

Why Have Resolutions of the UN General Assembly If They Are Not Legally Binding?

Written by Celine Van den Rul

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CELINE VAN DEN RUL, JUN 16 2016

The General Assembly may discuss any questions (...) within the scope of the present Charter (...), may make recommendations to the Members of the United Nations or to the Security Council.[1]

The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification (...).[2]

The powers and functions of the United Nations General Assembly (UNGA) are clearly set out in Article 10 through 17. Looking to the 'soft language' used to describe its role, the effectiveness of the General Assembly (GA) has often been derided to a mere 'talking shop', where debates tend to focus on process rather than substance and decisions simply reflect the lowest common denominator.[3] Linked to this critique is the fact that GA resolutions are merely recommendations, not laws, and thus not binding on member states. Hence, an important focus has been put on the 'legal status' of the resolutions: without any formal legal obligation for the member states (MS) to implement, let alone consider these resolutions, it is difficult for the GA to have any real coercive authority.[4] Accordingly, the aim of this essay will be to challenge this view and argue that, even though GA resolutions enjoy a limited legal status, there is actually a point to having them if we consider first their symbolic as well as political impact and secondly their influence on contemporary international law, especially customary law. Even though not addressed in this essay, one should always bear in mind the fact that the effect of a resolution ultimately varies in accordance with the circumstances peculiar to each resolution, such as the time at which the resolution was passed, the fundamental issues that ground the resolution, the vote taken on the resolution or the language of the resolution.[5]

It cannot be denied that when a resolution is passed by an Assembly comprising most of the states in the world, such as the GA, it develops into something more than just a common statement or wish of the MS. In this regard, H.W.A. Thirlway argues that: 'those who regard the effects of GA resolutions as law-making are being misled by a transposition of the term 'legislation' to the international plane'.[6] As a matter of fact, it is through the symbolic power of GA resolutions in international relations that one can find a persuasive argument in favour of having them. As an international forum or a 'town meeting of the world', the GA represents the most suitable place for international dialogue and discussion. The resolutions passed by the GA can then be successfully presented as crystallizing, formulating and expressing the view or opinion of the international community of states.[7] As a result, this 'world opinion' expressed in the resolutions can be symbolic in two main ways: it can have an invaluable influence on the behaviour of states and stigmatize or isolate the practice of states that do not conform to it. A first example shows that, resolutions defining or clarifying the meaning of a specific word such as Resolution 3314 on aggression directly reflect this idea of formulating a common view, which then sets 'common standards' that the global community can refer to. GA resolutions, by expressing a 'world opinion', can thus exert considerable pressure for states to take this opinion into account, especially when conducting their domestic or foreign affairs. As Roger Fischer argues, governments, in both their domestic and foreign operations are under heavy pressure to conform, or appear to conform, to acceptable standards of behaviour.[8] Other authors such as F. Blaine Sloan have emphasized that even though resolutions might not cause compliance, they are extremely effective in the way they crystallize the judgements of the GA as a collective world conscience, which in itself can represent a force external to the individual

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conscience of any given state.[9] A second example, Resolution 1761 condemning Apartheid in South Africa, is useful in showing us that even though it did not stop the South African government's discriminatory policy and Nelson Mandela's life-long imprisonment sentence two years later, it was essential to have it, in order to give the international community room to condemn one state's practice. Therefore, whilst the act of compliance is missing, GA resolutions reflect a symbolic gesture by the international community to stigmatize and formally condemn the practice of states'.

A second aspect to keep in mind here is the political impact of GA resolutions, if we consider the way states themselves value and use these resolutions. Ian Hurd argues that: 'to the extent that GA resolutions have a significant effect in world politics it is due to their political influence rather than to the legal obligations that they carry'.[10] Indeed, the mere existence of these resolutions can be used by MS as an instrument of persuasion or a point of reference to substantiate their claims. For instance, resolution 1653 that states that the use of nuclear weapons would constitute a direct violation of the Charter of the UN is a legal datum available to those arguing against the legality of nuclear weapons.[11] Furthermore, resolutions are valued considerably by member states in the way they deliver legitimacy. As Inis L. Claude argues: 'politics is not merely a struggle for power but also a contest over legitimacy, a competition in which the conferment or denial, the confirmation or revocation, of legitimacy is an important stake'.[12] In this sense, power and legitimacy are complementary: rulers seek legitimization not only to satisfy their consciences but also to reinforce their positions.[13] Thus, statesmen would primarily seek the political judgement of the international community rather than a legal judgement, and have therefore, themselves, recognized the significance and value of GA resolutions for that purpose. Examples put forward by Inis. L. Claude include the use of the UN to characterize North Korea's aggressive attacks upon South Korea in 1950, or the fact that the US sought and gained endorsement for a collective military response, and convincingly referred to this UN stamp of legitimacy, throughout the Korean War.[14] Most recently, the Resolution 68/262 dealing with the territorial integrity of Ukraine provided the Ukrainian government with substantive legitimacy in response to the Russian annexation of Crimea and the 2014 Crimean referendum. Thus, the political impact of GA resolutions far outweighs their limited legal status in the way they are valued by states themselves as an instrument of persuasion and legitimacy.

