The role of the United Nations General Assembly in advancing accountability for atrocity crimes: legal powers and effects

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CHAPTER 1: INTRODUCTION

1. Introduction to the Research

The rise of 'international justice', a field broadly concerned with the imperative of securing accountability for atrocity crimes, has led to much reflection on the role of international institutions in addressing impunity gaps.[1] This literature – now considerable - has included not only international criminal tribunals tasked with interpreting and applying the laws of individual criminal responsibility, but also other courts – including the International Court of Justice (ICJ) and regional human rights mechanisms – in adjudicating upon the responsibility of States in atrocity situations. [2] Similarly, there have also been studies on the impact of political institutions in advancing accountability for atrocities, with scholarship on the United Nations (UN) Security Council's contribution being particularly voluminous.[3] By contrast, at least until recently, there has been little attempt to comprehensively identify, classify and evaluate the contribution of the UN General Assembly (Assembly) to the field of international justice.[4] The Assembly is not only a principal organ of the UN, but also its most representative, comprising the entire UN membership.[5] As Inis Claude once noted, the Assembly provides the most prominent multilateral forum for States to articulate response priorities, mobilise opinion and express its disapprobation.[6] Writing in 1966, Claude noted that the exercise of this 'collective legitimization' function 'is and probably will continue to be, a highly significant part of the

[1] See generally Naomi Roht-Arriaza, 'Institutions of International Justice' (1999) 52(2) J Intl Aff 473, 476; Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law* (OUP 1997); David Wippman, 'The costs of international justice' (2006) 100(4) AJIL 861; Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28(3) Intl Security 5, 5; UNCHR, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, 5 (noting that UN Member States undertook to take 'joint and separate action' to ensure respect for human rights).

[2] See eg Milena Sterio and Michael Scharf (eds), *The Legacy of Ad Hoc Tribunals in International Criminal Law* (CUP 2019); Cenap Çakmak *A Brief History of International Criminal Law and International Criminal Court*: *Historical Evolution of International Criminal Law* (Palgrave 2017); Charles Jalloh, *The Sierra Leone Special Court and its legacy: The impact for Africa and International Criminal Law* (CUP 2014); Claus Kreß, 'The International Court of Justice and the Elements of the Crime of Genocide' (2007) 18(4) EJIL 619; Judith Gardam, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2001) 14(2) LJIL 349; Barbara Yarnold, *International Fugitives: A New Role for the International Court of Justice* (Praeger 1991).

[3] See eg Vincent-Joël Proulx, 'A Postmortem for International Criminal Law? Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty' (2020) 11 Harvard Nat Sec J 151; Jennifer Trahan, 'Revisiting the Role of the Security Council Concerning the International Criminal Court's Crime of Aggression' (2019) 17(3) JICJ 471; David Forsythe, 'The UN Security Council and Response to Atrocities: International Criminal Law and the P-5' (2012) 34 HRQ 840; Marco Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law' (2010) 43 Israel LR 330; Marc Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court' (2002) 78(4) Intl Aff 693; Michael Plachta, 'The Lockerbie Case: the role of the Security Council in enforcing the principle *aut dedere aut judicare*' (2001) 12(1) EJIL 125; Stephen Schwebel, 'The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law' (1995) 27 NYU J Intl Law & Pol 731.

[4] As to discrete studies, see Michael Ramsden, 'The Crime of Genocide in General Assembly Resolutions: Legal Foundations and Effects' (2021) HRL Rev; Rebecca Barber, 'Accountability for Crimes against the Rohingya: Possibilities for the General Assembly where the Security Council Fails' (2019) 17(3) JICJ 557; Alex Whiting, 'An Investigation Mechanism for Syria: The General Assembly Steps into the Breach' (2017) 15(2) *JICJ* 231; Michael Ramsden and Tom Hamilton, 'Uniting against Impunity: The UN General Assembly as a Catalyst for Action at the ICC' (2017) 66 ICLQ 893; Michael Ramsden, 'Uniting for MH17' (2017) 7(2) Asian J Intl L 337.

[5] Being 193 Member States as of 2020, plus two non-member observer states (Holy See and Palestine).

[6] Inis Claude, 'Collective Legitimization as a Political Function of the United Nations' (1966) 20(3) Intl Org 367.

political role of the United Nations'.[7] This political function aside, there has also been considerable debate over the extent to which the Assembly is able to exercise legal powers, or adopt resolutions that otherwise produce legal effects, that go beyond the recommendatory functions envisaged for this body in the UN Charter.[8]

Rooted in this debate, the following study aims to comprehensively examine the foundations and effects of Assembly power as it has developed to address the particular imperative of accountability for atrocity crimes. Assembly 'power', in this regard, is evaluated according to five functions: (1) 'quasi-legislative'; (2) 'quasi-judicial'; (3) 'empowering'; (4) 'recommendatory'; and (5) 'sanctioning'. In turn, this study poses two major questions. First, what is the scope of the Assembly's legal powers? Second, to what extent has the Assembly's exercise of these functions had an 'effect' in advancing accountability for mass atrocity? In addressing these questions, this study not only intends to identify the extent of the Assembly's legal competence but to also inspire more ambitious thinking regarding the possible role that it might play in responding to atrocity situations through the explication of these five functions.

2. Exercise of General Assembly Functions in Advancing Accountability for Atrocity Crimes: Literature Overview

There has been varying degrees of scholarly analysis on the Assembly's five functions outlined above, either as part of an abstract legal analysis or thematically in relation to their specific applications in an area of international affairs. This section will consider the most important scholarly contributions to the debate on the nature and scope of these functions, while also explaining the gap that exists in the literature in evaluating the application of these functions in the field of international justice.

2.1 'Quasi-Legislative'

Neither the text of the UN Charter or its drafting history provides a 'legislative' competence for the Assembly in international law, in the sense of it being able to enact law that binds States.[9] This does not mean, however, that no standard-setting role was envisaged for the Assembly. Article 13 of the UN Charter empowers the Assembly to 'initiate studies and make recommendations' for the purpose of, amongst other things, 'encouraging the progressive development of international law and its codification'.[10] While a role for the Assembly in promoting legal codification is therefore recognised, it is also apparent from practice, as this study will show, that Assembly resolutions have contributed towards the development of international law. There is now established institutional lexicon to signal that a 'recommendation', as formally defined, is, in fact, performing a function of identifying existing international law. As Chapter 2 makes clear, resolutions of this nature are often phrased as 'declarations' or use other language to denote a general recognition as to the existence of international law (such as 'affirmation'). The Assembly, for its part, has also accepted that the

[7] ibid 370.

[8] For general analysis, see Eckart Klein and Stefanie Schmahl, 'Ch. IV The General Assembly, Functions and Powers' in Bruno Simma and others (eds), *The Charter of the United Nations*, vol 1 (OUP 2012); Michael Schmidt, 'UN General Assembly' in Alex Bellamy and Tim Dunner, *Oxford Handbook on the Responsibility to Protect* (OUP 2016); Nigel White, 'Relationship between the Security Council and General Assembly' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015).

[9] See eg 9 UNCIO Docs 316 (1945) (Philippine delegation to vest legislative power in the Assembly rejected 26-1).

[10] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS 16 ('UN Charter'), art 13.

'development of international law may be reflected' in its 'declarations and resolutions'.[11] However, asserting that international law is identified in a resolution is one thing. Whether the resolution has an impact on international actors applying international law is another.

