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THE CRYSTALLISATION OF GENERAL ASSEMBLY SPACE DECLARATIONS INTO CUSTOMARY INTERNATIONAL LAW

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ABSTRACT

The current instruments of international space law include the United Nations space treaties and the declarations made by the General Assembly on both general and specific issues of space law. Along with other General Assembly resolutions, the exact nature and effect of the space declarations in the context of general international law remain somewhat controversial. It is generally accepted, however, that a provision of a General Assembly resolution or declaration may be regarded as customary international law if it has codified an existing customary principle or has crystallised into customary law through state practice and *opinio juris*.

This paper analyses the provisions of the General Assembly declarations and assesses their current status in the context of customary international law. In particular, it discusses the specific provisions of the declarations concerning remote sensing, direct television broadcasting and nuclear power sources and their effect as customary principles.

INTRODUCTION

It is a commonly observed fact that, over the past fifty years, the United Nations has played a singularly important role in the development of international space law. In addition to the Outer Space Treaty, the Rescue Agreement, the Liability Convention, the Registration Convention and the Moon Agreement, the five sets of principles adopted by the General Assembly relating to both general and specific aspects of international space law have also had a significant impact. Scholars, commentators and practitioners can often be caught referring to the relevant principles as the "law" of remote sensing or nuclear power sources without actually determining whether the relevant provision(s) qualifies as "law" according to the tests enunciated by the courts.

This paper is an empirical study of the extent of the crystallisation into custom of the principles contained in these General Assembly resolutions. It first sets out the appropriate "custom test" to be applied, recognising some of the unique nature of international space law, and then seeks to apply such a "test" to each provision.

CUSTOM GENERALLY

Article 38 of the Statute of the International Court of Justice refers to "international custom, as evidenced by a general practice accepted as law". The elements in establishing a principle of custom, as detailed by Brownlie, are:

- uniformity and consistency of the practice of States;
- generality;
- duration; and
- *opinio juris et necessitatis*.[1]

While complete uniformity is not required to establish a principle of custom, there must be evidence of substantial uniformity in state practice and that this practice is the expression of a legal right of the State.[2] The International Law Commission has produced a non-exhaustive list of the forms that state practice may take, including treaties, decisions of domestic and international courts, domestic statutes, diplomatic correspondence, opinions of national legal advisers and the practice of international organisations.[3]

Similarly, universality is not required but it is necessary to determine the weight of abstention from objection by a number of States in the face of established practice by other States. This is because silence on the part of States may infer anything from tacit acquiescence to a mere lack of interest. The approach taken by the International Court of Justice was to establish a customary principle by evidence demonstrating an "increasing and widespread acceptance" of the practice.[4] Although Article 38(1)(b) of the Statute of the Court refers to a "general" practice, the law does allow for local or regional customs among a group of States.[5] Tunkin has suggested that socialist international law can be a considered a form of local customary law in the governance of legal relations between socialist States.[6] Clearly, if this proposition is generally accepted, then there is no reason why the space faring States cannot form a "local" or "regional" group in relation to the customary law for space activities.

In the case of *opinio juris*, the Court has suggested that there must be a distinction between a rule of international comity in contrast to a practice accompanied by a belief that it is in accordance with an international legal obligation.[7] As Judges Tanaka and Sørensen suggested, it is difficult to discover the necessary *opinio juris* as States rarely explain the motives behind a particular statement or practice.

The main issue with the determination of the existence of customary principles in the field of space law is the duration. Brownlie suggests that, provided the consistency and generality of a practice are proved then no particular duration is required.[8] In the case of space law, if this was not the case, it would indeed be very difficult to prescribe the principles of custom as a result of the relative youth of such principles.

In this regard, it is pertinent to recall the words of Judge Lachs in the *North Sea Continental Shelf Cases*:

> The first instruments that men sent into outer space traversed the air space of States and circled above them in outer space, yet the launching States sought no permission nor did the other States protest. This is how the freedom of movement into outer space, and in it, came to be established and recognised as law within a remarkably short period of time.[9]

TREATIES, DECLARATIONS AND CUSTOM

In the *North Sea Continental Shelf Cases*, the Court was of the view that a treaty may relate to custom in one of three ways:

1. the treaty may be declaratory or a codification of existing custom;

2. the treaty may crystallise custom as agreed by the States during its negotiation process; or

3. the treaty provisions become accepted and followed by States as custom after its adoption.[10]

In the case of the United Nations space treaties, and in particular the Outer Space Treaty and the Liability Convention, the second and third alternatives may apply. In the various statements made during discussions in the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), the representatives often refer to binding legal principles in the context of specific space activities. Most of the provisions in the Outer Space Treaty and the Liability Convention, for example, are referred to by representatives as being the law regulating new fields of activities.