Another important impact of GA resolutions is in the way they influence contemporary international law. Even though highly debated, some scholars have emphasized the will of the international community as an important 'law-creating energy'. This view contrasts with the traditional assumption that the creation of international law is associated with the 'sources' of international law contained in Article 38 of the Statute of the ICJ or the more predominant view that in the development of customary international law, what states do is more important than what they say.[15] Today, international organizations increasingly give states a platform for the concentrated expression of their views, something that did not exist when customary law only developed disparately and unequally through the bilateral interaction of states.[16] As a result, if such statements reflect the opinion of a large number of states and they touch upon a legal matter, then they can be successfully regarded as indications of a general consensus, thus leading to the creation of a norm for international law.

As a matter of fact, the most persuasive example given by scholars is the impact that GA resolutions have in the field of international customary law. In this regard, Resolution 217 on the Universal Declaration of Human Rights offers the best case in point when acknowledging how the General Assembly can be used to reinforce norms or rules of customary law. Although the declaration is not legally binding, its influence on national constitutions, treaties or international laws since 1948 cannot be denied. Beyond the field of human rights, Christopher C. Joyner highlights how some notable resolutions have been perceived as filling a gap in or supplying a need for international law and as a result, have been transformed into a new legal norm or general principle of law.[17] For instance, in 1961, the GA successfully passed the resolution on the Peaceful Use of Outer Space, formally reasserted two years later in a GA declaration on Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.[18] Within only ten years, three multilateral treaty instruments were entered into force, which specifically incorporated these resolutions' provisions. Christopher C. Joyner concludes that: 'the evolutionary experience of resolutions since 1960 strongly indicated that selected resolutions may have become generally accepted principles of law, or at the very least, they inculcate nascent principles of emerging customary law'.[19] Some judicial courts have themselves given weight to GA resolutions by using them as a reference, proof or as a substitute for international customary law. For instance, in the case *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, the arbitrator René Dupuy relied

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on the support of the GA resolution 1803 to settle the dispute.[20] In 1980, the United States Court of Appeals also accorded significant weight to UNGA resolutions in the case *Filartiga v. Pena-Irala* to prove that no country can claim the right to torture its citizens.[21] It famously referred to the Universal Declaration of Human Rights, GA resolution 217 as well as GA resolution 2625 and 3452.[22] Finally, some scholars have focused on the way GA resolutions fulfil the requirements for the formation of a rule of customary law: (1) as an indication of state practice and (2) reflecting the *opinio juris sive necessitatis* ('an opinion of law or necessity').[23] Even though the extent to which GA resolution constitute state practice is still largely debated, a large consensus exists in the way GA resolutions can express, particularly if adopted by unanimity or consensus, the *opinio juris sive necessitatis*, and thus, in this way, create customary law.[24] One can also see the mere repetition of principles in resolutions or the vote casting by member states as an evidence for *opinio juris*. Thus, GA resolutions can have a notable legal impact in the field of customary law.

To limit ourselves to the 'legal status' of GA resolutions would only give us a narrow view when assessing the impact of these resolutions. Even though they are not legally binding on member states, there is a real and persuasive point in having GA resolutions. They have a symbolic impact in the way they express, formulate and crystallize the opinion of the international community, which can serve to influence the behaviour of the MS themselves and stigmatize or formally condemn the practice of MS's that do not conform with it. They also carry important weight in their political impact. GA resolutions can be used and are valued by MS as an instrument of persuasion and legitimacy. Finally, the most noteworthy effect of GA resolutions lies in the way they influence international law, especially customary law. Some major resolutions have been transformed into a new legal norm or used as reference in settling international law cases. Last but not least, they can be creative of customary law by reflecting an *opinio juris sive necessitatis*.

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Endnotes

[1] UN Charter (1945), Article 10, p.4.

[2] UN Charter (1945), Article 13, p.5.

[3] Annan (2005), p.40.

[4] Hurd (2011), p.104.

[5] Lande (1964), pp.165-166.

[6] Thirlway (1972), p.62.

[7] Lande (1964), p.164 & Hurd (2011), p.105.

[8] Cited in Lande (1964), p.164.

[9] Sloan (1948), p.32.

[10] Hurd (2011), p.105.

[11] Falk (1966), p.787.

[12] Claude (1966), p.368.

[13] *ibid.*

[14] Claude (1966), p.377.

[15] Schwebel (1979), p.303 & Falk (1966), p.784.

[16] Schwebel (1979), p.304.

[17] Joyner (1981), p.463.

[18] *ibid.*, p.468.

[19] *ibid.*, p.469.

[20] Kerwin (1983), p.883.

[21] *ibid.*, p.884.

[22] *ibid.*, pp.884-885.

[23] Sinclair (1994), pp.10-11.

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[24] Thirlway (1972), p.66-67.

*Written by: Celine Van den Rul
Written at: King's College London
Written for: Filippo Costa-Buranelli
Date written: December 2015*