In this regard, the notion that Assembly resolutions are capable of having 'quasi-legislative' effects, as Richard Falk noted in 1966, represents a middle position between a formal recognition of true legislative status and the formal denial of any law-creating role.[12] On the one hand (as noted above), it is clear that a proposal to confer upon the Assembly a power to legislate was rejected by the drafters of the UN Charter. Yet, on the other hand, the nature of the Assembly, as a forum comprising a near universal membership of States, provides scope for a shared legal position to be articulated by the international community. In turn, to treat a subset of Assembly resolutions as 'quasi-legislative' invites analysis on the extent to which they acquire 'normative status in international life', in supporting the interpretive legal claims of States, courts or other actors.[13] In this regard, Falk noted that the formal description of resolutions as 'non-binding' does not properly encapsulate their influence; some international courts, even at the time of his writing in 1966, displayed a tendency to use non-binding instruments in the construction of international law.[14] As to what would make an Assembly resolution more or less persuasive from a quasi-legislative perspective, Falk noted a number of contextual factors, including the use of 'declaratory language' together with 'the expectations governing the extent of permissible behaviour, the extent and quality of the consensus, and the degree to which effective power is mobilized to implement the claims posited in a resolution.'[15] Falk also noted that the degree of authoritativeness that the process of law-creating by Assembly action comes to enjoy depends upon the extent to which particular resolutions 'influence behaviour and gain notoriety in legal circles' and come to be 'incorporated into the developing framework of an evolving system and science of international law.'[16] Accordingly, to Falk, the limits upon the Assembly's quasi-legislative competence are less a reflection of the absence of a formal competence to legislate as they are a consequence of certain political constraints arising from the general requirement to mobilise effective community power in support of legislative claims.[17]

There has been some attempt to measure, as Falk envisaged as necessary, the extent to which communities have mobilised the legislative claims contained in resolutions. Hurst Hannum thus conducted a comprehensive jurisprudential survey of the varied ways in which domestic courts have applied the Assembly's 1948 Universal Declaration of Human Rights (UDHR), noting the instances in which it has been found to constitute or reflect customary international law.[18] The impact of the Assembly's 1974 Definition on Aggression has also been studied, particularly from the perspective of its incorporation into the decision-making of the

[11] ibid. See also UNGA Res 3232 (XXIX) (1974) ('Recognizing that the development of international law may be reflected, inter alia, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice').
[12] Richard Falk, 'On the Quasi-Legislative Competence of the General Assembly' (1966) 60(4) AJIL 782.
[13] ibid 784.
[14] ibid 783.
[15] ibid 786.
[16] ibid.
[17] ibid 788.
[18] Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 Ga J Intl & Comp L 287; UNGA Res 217 A (III) (1948). See also Krzysztof Skubiszewski, 'Recommendations of the United Nations and Municipal Courts' (1972-1973) (46) BYBIL 353; Egon Schwelb, 'An instance of enforcing the Universal Declaration of Human Rights, action by the Security Council' (1973) 22 ICLQ 161.

Security Council.[19] However, it is equally clear that there is a need for greater scholarly focus on the use of resolutions by legal communities in supporting the development of international law in the field of international justice. In particular, there has been no systematic attempt, so far, to trace the impact of Assembly resolutions on the functioning of courts where concerned with questions of responsibility for atrocity crimes. Given the growing judicial architecture to enforce international justice, including the International Criminal Court (ICC) and *ad hoc* tribunals, as well as regional human rights mechanisms, this dissertation aims to fill this research gap.

To be sure, the evidentiary value of Assembly resolutions to the development of international law (particularly customary international law) has been extensively considered, revealing a range of opinions.[20] Stephen Schwebel once doubted, for instance, that States mean what they say when voting in support of resolutions that purport to declare norms.[21] By contrast, at the other end of the spectrum, Bin Cheng argued that in areas of international legal vacuums an Assembly resolution is able to constitute 'instant custom' in authoritatively explicating the *opinio juris* of the new rule of customary international law.[22] A more moderate position was offered by Samuel Bleicher, who saw merit in Assembly resolutions declaring international law provided that there is persistent recitation of the norm in a series of resolutions.[23] This debate is deserving of fresh consideration both in light of the jurisprudential survey conducted in this dissertation as well as the recent conclusion of the ILC's major study into the processes of identifying customary international law, which includes analysis on the normative weight of Assembly resolutions.[24]

2.2 'Quasi-Judicial'

Although the ICJ is recognised in the UN Charter to be the 'principal judicial organ' of the Organisation with dispute-adjudicative competencies, a role is also envisaged in the Charter for the Assembly to perform some adjudicatory elements.[25] There are numerous provisions in the UN Charter that plainly involve the Assembly in making 'decisions', which, although limited to internal operational matters, might also have a bearing on a wider dispute. For example, whether the Assembly is to accept the credentials of a delegation seeking to represent a Member State might involve an adjudication as to the merits of this delegation according to a legal standard, especially where there are competing claims (of which, see Chapter 4).[26] Yet, even where the Assembly is confined to its recommendatory function, an evaluative judgment as to an underlying dispute will often be necessary for this function to be meaningfully exercised. Under Chapter IV of the UN Charter, the Assembly is to furnish recommendations to Member States or the Security Council as a means to secure the 'peaceful adjustment of any situation',[27]

[19] See eg Nicholaos Strapatsas, 'The Practice of the Security Council Regarding the Concept of Aggression' in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017); UNGA Res 3314 (XXIX) (1974), annex.
[20] See further Chapter 3.
[21] Stephen Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 ASIL Proc 301, 308
[22] Bin Cheng, *Studies in International Space Law* (Clarendon 1998), 139-141.
[23] Samuel Bleicher, 'The Legal Significance of Re-Citation of General Assembly Resolutions' (1969) 63 AJIL 444.
[24] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) UN Doc A/73/10.
[25] UN Charter, chapter XIV.
[26] ibid arts 4(2), 6 and 17.
[27] ibid art 14.

or to provide a response to situations that 'endanger international peace and security',[28] and which it 'deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations'.[29] The exercise of these Charter powers thus entails what is described here as involving a 'quasi-judicial' element, in monitoring compliance with a set of norms or making evidence-based factual determinations as a precursor to the Assembly exercising its decisional or recommendatory competencies.[30]

The nature and extent of the Assembly's quasi-judicial function has received some scholarly attention over the years. The earliest, most significant, contribution was provided by Oscar Schachter in 1964 who, in surveying UN practice in the first two decades of its creation, observed there to be some perceptible trends even if such resolutions were 'few in number' at that time (concerned, at that point, with the use of force, decolonisation and racial discrimination).[31] Indeed, this scholarly contribution pre-dates many of the significant advancements in quasi-judicial practice, particularly from the 1970s onwards, that are described in detail in this dissertation. Nonetheless, Schachter did raise a number of points both as to the legal basis for this quasi-judicial function which remains pertinent to any study into the Assembly's exercise of this function. In particular, Schachter raised as problematic the Assembly, as a political organ, passing judgment on State conduct without observing judicial standards of impartiality; the concern here was that the Assembly, as a political organ, produces an environment in which States vote in their self-interest and along partisan lines, which might deprive any determination of the impartial application of a legal standard that is found in judicial processes.[32] Nonetheless, Schachter considered that partisanship would not be the sole determinant of a quasi-judicial resolution; Member States, acting through a multilateral organ, cannot act solely on the basis of their national interest but will be shaped by a common interest and within the bounds of legal norms that will in turn mitigate bias.[33] Schachter also hypothesised that the Assembly's quasi-judicial resolutions are bound to exert meaningful pressure on relevant actors to comply or implement with what was recommended, as evaluations by the Assembly possess a 'degree of authority that generates pressures' towards observance.[34] He also observed the possibility for quasi-judicial resolutions to contribute towards the development of international law; the application of law to a situation is a 'law-creative act, even though the members of the organ maintain (as they often do) that their decision is confined to the specific facts and they do not intend to establish a precedent.'[35]

