On Consensus

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TWO PHENOMENA HAVE CONVERGED in recent years to account for the current interest among international lawyers in the concept of the "consensus" of states. The first is the recognition in jurisprudence that all law, and particularly the international legal system with its lack of centrally organized sanctions, is founded on inductively verifiable psychology and not in deductive principles purportedly derived from God, nature, or reason. If international law is nothing more or less than what states (national decision-makers and their counsel) think it is, then do not particular rules of international law owe their existence and transmutations to the flow of international consensus?

To ask this is not to adopt the positivist view of international law as dependent upon the "will" of each state if that position is construed to allow any state to "withdraw" from any rule at any time that it wants to disobey it. Rather it is to acknowledge the general force of the positivist doctrine, expressed in the Lotus case,2 that we are not dealing with metaphysics or natural law precepts but rather with what nation-state decision-makers themselves believe to be the

1 In discussing the positivist concept of "consent," Professor Jaffe wrote that "it is sufficient to the argument (and nearer to the reality) that consent is given to international law as a system rather than to each and every relationship contained in it." Jaffe, Judicial Aspects of Foreign Relations 90 (1933). See D'Amato, "International Law—Content and Function," 11 J. Conflict Resolution 504 (1967); D'Amato, "Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law," 10 Virginia J. Int'l Law 1 (1969).

2 The Permanent Court of International Justice declared in the Lotus Case that "the rules of law binding upon States...emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law..." P.C.I.J., Ser. A, No. 10, at 18 (1927).
law. It is indeed futile to attempt to describe international law in any sense other than what states believe that law to be, for such an attempt would amount, to the extent of its deviation from actual belief, only to a natural-law prescription of what states ought to believe. Thus the idea of "consensus" of state opinion as to international law would appear, at first sight, to be a helpful way of describing the indices of authority of the rules of international law.

Second, attention to the notion of consensus has ripened as a result of the increasing tendency of the General Assembly of the United Nations to pass resolutions purporting to declare and proclaim the existence of various rules of international law binding on all states. Do unanimous or near-unanimous resolutions on subjects such as anti-colonialism, the continental shelf, outer space, apartheid, and sovereignty over natural resources supersede, or supplement, all prior international law on these subjects? Can anyone who agrees that international law is a psychological datum dependent for its content on what states believe to be its content deny that United Nations resolutions create law? Is "consensus" indeed the answer to the convoluted controversy over the "sources" of international law?

It may be advisable to approach these questions with considerable caution. Looking for a moment at recent experience in the field of natural science, it is clear that great theoretical or research simplifications that only a few years ago were hailed as breakthroughs have been found upon further analysis to multiply previous realms of difficulty. This is true, for example, with respect to the concept of time-reversal in theoretical physics and cybernetics, to DNA in biochemistry, and to quasars in astronomy. A closer analogy is the very concept of "consensus" itself in sociology and political science. Professor Irving L. Horowitz has written that "few words in the vocabulary of contemporary sociology appear as soothing or as reassuring as consensus," but he went on to delimit eight shades of meaning of the term and concluded by calling for specific concern with problems of conflict and co-operation that are hidden ambigu-

3 Although this is essentially a phenomenological position (cf. Otaka, Grundlegung der Lehre vom Sozialen Verband (1932)), phenomenologists are hard put to explain their assertions of the "non-existence" of the objective world of fact. See, for example, Singer, "The Level-of-Analysis Problem in International Relations," 14 World Politics 77 (1961); cf. Husserl, Ideas: General Introduction to Pure Phenomenology (1931). This argument is reinforced if we view international law as our best and most objective description of how states view international law. This is not necessarily meta-phenomenological, even though it is certainly phenomenological at the state perception level.
ously behind the term.  Professor Herbert McClosky in the field of political science has used the term “consensus” not to apply to any definable referent but rather to indicate a continuum between simple majority agreement and unanimous shared beliefs. “No one,” he writes, “can say how close one must come to unanimity before consensus is achieved, for the cutting point, as with any continuous variable, is arbitrary.” It is clear from McClosky’s article that “consensus” is only an introduction to analysis, not the end of it.

