

## The UN General Assembly as a Law-Making Body

The United Nations General Assembly has great significance as a political body. Its pronouncements carry normative weight but, as a rule, no legal force. As Schwebel argues, this is in part, perhaps, because States and their representatives, aware that resolutions of the General Assembly have no binding force, vote for a multitude of reasons. One of those reasons may be an intention to abide by the standards expressed, but equally common are other motivations, such as a desire to win favour with or avoid alienating the States sponsors, a desire to appear progressive in the eyes of their peers or the world media or even, as Schwebel describes, because an individual member of the delegation is inclined to vote a certain way.

This is, it seems clear, the role the General Assembly was intended to play. Aside from a number of internal institutional matters where the General Assembly is given a full decision-making competence, and certain questions relating to the Trust territories, the text of the Charter clearly shows that the resolutions of the General Assembly were intended to be recommendatory in character. Indeed, a proposal at the San Francisco Conference to give the General Assembly the competence to develop international law was rejected overwhelmingly, with only a single State voting in favour of the suggestion. It seems abundantly clear, then, that the intention of the drafters of the Charter was to provide a degree of insulation for international law from the political pronouncements of the General Assembly. Nevertheless, in certain circumstances the General Assembly can, indeed, make law.

It is, first, entirely uncontroversial to say that the General Assembly can contribute to the formation of customary law. The resolutions of the General Assembly and the statements of representatives in the course of debates can (but will not necessarily) express the *opinio juris* of States. When such an *opinio juris* reaches the required standard of virtual uniformity paired with appropriate State practice, a customary law norm results. While discerning *opinio juris* from the attitude of States towards draft resolutions and in their voting habits should be treated with caution, for the reasons Schwebel gives, there can be no doubt that States can and do express *opinio juris* in the General Assembly as in any other forum.

On occasion, however, the General Assembly has played a more direct role in the creation of customary law – one that appears more akin to legislation than to the painstaking and incremental process that typifies custom-formation. A significant example of the General Assembly's role in creating what has come to be described as 'instant custom' is the Declaration of Legal Principles Governing the Activities of State in the Exploration and Use of Outer Space ('Space-Law declaration'). The Declaration, which was adopted by consensus, proclaims a number of principles, such as an assertion that '[O]uter space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use of occupation, or by any other means', and that '[t]he activities of State in the exploration and use of outer space shall be carried on in accordance with international law, including the Charter of the United Nations', which are phrased as imperative and authoritative statements as to the legal regime and principles applying to States' activities beyond the Earth's atmosphere. Indeed, it reads very like a piece of legislation. The subject matter of the Space-Law declaration, of course, made it particularly amenable to the formation of 'instant custom' – as an area in which no States were (at that time) engaged in day-to-day activities, which was subject to no regulation of any kind, and which contained no

sovereignties. Nevertheless, it is startling that this apparent exercise in legislation by the General Assembly appears to have been accepted as effective.

The same principles of ‘instant custom’ – that is to say, an attempt to provide principles guiding conduct in a hitherto unregulated area – may apply to the Sea-Bed Declaration, the legal effect of which was discussed at length in the 109th meeting of the Third UN Conference on the Law of the Sea. It is notable, however, that the authority of the declaration as a law-making document was not, in that instance, so uniformly accepted. It may be that the deep sea bed, although now less explored than the surface of the moon, was not seen as an unregulated area by some States, or it may be that the ability of States to commercially exploit the resources of the sea-bed provided a stronger incentive for them to treat the declaration as expressing political rather than legal norms. Whatever the reason, and despite a significant amount of academic criticism of the idea, instant custom does appear to be gaining a measure of acceptance.

A final apparent ‘mode’ of law-creation by the General Assembly is, to an extent, connected to the idea of instant custom, but should be considered a distinct category. This category, which again bears a resemblance to legislation, concerns certain of the resolutions of the General Assembly which, unlike those resolutions considered ‘instant custom’, concern areas of international law already subject to international regulation. Notable examples of resolutions in this category include the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res 1514(XV)), and the Declaration on Friendly Relations (UNGA Res 2625(XXV)). The Friendly Relations Declaration was confirmed to be customary law by the ICJ in its Nicaragua decision and, more than that, was confirmed to be new law – that is to say, more than merely an expansion of the Charter. Similarly, the Arbitrator in Texaco conducted a review of the status of resolution 1803(XVII), on Permanent Sovereignty over Natural Resources, concluding that it was customary law.

Judge Cançado Trindade, judge at the ICJ and a former judge of the IACtHR, has given a theoretical justification for the formation of law by the General Assembly. Such a resolution, he argues, expresses an *opinio juris communis* – a juridical cognisance of the international community as a whole. Where such a universal belief of law exists, Cançado Trindade argues, a rule of law will result. While the theory is a fascinating and original contribution to the debate on the formation of customary law, the theory has not (yet, at least) been widely accepted, and the mechanism for the creation of law by the General Assembly remains unclear. It may be, as is asserted by a number of commentators, that the three ‘modes’ described above are all aspects of a single type: that the General Assembly can, in some circumstances, express the *opinio juris* of States, individually or collectively. Others maintain, however, that the General Assembly occasionally exercises an additional, quasi-legislative, law-making power.

The documents below have been selected to give an overview of law-making by the General Assembly and, in particular in the Hague Course by Cançado Trindade, original academic thought on the subject. Those wishing to delve deeper into the question could not do better than to consult Rosalyn Higgins’ work on the subject: Higgins, Rosalyn, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963).

- [Schwebel, Stephen, 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law' \(1979\) 73 \*Proceedings of the Annual Meeting \(American Society of International Law\)\* 301.](#)
- [Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UN General Assembly Resolution 1962\(XVIII\).](#)
- [Scharf, Michael, 'Accelerated Formation of Customary International Law' \(2013-14\) 20 \*ILSA J. Int'l & Comp. L.\* 305, esp. p.324-328.](#)
- [Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, UN General Assembly Resolution 2749\(XXV\).](#)
- [Summary Record of the 109th Plenary meeting of the Third United Nations Conference on the Law of the Sea, Resumed Seventh Session, Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume IX, A/CONF.62/SR.109 \[20-37, et seq.\].](#)
- [Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly Resolution 1514\(XV\).](#)
- [Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2526\(XXV\).](#)
- [Military and Paramilitary Activities in and Against Nicaragua \(Nicaragua v United States of America\), Merits, Judgement, \(1986\) I.C.J. Rep 14 \[187-188\].](#)
- [Permanent Sovereignty over Natural Resources, UN General Assembly Resolution 1803\(XVII\).](#)
- [Texaco Overseas Petroleum Company and California Asiatic Oil Company v the Government of the Libyan Arab Republic, Award on the Merits \(1978\) 17 \*I.L.M.\* 1, 26 et seq.](#)
- [Cançado Trindade, Antônio Augusto, \*International Law for Humankind: Towards a New Jus Genitum \(I\)\* \(2005\) \*Collected Courses of the Hague Academy of International Law\* 316, Part III, Chapter V-VI, p.147-176.](#)