Committee, and the Assembly itself, formally lacked legislating power.[341] It was the generally shared belief that Assembly resolutions, if adopted by a large majority or by consensus,[342] could be seen as being binding on all States, not as independent sources of international law, but as authentic interpretations of the UN Charter. In this way, they could contribute to the law-making process.[343] Some delegates objected to this view. In their opinion, General Assembly resolutions were meant to be political statements and could not be automatically interpreted as law-making resolutions, or as authoritative interpretations of the Charter.[344]

An issue that also came up was whether the General Assembly itself was bound by its previous resolutions. Interestingly, when discussing the principle of non-intervention, the Committee was faced with the question to what extent it was bound by the Declaration on the Inadmissibility of Intervention, adopted earlier by the General Assembly.[345] The sponsors of that resolution, which was not adopted by consensus but with a majority vote, believed that the Assembly could not "undo" a resolution adopted only a few years before. In the end, the Special Committee's definition of the principle of non-intervention in the Friendly Relations Declaration was almost identical to that contained in the Declaration on the Inadmissibility of Intervention, which indicates that the Committee did believe that the Assembly was "bound" to follow its own previous resolutions.[346]

In their final comments submitted after the adoption of the Friendly Relations Declaration by the Special Committee, many States stressed the legal importance of what was soon to become an Assembly declaration. For example, Argentina believed that the Declaration ought to be regarded as "the most up-to-date expression of the scope and interpretation of the Charter of the United Nations, the basis of international law as it was understood and practiced by the civilized

[340] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/7326, adopted 30 September 1968 ("Fourth Report"), para. 20.
[341] See *e.g.*, Special Committee, Fourth Report, para. 34.
[342] The non-intervention declaration was adopted by a large majority (almost all States voted in favour, one State abstained from voting), but it was, strictly speaking, not adopted by consensus. Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6799 ("Third Report"), paras. 323.
[343] Special Committee, Third Report, para. 324.
[344] *Idem*, paras. 328-329.
[345] *Idem*, paras. 321-331.
[346] A similar debate took place about the legal force of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV), adopted 4 December 1960. See Special Committee, Fourth Report, para. 147.

nations of the world today."[347] Rosenstock, the representative of the USA in the Special Committee, referred to the Declaration as "the most important single statement representing what the Members of the United Nations agree to be the law of the Charter."[348] It was generally believed that the legal nature of the declaration derived from the fact that it was an authoritative interpretation of the norms of the UN Charter, as they had evolved with the changes in the international community, but was not an amendment of these norms.[349] Therefore their authority was based on a combination of two arguments: first, the Declaration constituted an interpretation of the UN Charter, and secondly, it was a reflection of customary international law. The first argument was generally considered to be more convincing. The customary law argument only served to strengthen the first argument.

Not all Assembly resolutions were considered to authoritative interpretations of provisions in the UN Charter. In his lectures delivered at The Hague Academy, Sahović, the delegate from Yugoslavia in the Special Committee, explained what distinguished the Friendly Relations Declaration from ordinary resolutions. He noted three aspects which generally determined the importance that should be attached to declarations adopted by the General Assembly.[350] The first was the historical aspect, the process by which the declaration had been drawn up and the political importance of this process.[351] Secondly, Sahović referred to the aspect of legal technique, by which he meant the importance of the particular methodology adopted by the drafters – research into the Charter principles and their evolution – and the ultimate aim of these drafters. It was important to know whether the declaration was *meant* to be an interpretation of existing norms of international law, or whether it was meant to provide suggestions for norms to be adopted in the future.[352] The third and final aspect mentioned by Sahović was the procedural

[347] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/8018, adopted 1 May 1970 ("Sixth Report"), paras. 102 and 109. Argentina even referred to the principles as *jus cogens*, but this was later denied by the USA (para. 254).

[348] Robert Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations" (1971), p. 714. Rosenstock emphasized that it was not a complete statement, since it only discussed a number of the UN Charter's principles, not all of them.

[349] See especially the remarks by the Romanian delegate, at Special Committee, Sixth Report, para. 119, Yougoslavia, at para. 162, and India (para. 213). See also remarks by the Italian delegate, at para. 142, and Australia, at para. 199, and USA, at para. 254.

[350] Milan Sahovic, "Codification des principes du droit international des relations amicales et de la coopération entre les Etats" (1974), p. 250. Compare with C. Don Johnson, "Toward self-determination" (1973), pp. 154-156, who distinguished four factors: intention of the drafters, consensus, legal foundation, and realistic acceptability.

[351] *Idem*, pp. 255-284. In discussing the history, Sahović mainly summarized the drafting history of the declaration.

[352] *Idem*, pp. 285-299. Bleicher made an interesting proposal. He suggested that the Assembly should explicitly state if a certain resolution was intended to reflect customary international law, or, one might

aspect.[353] This referred simply to the formal legal character of the resolution. In Sahović's view, there was general agreement that the principles contained in the Friendly Relations Declaration were legally binding because they constituted authoritative interpretations of some fundamental principles contained in the UN Charter. However, this was only the case for a limited number of General Assembly resolutions.[354]

A fourth aspect could be added to these three: the importance of consensus. Many delegates noted that for the first time in the history of the United Nations, the developing nations had been given a chance to express themselves on the most fundamental principles on which the work of the Organization was based. Their participation in the drafting process did not happen automatically. It was only after the first session of the Special Committee that the Assembly added a number of developing nations to the Committee, to provide a better guarantee of proper geographical representation, or inclusiveness.[355] This inclusiveness was universally applauded. Cameroon, for example, remarked that "the Committee's work had given the emergent nations an opportunity to play a part in the progressive development of international law, and the problems and aspirations of those countries were amply reflected in the text."[356] Similarly, Rosenstock remarked that one of the reasons for making the declaration in the first place was "a felt need on the part of some of those who had not been present at San Francisco in 1945 to put their views on record." [357] Mani (India) later wrote that "the Declaration constitute[d] one of the corner-stones of contemporary international law, in whose creation the Third World and the Socialist countries consciously participated, for the first time in the history of the world, alongside the 'old' States of the West."[358] Finally, Sinclair (UK) remarked that it "provided an ideal opportunity for the representatives of some newly independent States to flex their muscles in the international arena, and to pursue their quest for a 'new' international law which would be responsive to their needs and which would be freed from the constraints

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add, an authoritative interpretation of the UN Charter. See Samuel A. Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions" (1969), especially p. 448.

[353] *Idem*, pp. 300-308.

[354] *Idem*, pp. 302 and 307. See also p. 73, S.K. Roy Chowdhury, "The status and norms of self-determination in contemporary international law" (1977). Grigory I. Tunkin, "International law in the international system" (1975), pp. 149-152 did not agree; he believed the Friendly Relations Declaration went much further than merely interpreting certain Charter provisions.

[355] Consideration of principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, General Assembly resolution 2103 (XX), adopted 20 December 1965. The results were immediately apparent, as the Committee started to discuss the principle of self-determination and decolonization from that second session onwards.

[356] Special Committee, Sixth Report, para. 155.

[357] Robert Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations" (1971), p. 716.

