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

Ramsden, M.P.

CHAPTER 7: THE POTENTIAL ROLE OF THE GENERAL ASSEMBLY IN COORDINATING SANCTIONS

1. Introduction

There have been numerous instances in which the Assembly has threatened consequences in the event that a Member State fails to observe a resolution or international obligation. It warned South Africa of 'grave consequences' if it was to execute 'freedom fighters' and issued a 'solemn warning' to Israel to 'cease its threats of aggression'.[1190] Often times, these warnings have come to be seen as empty threats. On other occasions, the Assembly has recommended Member States to sanction the recalcitrant State. Such recommendations have been made with a view to ensuring that the recalcitrant State adjusts 'its conduct to its obligations under the Charter of the United Nations' and to 'give effect to resolutions adopted by the General Assembly', or similar formulations with the express aim of compliance with such resolution.[1191] The Assembly has, at various points, recommended that Member States impose sanctions against Congo, Israel, South Africa, Southern Rhodesia, China (and North Korea), Guatemala, and Portugal.[1192] These recommended sanctions have included the breaking of diplomatic relations (such as by recalling ambassadors from a country); closing sea and air ports to their vessels and aircrafts; boycotting all trade; terminating any credits; suspending technological assistance; severing cultural relations; and imposing an arms embargo.[1193] Some of these resolutions have included a combination of these measures; in the case of Israel and South Africa, the aim was the 'total isolation' of the recalcitrant regime in 'all fields'.[1194] Most of these recommendations have arisen in the context where the Security Council has not imposed mandatory sanctions, the Assembly instead recommending Member States to act autonomously in imposing sanctions against deviant subjects.[1195]

The Assembly's recommendation of sanctions in these instances raises the inevitable question as to whether they are an effective tool within the field of international justice.[1196] One of the earliest Assembly sanctions recommendations, that

---

[1190] UNGA Res 33/183 F (1979), [3] (South Africa).

[1191] UNGA Res 1742 (XVI) (1962), [7] (*'requests'* Members to use their influence 'to secure the compliance of Portugal with the present resolution'); UNGA Res 1593 (XV) (1961), preamble (South Africa).

[1192] UNGA Res 37/184 (1982), [5] (Guatemala); UNGA Res 1807 (XVII) (1962), [6]-[7] (Portugal); UNGA Res 1761(XVII) (1962), [8] (South Africa); UNGA Res 1474 (ES-IV) (1960) (Congo); UNGA Res 500 (V) (1951), [1] (Korea).

[1193] UNGA Res 37/69 F (1982), [2] (Israel/South Africa); UNGA Res 37/184 (1982), [5] (Guatemala); UNGA Res 34/93 A (1979), [12] (South Africa); UNGA Res 2107 (XX) (1965), [7] (Portugal); UNGA Res 1474 (ES-IV) (1960) (Congo); UNGA Res 500(V) (1951) (PRC); UNGA Res 39(1) (1946) (Spain).

[1194] See eg UNGA Res 41/35 B (1986), [7] (South Africa); UNGA Res 40/168 (1985), [13]-[14] (Israel).

[1195] The power of the Assembly to advise its membership to impose sanctions on the basis of each Member State's own legal authority is accepted in the scholarly literature, see: Higgins, 'Oppenheim's International Law' (n 414), 972, 977; White, 'Relationship' (n 8), 309.

[1196] This is also tied to the more general debate over the effectiveness of sanctions as a tool in promoting compliance with international norms. For a range of scholarly opinion, see Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007), 262; Nigel White, 'Collective Sanctions: An Alternative to Military Coercion?' (1994) 12(3) Intl Relations 75, 91; Arturo Carrillo and Annalise Nelson, 'Comparative Study and Analysis of National Legislation Relating to Crimes Against Humanity