The same can clearly be said in the case of General Assembly declarations, in the sense that they may crystallise custom as agreed by States during discussions in COPUOS or became accepted and followed by the States as custom. For example, Brownlie suggests that adoption of a resolution by the General Assembly constitutes evidence of the legal opinions of States.[11] Unless the extreme position that only physical acts can constitute state practice is taken, there is no doubt that the adoption of such resolutions must in some way constitute practice. Akehurst, for example, defines state practice as "any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstrato* (such as General Assembly resolutions), national laws, national judgments and omissions".[12]

The effect of such declarations on the obligations of States can be considered in three ways. On the one hand, Schwebel, when he was Deputy Legal Advisor to the Department of State, wrote that:

> As a statement of U.S. policy in this regard, I think it is fair to state that General Assembly resolutions are regarded as recommendations to Member States of the United Nations. To the extent, which is exceptional, that such resolutions, [which] are *meant to be* declaratory of international law, are adopted with the support of *all* members and are observed by the practice of States, such resolutions are evidence of customary international law on a particular subject matter.[13]

Consequently, it appears that a General Assembly declaration must have the explicit intention of creating customary law and that it was accepted by a true consensus. This calls into question the effect of abstentions as well as challenging the accepted view that generality, rather than universality, is the requirement for the establishment of a customary principle.

As a middle view, in the *South West Africa Cases*, Judge Tanaka held that:

> What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc. ... must take place repeatedly ... This collective, cumulative and organic process of custom-generation can be characterised as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law.[14]

It can be seen from this that, while Judge Tanaka did not appear to be as strict as Schwebel in prescribing the requirements placed on custom-making resolutions, he did require for the resolutions or declarations to be repetitive in their statements of the custom.

At the other end of the continuum, Sohn wrote that:

> There is wide consensus that these declarations actually establish new rules of international law binding upon all States. This is not treaty-making but a new method of creating customary international law. ... Thus the United Nations has made possible the creation of "instant international law" ... In a rapidly changing world the United Nations has found a method, albeit restricted by the rule of unanimity or quasi-unanimity, to adapt the principles of its Charter and the rules of customary international law to the changing times with an efficiency which even its most optimistic founders did not anticipate.[15]

To some extent, the debate between the different viewpoints found in the three extracts above has been overtaken by the recent cases of the Court. In *Nicaragua*, the Court relied almost exclusively on General Assembly resolutions in stating the law on the use of force and external interventions.[16] A similar approach can be found in the advisory opinion given by the Court in the *Nuclear Weapons Case*.[17]

SPACE LAW DECLARATIONS

Overview

The five General Assembly declarations concerning space activities are:

- the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space of 13 December 1963 (the "**Principles Declaration**");
- the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting of 10 December 1982 (the "**Broadcasting Principles**");
- the Principles Relating to Remote Sensing of the Earth from Outer Space of 3 December 1986 (the "**Remote Sensing Principles**");
- the Principles Relevant to the Use of Nuclear Power Sources in Outer Space of 14 December 1992 (the "**Nuclear Principles**"); and
- the Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries of 13 December 1996 (the "**Cooperation Declaration**").

In these General Assembly declarations it may be prudent or at least convenient to separate their provisions into three groups:

- provisions that merely repeat existing treaty principles (the "**Repeating Provisions**");
- provisions that state, without more, the application of existing treaty provisions to specific situations (the "**Applying Provisions**"); and
- provisions that create new rights, duties or obligations of law that have not been previously stated in existing treaties or those that extend the applicability or content of the treaty provisions (the "**New Provisions**").

In the case of Repeating Provisions, the extent of the treaty provision's "migration" into custom must first be considered. For example, the fact that the Outer Space Treaty is considered by most States and commentators to have crystallised into customary international law means that any Repeating Provisions that repeat the provisions of the Outer Space Treaty would merely be restating existing custom.

Applying Provisions are, strictly speaking, not statements of legal principles but are instead "working examples" of specific

applications of an existing treaty principle. Consequently, the only relevant consideration when determining the status of an Applying Provision in custom is whether the treaty provision being applied has crystallised into a principle of customary law.

In the case of New Provisions, it will be necessary to consider whether they crystallise custom as agreed during negotiations or if they have been subsequently accepted and followed as custom. As an empirical exercise, the *travaux préparatoire* and, as a secondary source, the writings of legal scholars and commentators are examined to determine whether a New Provision has been accepted by States to be a principle of customary international law.