[358] Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), p. 5.

of what they perceived to be outmoded, Euro-centric and inevitably 'colonialist' concepts."[359] The universal participation in the drafting of the text also ensured that it would be taken seriously by all States once it was adopted. The delegate of the United Arab Republic noted that "all the members of the Committee were authors of the text, and that fact alone should carry it towards ultimate success."[360]

The influence of the smaller nations resulted in the Declaration expressing a new, or evolved interpretation of the UN Charter's principles, which reflected the changes in the international community. The Western States, on the other hand, acted much more conservatively. Bearing in mind that the UN Charter was a "living constitution," Houben, the Dutch delegate, even blamed some of his Western colleagues for "adhering too rigidly to their conviction that in creating international law in this field one must not venture beyond the boundaries of the Charter."[361] Similarly, McWhinney blamed one of the Western States (the United States of America) for teaching the policy-oriented approach at its most prestigious universities, whilst defending the positivist, black-letter law approach in the Special Committee.[362] In any case, it was generally felt that the authority of the Friendly Relations Declaration was significantly enhanced because it was adopted by consensus, and because the drafting process was as inclusive as it was.[363]

What did these discussions add to the conclusions reached in San Francisco? Once again, it was suggested that the authority of Assembly resolutions was primarily derived from the fact that they constituted authoritative interpretations of the UN Charter, shared by the (majority of) States party to that treaty. This interpretation could bind the States themselves, and not just the Assembly.[364] In this sense, a State representative played two roles at the same time when voting for a certain Assembly resolution. He influenced both the legal obligations of the Assembly itself, and those of the State he represented.[365] It was suggested, not only in the Special Committee but also beyond, that a resolution containing an interpretation of the Charter had a certain value, not just because it was an Assembly resolution, but because certain Assembly resolutions showed that

[359] Sir Ian Sinclair, "The Significance of the Friendly Relations Declaration" (1994), p. 28.
[360] Special Committee, Sixth Report, para. 242.
[361] Piet-Hein Houben, "Principles of International Law Concerning Friendly Relations and Co-Operation Among States" (1967), p. 734.
[362] See Edward McWhinney, "The 'New' Countries and the 'New' International Law" (1966), pp. 30 and 33.
[363] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6230, adopted 27 June 1966 ("Second Report"), para. 37.
[364] See Francis Aime Vallat, "The competence of the United Nations General Assembly" (1959), p. 231.
[365] Max Sørensen, "Principes de droit international public" (1961), p. 105. He spoke of "dédoublement fonctionnel."

all States party to that treaty approved of a certain interpretation of the Charter.[366] In 1948 Sloan pointed out that the most authoritative description of the sources of international law, *i.e.* Article 38 of the Statute of the International Court of Justice did not yet mention General Assembly resolutions as a subsidiary means for the determination of rules of law, let alone as an independent source of law. [367] However, as Sloan and literally all the scholars who refer to Article 38 immediately admit, things are not that simple, and they can change.[368]

3.5.6 The true meaning of votes cast at the General Assembly

If General Assembly resolutions can be regarded as authoritative interpretations of the UN Charter, binding both the Organization and its Member States, they may very well be qualified, in the spirit of the Vienna Convention on the Law of Treaties, as ”subsequent agreement[s] between the parties regarding the interpretation of the treaty or the application of its provisions.”[369] As resolutions of the Assembly are not generally presented as such, the intention of the drafters must be determined for every single resolution. Was the resolution meant to interpret the relevant provisions in the Charter? The criteria proposed by Sahović may prove to be helpful here. The fact that a particular interpretation of the Charter is repeated in resolutions adopted in subsequent years is also relevant. Such repetition can be considered as proof that a certain interpretation really ”stuck.”[370] Arangio-Ruiz, however, believed that “it would be too easy if the ’shouting out’ of rules through

[366] *Idem,* p. 512. See also Gaetano Arangio-Ruiz, “The normative role of the General Assembly” (1972), p. 512. On one occasion, the ICJ even used a declaration of the General Assembly as proof of the *jus cogens* character of a particular norm. See para. 188 of the ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986.

[367] Many scholars started by pointing this out, and then continued to present more imaginative arguments. See *e.g.*, Blaine Sloan, “The binding force of a ’recommendation’ of the General Assembly of the United Nations” (1948), p. 2; Jorge Castaneda, “Valeur juridique des résolutions des Nations Unies” (1970), p. 212.

[368] Blaine Sloan, “The binding force of a ’recommendation’ of the General Assembly of the United Nations” (1948), pp. 21-22. See also p. 212 of Jorge Castaneda, “Valeur juridique des résolutions des Nations Unies” (1970); Christopher C. Joyner, “U.N. General Assembly resolutions and international law” (1981), pp. 453-455 and p. 477; Oscar Schachter, “International law in theory and practice” (1982), p. 111; Oscar Schachter, “United Nations law” (1994), p. 3. Gaetano Arangio-Ruiz, “The normative role of the General Assembly” (1972), p. 461, had some problems with this argument.

[369] Article 31(3)(a), Vienna Convention on the Law of Treaties. See also Robert Rosenstock, “The Declaration of Principles of International Law Concerning Friendly Relations” (1971), p. 715; Oscar Schachter, “The relation of law, politics and action in the United Nations” (1964), p. 186 (this was published before the Convention entered into force).

[370] Samuel A. Bleicher, “The Legal Significance of Re-Citation of General Assembly Resolutions” (1969).

General Assembly resolutions were to be law-making simply as a matter of 'times' shouted and size of the choir."[371]

Is it fair to suggest that any State casting an affirmative vote for a particular General Assembly resolution, interpreting certain provisions in the Charter, is always consciously expressing its opinion about the proper interpretation of that Charter provision? Or is it fair to suggest that a negative vote should always be interpreted as the rejection of the proposed interpretation of the Charter? It has been suggested that this seriously misconstrues the intention of such votes.[372] It is important to look beyond the affirmative vote itself, and try to find out the true motive behind the vote. Or, in the words of Arangio-Ruiz, one must find out "whether members of the General Assembly 'meant it' or not."[373] After all, "a vote cast in favour of a resolution of the General Assembly is not [by definition] the manifestation of that State's conviction that it is legally bound by the terms of the resolution."[374] In contrast with actually signing and ratifying a treaty, a "yes" vote to a non-binding resolution has little legal significance in itself. It may serve as an expression of a certain opinion, but then it is necessary to know what opinion is actually expressed.[375] At the very least, without evidence to the contrary, it may be assumed that when a State adopts an Assembly resolution, it agrees with the interpretation of the Charter proposed in that resolution.

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[371] Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 476.

[372] See Benedetto Conforti, "Le rôle de l'accord dans le système des Nations Unies" (1974), pp. 239-246; Oscar Schachter, "International law in theory and practice" (1982), pp. 115-118.

[373] Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 457. As Arangio-Ruiz pointed out, sometimes States vote in a certain way because they wish to keep their good "image" intact.

[374] S. Prakash Sinha, "Has self-determination become a principle of international law today?" (1974), p. 349. See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), pp. 485-486.

[375] A former state representative at the UN summarizes the difficulty in interpreting the votes as follows: "countries often have a tendency to cast their votes in a way obscuring their real intentions: a yes vote can mean anything from enthusiastic support at one end of the range, to: I do not like this text at all, but find it inconvenient to distinguish myself by voting against it. An abstention can signal: yes, but…, or: no, but… Only a no vote has kept most of its unambiguity: it is rare for a country to vote no although it really likes the text. However, this may occur if a country aligns itself with a no vote of other members of its group." p. 129 of Johan Kaufmann, *United Nations Decision Making* (1980). For a similar description, see p. 102 of M. J. Peterson, "General Assembly" (2007). See also p. 179 of Louis Henkin, *How Nations Behave: Law and Foreign Policy* (1979). The explanations of the vote may be of assistance here. If a State representative wishes to explain why it voted the way it did, it is given the opportunity to do so. The explanations are often very illuminating. See, for example, the objections some (Soviet) states had against the Universal Declaration of Human Rights when it was adopted in 1948 (UN Doc. A/PV. 183), or the objections of the United States of America to the Declaration on the Right to Development when it was adopted in 1986 (UNDoc. A/41/PV.97).

3.5.7 Conclusion

Some Assembly resolutions can be regarded as authoritative interpretations of the UN Charter *and* as a reflection of customary international law.[376] As such, they bind Member States of the United Nations and create justified expectations as to their future behaviour.[377] The Assembly therefore has enormous influence when interpreting the general provisions of the UN Charter. This is limited only by the need for consistent State practice. When the Assembly declares new rules that are not followed in practice, it cannot be said to have changed the legal obligations of the Organization and its Member States. Speaking about the Friendly Relations Declaration, Lowe warned about the potential for abuse of the Assembly's interpretative freedom if State practice were ignored:

> Once articulation [of a certain principle] was attempted, there was a tendency to establish a definition of the principle which cohered with other principles […] which together constitute the understanding of the international legal order. Coherence with other principles tended to be more important [than] the conformity of the putative principle with State practice. And once a coherent formulation of the legal principle had been adopted, the further elaboration of that principle became a matter of exegesis – the explanation of the meaning and significance of earlier "authoritative" texts, rather than an exercise based upon a return to State practice and the inference of rules therefrom.[378]

Thus Assembly resolutions derive their legal force from the fact that they are adopted by:

> An organ authorized to interpret the most fundamental principles of the international legal order as codified in the UN Charter;
> And (a majority of) all the States in the world.