called for an embargo on China and North Korea, was complied with by 'some forty-five countries'.[1197] Indeed, Member States collectively have, at various points, appreciated the value of sanctions in addressing serious violations of international law. For example, when defining the importance of sanctions to eradicate apartheid, the Assembly noted that 'universally applied economic sanctions are the only means of achieving a peaceful solution'.[1198] The Assembly has also identified the utility of sanctions in supporting ICC action, recommending the Security Council to authorize 'effective targeted sanctions' against perpetrators of international crimes.[1199] To be sure, the inevitable criticism about the Assembly's foray into recommending sanctions was that such measures did not always lead to overwhelming compliance.[1200] Western powers continued to trade with South Africa and arms continued to be supplied to Portugal, amongst obvious examples. But these are perhaps criticisms of prior sanctions strategies employed by the Assembly and the balance of Cold War politics at the time, rather than on the effectiveness of future sanctions (including 'smart' sanctions) that could be used in the realm of international justice.[1201]

Although the sanctions instrument has become a common tool used in response to serious violations of international law, questions over their legality remain, particularly where they are taken unilaterally.[1202] Examples of sanctions in the atrocity crimes context include the adoption of US legislation prohibiting the exports of goods and technology to, and all imports from, Uganda, given that its government 'committed genocide against Ugandans;'[1203] the imposition of a trade embargo by the European

---

and Extraterritorial Jurisdiction Special Report' (2014) 46 Geo Wash Intl LR 481; Margo Kaplan, 'Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility' (2014) 79(5) NYU L Rev 1902; Sarah H Cleveland, 'Norm Internalization and U.S. Economic Sanctions' (2001) 26 Yale J Intl L 1.

[1197] Francis Wilcox, 'How the United Nations Charter Has Developed' (1954) 296 Annals American Acad Pol & Social Science 1, 8.

[1198] UNGA Res 2054 (XX) A (1965), [6]. Similarly, the Assembly has noted the importance of 'mandatory sanctions' under Chapter VII as the 'most appropriate and effective means by which the international community can assist the legitimate struggle of the oppressed people of South Africa': UNGA Res 37/69 C (1982), preamble.

[1199] UNGA Res 69/188 (2014), [8].

[1200] Indeed, the Assembly has often recommended the Security Council to impose sanctions under Chapter VII alongside its own sanctions recommendations: UNGA Res 41/35 H (1986), [6]; UNGA Res 37/68 (1982), [9]; UNGA Res 31/6 D (1976), [1]; UNGA Res 1761 (XVII) (1962), [8].

[1201] 'Smart' sanctions differ from conventional sanctions in aiming to target the culpable political elites while cushioning vulnerable groups by exempting specified commodities such as food and medical supplies from embargoes. There is a voluminous literature on smart sanctions and their effectiveness, see eg Arne Tostensen and Beate Bull, 'Are Smart Sanctions Feasible?' (2002) 54(3) World Politics 373; Dursun Peksen, 'When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature' (2019) 30(6) Defence and Peace Economics 635.

[1202] Which might violate the principle of non-intervention, concerning those 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely': *Nicaragua (Merits)* (n 273), 108; Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 Chinese JIL 175, 181; Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention' (2009) 22 LJIL 345, 347; Daniel Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions' in Ali Morossi and Marisa Bassett (eds), *Economic Sanctions under International Law* (TMC Asser Press 2015) 89; Richard Porotsky, 'Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo against Cuba' (1995) 28(4) Vand J Transnatl L 901, 920; Curtis Henderson, 'Legality of Economic Sanctions Under International Law: The Case of Nicaragua' (1986) 43 Wash Lee LR 167, 181.

[1203] Uganda Embargo Act, Public Law 95-435 (10 October 1978); United States Statutes at Large 1978 92(1) (US Government Printing Office, 1980), 1051– 1053.