In international law, accordingly, it may be helpful to distinguish four possible kinds of “consensus”: complete unanimity, near-unanimity with a few abstentions, near-unanimity with one or more active dissents, and majority opinion with substantial minority disagreement. The first and last of these categories are relatively easy to analyze. If all states subscribe to a declaration that a particular formula expresses an existing rule of law, then that is the end of the matter, for what states believe to be international law is international law common usage. The only problem that arises — and it is often a substantial problem — is ascertaining whether the subscribed declaration purports to be expressive of a current rule of international law that the states agree is legal. The Universal Declaration of Human Rights of 1948 was not considered as law when it was adopted and is still at best precatory. It is clear from the language of the Declaration why this is so. The preamble states that the declaration is proclaimed as “a common standard of achievement,” and that the states “shall strive by teaching and education to promote respect for these rights and freedoms.” This is, of course, far from being a statement of existing international law. A more debatable case is resolution 1962 (XVIII) entitled “Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.” From this title one might expect that the resolution is in fact a declaration of existing law binding upon every state. But the preamble states that “The General Assembly . . . solemnly declares that in the exploration and use of outer space

6 Approved by G.A. Res. 217A (III).
States should be guided by the following principles.” The omission of the word "legal," and the inclusion of "guided" which suggests a moral obligation and not a legally binding requirement, operate to cast doubt upon the law-creating ability of this unanimously adopted resolution. To an extent, of course, a resolution on outer space or similar areas where there had been no pre-existing law may, by virtue of the peculiarities of language, seem to suggest that the "law" will be operative in the future and not in the present. Nevertheless, it would not appear to be an overly difficult task, in a thorough contextual examination of the resolution, to determine whether the subscribing states intended to be guided by principles in the future or intended to be presently bound by rules of law which will apply to them in the future if and when they find themselves in a factual position such that the rules are applicable.

If the situation is one of majority opinion with substantial minority disagreement, it would seem difficult to consider the majority opinion as constitutive of "consensus." In Latin the word "consensus" meant agreement, accord, sympathy, common feeling; it derived from "con" (together) and "sentio" (feel). The primary usage of the term in the sixteenth and following centuries was in the study of physiology of parts of the body, where it meant harmony, co-operation, or sympathy of movement. The idea of harmony, co-operation and sympathy is still important in the current usage of the word "consensus," and the word is typically defined either as unanimity of opinion or at least "general agreement." Professor Wright has used the paradoxical term "substantial unanimity" as a synonym of "consensus," which indicates something that is nearly unanimous and not just a majority opinion. In stating that near-

9 How this particular question is resolved is a matter for detailed interpretation in its relevant context. For an interesting though not wholly persuasive view, see Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", 5 Indian J. Int'l L. 23 (1965).
13 Ibid.; see also The Random House Dictionary of the English Language 312 (1966). This latter work, which is the latest dictionary to appear at the time of the present writing, introduces the idea of "majority of opinion" as a secondary meaning of the term "consensus": ibid. However, no attempt is made to distinguish between simple majority and unanimity.
unanimous resolutions of the General Assembly establish general international law, Professor Wright seems to indicate that even more than a two-thirds majority is needed:

The law-making effect of such resolutions depends, not on their acceptance by a two-thirds majority of the Assembly in accord with the formal requirement of the Charter, but on the actual generality of acceptance including all of the states with substantial interest in the subject.\(^{15}\)

As this quotation from Professor Wright indicates, "consensus" may not be simply quantitative but may also depend on the quality of the opposition. An actively dissenting state with an interest in the subject matter obviously would more greatly affect international expectations of authority and control and thus count for more in defeating the idea of a "consensus of opinion" than, for example, would a state that casually abstained or a state that, having no navy and no access to the sea, dissented from a declaration on the breadth of territorial waters. In any event, where there are many states that object to a given declaration of opinion, it would seem that the idea of "consensus" would preclude a finding that anything less than near-unanimity could constitute a true "consensus."