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[376] According to the ICJ: "Opinio juris may, though with al1 due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions […]." Pp. 99-100, International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986. However, Assembly resolutions have no more value as evidence of a custom than any other evidence of State practice or *opinio juris*. It is clearly not the case that the Assembly has formalized the custom-making process, in the sense that a vote in favour of a certain resolution would serve as evidence of an *opinio juris*, an abstention as tacit agreement, and a vote against as a persistent objection. Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), pp. 471-486. See also pp. 254-256, ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996. See also p. 180, 182 of Louis Henkin, *How Nations Behave: Law and Foreign Policy* (1979); and Jorge Castaneda, "Valeur juridique des résolutions des Nations Unies" (1970), pp. 317-318.

[377] See also Samuel A. Bleicher, "The Legal Significance of Re-Citation of General Assembly Resolutions" (1969), especially pp. 446-451, and p. 447.

[378] Vaughan Lowe, "The principle of non-intervention" (1994), p. 73.

Assembly declarations thus serve principally as constitutional interpretations of the UN Charter, but they also serve as "evidence" of customary international law, if States show, by acting accordingly, that they really meant it when they adopted the Assembly's declaration.[379]

3.6 The contribution of other UN organs to the global discussion

The focus in this study is on the role of the General Assembly in the evolution of the Charter's norms and values. As the Assembly is the only organ in which the procedural rules and substantive mandate comply with the criteria of a global discussion, the focus is on that organ. This is not to suggest that other organs of the United Nations have played no role whatsoever in the evolution of global values since 1945. Many organs, including the Trusteeship Council, the Economic and Social Council, the Human Rights Council, and the International Law Commission, in a sense work for the Assembly. This means that their work is "rubber-stamped" by the General Assembly in the form of a resolution. Two other organs deserve a special mention: the Security Council and the International Court of Justice. These organs operate largely independently of the Assembly.[380]

3.6.1 The Security Council

The UN Charter gives the Security Council immense powers to maintain international peace and security.[381] To ensure international peace and security, the Council can issue binding decisions on all Member States, including ordering them to temporarily ignore, or even violate their international legal obligations.[382] Such resolutions are not intended to be contributions to the progressive development of international law. Instead, they authorize emergency measures that apply for a short time, and only with regard to a particular dispute. The drafters of the Charter in San Francisco were very clear about their intention not to grant the Security Council any legislative powers. At best, it was believed that "[t]he Security Council, although not intended to be a legislative body, might conceivably build up a body of international common law through its reasoned action in dealing with international disputes."[383] The Security Council resolutions could then be considered to be

[379] The use of the word "evidence" to characterize the role of Assembly resolutions in the development of custom was taken from Oscar Schachter, "International law in theory and practice" (1982), p. 117.
[380] See also section 3.5 of Chapter III, above.
[381] The latter additional phrase is essential: the Council only has such broad powers when responding to a threat to international peace and security, invoking Chapter VII of the UN Charter.
[382] See Article 103 of the UN Charter, in relation with Chapter VII and Articles 24, 25 and 48.
[383] John Foster Dulles, "The United Nations: A Prospectus (The General Assembly)" (1945), p. 4.

judgments adjudicating particular disputes. The way in which one international dispute was settled by the Council could then set a precedent for the settlement of future disputes of a similar nature.

However, that is already going one step too far. The Security Council was not meant to have such a judicial function at all. It had – and still has – an action-oriented, essentially political character. [384] According to Stettinius, the Security Council was supposed to be "hardly even 'quasi-judicial' in its conciliatory function because of the latitude permitted for the play of political considerations." [385] In practice, the Council has made good use of this latitude.

And so it must be concluded that the resolutions of the Security Council should not be considered to have any sort of legislative function. In San Francisco the major powers suggested that the Council would operate largely outside the realm of the law. This frightened the smaller nations. Egypt proposed an amendment that explicitly stated that the maintenance of international peace and security, which was the prime task of the Council should be "in conformity with the principles of justice and international law."[386] The Soviet Union disagreed. The Soviets believed that the Organization was established to effectively prevent the repetition of a new war, and that the smaller countries simply had to trust the superpowers.[387] The response of the USA was that the Security Council had two very important functions, and that

> These might be characterized somewhat as being the functions of a policeman and the functions of a jury. […] It is our view that the people of the world wish to establish a Security Council, that is, a policeman who will say, when anyone starts to fight, "stop fighting". Period. And then it will say, when anyone is all ready to begin

[384] On the Security Council as promoter of the global interest (world peace), see p. 24-25 of Jean d'Aspremont, *Contemporary International Rulemaking and the Public Character of International La* (2006), pp. 574-575 of Bardo Fassbender, "The United Nations Charter as Constitution" (1998), Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997), and Bruno Simma, "From Bilateralism to Community Interest" (1994), pp. 264-283. Somewhat surprisingly, the first three authors hardly mention the role of the General Assembly in defining and promoting the global interest, while the last author devotes barely two pages to the Assembly as "World Parliament", which contrasts with the 20 pages devoted to the Council as the "World Government".

[385] Edward R. Stettinius, *Charter of the United Nations* (1945), p. 80.

[386] UNCIO, vol. 6, p. 23. All of the following delegates made a similar point in their proposed amendments to the Dumbarton Oaks proposal: France (UNCIO, Vol. 3, p. 383. See also, UNCIO, Vol. 3, p. 377); Greece (Vol. 3, p. 531); Netherlands (Vol. 3, p. 323); Norway (vol. 3, p. 355); Uruguay (vol. 3, p. 34); Venezuela (vol. 3, p. 224); Bolivia (vol. 3, p. 582); Ecuador (vol. 3, p. 398); Egypt (vol. 3, p. 447); Iran (vol. 3, p. 554); Mexico (vol. 3, p. 178); Panama (vol. 3, p. 265); Chili (vol. 3, p. 284). About this amendment and what became of it, see also Mohammed Bedjaoui, "Article 1" (2005), p. 315, and Manfred Lachs, "Article 1, paragraphe 1" (2005), p. 331.

[387] Speech by Molotov (UNCIO, vol. 1, p. 135): "The point at issue is whether other peace-loving nations are willing to rally around these leading powers to create an effective international security organization, and this has to be settled at this Conference in the interests of the future peace and security of nations."See also: UNCIO, vol. 1, p. 662-666.

> to fight, "you must not fight". Period. That is the function of a policeman, and it must be just that short and that abrupt; that is, unless at that place we add any more, then we would say "Stop fighting unless you claim international law is on your side". That would lead to a weakening and a confusion in our interpretation.[388]

Uruguay agreed that "the world [was] sick of wars," but then asked the rhetorical question: must the threat of all wars be reduced at any price? Payssé, the Uruguayan delegate, answered the question himself:

> The mere police function, which pursues the materiality or formality of the order, and which in the popular language of my country is translated into the meaningful expression "You are right, but you are under arrest," cannot attract our sympathies nor our hopes in the panorama of the reconstruction of the world. The day when there occurs anew the illusion that by sacrificing the rights of the weak in the face of threats by the strong the peace would be saved, on that day the fuse will have been lighted which sooner or later would set off the explosion of war. Injustice is not a propitious atmosphere for peace.[389]

After this discussion the Egyptian amendment was put to the vote. The result was 21 for, 21 against. Amendments required a two-thirds majority to be adopted in San Francisco.[390] The amendment was therefore rejected. This meant that the Security Council was not to be hindered by constraints of law when maintaining international peace and security. This discussion is often characterized as a struggle for power between the Big Five, who preferred to give the maintenance of security complete freedom, and the "small" Forty-Five, who wanted this freedom to be constrained by principles of justice. However, Uruguay had already rejected this characterization in San Francisco when the Uruguayan delegate warned that this debate should not be seen as "a duel between David and Goliath, in which the small countries […] throw the stone of justice at the great powers," because "that would be quite contrary to the truth."[391]

The Rapporteur of the relevant Commission hastened to explain this surprising result. He said that none of the delegates were against justice, but they felt that "adding 'justice' after 'peace and security' brings in at that juncture of the text a notion which lacks in clarity."[392] The United States, regretting the tone of the previous statement, tried to reassure the smaller States a few days later in a subsequent meeting of the Commission:

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[388] UNCIO, vol. 6, p. 29. The US delegate then explained the "jury function".
[389] UNCIO, vol. 6, p. 31.
[390] *Idem*, p. 34. See also pp. 229-230.
[391] First Session of Commission I, 14 June 1945, UNCIO, vol. 6, p. 31.
[392] *Idem*, p. 394 (already cited in section 3.5 of Chapter III, above).