Community and the US against Iraq following its act of aggression against Kuwait;[1204] and the freezing of Yugoslav funds and an immediate flight ban by many European States in response to President Milosevic's 'worsening record on human rights'.[1205] While not all measures that a State might take against another would entail responsibility (some measures being 'retorsions'), increasingly such matters are governed by treaties, such as bilateral or multilateral air services agreements, trade agreements, development aid treaties, or human rights treaties.[1206] The Security Council's authorisation of sanctions under Chapter VII would, by virtue of Article 103 of the UN Charter, release States from any conflicting obligations of this nature as it implements sanctions against the deviant State.[1207] For its part, the Assembly has repeatedly condemned 'unilateral coercive measures', aimed at subordinating a State's sovereign rights, as being 'contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States.'[1208] In turn, the legality of unilateral sanctions taken without authorisation by the Security Council continues to attract scholarly reflection.[1209] The extent to which the Assembly is able to legally authorise sanctions, as a way to redress the failure of the Security Council to do so in the face of atrocity crimes, therefore commands attention.[1210]

Whether an Assembly 'voluntary sanctions' resolution can act as a legal authorisation, and not merely an advisory recommendation for Member States to act based upon their own authority, will depend upon an analysis of a number of legal regimes.[1211] As a preliminary matter, the extent to which the Assembly is looked upon

---

[1204] See eg President Bush's Executive Orders of 2 August 1990, reproduced in (1990) 84(4) AJIL 903.
[1205] Reproduced in (1998) 69 BYBIL 581; (1999) 70 BYBIL 555.
[1206] See further Cleveland (n 1196); Devika Hovell, 'Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions' (2019) 113 AJIL Unbound 140, 145; Mohamed Helal, 'On Coercion in International Law' (2019) 52 NYU JIntl L & Pol 1; Antonios Tzanakopoulos, 'State Responsibility for "Targeted Sanctions"' (2019) 113 AJIL Unbound 135; Cedric Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)' (2008) 7 Chinese JIL 625; *Nicaragua (Merits)* (n 273), 138 (a '[S]tate is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation'); ILC, ARSIWA (n 861), 128.
[1207] Other scholars have argued that trade agreements allow for the possibilities of sanctions impliedly as a national security interest: Helal (n 1206), 104. For a contrary argument see Carlos Vázquez, 'Trade Sanctions and Human Rights - Past, Present, and Future' (2003) 6 J Intl Econ L 797.
[1208] See eg UNGA Res 74/154 (2019), preamble; UNGA Res 51/103 (1996) UNGA Res 46/210 (1991) and subsequent annual resolutions with the same title; UNGA Res 3281 (XXIX) (1974); UNGA Res 26/25 (1970); UNGA Res 2131 (XX) (1965). See also UNHRC, 'Thematic study of the Office of the United Nations High Commissioner for Human Rights on the impact of unilateral coercive measures on the enjoyment of human rights' (11 January 2012) UN Doc A/HRC/19/33; UNHRC, 'Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights' (30 August 2018) UN Doc A/HRC/39/54.
[1209] Hovell (n 1206); Mergen Doraev, 'The Memory Effect of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again' (2015) 37 U Pa J Intl L 355; Hofer (n 1202).
[1210] Other legal considerations when considering the permissibility of sanctions, which are not considered here, include the need to respect the human rights of the sanctioned, as well as 'secondary sanctions': Tzanakopoulos, 'State Responsibility' (n 1206).
[1211] Judge Lauterpacht once opined that Assembly recommendations may 'on proper occasions' provide a 'legal authorisation' for Member States to act, although did not expand on this observation *South West Africa* (Advisory Opinion) (Separate op Judge Lauterpacht) (n 999), 115. However, given that the case concerned the non-binding effect of Assembly resolutions, rather than their authorising effect, the facts did not provide the occasion for Judge Lauterpacht to expand upon this passage. See also the arguments for resolutions as authorisations in other contexts, including humanitarian intervention and humanitarian assistance: Rebecca Barber, 'A Survey of the General Assembly's Competence in Matters of International Peace and Security: in Law and Practice' (2020 forthcoming) J Use of Force in Intl L.