Admittedly the preceding distinction is not rigorous. Nevertheless, it can be argued to follow a fortiori from a consideration of the effect of near-unanimity on abstaining or dissenting states. The difficulties associated with an attempt to prove that near unanimity can generate rules of law should make it fairly clear that we may dispense with cases of majority opinion that amount to less than near unanimity. Let us therefore turn to a consideration of the hard cases of "consensus" with a few abstentions and consensus with one or more active dissents.

There at once arises a temptation to simplify the problem by stating that near-unanimity is all we can ever expect in international law, and yet practice short of total unanimity in the past has not barred the emergence of rules of universal application. As Judge Lauterpacht wrote, "if universal acceptance alone is the hall-mark of the existence of a rule of international law, how many rules of international law can there be said to be in effective existence?"\(^{16}\) Even the Soviet emphasis on national consent to rules of international law has not stood in the way of the following statement in

\(^{15}\) *Ibid.*

\(^{16}\) Lauterpacht, *The Development of International Law by the International Court* 191 (1958).
the 1964 textbook published by the Soviet Institute of International Relations:

The relativity of the element of generality expresses itself in the fact that for the arising of a customary norm, it is non-obligatory that all governments without exception acknowledge and apply it. Its acknowledgement on the part of the majority of governments, having the main role and greatest importance in international relations, appears to be necessary and sufficient practice.\textsuperscript{17}

However, these and other statements to the effect that international law consists in "generally recognized principles and norms"\textsuperscript{18} are typically found in discussions of customary international law and not in the relatively new idea of law formed by consensus. Yet, as we shall see below, there is a fundamental difference between the two alleged methods of law-creation, or at least enough of a difference to make it impermissible to apply generalities relating to custom to a different area.

This conclusion is reinforced by Professor Lissitzyn, who has given careful consideration to the idea of consensus. In his study \textit{International Law: Today and Tomorrow} (1965), which is heavily relied upon by Professor Wright in the article previously cited\textsuperscript{19} (see p. 7), Professor Lissitzyn suggests that operative differences can result from silence interpreted as acquiescence, express rejection, rejection in words or rejection in deeds, and challenges to a norm \textit{after} a period of general acceptance.\textsuperscript{20} In addition, he questions whether, given the current availability of materials on state practice, the "dissent of one state or a small group of states" can "suffice to prevent a norm from being one of general international law."\textsuperscript{21}

It is clear, therefore, that Professor Lissitzyn does not feel that a simple statement such as "generally accepted principles" will suffice to deal with the problem of the universal extension of a norm arising from near-unanimous consensus.

However, two theoretical approaches to the question of the extension of "consensus" to non-participating or dissenting states have recently been advanced which deserve brief consideration. The first, outlined by Professor Wright, equates consensus with consent, hold-

\textsuperscript{17} Kozhevnikov (ed.), \textit{Mezhdunarodnoye Pravo} 42 (1964).
\textsuperscript{18} \textit{Ibid.}, 32. Emphasis supplied.
\textsuperscript{19} \textit{Supra} note 14.
\textsuperscript{20} At 36-37.
\textsuperscript{21} At 36.
ing that the latter is "the ultimate source of international law." 22 If this equation were true, Professor Wright would have to conclude, which he does not, that only the states that consented to a declaration could be bound by it and not the few that may have abstained or dissented. There are perhaps two reasons why Professor Wright does not reach this conclusion. A minor reason is that "consensus" is not just an aggregate form of "consent"; the Latin and Old French derivations were different, 23 and in common usage "consent" implies active agreement while "consensus" refers to shared or sympathetic beliefs. 24 More importantly, Professor Wright's discussion of "consent" defines that term in an extremely broad manner. He writes that consent may be express, tacit, presumed, or implied, and that it can be evidenced by agreement, custom, reason, or authority, respectively. 25 The third of these elements—the presumption of consent according to reason—appears to negate the meaning of the term as voluntary agreement. Professor Wright explains that "reason establishes a presumption of consent to a norm by rational beings capable of perceiving the unwelcome consequences of non-observance and, therefore, a general interest in observance." 26 Yet this surely commits the natural-law fallacy of imputing rational requiredness to the actions of states irrespective of their own beliefs, and in any event cannot be ascribed to the operation of "consent." We are left, therefore, with the idea of "consensus" which is unexplained in Professor Wright's article.