> We are here [in San Francisco], first of all, to find ways and means to maintain international peace and security throughout the world. But above and beyond that most desirable objective, we are here to lay the first foundation of a new world civilization which in its international relations shall be based upon law and justice and brotherhood, rather than upon brute force.[393]

There is something hypocritical about this statement, considering that it was made after the Egyptian amendment had been rejected. The relevant article in the UN Charter does not have the desirable reference to international law. This is largely due to US resistance. When maintaining international peace and security, the Security Council can take measures obliging Member States to act in violation of international agreements.[394] An organ which is itself not even bound by international law cannot be expected to contribute to its evolution, either as international judge, or as an international legislator. Nevertheless, the Council did create for itself, at least during a few years after the Cold War, a "quasi-legislative role."[395] Understandably, these resolutions proved to be highly controversial. The Council's "legislation" is discussed in the next chapter on peace and security.

3.6.2 The International Court of Justice

The other organ that deserves a special section is the International Court of Justice. It is possible to imagine a role for the Court in assisting States and the General Assembly with the legally correct interpretation of the UN Charter. However, this role for the Court as the "legal guardian" of the UN Charter was explicitly rejected.[396] This can best be shown by referring to the proposal made in San Francisco that the International Court should ensure that the Security Council would act in accordance with the values, purposes, and principles of the UN Charter. The immense powers given to the Council, and the fact that these powers could be exercised outside the realm of the law, worried the delegates of the smaller nations in San Francisco.[397] They therefore attempted to create some kind of judicial control

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[393] *Idem*, p. 118.

[394] See Article 103 of the UN Charter, in relation with Chapter VII and Articles 24, 25 and 48. When the Security Council acts outside Chapter VII, it is bound by international law and agreements. See Articles 24 and 1.

[395] Nico Schrijver, "The Future of the Charter of the United Nations" (2006)," p. 23.

[396] Judge Lachs referred to the Court as the "guardian of legality for the international community as a whole, both within and without the United Nations," but then failed to explain the consequences of such a qualification. P. 26, Separate Opinion of Judge Lachs, in Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Request for the Indication of Provisional Measures, Order of 14 April 1992.

[397] The Dutch delegate leader, Eelco van Kleffens, wrote in his diary: "De Belgen maken zich evenals wij ongerust over het van de conferentie te verwachten resultaat: bezegeling van de hegemonie der

over the Security Council. As the Council was not immediately bound by international law in general, exercising "judicial control" essentially meant checking whether the Council's resolutions were in accordance with the UN Charter. Contrary to most other international law, the Charter had the power to limit the competence of the organ – the Security Council – it had itself established.

The Netherlands suggested leaving this judicial scrutiny up to a "body of eminent men."[398] The Netherlands believed that "it clearly could not be left to the Security Council to decide, for if that were done this Council would be allowed to sit in judgment on its own proposals."[399] A more obvious candidate to exercise judicial control over Security Council decisions, rather than this body of eminent men, was the International Court of Justice. This is what Belgium proposed as an amendment to Dumbarton Oaks:

> Any State, party to a dispute brought before the Security Council, shall have the right to ask the [International] Court of Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the [General] Assembly for decision.[400]

It does not come as a surprise that the Soviet Union was the most outspoken opponent of this proposal. According to the Soviet Union, "if it were possible for a state to appeal from the Council to the International Court of Justice […] the Council would find itself handicapped in carrying out its functions."[401] The UK

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groote mogendheden ten koste van de kleinere, gepaard aan een ronflant verdrag zonder inhoud." [Translation: "The Belgians are just as worried as we are about the expected results of this conference: sealing of the hegemony of the big powers at the cost of the smaller nations, through a treaty without much content."]. Kleffens" Diary, published in Cees Wiebes, "De oprichting van de Verenigde Naties" (1995), p. 84.

[398] The Netherlands (UNCIO, vol. 3, p. 313): "[The Netherlands] offer as a solution the appointment of an independent body of eminent men from a suitable number of different countries, men known for their integrity and their experience in international affairs, who should be readily available to pronounce upon decisions of the Security council whenever an appeal to that effect were addressed to them, either by the Council or by a party to the case in question. This body, it should be emphasized, should pronounce upon the matter solely from the point of view of whether the Council's decision is in keeping with the moral principles [...], and should render its decision within a set number of days so as to avoid an undue delay."

[399] UNCIO, vol. 3, p. 313.

[400] UNCIO, vol. 3, p. 336. Belgium also said, in relation to the hypothetical situation that the recommended procedure of the Security Council for the peaceful settlement of disputes is not successful, that "before a project for the settlement of a difference, drawn up by the Council or by any other body became final, each of the States concerned should be able to ask an advisory opinion from the International Court of Justice as to whether the decision respected its independence and vital rights." (UNCIO, vol. 14, p. 446.)

[401] UNCIO, vol. 12, p. 49.

added that "the procedures proposed by the [Belgian] amendment would cause delay, at a time when prompt action by the Security Council was most desirable."[402] The Belgian proposal was ultimately withdrawn.[403]

This meant that the Court lost its role as legal guardian of the Charter altogether. A subcommittee was established in San Francisco to answer the following question: "How and by what organ or organs of the Organization should the Charter be interpreted?"[404] The answer was as follows: "Each organ will interpret such parts of the Charter as are applicable to its particular functions."[405] Therefore the International Court of Justice was not the organ to check whether the Council, or any other UN organ, was acting within its constitutional scope of competence (*intra vires*).

The "founding fathers" did not give the International Court of Justice the competence to check the binding resolutions of the Security Council on their constitutionality. But the UN Charter is a "living tree." The interpretation of the text evolves over time.[406] However, since 1945 the judges of the International Court of Justice have consistently denied themselves the authority to exercise judicial control over the Council. As early as 1962, the Court noted in the Certain Expenses Opinion that:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.[407]

A little less than ten years later, the Court reiterated its standpoint in the Namibia Opinion.[408] In the 1990s the Court was asked to deal with the issue of judicial

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[402] UNCIO, vol. 12, p. 65.
[403] See UNCIO, vol. 12, p. 66; see also: vol. 13, p. 645.
[404] UNCIO, vol. 13, p. 668. The Subcommittee (Subcommittee IV-2-B) consisted of representatives from Belgium, France, Norway, the UK and the USA.
[405] UNCIO, vol. 13, p. 668, 709. See also section 3.5 of Chapter III, above. The Committee added that "two organs may conceivably hold and may express or even act upon different views. Under unitary forms of national government the final determination of such a question may be vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature."
[406] Thomas M. Franck, "Is the UN Charter a Constitution?" (2003).
[407] See International Court of Justice, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962. I.C.J. Reports 1962, p. 168.
[408] There the Court said: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned." International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), an Advisory Opinion of 1971. I.C.J. Reports 1971, p. 45.

control in a contentious case. The Security Council imposed economic sanctions on Libya in an attempt to force it to comply with requests from the USA and the United Kingdom to surrender Libyan nationals accused of blowing up an airplane above Lockerbie, Scotland.[409] Libya claimed the sanctions were illegal and, as it could not bring the Security Council itself before the Court, it instead initiated proceedings against the UK and the US.[410]

Two decisions of the Court in the Lockerbie Case are discussed briefly to show what the Court said about its competence of constitutional review: first, the order on the request by Libya for an indication of provisional measures ("Lockerbie Order"),[411] and secondly, the judgment on preliminary objections ("Lockerbie Judgment").[412]

First, Libya asked the Court to order the US and the UK, as a provisional measure, not to compel it to surrender the individuals accused of the Lockerbie bombing.[413] This was exactly what the relevant Security Council resolutions compelled Libya to do.[414] The Court did not grant Libya's request, because such a provisional measure would undermine the rights which the US and the UK appeared to have by virtue of a Security Council resolution.[415] The Court did not assess the legality of the Council's resolution in the order, nor did it address the issue of judicial control in any detail.