Since then, numerous scholars have examined the nature of the Assembly's quasi-judicial function, both as to the conditions for them being treated as authoritative and their impact from different vantage points. One important analysis was provided by Christian Tomuschat when examining the Assembly's role in monitoring compliance with international human rights law.[36] Tomuschat acknowledged that political bodies such as the Assembly have

[28] ibid art 11(3).
[29] ibid art 14.
[30] Mara Tignino, 'Quasi-judicial bodies' in Catherine Brölmann and Yannick Radi (eds), *Research Handbook on the Theory and Practice of International Lawmaking* (Elgar 2016), 242.
[31] Oscar Schachter, 'The Quasi-Judicial Role of the Security Council and the General Assembly' (1964) 58 AJIL 960, 961. See also the earlier contribution of Blaine Sloan, 'The Binding Force of a Recommendation of the General Assembly of the United Nations' (1948) 25 Brit YB Int'l L 1, 28 ('Those resolutions of the General Assembly which are declaratory of international law may be expected to play an important role in judicial and diplomatic proceedings. They would possess considerable persuasive or evidential value in determining existing law, both as restatements of established rules and indications of trends in development.')
[32] ibid 962.
[33] ibid.
[34] ibid 963.
[35] ibid 964.
[36] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2014), 184.

'great difficulties satisfying the requirement to act in a fair and objective manner', but also saw the advantage in collective State involvement as carrying 'more weight than assessments by expert bodies'.[37] While considering Assembly resolutions to be 'no panacea to cure all conceivable ills', Tomuschat noted their 'moral weight' to be considerable; no State 'likes being blamed by the world community for failure to heed generally recognized international standards'.[38] At the same time, according to Tomuschat, the most intensive forms of disapproval of a State's conduct do not free the Assembly 'from the constraints of its competencies'.[39] Continuing the theme that a determination contained in an Assembly recommendation does not carry legal effects, Marko Öberg surveyed the use of quasi-judicial resolutions in the jurisprudence of the ICJ, noting a general acceptance of these instruments in establishing a persuasive narrative of events, but also cautioning that the Court with its 'judicial nature and its careful approach to establishing facts, should not be bound by such determinations'.[40] By contrast, a broader view was taken by Nigel White, who observed that resolutions adopted by consensus or large majorities, and which are clearly based upon international law, are likely to be accepted as 'authoritative' legal determinations.[41] Building upon this proposition, Rebecca Barber also considered the basis for the Assembly to, hypothetically, certify that the legal conditions exist for States, invoking the necessity doctrine, to intervene in another State in order to provide humanitarian assistance to a civilian population.[42] Barber here surveyed a range of Assembly quasi-judicial practice to support the proposition that the Assembly could act robustly in the Syria situation and express on behalf of the international community that the civilian population has an essential interest that faces grave and imminent peril.[43]

The present dissertation seeks to build upon the literature by considering the quasi-judicial function of the Assembly specifically as a means to advance accountability in atrocity situations. As the above literature overview shows, there has been no comprehensive survey on the Assembly's application of international law pertaining to atrocity situationss, comprising the core international crimes (genocide, war crimes, crimes against humanity and aggression) and serious human rights violations; the following dissertation aims to fill this gap. At the same time, it seeks to grapple with two of the important general themes identified in the existing literature; in particular, the general appropriateness of the Assembly engaging in this quasi-judicial function and some of the observable effects of these resolutions. This dissertation considers these issues in the context of international justice and the impact of quasi-judicial resolutions on the activity of the main instituional actors in the field: in particular, the ICC, ICJ, the UN *ad hoc* tribunals, regional human rights mechanisms, and the UN's other principal political organ, the Security Council.[44] Given the important role of courts in enforcing international justice, be that in imposing individual or State responsibulity in atrocity situations, it is therefore interesting to examine the extent to which the Assembly's resolutions have been invoked in a manner that supports the effective exercise of their judicial function.

2.3 'Recommendatory'

[37] ibid.
[38] ibid 198.
[39] ibid 198
[40] Marko Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2006) 16 EJIL 879, 892
[41] Nigel White, *The Law of International Organisations* (MUP 2005), 179.
[42] Rebecca Barber, 'How Necessary is Security Council Authorisation for Humanitarian Assistance, in the Absence of Consent by the Host State?' (2021 forthcoming).
[43] ibid.
[44] Michael Ramsden, '"Uniting for Peace" in the Age of International Justice' (2016) 42 Yale J Intl L 1.

Under a trio of provisions in the UN Charter, the Assembly has powers to make 'recommendations' to Member States and the Security Council in relation to matters that fall within the broad ambit of the Organisation. Article 10 of the UN Charter specifically grants power to the Assembly to discuss any matters falling within the ambit of the Charter or 'relating to the powers or functions of any organs provided for' in the Charter, and to make recommendations on such matters to Member States or the Security Council, or both.[45] Article 11 provides greater elaboration on the Assembly's powers in the field of international peace and security. Article 11(2) thus provides that the Assembly may discuss 'any question relating to the maintenance of international peace and security' brought to it by a State or the Security Council and 'may make recommendations with regard to any such questions to the State or States concerned or to the Security Council or to both'. Article 11(3) adds further emphasis to the power of the Assembly to furnish recommendations to the Security Council pertaining 'to situations which are likely to endanger international peace and security'. Finally, Article 14 allows the Assembly to recommend measures 'for the peaceful adjustment of any situation' in which it 'deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.'

Whether an Assembly 'recommendation', specifically to Member States, carries any legal obligation to comply was most prominently analysed by Blaine Sloan in 1948.[46] Sloan rejected the proposition that the normal meaning of 'recommendation' necessarily means that the Assembly was precluded from binding the membership. Sloan argued that 'no single conclusion' can be made on the legal nature of 'recommendations', either based on the text of the UN Charter or the drafting history.[47] Aside from those instances in which the Assembly is authorised to make binding decisions in relation to internal operational matters under the UN Charter, Sloan noted that recommendations might come to bind Member States, particularly by way of an institutional customary rule that recognises such effect.[48] In this regard, Sloan recognised the dual role of the Assembly, as a body with its own legal personality under the UN Charter but also as a congress of individual nations which has 'inherent powers which need not derive from a specific enumeration in the Charter'.[49] Sloan here recognises the role of the membership in developing Assembly powers, by attributing to this body authoritative competencies through institutitonal practice, 'where the intention is to be so bound'.[50] Although Sloan noted that the Assembly has used a variety of phrases in which to convey a legal expectation that a recommendation will be complied with (from 'invites' to 'request'), he also noted that it was necessary to 'approach the realm of *de lege ferenda*' to consider the possibilities for an institutional custom to emerge.[51] Sloan envisaged a possible role for the Assembly in areas that are lacking sufficient international oversight but in which Member States have international obligations; it thus 'might be argued that the protection of human rights falls