Further, for the purposes of considering the Repeating Provisions and the Applying Provisions, the provisions of the Outer Space Treaty, the Rescue Agreement and the Liability Convention are considered to have crystallised into custom at the time that these treaties were adopted by the General Assembly.

Principles Declaration

The Principles Declaration, adopted by the General Assembly in 1963, is the only resolution considered to contain principles of space law that was declared before the adoption of the Outer Space Treaty and the Liability Convention. Consequently, the Principles Declaration is unique in that, at the time it was adopted, its provisions were all New Provisions. Since the adoption of the 1967 Outer Space Treaty, however, these provisions may be considered to have transformed into Repeating Provisions.

Between 1963 and 1967, the status of the provisions of the Principles Declaration would have required an evaluation of the *travaux préparatoire* to assess the level of their acceptance by States. Considering the positive statements made by almost all governmental representatives during the debates and negotiations, it is likely that the Principles Declaration is a codification of the customary principles accepted by States during the negotiations process. However, those provisions relating to the freedom of movement in outer space may well have already represented customary law by that time, as discussed above.

After 1967, the widespread acceptance of the Outer Space Treaty as customary law means that all that would be necessary is to compare the provisions of the Principles Declaration with those of the Outer Space Treaty. As the provisions of the Principles Declaration are virtually identical to their equivalents in the Outer Space Treaty, it is probable they can all be considered to have crystallised into customary law.

Table 1. Principles Declaration

Para.	Type	Treaty Provision
1	Repeating	Outer Space Treaty I
2	Repeating	Outer Space Treaty I
3	Repeating	Outer Space Treaty II
4	Repeating	Outer Space Treaty III
5	Repeating	Outer Space Treaty VI
6	Repeating	Outer Space Treaty IX
7	Repeating	Outer Space Treaty VIII
8	Repeating	Outer Space Treaty VII
9	Repeating	Outer Space Treaty V

Broadcasting Principles

The Broadcasting Principles may be considered to be the first of three General Assembly declarations that relate to specific space activities. The first three paragraphs provide for the purposes and objectives to be observed by States when conducting direct television broadcasting activities. Paragraph 6 requires States to make appropriate arrangements for international cooperation, taking into account the

interests of developing States. Principle 11 requires States to cooperate on the protection of copyright and associated rights in the conduct of television broadcasting. A cursory glance over the *travaux préparatoire* of the Broadcasting Principles appears to show that there was substantial acceptance of the above provisions as being legal obligations, indicating their crystallisation into customary law.

Table 2. Broadcasting Principles

Para.	Type	Treaty Provision
1	New Provision — Custom	
2	New Provision — Custom	
3	New Provision — Custom	
4	Applying	Outer Space Treaty III
5	Applying	Outer Space Treaty I
6	New Provision — Custom	
7	Applying	Outer Space Treaty III
8	Applying	Outer Space Treaty VI
9	Applying	Outer Space Treaty VI
10	New Provision — Not Custom	
11	New Provision — Custom	
12	Repeating	Outer Space Treaty XI
13	New Provision — Not Custom	
14	New Provision — Not Custom	
15	Applying	ITU Instruments

Paragraph 10 provides that a broadcasting or receiving State has the right to request consultations with the other States on the satellite broadcasting service. Paragraphs 13 and 14 provide that a State establishing a new broadcasting service must notify the proposed receiving States and enter into consultations if requested. Paragraph 15 states that the instruments of the International Telecommunication Union (the "**ITU**") are exclusively applicable to the signal overspill from the service. There does not appear to be widespread acceptance on the part of States during the debates and negotiations. For example, Argentina considered the spill-over issue not to be subject to the ITU, while Czechoslovakia and India both considered prior consent to be necessary.[18] Accordingly, it is likely that these particular provisions may not have the sufficient acceptance by States to be considered customary principles of law.

Remote Sensing Principles

Observations concerning the Broadcasting Principles can similarly be made about the Remote Sensing Principles. While most of the provisions are applications of the Outer Space Treaty, there are a set of provisions relating to international cooperation and another set of provisions relating to the duty and the right to consult.

Principle II states that remote sensing activities are to be conducted for the benefit and in the interests of all States while "taking into particular consideration the needs of the developing countries". This is in effect a repetition of Article I of the Outer Space Treaty except that the treaty provision does not require the particular needs of developing States to be taken into consideration. The fact that this "change" is repeated through the subsequent treaties and declarations suggests that this is now an additional requirement that is supported by acceptance of most States.