A second approach, mentioned previously, is the conjunction of "consensus" with "custom," and more specifically the equation of consensus with opinio juris. If such an equation were convincing, then we would have to conclude that the few abstaining or dissenting states would be bound if the overwhelming majority of states accepted a certain legal position. This would follow from the idea of customary law which gives, in appropriate cases, universal applicability to practices engaged in by fewer, often substantially fewer, than the totality of states. 27

22 Wright, supra note 14, at 153.
23 Murray, op. cit. supra note 10.
24 See text supra at notes 11-13.
25 Wright, supra note 14, at 153.
26 Ibid., 154.
27 The Fisheries Case, [1951] I.C.J. Rep. 116, is no exception despite the restrictive interpretation given it by many commentators. Although the Court said that "in any event the ten-mile rule would appear to be inapplicable
Professor Ben Cheng has accordingly made the argument that consensus is the equivalent of *opinio juris*.\(^{28}\) He argues that although the traditional view of customary law is that it contains two constitutive elements, the material and the psychological, in fact the material element of usage is "purely evidentiary."\(^{29}\) It merely "provides evidence on the one hand of the contents of the rule in question and on the other hand of the *opinio juris* of the States concerned."\(^{30}\) He concludes that there is no need of any usage or practice provided that the *opinio juris* can be clearly established. "Consequently, international customary law has in reality only one constitutive element, the *opinio juris,*" which in appropriate cases can be found in General Assembly resolutions.\(^{31}\) The difficulty with Professor Cheng's argument is not his general conclusion about consensus, for Professor Cheng acknowledges that "if States consider themselves bound by a given rule as a rule of international law, it is difficult to see why it should not be treated as such,"\(^{32}\) but with his insistence that consensus is equivalent to *opinio juris*. For the operation of "customary" international law is not quite so simple as Professor Cheng argues it is. One cannot readily divorce the material element from the psychological element, for in the specific cases

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\(^{28}\) *Supra* note 9, at 35-48.

\(^{29}\) *Ibid.*, 36.

\(^{30}\) *Ibid.*


where custom has been alleged both of these elements operate interdependently to qualify each other. *Opinio juris* helps to characterize practice as legal rather than a matter of comity or expediency, as international rather than domestic, or, as in the Lotus case, as obligatory non-action rather than inertia. Similarly, usage helps concretize the general asserted rule, or select it from numerous rules alleged concurrently, or perhaps even to defeat the rule of *opinio juris* in cases where practice diverges from protestation.\(^3^3\) The whole flow of behaviour from which legal inferences are made includes both utterances and deeds. It is therefore unwarranted to divorce the psychological element of custom from the material element, and in any event doing so is unnecessary to Professor Cheng’s argument since he did not in fact choose to argue that abstaining or dissenting states are bound by near-unanimous consensus in General Assembly resolutions.

A more original analogy to custom was advanced by Judge Tanaka in his dissenting opinion in the South West Africa cases (Second Phase).\(^3^4\) He seized upon the characteristic of custom-formation as it has traditionally been viewed of repetition of acts extending over a long period of time. Then he argued that although an individual resolution of the General Assembly condemning apartheid does not itself have binding force upon the members of the organization, repetition of resolutions to the same effect over a period of time can add up to a rule of customary law.\(^3^5\) Judge Tanaka concluded that the long list of anti-discrimination resolutions cited by the applicants in the case (thirty-three resolutions from the first to the eighteenth session of the General Assembly)\(^3^6\) amounted to an anti-apartheid norm of customary international law binding upon South Africa. However, he adduced no reason why numerous resolutions can have an effect when a single resolution has no effect. Moreover, the passage of a series of resolutions would appear to be a formalistic device well within the power of a majority of states in an international organization. All that would be required would be the drafting, proposal, and voting elements, which is not at all analogous to the repetition of practice constitutive of custom.

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\(^3^3\) See, for example, Professor Tucker’s discussion of the “negative effects of custom” in his revision of Kelsen, *Principles of International Law* 451, n. 24 (3d ed. 1966).


\(^3^5\) *Ibid.*, 290.