for guidance as to the validity of conduct will also tie more generally to perceptions as to its quasi-judicial function in international relations; the practice in Chapter 4 is therefore relevant background to the potential for the Assembly's authorising role under the laws of State responsibility. In this respect, the starting point is the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[1212] The ILC did not include the adoption of an Assembly resolution as a possible circumstance precluding wrongfulness in the ARSIWA amongst the justifiable circumstances.[1213] Still, there are arguments that Assembly resolutions help to certify that a context exists that contribute towards the exclusion of State responsibility. Given that this involves an assessment of how Assembly resolutions affect the functioning of treaties, the VCLT must also be considered, particularly its provisions for bringing a treaty to an end, or otherwise suspending it.[1214] Finally, it will be argued that, in relation to the UN Charter, acting upon an Assembly recommendation can, in limited circumstances, constitute 'action' within the framework of the international organisation, thereby having an authorising quality. Attention here is placed on the Uniting for Peace mechanism, as a device in which the Assembly is able to authorise Member States to take action, potentially including enforcement action analogous to that under Chapter VII of the UN Charter.[1215] Therefore, four possible relevant legal avenues will be explored here, drawing upon the circumstances that preclude wrongful acts under the ARSIWA, provisions under the VCLT and UN Charter, and Uniting for Peace.

2. Resolutions as constituting a 'fundamental change of circumstances'

The first relevant doctrine here is *rebus sic stantibus*, which provides a basis for 'termination or withdrawal' from a treaty, or suspension of its effects, where there is a 'fundamental change in circumstances'.[1216] The *rebus sic stantibus* doctrine remains controversial, particularly given the concern that it undermines the stability of international agreements, but this is not the place for a detailed exposition of its rationale or history.[1217] The doctrine is evidently part of customary international law and was codified in Article 62 of the VCLT. According to this doctrine, it is necessary to establish that the existence of those circumstances constituted an 'essential basis' of the consent of the parties to be bound by the treaty, the effect of the change being to 'radically transform' the extent of obligations still to be performed under the treaty.[1218] Meeting these limiting conditions is ultimately a question to be determined according to the particularities of each treaty: it is conceivable that the violation of human rights, and commission of international crimes by State agents specifically, could constitute a 'fundamental change of circumstances'. The doctrine was invoked, for example, by the

[1212] See ARSIWA (n 861).
[1213] ibid, arts 20-25 (consent, self-defense, countermeasures, force majeure, distress, and necessity).
[1214] VCLT (n 108).
[1215] COIs often refer to the Assembly taking action under *Uniting for Peace*, eg Gaza Report (n 976), [1971].
[1216] VCLT (n 108), art 62.
[1217] See further Hersch Lauterpacht, *Function of Law in the International Community* (OUP 1933), 271-285 (the doctrine is a general principle of law and also an 'expression of the view that the rule *pacta sunt servanda* does not apply to States with the same cogency as it applies to individuals, for the simple reason that they are States, and that their interests cannot be subjected to an obligation existing independent of their own will.'). See also Oliver Lissitzyn, 'Treaties and Changed Circumstances (Rebus Sic Stantibus)' (1997) 61 AJIL 895.
[1218] VCLT (n 108), art 62.

Netherlands to suspend the operation of its long-term development aid treaty with Suriname when it came to light that the latter's agents assassinated fifteen political opponents.[1219]

It is thus instructive to consider here what role the Assembly is able to perform in application of *rebus sic stantibus*. Interestingly, the Assembly's predecessor, the Assembly of the League of Nations, could 'advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world'.[1220] This does not textually go so far as to 'release' a State from its treaty obligations, but its significance lies rather in the recognition that the League Assembly was competent to determine the conditions whether indeed, in its view, a treaty had become 'inapplicable'.[1221] By contrast, the UN Charter did not include a like provision, although Article 14 is broad enough to include recommendations pertaining to treaty revision where these obstruct peace and security ('recommend measures for the peaceful adjustment of any situation'). Indeed, writing in 1948, Blaine Sloan argued that an Assembly recommendation based on the doctrine of *rebus sic stantibus*, in the absence of judicial settlement, would have 'sufficient force effectively to release a State from obligations incurred under a treaty'.[1222] However, given the strict conditions to invoke a fundamental change of circumstances in Article 62 of the VCLT, it seems more difficult to argue that an Assembly resolution would legally 'release' a State from a treaty in the formal sense.[1223] Article 62 of the VCLT notes that a 'fundamental change of circumstances', which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, 'may be invoked' as a ground for terminating or withdrawing from the treaty, or otherwise suspending its operation. It is apparent that a party to the treaty can only 'invoke' the doctrine; the function of the Assembly, therefore, would be in recommending that the Member States concerned proceeds to invoke *rebus sic stantibus*. Furthermore, even if the State heeds the Assembly recommendation and invokes the doctrine, this act does not then 'release' the invoking State from the treaty. Pursuant to Article 65 of the VCLT, it is necessary for the invoking state to notify the other State; if the latter objects, then the parties have to follow a special conciliation procedure set out in Article 33 of the UN Charter.