[45] See further Klein (n 8), 463.
[46] Sloan, 'Binding Force' (n 31).
[47] ibid, 7 (as Sloan noted in relation to the Philippines proposal to confer upon the Assembly a legislative competence, the 'enacting of legislation is not the only way in which binding decisions are made').
[48] ibid, 15, 19 Sloan also pointed to the possibility that Assembly recommendations become binding via special agreement, where Member States agree in advance to be bound by Assembly recommendations; here the legal effect is not derived from the recommendation but rather from the binding force attributed to it in the special agreement: ibid, 16. See also Louis Sohn, 'The Second Year of United Nations Legislation' (1948) ABAJ 315 ('States can, therefore, agree in advance to be bound by Assembly recommendations; and with respect to States parties to such an agreement, such recommendations will be as effective as if they were laws enacted by an international legislature with powers similar to a national legislative body.')
[49] ibid, 22.
[50] ibid, 22.
[51] ibid, 23.

or will be brought into a sphere of action where binding resolutions may be made'.[52] In such areas, the Assembly, as an agent of the international community, 'may assert the right to enter the legal vacuum and take a binding decision'.[53]

Despite Sloan paving the way for scholarship that assesses the relevance of Assembly practice in the development of a more muscular form of binding recommendation in discrete areas of international law, there has been little scholarly attempt to assess the extent to which any such custom has emerged. The conventional wisdom is often cited in scholarship, to the effect that recommendations are not legally binding.[54] It might be said that this scholarship is merely following the practice, or lack thereof, which has not developed along the lines that Sloan anticipated might happen when penning his article in 1948.[55] Nonetheless, it is instructive to consider whether there has been any attempt by the Assembly to instil in its recommendations a legal impetus for compliance. Even if this has not fully emerged, existing practice might, in this regard, provide a foundation for future arguments to the effect that an institutional custom might crystallise a norm that treats recommendations as binding in the field of international justice. In turn, through a detailed consideration of recommendations practice, the present study will test Sloan's hypothesis that Member States could, through the accretion of an institutional custom, attribute to Assembly recommendations a binding character in specific fields of international law (here, accountability for atrocity crimes). As noted, Sloan anticipated that this role might arise from the Assembly due to a legal enforcement vacuum. Although the mechanisms to enforce and monitor compliance with international justice have advanced considerably in the ensuing decades, a major criticism still remains that there is a lack of sustained institutional leadership in holding States to their international obligations.[56] The extent to which the Assembly has stepped into the breach, to call upon Member States to meet its obligations in relation to the prosecution of atrocity crimes, and done so by injecting into its recommendations a legal impetus that requires compliance, therefore justifies attention.

Aside from debate over the binding force of Assembly recommendations, there is also scholarship that has sought to account for the extra-legal effects of these instruments on State behaviour. Again, Sloan argued that 'recommendations possess moral force and should, as such, exert great influence'.[57] This was so because the Assembly 'represents the will of the majority of nations', with this body enjoying 'an advantage because of the opportunity, which is not always available in the sphere of international law, for full publicity and for a recorded vote'.[58] That Assembly recommendations are not legally binding, on this understanding, is therefore considered to be of no detriment to these instruments influencing State behaviour, having a 'moral and political motivating force which makes it more effective than many a legal norm'.[59] DHN Johnson preferred to characterise recommendations as carrying some 'political effect', in that Member States who do not observe them 'run the risk of losing the political friendship and

[52] ibid 24.
[53] ibid 24. See a narrower view in Hans Kelsen, *The Law of the United Nations* (Stevens 1950), 40, 195-196 (suggesting that Assembly recommendations, where taken in relation to a subject of international peace and security, can be classed as binding; by contrast those concerned with economic and social cooperation, including human rights, have 'no legal effect whatsoever').
[54] Blaine Sloan, *United Nations General Assembly Resolutions in Our Changing World* (Brill 1992), 5 (criticising this misconception).
[55] Similarly, this scholarship has tended to focus on the legal significance of Assembly practice as it has been analysed by the ICJ. See eg Öberg (n 40); DHN Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955-1956) 32 BYBIL 97.
[56] See in particular the criticisms of Security Council leadership in n 3 above.
[57] Sloan, 'Binding Force' (n 31), 31.
[58] ibid.
[59] Alf Ross, *Constitution of the United Nations: Analysis of Structure and Functions* (Einehart 1950), 60-61.

understanding of their fellow Members who voted for the resolution'.[60] However, these extra-legal effects have been largely assumed without proof. For instance, Gabriella Lande noted there to be 'little doubt' that Member States give 'some attention' to Assembly resolutions given the bargaining that often occurs prior to their adoption.[61] Similarly, other scholars have pointed generally to the factors that might indicate the degree to which recommendations are capable of producing political effects, looking to the 'quality, quantity and intensity of community support behind them'.[62] Accordingly, this dissertation will embrace this literature on effects when examining Assembly's recommendations practice in the field of international justice, an area that remains yet to be analysed in the scholarly literature.

2.4 'Empowering'

Aside from the Assembly being able to act quasi-judicially it is also able to empower judicial or subsidiary entities for an adjudicatory or fact-finding purpose. This empowering function is enshrined in the UN Charter and also, as this dissertation explores, in Assembly practice. Dealing with the textual basis in the Charter, Article 22 empowers the Assembly to 'establish such subsidiary organs as it deems necessary for the performance of its functions'. As Chapter 6 of this dissertation shows, this provision has been interpreted broadly where it has arisen in cases before the ICJ, it being left to the 'Assembly to appreciate the need for any particular organ', with it being contrary to the Charter 'to place a restrictive interpretation' on this power.[63] In addition to being able to establish subsidiary organs that contribute towards the discharge of the Assembly's broad functions, Article 96(1) also envisages a role for the Assembly in requesting an advisory opinion from the ICJ on 'any legal question', which in turn opens up the possibility for Assembly-ICJ dialogue on an atrocity crimes situation.

The extent to which the Assembly has used, and is capable of using, these provisions as a means to advance accountability for atrocity crimes has been considered in the scholarly literature. This has broadly tracked and critiqued Assembly 'empowering' practice but also involved imaginative proposals for how this power might be extended and applied in the future. The Assembly's creation of the International, Impartial and Independent Mechanism for Syria ('IIIM-Syria') in 2016 led numerous scholars to legally justify this mechanism in light of the significant resistance to them by a minority of States in the explanation of vote.[64] The Assembly's power to request advisory opinions has also been analysed in the scholarship, both as to the limits on this power and the propriety of the ICJ so entertaining such requests.[65]

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[60] Johnson (n 55), 121. See also Clyde Eagleton, *International Government* (Ronald Press 1948), 322 (Assembly resolutions carry 'great weight, and desperate parliamentary battles may be fought to avoid unfavourable conclusions').

[61] See eg Gabriella Lande, 'The Effect of the Resolutions of the United Nations General Assembly' (1966) 19(1) World Politics 83, 100 ('little doubt' that Member States give 'some attention' to Assembly resolutions given the bargaining that often occurs prior to their adoption).

[62] Daniel Cheever and Field Haviland, *Organizing for Peace: International Organization in World Affairs* (Hughton Mifflin 1954), 89.

[63] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 66, 172.