\(^3^6\) Listed in 4 *South West Africa cases — I.C.J. Pleadings* 502, n. 4 (1966).
where at least the time and situational elements vary from act to act to produce genuine variations and testings of the underlying rule. At any rate, no other judge in the South West Africa cases took up Judge Tanaka's suggestion, and there appears to be no mention of it in state papers or writings of publicists.

If we put aside dubious analogies such as consent or custom, we may proceed to a particularistic consideration of the legal effect of consensus upon abstaining or dissenting states. To simplify the analysis, let us assume that the consensus is manifested by a resolution of the General Assembly that clearly purports to declare the current existence of a binding rule of general international law. Let us also assume that the rule is not addressed to a matter of internal Charter law where the Assembly has or might arguably have authority to bind the member states, such as issues relating to admission of members or financial assessments. Rather, assume that the resolution purports to declare the existence of a general rule of law such as one that relates to the continental shelf or to nationality or ownership of natural resources. On such questions, the General Assembly has no Charter authority to bind its members, and therefore the resolution is a "pure" vehicle for the expression of international opinion.\(^\text{37}\)

\textit{A. Consensus with a Few Abstentions}

If a resolution is passed with one or a few states abstaining\(^\text{38}\) but no state dissenting, is the situation sufficiently close to absolute unanimity to regard the resolution as expressive of a rule of international law? One line of argument is that the abstaining states are

\(^{37}\) It is important to stress this limitation. For it may make considerable difference if a general rule of law is contained in a convention instead of a resolution. A convention itself binds the parties in addition to serving as a vehicle for consensus, and therefore might be a more powerful source of a rule of universal applicability. The parties to a convention reflect this in the greater care they take in the drafting, knowing that they will be bound by virtue of the treaty itself. They may even refuse to sign a convention (for example, on human rights) that they have no hesitation about subscribing to in the General Assembly in the form of a resolution. Finally, because of its binding power, a convention shapes subsequent state practice whereas a resolution might be negated by subsequent practice in which case we might conclude that the consensus has changed.

\(^{38}\) Abstention might also include absences of non-members of the United Nations who at the time of the resolution issued no national statements presenting a different view of the law. This question of course cannot be resolved conclusively at the present time owing to the absence of state practice on the precise point.
bound because they have acquiesced in the resolution. Professor Lissitzyn suggests that acquiescence can be implied as to states which "have not had the occasion to act in the matter or express any view of it," but can the same be said for states which have had an occasion to participate in voting but have consciously abstained? Practice in the United Nations, apart from issues relating to Charter procedure such as vetoes or the existence of a quorum, indicates that delegates strenuously contest any imputation of acquiescence when they abstain from a vote. An abstention can just as easily be viewed as a refusal to say yes as it can be interpreted as a refusal to say no. "Acquiescence," in the sense of accepting or complying tacitly or passively, cannot persuasively be imputed to abstention. Moreover, one might question the necessity of finding acquiescence. The search for acquiescence implies a basis of "consent" in international law, which often leads as in Professor Wright's article previously cited, to the inclusion of elements that have nothing to do with consent. The reason for such inclusion is plain: "a customary rule is observed, not because it has been consented to, but because it is believed to be binding." There is, in brief, no particular need to adopt a consent theory of international obligation, and no further need to strain to impute acquiescence to attenuated situations such as abstention.

Perhaps no theory at all is needed. In the analogous situation of authoritative interpretation of the United Nations Charter, Oscar Schachter stated:

The question of primary interest to the international lawyer has generally been the extent to which the interpretations reached by, or within, the political organs are to be regarded as legally authoritative when the organ has not been accorded the competence to make binding decisions. In considering this, one might start with the principle that an "authentic" interpretation of a treaty by the parties is legally binding on them to the same degree as the treaty itself. I believe it is generally accepted that this conclusion would hold for an interpretation of the Charter adopted by all the Members (or even "by the overwhelming majority" except for some abstentions) in the General Assembly; the interpretation would be characterized by international lawyers as having the same legal force and effect as the Charter itself.