Principles V to VIII, setting out the steps required of States in relation to mutual assistance and international cooperation, were not the subject of much controversy during the debates. Consequently, they may in all likelihood be considered to be custom created during the negotiations or soon thereafter. Principle XI requires States to transmit relevant data and information to States affected or likely to be affected by natural disasters. Similarly, this may be considered to be a small extension of the obligations under Article IX of the Outer Space Treaty and the absence of

controversy suggests that this was widely accepted by most States.

Principle XIII requires "sensing States" to enter into consultations upon request with "sensed States" in order to make available opportunities for participation. This infers, as with the Broadcasting Principles, that the sensing States are required to notify sensed States of their sensing activities. This is in contrast to the prior consent requirement that a significant number of States advocated during the negotiations as part of their permanent sovereignty over natural resources. In the absence of uniformity, it would be appropriate to suggest that the provision is not custom.

Table 3. Remote Sensing Principles

Para.	Type	Treaty Provision
I	Definitional Clause	
II	Repeating	Outer Space Treaty I (except to take into account the needs of developing countries)
III	Applying	Outer Space Treaty III
IV	Repeating	Outer Space Treaty I, IX
V	New Provision — Custom	
VI	New Provision — Custom	
VII	New Provision — Custom	
VIII	New Provision — Custom	
IX	Repeating	Outer Space Treaty XI
X	Applying	Outer Space Treaty IX
XI	New Provision — Not Custom	
XII	New Provision — Not Custom	
XIII	New Provision — Not Custom	
XIV	Applying	Outer Space Treaty VI
XV	Applying	Outer Space Treaty III

Principle XII is a unique provision in that it requires sensed States to have access to primary and processed data relating to their territory on a non-discriminatory basis and on reasonable cost terms. This provision does not appear to be based on any existing principle of space law but is in fact a compromise reached between those States wanting free access and those that do not wish to provide any more rights to the sensed States beyond notification and consultation. In one of the later reports of the Legal Sub-Committee Working Group on Remote Sensing, it was evident that there were divergent views concerning the basis of those access rights, the type of data involved and the timing of the access and that the final wording was a compromise that did not satisfy a significant number of States.[19] Therefore, it would be difficult to support an argument that Principle XII is a legal obligation agreed to by all States.

NPS Principles

The NPS Principles contain eleven provisions of which Principles 1, 6, 7, 8, 9 and 10 are Applying Provisions in the sense that they merely restate the application of provisions of existing treaties to nuclear power sources. In particular, Principle 6 merits some attention as it requires States concerned with the re-entry of a nuclear power source will have a right to consultations. This may be considered to be a direct application of the right to consultations in the case of potential harmful interference as provided for in Article IX of the Outer Space Treaty. This is distinguished from the consultation provisions of the Broadcasting Principles and the Remote Sensing Principles in that their consultation rights are not dependent on the potential for harmful interference to the space activities of the affected States.

In the case of the New Provisions, namely Principles 3 to 5, it is pertinent to assess the legal basis of these provisions to ascertain their appropriate status in customary international law. Principles 3 and 4 are concerned with imposing a set of guidelines and criteria for the safe use of nuclear power sources, along with a requirement for a thorough safety assessment to be conducted prior to launch. This can be seen

to be an elaboration of the obligations of States under Article IX of the Outer Space Treaty in that States are to have due regard to the interests of other States and to avoid harmful interference.

Principle 5 requires States to inform other States and the United Nations if an object containing a nuclear power source is malfunctioning. The notification must include the orbital parameters of the spacecraft and its radiological risk. The provision appears to have its origins from the following treaty provisions:

- Article IX of the Outer Space Treaty, requiring States to avoid harmful contamination and adverse changes to the Earth environment by introduction of "extraterrestrial" matter; and
- Article IV (3) of the Registration Convention, which imposes a duty on States to notify the United Nations if a registered spacecraft is no longer in Earth orbit.[20]

Table 4. NPS Principles

Para.	Type	Treaty Provision
1	Applying	Outer Space Treaty III
2	Definitional Clause	
3	New Provision — Custom	
4	New Provision — Custom	
5	New Provision — Custom	
6	Applying	Outer Space Treaty IX
7	Applying	Rescue Agreement
8	Applying	Outer Space Treaty VI
9	Applying	Outer Space Treaty VII Liability Convention XII
10	Applying	Outer Space Treaty III
11	Review Clause	

The widespread acceptance by States of the underlying provisions and the absence of significant dissensions during the debates suggest that Principle 5 may be considered, along with Principles 3 and 4, to have crystallised into international law either at the time of their declaration or soon after.