While an Assembly recommendation is unable to legally effectuate *rebus sic stantibus*, it might support a State's claim that it is released from the treaty obligations. The argument here is that the Assembly recommendation serves a quasi-judicial purpose (covered in Chapter 4), with the resolution offering evidence that the conditions for such a release have been met. The Assembly 'advantage' is that it comprises a near universal membership of States and thus, in this context, is capable of having a powerful legitimating influence for breaches of treaties.[1224] This will be the case whether the parties to the treaty have the matter resolved by a tribunal or otherwise. An adjudicator is unlikely to ignore an Assembly resolution calling for the invocation of *rebus sic*

[1219] See further Robert Munnelly, 'Rebus Redux: The Potential Utility of Fundamental Change of Circumstances Doctrine to Enforce Human Rights Norms' (1989) 22(1) Cornell Intl LJ 147, 148-149.
[1220] Covenant of the League of Nations (entered into force 20 January 1920), art 19.
[1221] John Williams, 'The Permanence of Treaties: The Doctrine of Rebus Sic Stantibus, and Article 19 of the Covenant of the League' (1928) 22 AJIL 89.
[1222] Sloan, 'Binding Force' (n 31), 29.
[1223] Talmon, 'Legalizing' (n 75).
[1224] Schermers and Blokker (n 434), 779; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Questions of Jurisdiction, Competence and Procedure' (1958) 34 BYBIL 1, 5; Schachter, '*International Law'* (n 557), 85.

stantibus, especially so where the change in 'circumstance' relates to questions within the Assembly's broad mandates in promoting human rights and maintaining international peace and security.[1225] Where a judicial mechanism is lacking to adjudicate on the validity of a *rebus sic stantibus* claim, a quasi-judicial determination of the Assembly is likely to be especially authoritative on the propriety of the State in invoking this doctrine. Finally, given that abuse is a particular concern with any unilateral invocation of *rebus sic stantibus*, there is an advantage in having a multilateral body find that the underlying circumstances of a treaty have now changed to the point that avoidance of the obligations is justified. Action consequent upon an Assembly resolution is, in this regard, preferable to unilateral action.

3. Assembly Resolutions as Supporting Countermeasures

Countermeasures may preclude wrongfulness 'in the relations between an injured State and the State which has committed the internationally wrongful act'.[1226] In this regard, an Assembly resolution might in turn provide a certification that a context exists (i.e. that a State is 'injured' or a norm violated) that in turn justifies countermeasures by injured States. Under the ARSIWA, the doctrine serves to justify action by States that would otherwise constitute an internationally wrongful act, subject to meeting a number of requirements.[1227] In particular, the action taken must be proportionate, aimed at inducing compliance, temporally limited to the period of the breach, and not operate in a way to compromise peremptory norms, international human rights law and obligations of a humanitarian character.[1228] Several Assembly 'voluntary sanctions' recommendations embrace aspects of this definition, as covered above, particularly in expressing the purpose of the sanctions to bring the recalcitrant or offending state back into compliance with its international obligations. This is apparent, for example, in the Assembly recommendation that called upon States to refrain from providing arms to Guatemala 'as long as serious human rights violations' continue to be reported.[1229] There is potential, in this vein, for Assembly voluntary sanctions recommendations to be relied upon by States in support of countermeasures. Such resolution would not be, as with *rebus sic stantibus,* dispositive of the issue but would offer a presumption in favour of the conditions for countermeasures being met (in particular, that the State to which the countermeasures are directed has violated international law and that the measures recommended are proportionate to the breach).