[64] Whiting (n 4); Christian Wenaweser and James Cockayne, 'Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the Realm of International Criminal Justice' (2017) 15(2) JICJ 211; Beth van Schaack, 'The General Assembly and Accountability for International Crimes' (*Just Security*, 27 February 2017) <https://www.justsecurity.org/38145/general-assembly-accountability-international-crimes/>. See also Andrew Hudson and Alexandra Taylor, 'A New Model for International Criminal Justice Mechanisms' (2010) 8 JICJ 53.

[65] Martin Lailach, 'The General Assembly's Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1995) 8 LJIL 401; Michla Pomerance, 'The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial' (2005) 99(1) AJIL 26;

Scholars have, in turn, argued for greater use of the advisory mechanism in atrocity situations, be that as a means to clarify the Security Council's responsibilities under the UN Charter, or to offer some judicial scrutiny on the occurrence of crimes and serious human rights violations in country situations.[66] Finally, there has been more imaginative scholarship, in considering the possibility for the Assembly to establish *ad hoc* criminal tribunals in instances where there are no other ways in which to secure accountability for a situation.[67] Rebecca Barber presented this creative solution as a means to secure accountability for crimes against the Rohingya.[68] According to Barber, the Assembly would be able to establish an *ad hoc* tribunal based upon its established practice in creating subsidiary mechanisms in advancing the Charter purpose of maintaining international peace and security.[69]

While these are important perspectives on the powers of the Assembly to empower investigations into atrocity situations, there is also a need for further analysis on the nature and extent of these powers. It is now relatively uncontroversial to conclude that the Assembly can create commissions of inquiry. However, the recent innovation of subsidiary organs being vested with 'quasi-prosecutorial' powers, in preparing cases so as to support the investigation and prosecution of individual suspects at an international or domestic level, deserves more scholarly analysis. Similarly, while it appears to be conventional wisdom that there is no duty to cooperate with Assembly-established commissions of inquiry, this proposition is worth closer scrutiny, particularly in light of Assembly practice, the text of resolutions and the views of Member States on this issue. This might in turn reveal less uniformity on this proposition than was originally thought and the possibility for a cooperation duty to emerge in the future. In relation to the Assembly's use of its power to request an advisory opinion, this scholarship has tended to focus on the propriety of individual requests; it is instructive to take a more holistic approach in relation to the potential of this mechanism as a means to address gaps in the judicial accountability of atrocity crimes. Finally, beyond Barber's focus on established practice as a foundation for the Assembly to create an *ad hoc* tribunal, there are other potential legal bases that warrant closer attention. One possibility, in this regard, was alluded to in the commission of inquiry report concerning alleged crimes against humanity in the Democratic People's Republic of Korea (DPRK).[70] This report alluded to the possibility that the Assembly could establish an *ad hoc* tribunal, particularly where the Security Council has failed to do so, using the Uniting for Peace mechanism, or the 'combined sovereign powers' of Members States to assert universal jurisdiction.[71] These claims will be considered in greater depth in Chapter 6.

2.5 'Sanctioning'

Andrea Bianchi, 'Dismantling the Wall: The ICJ's Advisory Opinion and Its Likely Impact on International Law' (2004) 47 GYIL 343; Karin Oellers-Frahm, 'Law-making through Advisory Opinions?' (2011) 12(5) German LJ 1033.

[66] Jennifer Trahan, *Existing Legal Limits to Veto Powers in the Face of Atrocity Crimes* (CUP 2020), 254-255; James Goldston, 'We Need an ICJ Ruling on Syria' (*Open Democracy*, 27 June 2015) <https://www.opendemocracy.net/en/north-africa-west-asia/we-need-icj-ruling-on-syria/> (discussing the possibility of an Assembly request for an ICJ advisory opinion on Syria).

[67] The potential for the Assembly to exercise a ICC referral power has also been analysed: Ramsden and Hamilton (n 4).

[68] Barber, 'Accountability' (n 4). See also, in the context of accountability options for the MH17 airline disaster: Michael Ramsden, 'Uniting for MH17' (n 4).

[69] ibid.

[70] UNHRC, 'Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea' (7 February 2014) UN Doc **A/HRC/25/CRP.1**.

[71] ibid, [1201].

Although the UN Charter envisages a role for the Security Council in sanctioning States for their deviant conduct, it is also apparent that the Assembly is able to perform a limited sanctioning function. To be sure, Article 41 of the UN Charter provides the most direct reference to a sanctioning power, in empowering the Security Council to decide upon appropriate non-forceful measures Member States ought to take to address threats to international peace and security, including the 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.[72] Yet, the Assembly might also sanction a Member State in a limited sense of contributing towards a decision that deprives such Member of some or all of its rights of membership. Article 5 of the Charter provides that where the Security Council has taken 'preventive or enforcement action' against a Member State, the Assembly might, 'upon the recommendation of the Security Council', suspend that State 'from the rights and privileges of membership'. Furthermore, Article 6 provides that, 'upon the recommendation of the Security Council', the Assembly can expel a Member State that has 'persistently violated' the principles of the Charter. Although the Assembly is unable to exercise these powers independent of a Security Council recommendation, it might autonomously make a decision concerning the credentials of those delegates seeking to represent Member States.

The extent to which the Assembly is able to sanction a Member State has attracted some attention in the scholarly literature. This scholarship has fallen into three main clusters. The first has been to evaluate the power and practice of the Assembly to deprive an offending State of its UN membership rights, be that under Article 6 or in considering the credentials of a government that purports to represent a State in the Assembly.[73] Another cluster of scholarship has analysed the possibility for the Assembly to contribute towards the lawful imposition of economic sanctions against States that have violated their international obligations.[74] Stefan Talmon considered the possible 'authorising' function of Assembly resolutions and their interaction with numerous doctrines of State responsibility, including countermeasures and 'fundamental change of circumstances'.[75] Finally, scholars have also considered the use of the Uniting for Peace resolution as a means to confer upon the Assembly analogous enforcement powers to those of the Security Council, including to legally authorise sanctions.[76] This has also considered the constitutionality of this mechanism, in purporting to confer upon the Assembly powers that are not so obviously contemplated in the UN Charter, be that in acting where the Security Council is doing so, or in assuming powers comparable to those found in Chapter VII

[72] However, art 41 is not solely confined to sanctioning violations of international law but more broadly is concerned with the maintenance of international peace and security. For a detailed analysis on this provision, see Nico Krisch, 'Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Article 41' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol II (3rd edn, OUP 2012), 1310.

[73] See eg Farrokh Jhabvala, 'The Credentials Approach to Representation Questions in the U.N. General Assembly' (1977) 7 Cal W Intl LJ 615; Gerhard Erasmus, 'Rejection of Credentials: A Proper Exercise of General Assembly Powers or Suspension by Stealth?' (1981) 7 South African J Intl L 40; Raymond Suttner, 'Has South Africa been Illegally Excluded from the United Nations General Assembly?' (1984) 17 CILSA 279; Malvina Halberstam, 'Excluding Israel from the General Assembly by a Rejection of its Credentials' (1984) 78 AJIL 179, 186-7; Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (CUP 2011).

[74] John Halderman, 'Some Legal Aspects of Sanctions in the Rhodesian Case' (1968) 17(3) ICLQ 672.

[75] Stefan Talmon, 'The Legalizing and Legitimizing Function of UN General Assembly Resolutions' (2014) 108 AJIL Unbound 123.