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[409] The relevant resolutions: Security Council 731 (1992) of 21 January 1992, 748 (1992) of 31 March (1992), and 883 (1993) of 11 November 1993. In the first resolution, Libya was urged to surrender the suspected individuals; in the second, adopted after Libya went to the ICJ, the Council invoked Chapter VII and ordered Libya to surrender the suspects, already imposing sanctions. On the 31st of January 2001, an essentially Scottish court, set up in the Netherlands especially for the trial, sentenced one man to life, another was set free.

[410] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America). Similar proceedings were started against the UK, with similar orders and similar judgments as the result.

[411] Order on the Request for the Indication of Provisional Measures, 14 April 1992, in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) ("Lockerbie Order").

[412] Judgment (Preliminary Objections), 27 February 1998, in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) ("Lockerbie Judgment").

[413] Lybia asked the Court "to enjoin the United States from taking against Libya measures calculated to exert coercion on it or compel it to surrender the accused individuals to any jurisdiction outside of Libya; and to ensure that no steps are taken that could prejudice in any way the rights of Libya with respect to the proceedings instituted by Libya's Application." Lockerbie Order, para. 20.

[414] Security Council resolutions 731 (1992) of 21 January 1992, and 748 (1992) of 31 March (1992).

[415] Lockerbie Order, Para. 42-44. The Court relied on Article 25 and 103 of the UN Charter in reaching its decision.

However, the separate and dissenting opinions did.[416] In his separate opinion one judge asked "If there are any limits [to the competence of the Security Council], what are those limits and what body, if other than the Security Council, is competent to say what those limits are?"[417] In addressing their colleague's question, the other judges mainly discussed two issues: "constitutional relations,"[418] and the *legal versus political* dichotomy.[419] Bluntly stated, the conclusion was, that contrary to many domestic constitutions, the UN constitution did not contain any system of checks and balances, and that the Council and the Court did not need to interfere in each other's work, even when dealing with the same situation, because they operated in different fields (politics and law, respectively). Some academics followed in their footsteps, many others criticized them.[420]

The demand for provisional measures was therefore rejected. Subsequently, the Court had to decide whether it had jurisdiction in principle. The answer in the Lockerbie Judgment was affirmative. But the Court reserved the question on the Council's resolution for the discussion on the merits of the case.[421] The Court never reached that point, because the Lockerbie Case was ultimately removed from the Court's list at the joint request of the Parties.[422]

Again, the most elaborate discussions on judicial control can be found not in the actual judgment, but in the separate and dissenting opinions. The American judge Schwebel wrote a strong dissenting opinion on the judgment. He wrote that "the conclusions to which the *travaux préparatoires* and text of the Charter lead are that the Court was not and was not meant to be invested with a power of judicial

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[416] For a discussion of these separate opinions, see also Thomas M. Franck, "The "powers of appreciation"" (1992).

[417] Separate Opinion of Judge Shahabuddeen to the Lockerbie Order.

[418] See (almost) all opinions to the Lockerbie Order. Some judges compared the relationship between the main UN organs with those of a State. See, *e.g.*, the Dissenting Opinion by Judge Bedjaoui, para. 7; and the Dissenting Opinion of Judge Weeramantry.

[419] The judges believed that the Court had to adopt a *legal* standpoint, whilst the Council could consider the same issue from a *political* standpoint. See, *e.g.*, the Declaration of Judge Ni to the Lockerbie Order.

[420] There are many articles on the Lockerbie case, focusing on "constitutional relations". See, *e.g.*, Vera Gowlland-Debass, "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case" (1994), p. 643-677; Jose E. Alvarez, "Judging the Security Council" (1996).

[421] For a discussion on the Security Council resolutions, see especially paras. 36-38 and 42-44 (jurisdiction and admissibility had to be considered at a time when the main resolutions were not yet passed). The Court did not want to respond at the stage of preliminary objections to the argument that Libya's claims became moot because Security Council resolutions rendered them without object, because it would then have to make a decisions on two issues which formed the subject-matter of the case: a decision establishing that the rights claimed by Libya under the Montreal Convention were incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevailed over those rights by virtue of Articles 25 and 103 of the Charter. (see para. 49).

[422] Lockerbie Order of 10 September 2003.

review of the legality or effects of decisions of the Security Council."[423] According to Schwebel, even if the UN Charter is considered to be a living instrument, with an interpretation which evolves over time, the Court could still not exercise a judicial review of Security Council resolutions, because that would be a "revolutionary," as opposed to an "evolutionary," interpretation of the Charter. "It would be not a development but a departure, and a great and grave departure."[424]

After the Lockerbie Judgment was published, some authors argued that the only check on the Security Council's actions arose from *realpolitik*. The limit of the Council's powers would be reached when it ordered sanctions or military intervention and no one was willing to respond.[425] In response to this pessimistic view, others argued that judicial control was meant to prevent exactly that: by preventing the Council from ordering unconstitutional measures, the Court could ward off illegitimate orders that no State in the world would obey.[426]

For different reasons then, the roles of the Security Council and the International Court of Justice are limited in the global conversation about values. The Security Council is a political organ, dealing only with emergencies. The role of the International Court of Justice in the evolution of the Charter's values and norms has weakened because the Court has not yet accepted for itself in an unambiguous way the power to check the acts of the other organs on their constitutionality.

3.7 Conclusion

The General Assembly's discussions that were examined were a continuation of the discussions started in San Francisco in 1945.

First, it was shown that the Assembly had the competence to discuss all values, purposes and principles of the UN Charter. Then the Assembly's discussions were assessed on the basis of the three essential conditions of a discussion suitable for determining and evolving global values: its inclusive and genuine character, and the capacity to motivate action.

With regard to its inclusive character, it was noted that all States had the opportunity to participate in the discussion. Although there are some objections to the one State, one vote rule, this rule is the best of all possibilities to ensure universal representation.

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[423] Dissenting Opinion of Judge Schwebel to the Lockerbie Judgment.
[424] *Idem*.
[425] José E. Alvarez, "Judging the Security Council", p. 2, and the literature cited there. See also Thomas M. Franck, "The 'powers of appreciation'" (1992), p. 523; Oscar Schachter, "United Nations law" (1994), p. 8.
[426] José E. Alvarez, "Judging the Security Council," p. 3, and the literature cited there.

With regard to its genuine character, some remarks were made about the sincerity of the representatives in the Assembly. Why do States *really* vote the way they do? The fact that the State's national interest plays an important role here does not, so it was argued, mean that the discussions are carried out insincerely.

As international law is the language *par excellence* to motivate action, the Assembly's resolutions were assessed in terms of their legal power or binding character. There are generally two ways in which Assembly resolutions could reflect legal obligations: as interpretations of the provisions in the UN Charter, and as authoritative declarations of existing customary law.

Finally, the role of other organs was examined, especially the Security Council and the International Court of Justice. It was not suggested that the other organs of the United Nations played no role whatsoever in the global discussions, but that the General Assembly was the organ that best satisfied the general criteria any global discussion should meet, and that other organs could consequently only play a secondary role.

4 RESPONSIBILITY FOR THE REALIZATION OF THE NORMS AND VALUES OF THE UN CHARTER

4.1 Introduction

Who better to accept responsibility for the realization of global values and the defence of the community interest than the international community itself?[427] The United Nations Organization is often mentioned as the most suitable candidate to serve as the active limbs of the international community.[428] However, the Organization and its organs cannot realize the global values on their own.[429] The States need to do most of the work.

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[427] See Andre de Hoogh, *Obligations Erga Omnes and International Crimes* (1996); Pierre-Marie Dupuy, "L'unité de l'ordre juridique international" (2002), pp. 373-374, p. 391; p. 272, Christian Hillgruber, "The Right of Third States to Take Countermeasures" (2006); Jochen Frowein, "Reactions by not directly affected states to breaches of public international law" (1994), p. 423; Christian Tomuschat, "Obligations arising for states without or against their will" (1993), pp. 364-365; Christian Tomuschat, "International law: ensuring the survival of mankind on the eve of a new century" (1999), p. 377; Antônio Augusto Cançado Trindade, on p. 108, Annuaire de l'Institut de droit international, vol. 71-II (2006); p. 200, Martti Koskenniemi, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law (Report of the Study Group of the International Law Commission)*, 13 April 2006, UN Doc. A/CN.4/L.682.