There is also potential for the Assembly to coordinate 'collective' countermeasures to uphold obligations *erga omnes* (obligations owed by States to all other States).[1230] Under the ARSIWA only the 'injured State' may ordinarily take countermeasures against a State which is responsible for an internationally wrongful act; but it is also defined to include breaches of legal obligation that are owed to a group

[1225] Sloan, 'Changing World' (n 54), 101. Quite what qualifies an Assembly recommendation as 'legitimate' is a difficult question, although the extent of Member State support for a resolution will be an important indicator.
[1226] ARSIWA (n 861), 75.
[1227] ibid, art 52.
[1228] ibid.
[1229] UNGA Res 37/184 (1982), [5] (Guatemala).
[1230] *Barcelona Traction, Light and Power Company Limited* (Belgium v Spain) (Merits) [1970] ICJ Rep 3, 32. See also See Antonios Tzanakopoulos, 'Sanctions Imposed Unilaterally by the European Union: Implications for the European Union's International Responsibility' in Ali Marossi and Marisa Bassett (eds), *Economic Sanctions under International Law* (TMC Asser Press 2015), 156; Kaplan (n 1196).

of States, or the international community as a whole.[1231] The invocation of collective countermeasures would thus apply to *erga omnes* obligations. According to this doctrine, all States (and not just the one that is the direct victim) are entitled to take countermeasures in relation to violations of obligations owed to all States. Such obligations, as the ICJ in *Barcelona Traction* noted, include obligations not to engage in acts of aggression or genocide in addition to 'the basic rights of the human person' including protection from slavery and racial discrimination.[1232] This dictum would seem to reasonably include all other serious violations of international criminal law, international humanitarian law and international human rights law. This is confirmed by earlier drafts of the ARSIWA which indicated that the commission of 'international crimes' would constitute a breach of *erga omnes* obligations.[1233] The Assembly is particularly well placed to coordinate countermeasures against States who violate obligations *erga omnes*, given its 'advantage' of comprising an almost entire membership of States, all of whom have a legal interest in the upholding of such obligations.[1234] The perceived risks of abuse attendant with unilateral assessments of *erga omnes* breaches adds weight behind the Assembly performing such a coordinating function given its plenary status.

4. Non-Recognition of Peremptory Norm Violations

Given the focus of this study on atrocity crimes accountability, it is also instructive to consider the potential applicability of the collective non-recognition 'sanction' in international law, as a means to counteract the effects of the legal violation.[1235] Under Article 41(2) of the ARSIWA, States are said to be under a legal obligation not to recognise, as lawful, a situation created by a serious breach of a peremptory norm of international law, nor render aid or assistance in maintaining that situation.[1236] There is inevitable uncertainty as to what norms are peremptory, although the ICJ has provided useful guidance, referring, by way of example, to the prohibitions on aggression,

[1231] ARSIWA (n 861), arts 42 and 48. See also Nigel White, 'Sanctions and Restrictive Measures in International Law' (2018) 27(1) Italian Ybk Intl L 1; Linos-Alexandre Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 1137, 1146-47

[1232] *Belgium v Spain* (Merits) (n 1230), 32.

[1233] Martin Dawidowicz, 'Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council' (2007) 77(1) BYBIL 333, 347 (and citations there).

[1234] ibid, 345 (and citations there).

[1235] On non-recognition as a form of sanction aimed at isolating the deviant State, see Stefan Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2005) 99, 125 (the obligation 'may prove a powerful sanction by the international community against the responsible State'); Enrico Milano, 'The non-recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question' (2014) Quest Intl L 35, 49; Christian Tomuschat, 'International crimes by States: an endangered species?' in Eric Suy and Karel Wellens (ed) *International Law: Theory and Practice - Essays in Honour of Eric Suy*, (Martinus Nijhoff 1998) 253, 259 (nonrecognition as 'an essential legal weapon in the fight against grave breaches of the basic rules of international law').