[76] Andrew Carswell, 'Unblocking the UN Security Council: The Uniting for Peace Resolution' (2013) 18(3) JCSL 453; Rebecca Barber, 'Uniting for Peace not Aggression: Responding to Chemical Weapons in Syria Without Breaking the Law' (2019) 24(1) JCSL 71; Christian Tomuschat, 'Uniting for Peace' UN Audiovisual Lib Intl L 3 (2008) <http://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf>.

(including Article 41 above).[77] Given that the use of the Uniting for Peace mechanism has declined considerably, more recent scholarship has also sought to consider whether it still continues to serve a useful purpose as a basis for Assembly action.[78]

The following study complements the existing literature by comprehensively analysing the Assembly's use of the sanctions instrument and its potential in the field of international justice. Accordingly, this study aims to contribute to the literature in considering how the sanctions instrument might be used as a means to advance accountability for atrocity crimes. By contrast, it is apparent that much of the literature on the Assembly's sanctioning function have not been specifically focused on how it might be used as an instrument to advance accountability for atrocity crimes. For example, much of the scholarship on Uniting for Peace has been concerned with the scope for the Assembly to authorise the use of force including humanitarian intervention, rather than how this mechanism might support accountability efforts.[79] In considering the latent potential of the Assembly to perform a more prominent role in the field of international justice, it is therefore worthwhile to provide a comprehensive and holistic analysis of the potential for its resolutions to have legal effects that support collective sanctions against those responsible for atrocity crimes.

3. Research Goals and Approaches

As the above literature review indicates, there is a need for a comprehensive analysis of the Assembly's contribution in the field of international justice. This dissertation has three goals in view. Firstly, it seeks to identify the scope of the Assembly's legal powers, according to the five functions above (i.e., quasi-legislative, quasi-judicial, empowering, recommendatory, sanctioning). This exercise aims to enrich the general understanding of the Assembly's powers as a UN principal organ. A full explication of these institutional powers will also usefully serve to highlight the possibility for the Assembly to be used by States and other actors as part of a strategy to obtain accountability in an atrocity situation and, hopefully, to stimulate creative thinking on how the UN plenary body can be used to address impunity gaps. Secondly, the dissertation also seeks to provide a comprehensive survey of Assembly practice in the field of international justice, which includes the adoption of resolutions and decisions, as well as creation of subsidiary organs. By outlining this practice, the dissertation aims to highlight to the reader areas in which the Assembly has been active and to, conversely, identify areas where gaps or inconsistencies exist in responding to atrocity crimes. Thirdly, the dissertation aims to

[77] Juraj Andrassy, 'Uniting for Peace' (1956) 50 AJIL 563, 564; Hans Kelsen, 'Is the Acheson Plan Constitutional?' (1950) 3(4) Western Political Q 512, 516; Leland Goodrich, 'Expanding Role of the General Assembly: The Maintenance of International Peace and Security' (1951) 29 Intl Conciliation 231; LH Woolsey, 'The "Uniting for Peace" Resolution of the United Nations' (1951) 45(1) AJIL 129, 134.

[78] Larry Johnson 'Uniting for Peace: Does it Still Serve any Useful Purpose?' (2014) 108 AJIL Unbound 106; Jean Krasno and Mitushi Das, 'The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008); Harry Reicher, 'The Uniting for Peace Resolution on the Thirtieth Anniversary of its Passage' (1981) 10 Colum J Transnatl L 1, 36-7; Henry Richardson, 'Comment on Larry Johnson, Uniting for Peace' (2014) 108 AJIL Unbound 135; Ramsden, 'Age of International Justice' (n 44).

[79] Carswell (n 76); Dominik Zaum, 'The Security Council, The General Assembly, And War: The Uniting for Peace Resolution' in Vaughan Lowe and others (eds), United Nations *Security Council and War*: The Evolution of Thought and Practice Since 1945 (OUP 2008); Coman Kenny, 'Responsibility to Recommend: The Role of the UN General Assembly in the Maintenance of International Peace and Security' (2016) 3(1) J Use of Force Intl L 3; Barber, 'Uniting for Peace not Aggression' (n 76); Graham Melling and Anne Dennett, 'The Security Council Veto and Syria: Responding to Mass Atrocities through the "Uniting for Peace" Resolution' (2018) 57(3-4) IJIL 285; Michael Ramsden, 'Uniting for Peace and Humanitarian Intervention: The Authorising Function of the UN General Assembly' (2016) 25(2) Wash Intl LJ 267.

advance scholarly understanding on the 'effects' of Assembly resolutions, broadly conceived, using international justice as a case study in which to appreciate these effects.

In this respect, 'effects' will be measured in different ways in this dissertation, which will vary according to the Assembly function under study. The quasi-legislative effects of resolutions will thus turn partly upon an assessment of international jurisprudence to ascertain the extent to which these resolutions have contributed towards the judicial construction of the sources of international law at issue. Similarly, the effects arising from the Assembly's quasi-judicial function will also primarily focus on the extent to which courts have used such resolutions as a means to support their functions, although not exclusively so. As will be developed in Chapter 4, a derivative of quasi-judicial resolutions, particularly those that seek to apply norms to the conduct in country situations, is that it provides Member States with an opportunity to crystallise an interpretive understanding that might in turn contribute towards the development of international law: a quasi-judicial resolution can therefore also have quasi-legislative effects. Yet, while it is possible to appreciate the effects of quasi-legislative and quasi-judicial resolutions on the decision-making of courts, measuring the impact of Assembly's recommendations, be that to Member States or the Security Council, poses greater difficulty. The most direct form is that either of these subjects implement the recommendation; however, such causality is almost impossible to establish directly (these actors are often unlikely to attribute the decisions it makes to anything other than their own considered judgment). Equally problematic is that attempts to secure accountability for atrocity crimes often fail despite multilateral efforts, as some Member States have lamented.[80] Nonetheless, a recommendation might produce certain institutional effects which are worthy of analysis, be that, for example in leading to a stronger response from the Assembly, in mobilising shame against a deviant State, or in calling upon the Security Council to take action. It is instructive therefore to consider whether defiance of Assembly recommendations produced any further effects that contributed towards the crystallisation of a UN position, in shaping an international public attitude towards a situation, which in turn might have led to the eventual implementation of the recommended action in a country situation. Finally, there are effects that remain, at this point, largely hypothetical, as with Assembly resolutions that purport to authorise Member States to take action that would otherwise be inconsistent with international law (see Chapter 7).

In evaluating these various effects, it is also readily acknowledged that a medley of factors will affect the degree to which the Assembly is capable of having impact. The factors noted by Richard Falk in the previous section – including the nature and scale of support for a resolution – are amongst those that are likely to be relevant as to how a resolution is received and used in international life. But it must also be appreciated that there are a panoply of other political mechanisms in international justice that contribute towards efforts at securing accountability for atrocity crimes; these are worthy of major studies in their own right. Within the UN, the Security Council is assigned the most significant role in advancing international justice, best illustrated by its power to refer situations to the ICC Prosecutor; its resolutions, even outside of the context of Chapter VII enforcement action, also command great attention.[81] The UN Human Rights Council (UNHRC) has also assumed the leading position in the UN system for creating commissions of inquiry which have had an observable impact on various processes, including Security Council decision-making.[82] Outside of the UN, the ICC Assembly of States Parties (ICC-ASP) serves comparable plenary functions to those of the Assembly specifically in relation to the ICC, in playing a role in adopting amendments to the

[80] UNGA, Fifty-fourth session, 80th plenary meeting (15 December 1999) UN Doc A/54/PV.80, 17 (Jordan).
[81] See further the discussion in Ramsden and Hamilton (n 4), 879-899.
[82] ibid.