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40 Webster's New International Dictionary of the English Language 23 (1958).
The key statement for our purposes in this quotation is that contained in the parentheses. Mr. Schachter's use of a parenthetical comment without underlying reasons why the abstaining states would be bound accurately reflects current international legal thinking that "some abstentions" would not operate to destroy the universality of the interpretation or, in the case of "consensus," of the universal application of the rule that is being declared.

But there is in fact a good theoretical explanation for this result. It is entirely natural for national decision-makers, their counsel, international lawyers, delegates to the United Nations, and international jurists to expect that a state which consciously abstains from a resolution declaring a legal rule is estopped in the future to assert that it is not bound thereby. Although writers have drawn finely spun if not rigid "requirements" of the "doctrine of estoppel" in international law, at the heart of the notion of estoppel in all legal systems including the international is the feeling that failure to speak up when given an easy opportunity to do so should not result in a preferred position later on. The abstaining state should not later be able to invoke the rule if invocation is in its interest, or denounce it if denunciation would give it an advantage. The Permanent Court of International Justice alluded to this sort of consideration with respect to a resolution of the Assembly of the League of Nations in the advisory opinion on the Monastery of Saint-Naoum, while the International Court of Justice in the Fisheries case stressed the importance of a lack of protest in a situation where it would have been easy to do so and where the complained-of practice was notorious. In general, states have an interest in an international legal system made up of some rules that are relatively ascertainable and are universally and reciprocally applicable; this interest is evidenced by the reality of international law. It is easy to conclude from this that considerations of estoppel will operate to extend to abstaining states a rule contained in a declaration of consensus, as well as reinforcing the rule for the states that have actively participated in the expression of consensus.

44 Ser. B, No. 9, at 6, 13 (1924).
B. Consensus with One or More Dissents

The truly difficult questions arise when a state actively dissent from a general expression of consensus as to a rule of law. Here there can be no estoppel and, of course, no acquiescence. It is permissible to argue that if there are only one or two dissenting states, they are nevertheless bound because international law is defined as the rules among states that are generally accepted by the states? Can we take up the implication in the late Judge Lauterpacht’s question cited previously that international law of necessity cannot depend for its existence on complete universal acceptance of each of its rules? So long as the consensus is the opinion of the overwhelming or nearly universal majority of states, is it not reasonable to assume that the one or two dissenting states are likewise bound by virtue of the simple fact that they are members of an international community and must go along with the predominant expressions of that community?

Of course, the statement “international community” begs the question. Moreover, the problem is not one of a reasonable solution, but rather of what states believe to be the applicable rule in this situation. It is important to distinguish between an international expression of consensus as to a particular substantive rule of law, and what states believe to be the role of consensus as a possible creator of law. The former is a question about rules; the latter about “sources” of law. With this distinction in mind, which shall be specified in greater detail later, let us proceed with a cautious analysis of the slight amount of state practice currently available on these questions.

In the first place, we must distinguish between resolutions that purport to create new law and those that purport to reinforce the old. In the latter instance, there is sufficient state practice to the effect that near-universal consensus strengthens a prior rule even in the teeth of dissents. It is much harder for a dissenting state to object to a rule that has been “codified” in a Geneva convention or an International Law Commission recommendation than it was to object to such a rule prior to the codification. This is even true if the codification is somewhat “progressive,” as long as the departure is marginal. The prior rule cannot help but be strengthened because of its articulation in a codification. However, this line of argument is true largely or entirely because the dissenting states were already bound by the prior law. Even if they had protested against the prior
law at the time it arose, that law might have arisen by virtue of international custom which formulated a norm of universal applicability. Or the dissenting state might have belied its dissent by practice in conformity with the generally accepted rule, a situation which is far more frequent than partisans of logical consistency between words and deeds might expect. Moreover, early dissents against a general community practice may have been replaced as time went on by weaker dissents or mere reservations of legal rights which in the shifting and changing international legal environment have rarely been accorded deference in subsequent international claim-conflict situations. Whatever the reasons, it is clear enough for present purposes that we should distinguish the case of consensus as codification from the harder problem of consensus that purports to create new rules of law.