[1236] Earlier drafts encapsulated this doctrine in the context of international crimes. See Eric Wyler, 'From "State Crimes" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law' (2002) 13(5) EJIL 1147.

genocide, slavery and racial discrimination.[1237] The non-recognition duty is also limited to the 'situations created' by the serious violation of international law, such as attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples.[1238] To the extent of addressing a peremptory breach, therefore, a State is obliged to sanction a violating State through non-recognition; the opposite of this would be to assist that State with, for example, trade or provision of economic assistance in relation to that particular situation. Of the numerous judicial applications of this principle, the ICJ in *Wall*, having noted the construction of the wall to have violated certain peremptory norms, advised that States are 'under an obligation not to render aid or assistance in maintaining the situation created by such construction'.[1239] The general existence of the non-recognition duty seems clear but how precisely might the Assembly support its application and what relevance does it have in the field of atrocity crimes accountability?

Absent a judicial mechanism to determine both a violation of peremptory norms and to apply the non-recognition duty in a specific scenario, the commentary to ARISWA indicates rather opaquely that '[c]ollective non-recognition would seem to be a prerequisite for any concerted community response against such breaches'.[1240] There is some limited practice of the Assembly doing so, particularly in the colonial-human rights context or where a State has unlawfully acquired territory.[1241] Following the Rhodesian white minority government's unilateral declaration of independence from the UK, the Assembly condemned 'activities of those foreign financial and other interests which, by supporting and assisting the illegal racist minority regime in Southern Rhodesia, are preventing the African people of Zimbabwe from attaining freedom and independence.'[1242] It has also recognised Israeli and South African occupations as invalid and called upon States not to recognise them.[1243] In relation to Russia's annexation of Crimea, the Assembly further underscored that the referendum purporting to alter the status of Crimea had 'no validity' and called upon States 'to refrain from any action or dealing that might be interpreted as recognizing any such

[1237] *Belgium v Spain* (Merits) (n 1230), 32. See also *East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90, 102 (right of peoples to self-determination).
[1238] ARSIWA (n 861), 114-115.
[1239] *Wall* (Advisory Opinion), n 108, 196. See also *Nicaragua (Merits)* (n 273), 100; *Namibia* (Advisory Opinion) (n 108), 56 (noting there to be an obligation 'to recognize the illegality and invalidity of South Africa's continued presence in Namibia' and 'to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia').
[1240] ARSIWA (n 861), 114. For a general overview, see: Talmon, 'Duty not to Recognize' (n 1235), 121 ('In practice, it is most likely that this collective response will be co-ordinated through the competent organs of the United Nations'). See also individual judicial opinion on the extent to which a non-recognition determination is necessary by either of the principal political organs: *Portugal v. Australia* (Merits) (n 1237) (Separate op Judge Skubiszewski) 224, 264 (non-recognition as 'self-executing'); *Wall* (Advisory Opinion) (n 108) (Sep op Judge Higgins), 216 (Judge Higgins) (non-recognition as premised upon a binding decision of the Security Council). As to Security Council practice, see eg UNSC 569 (1985) (South Africa); UNSC Res 218 (1965) (Portugal).
[1241] See also Assembly declarations on the non-recognition doctrine: UNGA Res 2625 (XXV) (1970), annex, first principle ('No territorial acquisition faulting from the threat or use of force shall be recognized am legal').
[1242] UNGA Res 2022 (XX) (1966), [9]; UNGA Res 2151 (XXI) (1966), [5] (Southern Rhodesia).
[1243] UNGA Res 37/123 A (1982), [5] (Israel); UNGA Res 37/39 (1982), [4]; UNGA Res 34/93 G (1979), [5]-[6] (South Africa); UNGA Res 3151 (XXVIII) G (1973), [7] (South Africa); UNGA Res 2254 (ES-V) (1967), [2] (Israel); UNGA Res 39/15 (1984), preamble (South Africa); UNGA Res 32/105 N (1977), [5]-[6] (South Africa); UNGA Res 31/6 A (1976), [3] (South Africa); UNGA Res 2054 (XX) A (1965), [7] (South Africa); UNGA Res 1761 (XVII) (1962), preamble (South Africa).