ICC Statute and mobilising shame against deviant States Parties.[83] Regionally, there are various political initiatives to address impunity gaps undertaken by the European Union (EU) and African Union (AU).[84] In short, appreciating Assembly impact in the field also has to take into account the contributions of these other actors and inter-institutional habits of cooperation that have formed in responding to atrocity crimes. For instance, there is a great deal of evidence that the work of the International Committee of the Red Cross (ICRC) and the UNHRC in international justice has influenced Assembly resolutions and other activity; and vice versa.[85] Although it would be impossible in relation to the present study to fully contextualize the influence of all these relevant actors on campaigns for accountability for atrocity crimes, it is nonetheless a broader context that is acknowledged and referenced in this dissertation.

Still, there are some who might regard the role of the UNHRC in advancing international justice as being a more appropriate UN organ in which to focus scholarship. The UNHRC is a creation of the Assembly; technically, its subsidiary organ.[86] The Assembly also retains powers over its membership, being able to suspend a Member of the UNHRC 'that commits gross and systematic violations of human rights'.[87] But at the same time, the UNHRC has been relatively autonomous in defining its agenda and, in many respects, has gone further than its parent organ in advancing international justice. This relationship itself reinforces the importance of the Assembly on human rights matters; to some Member States, the UNHRC would help to revitalise the work of the Assembly.[88] The UNHRC's mandate includes to 'address violations of human rights, including gross and systematic violations', making it very relevant to the advancement of the norms of international justice.[89] Like the Assembly it has engaged in quasi-judicial activity, in condemning conduct within States and establishing commissions of inquiry to undertake investigations.[90] The Assembly has established commissions of inquiry and other fact-finding missions, but the UNHRC has done so to a more significant extent in its short history, accounting for over 60% of those established within the UN system since 2006.[91] The wide ranging coverage of these investigations (including Lebanon, Sudan and DPRK) might in turn make up for accountability blind spots or oversights that have arisen in the principal political organs, including the Assembly. The UNHRC's creation of commissions of inquiry have also been credited as having a catalytic effect in the UN system, most prominently in supporting a referral by the Security Council of the Libya situation to the ICC Prosecutor.[92]

Does this mean that the UNHRC is a more suitable organ than the Assembly to advance international justice? This was the argument of the Algerian delegate during a plenary debate, arguing that the Universal Periodic Mechanism under the auspices of the UNHRC, given that it fosters a spirit of cooperation, 'should be the primary tool for considering human rights issues'

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[83] Ibid; Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (ICC Statute).

[84] EU, 'Policy Framework on Support to Transitional Justice' (2015) <http://eeas.europa.eu/archives/docs/top_stories/pdf/the_eus_policy_framework_on_support_to_transitional_justice.pdf>; AU, 'Transitional Justice Policy' (2019) <https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf>.

[85] Ramsden and Hamilton (n 4) 897-899.

[86] UNGA Res 60/251 (2006) [1].

[87] ibid [8].

[88] UNGA, 'Summary of the open-ended informal consultations held by the Commission on Human Rights pursuant to Economic and Social Council decision 2005/217' (21 June 2005) UN Doc A/59/847-E/2005/73, [27]–[28].

[89] UNGA Res 60/251 (2006) [3].

[90] Ramsden and Hamilton (n 4) 898.

[91] Larissa van den Herik and Catherine Harwood, 'Commissions of Inquiry and the Charm of International Criminal Law' in Philip Alston and Sarah Knuckey, *The Transformation of Human Rights Fact-Finding* (OUP 2015), 236.

[92] Compare UNHRC Res S-15/1 (2011) and UNSC Res 1970 (2011).

rather than the Assembly.[93] However, it is erroneous to assume that the Assembly has now been side-lined by its subsidiary organ.[94] For a start, the Assembly has a much richer history in the field of international justice, dating back to 1946; it has in this time adopted wide-ranging resolutions in the field that continue to have impact today, as this study shows. Furthermore, there remains, due to the wider membership and broader remit, a sense within the UN system that a resolution by the Assembly generally carries greater weight than one by the UNHRC.[95] Similarly, a specialism of the UNHRC has been to establish commission of inquiries; but the Assembly also has a rich history in doing so, with a prominent recent example being the creation of the IIIM-Syria in December 2016.[96] Indeed, the model adopted by the Assembly for the IIIM-Syria has been used by the HRC subsequently for Myanmar.[97] Finally, the UNHRC is unable to produce resolutions having the same legal effects as ones by the Assembly in 'authorising' Member States to take action within the framework of the UN Charter or the Uniting for Peace mechanism, as Chapter 7 considers. Furthermore, one of the UNHRC's functions is to 'make recommendations to the [Assembly] for the further development of international law in the field of human rights'.[98] In the enforcement of international justice, the HRC has recognised the important function of the Assembly in making recommendations to the Security Council; for instance, the UNHRC implored the Assembly to recommend the Security Council to refer the Gaza situation to the ICC.[99] The Assembly, as a principal organ of the UN, therefore remains centrally placed to advance the objectives of international justice, with the UNHRC, as its subsidiary organ, supporting these efforts.

While it is necessary to look at how Assembly activity might contribute, in tandem with other actors, towards the advancement of international justice, it must also be acknowledged that a major motive of this dissertation was to consider the ways in which the Assembly is able overcome Security Council failures to take action in response to atrocity crimes. Commentators have made casual references to the world being in a 'new Cold War' and a prediction that such tensions 'will affect nearly every important dimension of the international system.'[100] Member States have often pointed to a Security Council legitimacy deficit and Assembly resolutions have been more pointed in condemning inaction by the permanent members.[101] Member States have called upon the Assembly to take more 'concerted action' to realise its 'responsibilities which should be exercised in regard to the maintenance of international peace and security'.[102] It has followed that the failure of the permanent members to reach accord, for instance, on a referral of the Syria situation to the ICC Prosecutor or the creation of an *ad hoc* tribunal for the Malaysia Airlines Flight 17 (MH17) disaster, has contributed towards an increased reflection

[93] UNGA, Sixty-ninth session, 73rd plenary meeting (18 December 2014) UN Doc A/69/PV.73, 22.
[94] See also UNGA, Sixty-sixth session, 89th plenary meeting (19 December 2011) UN Doc A/66/PV.89, 24 (Iceland) (Assembly 'enrich[es] the international human rights dialogue with their discussion').
[95] UNGA, Seventy-first session, 65th plenary meeting (19 December 2016) UN Doc A/71/PV.65, 34 (Ukraine).
[96] UNGA Res 71/248 (2016).
[97] UNHRC Res 39/2 (2018) [22] (welcomed in UNGA Res 73/264 (2018) preamble).
[98] ibid [5(c)].
[99] UNHRC Res 16/32 (2011), [8]. See also UNHRC Res 39/2 (2018), [6] (inviting the Assembly to consider action on Myanmar).
[100] Robert Legvold, 'Managing the New Cold War' (2014) Foreign Aff 74.
[101] UNGA Res 66/253 B (2012). See also Martin Binder and Monika Heupel, 'The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates' (2015) 59(2) Intl Studies Q 238 (negative opinions of the Security Council by UN Member-States outweigh positive ones from a sampling of debates); Matthew Stephen, 'Legitimacy Deficits of International Organizations: design, drift, and decoupling at the UN Security Council' (2018) 31(1) Cambridge Rev Intl Aff 96.
[102] Permanent Mission of Canada to the UN, 'Letter to the President of the Seventy-First Session of the UN General Assembly' (13 October 2016) <https://www.un.org/pga/71/wp-content/uploads/sites/40/2015/08/Informal-briefing-on-the-situation-of-Syria.pdf>. The Assembly has also acknowledged the need for itself to play an active role in dealing with issues pertaining to international peace and security: UNGA Res 64/301 (2010), [4].