[428] For the moment, the term "international community," which is often left undefined in the literature, can be defined as the collective of all the world's citizens, organized in various States.

[429] See *e.g.*, p. 287-288, Christian Hillgruber, "The Right of Third States to Take Countermeasures" (2006); Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (2005), pp. 79-83.

This section discusses two possibilities for collective action. The "institutionalized" alternative is examined first. The principal organs of the United Nations are assessed in terms of their capacity to realize the values proclaimed in the Charter and in General Assembly resolutions (4.2). Secondly, the role of the States themselves, acting in concert, is assessed (4.3).

4.2 The United Nations Organization

The UN Charter has often been called a "constitution." This label is particularly relevant in the present context. The similarities between the UN Charter and domestic constitutions are most obvious when the principal organs of the Organization, and the powers accorded to them in the UN Charter, are compared with the principal organs of domestic systems of government.[430]

The United Nations machinery is quite similar to the way in which things are organized domestically. The General Assembly can be seen as the world's parliament. The executive branch of the "world government" is made up of a collection of specialized councils: the Security Council for peace and security; the Economic and Social Council for social progress and development; the Human Rights Council for human dignity; and the Trusteeship Council for self-determination of peoples. These councils are comparable to the ministries that jointly constitute the government at the domestic level. There is a "world court," the International Court of Justice.[431] In addition, there is a system of checks and balances in the Charter, although this is much less developed than the checks and balances in most domestic systems.[432]

A closer look leads to the conclusion that there are substantial differences between the UN machinery and domestic constitutional systems. One of these differences is that in the UN, every organ interprets its own mandate. Access to the Court to decide on constitutional questions is limited, if there is such access at all.[433] The main organs of the United Nations have hardly any powers to compel

[430] See also Bardo Fassbender, "The United Nations Charter as Constitution" (1998), p. 589. See also Bruno Simma, "From Bilateralism to Community Interest" (1994), p. 262, and Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited" (1997).

[431] This comparison was already made in San Francisco. For example, Stettinus referred to the UN's main organs as "the enforcement officer" (Security Council), "the Court" (ICJ), "the public meeting" (General Assembly), and "the center of science and of knowledge" (Economic and Social Council). Edward R. Stettinius, *Charter of the United Nations* (1945), pp. 13-118 (quote can be found on p. 17).

[432] See, *e.g.*, Thomas M. Franck, "The 'powers of appreciation'" (1992); James Crawford, "Multilateral Rights and Obligations in International Law" (2006), pp. 379-388.

[433] The most often discussed of these checks and balances is the check by the International Court of Justice, and, to a lesser extent, by the General Assembly, on the powers of the Security Council. The Court has pronounced itself on this issue in a few occasions: See International Court of Justice, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advising Opinion of 20 July 1962. I.C.J. Reports 1962, p. 168; International Court of Justice, Legal Consequences for States of the

Member States to act in compliance with the UN's purposes and principles. The Court has no compulsory jurisdiction. The General Assembly cannot impose binding legislation on the Member States, and the Security Council can only act against the wishes of States by imposing sanctions or when authorizing the use of force to maintain international peace and security. Such measures are – and should be – exceptional measures. The other Councils, responsible for the implementation of the other values, have no such sweeping powers. The situation is very different at the domestic level, where the government is constantly imposing obligations on its "clientele," *i.e.* the population. Therefore the slight similarities between the UN machinery and domestic organs of government should not lead to the conclusion that the United Nations was intended to be a world government, or ever will be. This was already pointed out by the International Court of Justice in 1949, when it stated that the Organization was not a "super-State;" and there is nothing to indicate that this view is out of date now.[434]

This does not mean that the Organization has no means at its disposal to defend the values it proclaims and develops. Slowly but surely, the United Nations has become "a machine that runs by itself."[435] It has become increasingly independent from its creators. The UN Charter provides the skeleton of that machine. The UN's international civil servants provide the machine with a soul.[436] It is noticeable that this machine is generally studied by looking at the intention of its makers, not by looking at the machine itself. In less metaphorical terms, looking at international organizations as instruments made and controlled by States may not necessarily be the best way to look at them. As Klabbers commented on international organizations in general, "[t]he very thing that is subjected to control tends to escape from control and instead ends up in control (not unlike Frankenstein's creation)."[437] Instead of studying Doctor Victor Frankenstein to understand the monster, it may be better to study the monster itself. This monster then independently sets out to pursue the purposes and principles it was set out to pursue. As it only seeks to accomplish certain noble purposes, the monster has some moral authority and legitimacy that a mere instrument of powerful States can never

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Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), an Advisory Opinion of 1971. I.C.J. Reports 1971, p. 45; and the Lockerbie case discussed above.

[434] See International Court of Justice, Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, especially p. 179.

[435] Thomas M. Franck, "Is the UN Charter a Constitution?" (2003), pp. 98 - 101.

[436] In Dupuy's own words: "Il faut lui insuffler une âme." See Jean Dupuy, *San Francisco et la Charte des Nations Unies* (1945), p. 69. Similarly, van Kleffens remarked that "[t]he United Nations, if left alone, is nothing but a disused piece of machinery," and that "[i]t will do nothing unless handled." Eelco N. van Kleffens, "The United Nations and Some Main Trends of Our Time" (1947), p. 74.

[437] Jan Klabbers, "Constitutionalism Lite" (2004), p. 37. Klabbers borrowed this metaphor from Dan Sarooshi.

have.[438] As soon as the monster is out in the open, the constitutive document (the UN Charter) becomes more of a constraining force, limiting the monster's powers in the pursuance of its purposes, and in this way protecting the creator from his creation.[439] Thus, like all constitutions, the UN Charter contains both ambitious principles, and rules that serve to restrain the powers of the organs of that very same Organization. The most important of those rules is the rule that prohibits the organization from interfering in essentially domestic affairs, *i.e.* Article 2(7) UN Charter.

How exactly does this monster operate? If it does not operate exactly in the same way as a domestic government, how far does this comparison apply? It is certainly true that not a single organ or subsidiary body of the United Nations has the mandate to defend the values and norms of the United Nations on behalf of all member States. The organ that is most often mentioned as a potential "enforcer" of the norms in the UN Charter is the Security Council. For a long time the Council could not be considered a serious candidate for the role of enforcer of United Nations values and norms because of the extensive use of the veto and the failure to create a "UN Army," as envisaged in Article 43 of the Charter.[440] These two Cold War facts together "at once paralyzed and disarmed" the Council. The direct consequence of this was that the Charter's intentions in the field of collective security essentially "came to nothing."[441] After the recent "*résurrection spectaculaire*" of the Security Council,[442] it did, at least for a few years, truly act as the defender of United Nations values and norms, by considering any serious violation of such norms and values as constituting a "threat to the peace, breach of

[438] See Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (2004), p. 5. This is the gist of the argument: "IOs [international organizations] act to promote socially valued goals such as protecting human rights, providing development assistance, and brokering peace agreements. IOs use their credibility as promoters of "progress" toward these valued goals to command deference, that is, exercise authority, in these arenas of action. In addition, because they are bureaucracies, IOs carry out their missions by means that are mostly rational, technocratic, impartial, and nonviolent. This often makes IOs appear more legitimate to more actors than self-serving states that employ coercive tactics in pursuit of their particularistic goals. Their means, like their missions, give IOs authority to act where individual states may not."

[439] This is a characteristic all constitutions share, be it domestic or international. On the UN Charter's constraining powers, see also Grigory I. Tunkin, "The legal nature of the United Nations" (1969), p. 22.

[440] In 1948, Kaeckenbeeck still believed that is was the Council's command over the "UN Army," which constituted "l'embryon dun pouvoir exécutif." Georges Kaeckenbeeck, "La Charte de San-Francisco dans ses rapports avec le droit international" (1948), p. 131.