Cooperation Declaration

The Cooperation Declaration, adopted by the General Assembly without a vote in 1996, is special in that not all of its provisions contain mandatory obligations that would support a view that they are intended to have legal effect. For example, Paragraphs 7 and 8 merely suggests that States are to strengthen the role of COPUOS and to contribute to the United Nations space programs and initiatives. As such, they cannot reasonably be considered as legal obligations at all and certainly cannot be considered as part of customary law.

Paragraph 5 poses particular difficulties in its classification in that it requires States to keep in mind certain goals and objectives in framing activities involving international cooperation. It is unclear whether these goals are intended to be of a mandatory nature, as the words "promoting", "fostering" and "facilitating" are used. Even if the consideration of such issues is considered mandatory, the vagueness of the content of these goals makes it unlikely that States have intended for this to be a binding legal obligation.

Paragraphs 1 and 2 may be classified as Applying Provisions in that they are a specific application of existing treaty provisions in the context of international cooperation. Paragraph 2, for example, provides that States are free to determine all aspects of their participation in international space endeavours while ensuring compliance with legitimate interests of other States. This is in effect an application of Article IX of the Outer Space Treaty requiring States to undertake space activities with due regard to the *corresponding* interests of other States and Article I of the Outer Space Treaty in relation to freedom of exploration and use.

Table 5. Cooperation Declaration

Para.	Type	Treaty Provision
1	Applying	Outer Space Treaty III
2	Applying	Outer Space Treaty I Outer Space Treaty IX
3	No Mandatory Obligation	
4	Definitive Clause: Scope of "International Cooperation"	
5	No Mandatory Obligations	
6	No Mandatory Obligations	
7	No Mandatory Obligations	
8	No Mandatory Obligations	

CONCLUSIONS

This empirical exercise demonstrates that the provisions of the General Assembly declarations have, with the notable exception of the Cooperation Declaration, been substantially crystallised into custom. This has been done either through the application or extension of existing treaty provisions that have crystallised into customary law or through the codification of customary principles as agreed to by States during the negotiation processes.

Notwithstanding this conclusion, it should be noted that this analysis has been undertaken in the absence of a substantial body of state practice. In order for space law to provide a clear and certain basis for future human exploration and use, it may be necessary to consider the codification of these principles into separate treaties.

Notes

This paper is written in the personal capacity of the authors and does not necessarily represent the views of any organisations with which they are associated.

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[1] Brownlie, *Principles of Public International Law* (5th ed., 1998), at pp. 5-11.
[2] *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116 at 131; and *Asylum Case (Columbia v Peru)* [1950] ICJ Rep 266 at 276-277.
[3] International Law Commission [1950] II Y.B.I.L.C. 368-372.
[4] *Fisheries Jurisdiction Case (United Kingdom v Iceland)* [1974] ICJ Rep 3 at 23-26.
[5] *Asylum Case, supra* note 2, at 266; and *Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 6 at 257.
[6] Tunkin, *Theory of International Law* (trans. Butler, 1974), p. 444.
[7] *North Sea Continental Shelf Cases (Germany v Denmark; Germany v The Netherlands)* [1969] ICJ Rep 3, para. 77.
[8] Brownlie, *supra* note 1, at p. 5. This is supported by the *North Sea Continental Shelf Cases, ibid.* at para. 73.
[9] *North Sea Continental Shelf Cases, supra* note 7, at 230.
[10] *Ibid.*
[11] Brownlie, *supra* note 1, p. 14.
[12] Akehurst, "Custom as a Source of International Law" (1974-1975) 47 B.Y.I.L. 1 at 53.
[13] Schwebel [1975] U.S.D.I.L. 85.
[14] *South West Africa Case (Ethiopia and Liberia v South Africa)* [1966] ICJ Rep at 292.
[15] Sohn, in Bos (ed.), *The Present State of International Law and Other Essays* (1973) at 52-53.
[16] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* [1986] ICJ Rep 14.
[17] *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226.
[18] See generally the *travaux préparatoire* of the Broadcasting Principles as reproduced in Jasentuliyana and Lee, *Manual on Space Law* (1979), vol. III.
[19] Report of the Chairman of the Working Group on Remote Sensing, U.N.Doc. A/Ac.105/271.
[20] Article IV (2) of the Registration Convention, although allow States to provide "additional" information concerning a space object, does not impose a mandatory obligation.