on the possibility of creative solutions to overcome Chapter VII deadlock.[103] Proposals for reform have included a 'code of conduct' which would require voluntary veto-use abstention in cases 'involving mass atrocity crimes'.[104] Jennifer Trahan took this a step further and argued that there exists legal limits on the veto power where concerned with atrocity situations which, if true, might be used as a basis to challenge the behaviour of permanent members and subject them to legal standards.[105] By contrast, others have considered the feasibility of solutions outside of the Security Council, including through a revival of the Assembly's Uniting for Peace mechanism.[106] For example, when exploring solutions outside of the Security Council for securing accountability for the crimes committed in the DPRK, the final commission of inquiry report mused that States could use their 'combined sovereign powers…to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction', alluding to the Assembly as the forum for such delegation of powers to be established.[107] An important component of this dissertation, therefore, will be to consider these inter-organ dynamics on international justice and the scope for the Assembly to assume more powers within the framework of the UN Charter in instances where the Security Council has failed.

In assessing the legal powers of the Assembly in the field of international justice, its practice is given special emphasis in this dissertation. While the text of the UN Charter is a natural starting point in assessing the scope of the Assembly's powers, there is procedural latitude for the membership to develop these powers. This reflects the principle of treaty interpretation, explored in Chapter 3, that mandates the treaty terms to be read in light of any subsequent practice or subsequent agreement which establishes the agreement of the parties regarding its interpretation (although, as will be shown, the UN has its own customary principle, based upon the 'established practice' evincing 'general agreement' of the membership, in which to evolve an organ's powers under the UN Charter).[108] In turn the practice of the Assembly, evidenced by the adoption of resolutions and the creation of subsidiary organs, in turn help to establish the scope of their existing powers in the field of international justice. All relevant practice was surveyed, from the first session until, at the time of completion of this dissertation, the most recent (1945-2021). Those resolutions and subsidiary organs identified to be concerned broadly with addressing atrocity situations and serious human rights violations were then catalogued and analysed according to the five major themes explored in this work (quasi-legislative; quasi-judicial; empowering; recommendatory; and sanctioning). The language used in resolutions and explanations of vote were also carefully analysed given that they provide a

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[103] Jan Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?' (2016) 27(4) EJIL 923.

[104] UNSC, Sixty-eighth session, 7052nd meeting (29 October 2013), 13-14; Bolarinwa Adediran, 'Reforming the Security Council through a Code of Conduct: A Sisyphean Task?' (2018) 32(4) Ethics & Intl Aff 463.

[105] Trahan, 'Existing Legal Limits' (n 66).

[106] Barber, 'Uniting for Peace not Aggression' (n 76); Yasmine Nahlawi, 'Overcoming Russian and Chinese Vetoes on Syria through Uniting for Peace' (2019) 24(1) JCSL 111; White, 'Relationship' (n 8), 293; Carswell (n 76); Zaum (n 79).

[107] DPRK Report (n 70) [1201].

[108] This principle is recognised in multiple sources, including Vienna Convention on the Law of Treaties (entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31. See also Certain Expenses of the United Nations (Advisory Opinion) [1962] ICJ Rep 151, 175-79; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 16, 22*; Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, 149; ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (2018) UN Doc A/73/10, 6. For discussion see Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organisations' (2013) 38 Yale J Intl L 289, 295; Irena Buga, *Modification of Treaties by Subsequent Practice* (OUP 2018) 35-41; Peter Quayle, 'Treaties of a Particular Type: The ICJ's Interpretive Approach to the Constituent Instruments of International Organisations' (2016) 29 LJIL 853.

window into ascertaining the general agreement of the membership as to the scope of the Assembly's powers.

Aside from the Assembly's powers as understood through resolutions and subsidiary organs, court judgments were another major source of material analysed in this dissertation. The jurisprudence from international courts feature in particular when appreciating the quasi-legislative and quasi-judicial effects of Assembly resolutions in the decision-making of other regimes, as explored in Chapters 2 and 4. This focus recognises the important role of courts to the advancement of international justice, in rendering decisions that are capable of finding individuals or States responsible for atrocity crimes. How resolutions have influenced judicial outcomes is therefore a worthwhile study, even if broader conclusions cannot be made on the effect of resolutions on non-judicial actors (although correlates can sometimes be drawn based upon UN materials and secondary literature, as considered in this dissertation). A wide range of courts relevant to the field of international justice were surveyed. In relation to those vested with the power to determine individual criminal responsibility, these included the ICC, International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone, Special Tribunal for Lebanon (STL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). It also covers the jurisprudence from regional human rights mechanisms – particularly the European Court of Human Rights (ECtHR) and Inter-American Court of Human Rights (IACtHR) – and the manner in which they have used Assembly resolutions in the construction of norms pertaining to accountability for atrocity crimes in the context of human rights law.[109]

4. Structure of the Dissertation

Including this Introduction, this dissertation is divided into seven Chapters, structured in a manner that considers the theme of international justice in relation to particular Assembly functions. Chapter two analyses the quasi-legislative effect of Assembly resolutions in the judicial consideration of atrocity situations. Having set out the Assembly's broad quasi-legislative practice in the field of international justice, Chapter three then broadens the analysis to consider the relationship between Assembly resolutions and the development of international law, both institutionally (under the UN Charter) and externally (in relation to other treaty regimes and customary international law). This analysis will in turn allow conclusions to be made as to the scope for the Assembly to shape international norms, including its own powers under the UN Charter, in a manner that advances international justice. Chapter four then shifts focus onto the Assembly's quasi-judicial practice and how their resolutions have been used by institutional actors to support accountability responses to atrocity crimes. This is followed by Chapter five which evaluates the scope and effect of the Assembly's recommendations practice. The following two Chapters consider the possibilities for the Assembly, in building upon some of its practice, to take creative solutions to advance international justice. Chapter six thus considers the scope of the Assembly's capacity to empower judicial or subsidiary organs to address atrocity situations, including to establish commissions of inquiry, request ICJ advisory opinions and to create *ad hoc* criminal tribunals. Chapter seven then rounds off the substantive

[109] In relation to the aim of addressing the impunity gap, relevant State duties contain the duty to prevent human rights violations, the duty to investigate such violations, and the obligation to prosecute and punish them. There is an embryonic literature about the interactions of 'international criminal law by other means', see Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 107(1) AJIL 1.

analysis by looking into the legal feasibility of the Assembly assuming a function in coordinating and authorising lawful sanctions as a means to advance accountability in atrocity situations. Chapter 8 concludes.