[441] Rosalyn Higgins, "International law and the avoidance, containment and resolution of disputes" (1991), p. 229. See also Francis Aime Vallat, "The competence of the United Nations General Assembly" (1959), p. 251.

[442] Alain Pellet, "La formation du droit international dans le cadre des Nations Unies" (1995), p. 6. See also p. 296 of Jean-Pierre Cot & Alain Pellet, "Préambule" (2005), and Manfred Lachs, "Article 1, paragraphe 1" (2005), p. 333. Simma and Paulus speak of the "revitalization" of the Council. See p. 274, Bruno Simma and Andreas L. Paulus, "The International Community" (1998).

the peace, or act of aggression."[443] Some scholars agreed with this extensive interpretation of the Council's mandate. Hannikainen, for example, believed that "according to current interpretation of the Charter, those obligations which are most essential for the maintenance of international peace and security are the same as the basic obligations arising from the main purposes of the UN in Art. 1 of the Charter: the prohibition of acts of aggression, the respect for self-determination of peoples and the (elementary) respect for human rights without distinction, especially without distinction of race."[444] Tomuschat did not have any problem either with an expanded interpretation of a "threat to the peace" so that whenever other values were violated "to such a degree that outbursts of violence may be expected,"[445] the Security Council should use far-reaching means to act in the general interest.[446] If the Council interpreted its own mandate in this way, it would become the *primus inter pares* among the UN's councils. It could make full use of its authority to impose obligations on all States. The other councils lacked this authority.

Other scholars were less enthusiastic. According to Dupuy, an organ like the Security Council could not replace the decentralized way of upholding global values,[447] primarily because of the arbitrary nature of its actions.[448] If the Council was to fulfil a role as a global enforcer, its actions should be based on objective terms (values) that all States can accept, at least in principle, and which can be applied objectively.[449] This raises the question of control over the Council. The call, often heard during the Cold War, to find ways to make the Council more active was recently suddenly replaced by a call for (legal) restraints on that very same Council.

The Security Council still does not have its own army, and has to rely on Member States to respect and carry out its resolutions. This is why Simma and Paulus have referred to the "authorization model," in which "individual States assume the role of agents of the international community represented by the Security Council."[450] In that case the actions taken by individual States on the authority of the Council are not all that different from counter measures taken in the collective interest. The main difference is a prior authorization to act – or in the

[443] Article 39 of the UN Charter.
[444] Lauri Hannikainen, *Peremptory Norms (jus cogens) in International Law* (1988), p. 284.
[445] Christian Tomuschat, "Obligations arising for states without or against their will" (1993), p. 342.
[446] *Idem*, pp. 333-346, and pp. 355-356.
[447] Pierre-Marie Dupuy, "L'unité de l'ordre juridique international" (2002), pp. 377.
[448] The genocide in Rwanda and in Srebrenica can be considered as examples. See Samantha Power, *"A problem from hell": America and the age of genocide* (2002), Romeo Dallaire, with Brent Beardsley, *Shake Hands with the Devil* (2003); Otto Spijkers, "Legal Mechanisms to Establish Accountability for the Genocide in Srebrenica" (2007).
[449] See also Ian Johnstone, "Legislation and adjudication in the UN Security Council" (2008), pp. 275-308.
[450] Bruno Simma and Andreas L. Paulus, "The International Community" (1998), p. 275.

case of sanctions: a legal obligation to act – stemming from a collective organ established by all members of the international community together.[451]

Apart from the Council, there are many other, "softer" means available to the United Nations to ensure compliance on behalf of the international community as a whole, with the norms and values proclaimed in the UN Charter and developed by the General Assembly. The powers of the other Councils are discussed in the chapters dealing with the particular value they were established to protect.[452] The Assembly's resolution-making "power" could also be included in this list. Even though the Assembly has no means to enforce compliance with its resolutions, the violation of an essential norm adopted by the Assembly may be followed by public condemnation, "naming and shaming," which is sometimes, as a judge of the Court already pointed out as early as 1951, more powerful than more legalistic methods of "enforcement".[453] The drafters of the Charter foresaw that its influence on world public opinion would become the Assembly's most powerful weapon. Evatt, for example, believed it was crucial for the Assembly to have "the widest possible powers of discussion and recommendation, so that the pressure of world public opinion could be brought to bear upon countries not living up to their international obligations."[454] If "public opinion" was a powerful weapon in the 1950s, it is certainly a powerful weapon today, with the globalization of the media and the impressive mushrooming of NGOs specializing in scrutinizing international affairs.

The exact qualification of the role of the United Nations and its principal organs, in the promotion and codification of value-based norms is not yet clear. It is certainly not a world government, but how then can its role be qualified? Earlier, global values were described as the driving force behind global governance.[455] It was suggested that the United Nations was the focal point in the global realization of certain shared goals. These goals, as Rosenau explained, could be derived from legal norms, but they do not necessarily need a global police force to ensure compliance.[456] Recently the Assembly itself started researching its own role and that of the Organization as a whole in global governance. It "acknowledg[ed] the vital importance of an inclusive, transparent and effective multilateral system in order better to address the urgent global challenges of today."[457] This is the general challenge of global governance. The Assembly "recogniz[ed] the universality of the

[451] See also Jochen Frowein, "Reactions by not directly affected states to breaches of public international law" (1994), p. 433.
[452] See the relevant chapters in Part II of this study.
[453] See Alvarez, Separate Opinion in the ICJ's Reservations to the Genocide Convention Advisory Opinion, 28 May 1951, p. 52.
[454] Herbert Vere Evatt, *The United Nations* (1948), p. 19.
[455] See section 5.2 of Chapter II, above.
[456] James N. Rosenau, "Governance, Order, and Change in World Politics" (1992), p. 4.
[457] The United Nations in global governance, General Assembly resolution 65/94, adopted 8 December 2010.

United Nations [and] reaffirm[ed] the role and authority of the General Assembly on global matters of concern to the international community, as set out in the Charter."[458] Although the debate on the role of the United Nations in global governance has only just begun, this contribution already indicates that the Assembly accepts for itself a central role in global attempts to address the most urgent global challenges.

4.3 United Nations Member States

It is clear that as the prime actors of the international community, States have the primary responsibility for realizing the global values proclaimed by the United Nations. In doing so, they act on behalf of their citizens. The United Nations Organization merely provides the framework in which the States are required to fulfil their responsibilities. But global civil society,[459] and even individuals, have a responsibility too.[460]

Most importantly, States have a duty to implement the values to which they subscribed by ratifying the UN Charter and by voting in favour of General Assembly resolutions, within their jurisdiction. Therefore they are required to ensure that their territory is not used as a basis for activities that threaten international peace and security. The State must also respect the human dignity of all individuals residing within its jurisdiction and under its effective control. Furthermore, it is required to ensure sustainable development and social progress, and to show respect for the self-determination of all peoples – including minorities – who find themselves within its jurisdiction. Almost all the declarations adopted by the Assembly stress this primary responsibility of States.[461]

States also have an obligation to assist each other in these domestic efforts. One of the principal roles of the United Nations is to coordinate and institutionalize this international assistance. Article 2(5) UN Charter states that "all Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter." This principle is an expression of the general *legal* duty of all States to cooperate in promoting the values, purposes and principles of the UN. Arangio-Ruiz referred to this principle as a "sort of procedural super-principle,"

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[458] *Idem.*

[459] See *We the peoples: civil society, the United Nations and global governance, Report of the Panel of Eminent Persons on United Nations–Civil Society Relations*, UNDoc. A/58/817, distributed 11 June 2004. This report explores various ways in which global civil society can help the United Nations realize their values. The most important recommendation is to establish partnerships including ngos, states, and businesses to undertake specific tasks. The UN can do the coordination.

[460] See the Declaration of Human Duties and Responsibilities, adopted by a High Level Group chaired by Richard J. Goldstone, 1999.