Accordingly, let us examine the situation where an expression of international consensus purports to change prior law or to create law (as in the case of rules governing outer space) where previously there had been none. Let us assume, moreover, that the dissenting state has more than a mere scintilla of genuine interest in the issue. For example, a trivial dissent to the question of the breadth of the territorial sea by a landlocked state having no navy would probably be ignored by the international community as well, perhaps, as by the state itself should it later find itself in a position to come into contact with the new rule. However, we need not assume that the dissenting state be a powerful or major state or the leader of a bloc of states; such considerations of “weight” which often creep into the discussions of publicists confuse might with right in a manner which may these days be as anachronistic as gunboat diplomacy, let alone unjustifiable. The advent of the nuclear era has paradoxically created impotency in the highest places. Interbloc nuclear balance, the counter-productively excessive power of nuclear weapons, and the ability owing to modern mass communication of small nations to rally to the side of any one of them threatened by a larger power, make it necessary in any discussion of international law— which itself is designed to persuade the reader and not to force him to accept a position—to assume equality of states before the law and genuine reciprocity.

The best and perhaps only example currently available for testing the preceding problem can be found in the oral arguments before the International Court of Justice during the South West Africa cases (Second Phase). The applicant states had cited in their reply
brief thirty-three resolutions by the General Assembly which the applicants alleged amounted to an international norm of universal applicability condemning apartheid as illegal. The resolutions were passed by overwhelming majorities, the dissenting states only being South Africa (consistently) and Portugal (usually). The alleged rule was certainly “new” to international law in the sense that treatment of intra-territorial population groups by states has been considered, except for aliens or in the case of alleged genocide, as outside the jurisdiction of international law.

The applicants took the position that the multiplicity of new states, technological development, the spread of communication, and the lack of central legislative organs in international society have created the need for new procedures “to change and evolve international standards and norms.” They argued that “scholars have increasingly urged that suitable and, in appropriate cases, quasi-legislative effect be given to official acts of international institutions.” In this light, the Applicants contend that the Court should confirm the role of international consensus as a source of international law within the meaning of Article 38 of the Statute of the Court and within clear, practical limitations. “Consensus” is used by the Applicants to refer to an overwhelming majority, a convergence of international opinion, a pre-
dominance of view; it means considerably more than a simple majority, but something less than unanimity.\textsuperscript{51}

Answering these contentions, South Africa argued that they amounted to a plea for reform in international law rather than a statement as to what current international law is.\textsuperscript{52} The need, if there is one, for a quasi-legislative body does not create such a body, nor does it give the Court the right to exercise a quasi-legislative function.\textsuperscript{53} Counsel for South Africa stressed the fact that the application of a resolution to a dissenting state would be a legislative act, and cited numerous authorities, including Judge Jessup,\textsuperscript{54} to the effect that the United Nations is not a world legislator and that at present there is no state recognition of an international legislative process.\textsuperscript{55}

The judgment of the International Court of Justice of July 18, 1966 did not resolve these questions because the case was dismissed for want of legal right or interest of the applicants in the subject matter of the dispute. The vote to dismiss was 7 to 7, with the President casting the decisive extra vote in favor of dismissal. However, had the merits been reached (for example, if Judge Bustamante y Rivero had been able to attend the oral pleadings and if he had voted as he did in the first phase of the case in 1962), the Court might nevertheless have rejected the applicants' arguments on the question of consensus. For Judge Jessup rejected these arguments in the course of his dissenting opinion, and although the other two judges who alluded to the issue in their dissents were favorably disposed toward the applicants' position, these latter judges did not substantiate their stand with reasoned comment.\textsuperscript{56} Judge Jessup's reasoning, however, was clear:

...I do not accept Applicants' alternative plea which would test the apartheid policy against an assumed rule of international law

\textsuperscript{51} Ibid., 345.
\textsuperscript{52} Ibid., 634.
\textsuperscript{53} Ibid., 634-35.
\textsuperscript{55} 9 South West Africa Cases — I.C.J. Pleadings 655 (1966).
\textsuperscript{56} Judge Tanaka would have accepted the consensus argument; see supra (text at note 34). Judge Padilla Nervo appears to have accepted the position, although the indication is weak. He refers in his dissent, [1966] I.C.J. Rep. 447, to "international legal norms and/or standards prohibiting racial discrimination": ibid., 469, and states that the resolutions "might be considered, in fact, as a manifestation of some of the directives that the Court should apply...": ibid., 456.
(“norm”) 57. . . [T]he argument of Applicants seemed to suggest that the so-called norm of non-discrimination had become a rule of international law through reiterated statements in resolutions of the General Assembly, of the International Labour Organisation, and of other international bodies. Such a contention would be open to . . . [the] attack . . . that since these international bodies lack a true legislative character, their resolutions alone cannot create law. . . . 58