[461] See especially the concept of the responsibility to protect, discussed in section 5.4 of Chapter VII.

which could be given substance by the shared goals to be achieved through cooperation.[462]

The general duty for all Member States to cooperate with the Organization in its efforts to achieve its purposes was discussed in great detail when the Friendly Relations Declaration was being drafted. Before that, not much attention was devoted to it. As Mani pointed out about the discussion of this principle in the 1960s: "It [was] probably for the first time that the concept of international co-operation was considered juridically by the United Nations and formulated in an international instrument alongside other basic principles of international law."[463]

The first discussions took place during the second session of the Special Committee that drafted the declaration. There it was suggested that the UN Charter, especially Article 56, had created a legal, as opposed to political or moral, duty to cooperate in realizing the purposes of the United Nations.[464] According to Mani, "all delegations – the Socialist, the Western, and the Third World – ha[d] agreed that the duty of States to co-operate in accordance with the Charter [was] a legal obligation."[465] The only remaining disagreement was on the exact content of this obligation. It was suggested that the United Nations Charter had established a duty of "active coexistence," as opposed to a situation in which "States [..] merely tolerate[d] the existence of other States."[466] The most interesting element was whether such a duty to cooperate introduced some kind of global distributive justice into world politics.[467] Some suggestions indicated that this was indeed the case. The USA and some other States, for example, suggested that each State should "contribute to the acceleration of economic growth and the equitable elevation of standards of living throughout the world and the economic and social progress and development of other States."[468] The most obvious way to do this was to provide development aid to developing States, or at least to remove all trade barriers.[469] No definition of the principle could be agreed upon by all States represented in the Committee.

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[462] See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 572.
[463] Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), p. 168.
[464] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6230, adopted 27 June 1966 ("Second Report"), para. 435. See also Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), pp. 174-180.
[465] Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), pp. 175-180.
[466] Special Committee, Second Report, para. 420. Abi-Saab distinguished between the law of "co-existence" and the law of "cooperation." The latter can be compared with the law of "active co-existence." See Georges Abi-Saab, "Whither the international community?" (1998).
[467] Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), pp. 186-192.
[468] Special Committee, Second Report, para. 416.
[469] *Idem*, paras. 427-429, and para. 442.

The third session again discussed the principle of cooperation. It was suggested that the principle could serve as a "catalyst," without which other, more substantive principles, would not have any effect.[470] The universal application of this principle was stressed. It meant that all States should have an opportunity to participate in global efforts to jointly realize shared goals, on equal terms and without discrimination, and that they all had an obligation to do so.[471] Once again, development aid, granted without any political conditions or restrictions, was suggested as part of global cooperation in economic affairs.[472] One representative (USA) suggested that the Friendly Relations Declaration should at least refer to global cooperation in the promotion of human rights, if only because Article 55 UN Charter also did so.[473]

At the end of the third session, the Special Committee adopted, with a consensus, the definition of the principle of cooperation as it later appeared in the Friendly Relations Declaration. It described a general duty of all States to "co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences." This was followed by a list of substantive goals, viz. peace and security, human rights, sovereign equality and non-intervention, the realization of which required global cooperation. This list was followed by a reiteration of Article 56 UN Charter. The suggestions relating to development cooperation ended up in the final paragraph, which, *inter alia*, stated that, "States should co-operate in the promotion of economic growth throughout the world, especially that of the developing countries."[474]

The duty to cooperate was mentioned again in the Millennium Declaration, which stressed that the Organization and its Members should act in "solidarity". This meant that "global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice [and that] those who suffer or who benefit least deserve help from those who benefit most". [475] The Declaration also introduced the idea of "shared responsibility," which was described as follows:

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[470] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6799, adopted 26 September 1967 ("Third Report").
[471] Special Committee, Third Report, paras. 146-149.
[472] *Idem*, para. 156.
[473] *Idem*, paras. 158 and 164.
[474] Friendly Relations Declaration.
[475] Millennium Declaration, resolution adopted by the UN General Assembly, 18 September 2000. UNDoc. A/RES/55/2 para. 6 (see also para. 2).

> Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role.[476]

Although these ideas were not presented as such, they can be interpreted as giving more substance to the principle of global cooperation.

States have a legal duty to cooperate and take joint and separate action in cooperation with the Organization to achieve the UN's purposes. But what are the means available to the Member States to take such action? There is a great deal of uncertainty about this. First, the UN Charter itself does not give Member States any special rights to actively promote the values of the United Nations. It is presumed that such action should be taken collectively, or at the initiative of the Organization itself. However, because of the frequent failure of the UN organs to accept their responsibility in the past, many efforts have been made to create an alternative mechanism to uphold the UN's values, a mechanism which allows States to act independently of the UN.[477] This development does not change the fact that States have an obligation to cooperate and play their part in the work of the Organization. Any discussion of the means available to States, acting individually but on behalf of the international community, would take us outside the framework of the United Nations.[478]

4.4 Conclusion

The means available to the international community to collectively defend its values and norms, as defined in the UN Charter and further elaborated by the General Assembly, are limited. The general idea is that States themselves bear the primary responsibility for ensuring respect for human dignity, sustainable development and social progress within areas under their own jurisdiction and control. States are also responsible for respecting the self-determination of peoples in their internal and international affairs, and they are prohibited from threatening international peace and security. The role of the United Nations Organization is "only" to remind States

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[476] *Idem*.

[477] See especially, "Seventh report by Arangio-Ruiz," UNDoc. A/CN.4/469 and Add.1-2. See also pp. 48-49, "Third report by Willem Riphagen," in the Yearbook of the International Law Commission 1982, vol. II, Part I; and p. 22, "Fourth report by Willem Riphagen," in the Yearbook of the International Law Commission 1983, vol. II, Part I. For a discussion of these proposals, see Pierre Klein, "Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law" (2002), p. 1246.

[478] For an overview of these alternative means to defend global values, outside the UN context, see Otto Spijkers, "What's running the world" (2010).

of their responsibilities, and to provide international assistance. Only in exceptional cases can the Organization intervene in the domestic affairs of States.

5 CONCLUSION

This chapter characterized the decision making of the United Nations, especially during the drafting of the UN Charter in 1945 and in all subsequent debates in the General Assembly, as value-based authoritative decision making. It examined the inclusive and genuine character, and the capacity to motivate action of both these global discussions.

In 1945, representatives of nearly fifty States came together to draft the blueprint of the post-war legal order. The horrors of the Second World War made them aware of the urgency of their work. All cultural and political differences faded into the background. The purposes and principles adopted in San Francisco were considered to be so important that all other legal norms had to be ignored if they obliged States to violate the newly agreed post-war principles. These purposes and principles can be linked to a set of fundamental values shared by all the States present in San Francisco. Therefore the discussion was about values, and satisfied the criteria of genuineness and the capacity to motivate action. But was it a truly "global" discussion? Many peoples were absent in San Francisco: colonial peoples, the Axis powers, and those States that refused to declare war against these powers. All these peoples later adhered to the UN Charter, and thus they also subscribed to the principles contained in that blueprint, ensuring their "global" relevance.

Once the Charter entered into force and the United Nations Organization was established, the discussions continued in the General Assembly. Representatives of a growing number of States came – and still come – together every year to discuss international affairs and to find global solutions to global challenges. As all the States in the world are represented in the Assembly, the criterion of inclusiveness has been met. The important thing is that the world's citizens feel sufficiently involved in the work of the Organization, and this has been achieved to a great extent. The ideal would be for everyone to see the UN as *their* organization, even though they have little direct influence on UN decision making. What about the other two criteria? Is the discussion about values a genuine discussion? Sir Jolly referred to the Assembly's practice of adopting resolutions with lofty goals, values and principles as "hypocrisy." He suggested that not all States represented in the Assembly intended to practise what they preached. Increasingly, States are reminded of the "promises" they made in General Assembly resolutions by non-State actors that closely observe what is going on at UN Headquarters in Manhattan, New York. No State is entirely insensitive to such public naming and shaming. The resolutions are also frequently invoked, for example, in academic circles and by the International Court of Justice, as "evidence" of the existence of a norm of customary law. Once established with the

help of the Assembly's resolutions, a norm can be applied to any State, especially those that voted in favour of the norm and generally acted in accordance with it. When it comes to resolutions that interpret the value-based principles of the UN Charter itself, things get even more serious. The Assembly has the authority to interpret those principles in a binding way, speaking on behalf of the Organization's Members. Thus the Assembly plays a central role in the continued evolution of the Charter's value-based principles. This makes the Assembly the most relevant Organization for this study, and a true successor to the San Francisco Conference.