It is furthermore clear that if the Court had reached the merits, the majority opinion would have had to contend with Judge Jessup’s argument that the resolutions cannot be imbued with legislative force vis-a-vis South Africa. Significantly, Judge Jessup felt no need to document his conclusion that the international organizations lack a true legislative character, other than a footnote which said simply “the literature on this point is abundant.”

More generally, it may be argued that despite the near-universal condemnation of South Africa’s racial policies, nations may be reluctant to purchase an anti-apartheid norm at the cost of attributing legislative character to the General Assembly or other international organizations. Judge Fitzmaurice’s warning in his separate opinion in the Certain Expenses case is extremely pertinent:

. . . [If] Article 17, paragraph 2, is sufficient to give rise to a financial obligation for the dissenting voter . . . then it would follow that, in theory at least, the Assembly could vote enormous expenditures, and thereby place a heavy financial burden even on dissenting States, and as a matter of obligation even in the case of non-essential activities. 59

It would be less than realistic or candid to ignore the fact that the Certain Expenses opinion was not obeyed. It is moreover conceivable that an element in the decision of the United States not to continue to apply diplomatic pressure against France and the Soviet Union for compliance with the Court’s advice could have been a realization in United States’ policy-making circles that Judge Fitzmaurice was right in his underscoring of the reciprocity inherent in any attempt to give majorities the power of authoritative interpretation.

In sum it would appear that the strong international feeling that


58 Ibid., 432.

international organizations lack legislative capacity, coupled with the slight available evidence on the direct point, amounts to a rule that a universal legal norm is not created vis-a-vis a dissenting state by virtue of a mere declaration of consensus. No evidence at all has been found, however, as to whether the norm in a resolution creates new law for the assenting states inter se. That is a possible, and indeed likely, result. On the other hand, it is possible that an interested state’s dissent could operate to destroy the norm entirely. If South Africa can claim that no anti-apartheid norm has been created by General Assembly resolutions, might not another country which practices racial segregation persuasively argue that it also is not bound by such an alleged norm? If South Africa is not bound, then either a norm exists that specifically exempts the allegedly worst offender, or no norm exists at all. We will have to wait and see how states resolve this issue when it comes up, as it assuredly will sooner or later.

But a theoretical problem remains that need not await international developments for its resolution. One might ask, how can consensus be held to create law if a few states abstain but not create law if a few states dissent? How can an international principle such as this depend on a shade of difference in the actions of one or two states? The answer suggested here is that consensus is not a law-creating process, even though it is often conveniently referred to as such. Consensus — the inference we draw from the process of international communication about norms — is international law; what states believe to be law is law. The crucial question to ask in any case is, What do the states believe? When all the states without exception believe that X is a rule of law, then X is in fact a rule of law. Unanimous consensus can never be questioned by writers or courts. If the consensus is nearly unanimous and there are a few abstentions, then what states believe to be the law is X coupled with the principle of estoppel, which operates to extend the rule X to the abstaining states. It is state belief about estoppel, and not the consensus, which creates law for the abstaining states. Finally, if the consensus is nearly unanimous but there are one or more dissenters, then estoppel is not present. The only other “active” principle believed in by states which could extend the rule to the dissenting states would be the principle of legislation. But this is precisely the principle that states in the present stage of international development do not want to accept. There is, in short, no metarule of the
legislative effect of declarations of consensus. Thus, since consensus itself is not a metarule but merely a definition of what we mean by the expression "international law," we are forced to conclude at the present time that a dissenting state is not bound by a General Assembly resolution. Whether the assenting states are bound inter se will have to await the consensual development or rejection of a metarule to that effect.