altered status'.[1244] It can be seen that Assembly practice in this area serves a quasi-judicial function in identifying serious violations of international law which then clarifies the duty of non-recognition in specific instances. Yet, it might be said that the Security Council is a better candidate to demand non-recognition, as it is able to bind the membership.[1245] However, the Security Council has not always acted and nor have the Assembly regarded this to be an exclusive role of the Council (as the above practice shows). Although a Security Council decision could underpin a call for collective non-recognition with the force of the UN Charter, an Assembly resolution can also offer strong evidence as to the existence of a peremptory breach and the requirement for non-recognition as a matter of customary international law.[1246]

There is also the question whether the non-recognition doctrine is structurally amenable to application to the effects created by atrocity crimes; recall that Article 41 ARISWA purports to apply to all violations of peremptory norms.[1247] The doctrine is ultimately premised upon denying the existence of rights or claims that flow from an illegal act, with such acts of non-recognition including the withdrawal of consular representation or diplomatic missions, denial of the legal validity of public officials or acts of the regime, and to refuse any claim to membership of an international organisation.[1248] Non-recognition has operated, in practice, in cases of a factual situation that also takes the form of a claim arising from the illegality, be that to Statehood, territorial sovereignty, or governmental capacity.[1249] Even where the racist policies of the Rhodesian and South African colonial authorities were condemned by the Assembly, the call for non-recognition was ultimately tied to the claim over the continued legality of governance by these authorities over peoples with a right to self-determination.[1250] In relation to non-recognition and the perpetration of the core international crimes, the duty would be most obviously applicable where the crime of aggression has occurred, as this conduct might lead to unlawful territorial acquisition that justifies denial by States.[1251] By contrast, the perpetration of genocide, crimes

[1244] UNGA Res 68/262 (2014), [6]. See also UNGA Res 541 (1983), [15] (non-recognition of Turkish Cyprus); Thomas Grant, 'East Timor, the UN System and Enforcing Non-Recognition in International Law' (2000) 33(2) Vand J Transnatl L 273, 277 (and citations there on the Assembly's response in rejecting Indonesia's claim to title over East Timor).

[1245] The ICJ has also emphasised Security Council binding resolutions on non-recognition: *Namibia* (Advisory Opinion) (n 108), 53 ('A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence.'); *Portugal v. Australia* (n 1237), 105.

[1246] See also Talmon, 'Duty not to Recognize' (n 1235), 121-122 ('Many, if not most, of the calls for non-recognition have been made in non-binding resolutions of the General Assembly and in statements of the President of the Security Council, which could neither authoritatively determine the existence of a serious breach nor create an obligation not to recognise a situation as lawful. The title of Art. 41 speaks of "particular consequences of a serious breach", not of the particular consequences of a UN resolution.')

[1247] Dawidowicz (n 1233), 677.

[1248] ibid 683 (and citations there).

[1249] See generally Talmon, 'Duty not to Recognize' (n 1235).

[1250] See n 1273-1274; Dawidowicz (n 1233), 678 (noting that the relevant 'ILC Commentary refer almost exclusively to unlawful situations resulting from territorial acquisitions brought about or maintained by the threat or use of force').

[1251] It has also been suggested that non-recognition extends to a government that comes to power due to a genocidal campaign, although Assembly practice of this nature is non-existent: Talmon, 'Duty not to Recognize' (n 1235). See also UNCHR, 'Summary Record of the 3rd meeting' (4 December 1992) UN Doc E/CN.4/1992/S-2/SR.3, 16 (Malaysia) ('It was imperative that the international community should firmly uphold the principle of nonrecognition of territories acquired through Serbian aggression, ethnic cleansing and other illegal acts.') Furthermore, as some writers have noted, the obligation of non-recognition has traditionally been intimately linked to forcible territorial acquisition: Dawidowicz (n 1233), 685.

against humanity, war crimes, and large scale human rights abuse, do not so apparently result in unlawful situations and claims which are capable of being denied by States.[1252] The non-recognition duty here would most likely arise and be breached if a third-party State were minded to expressly support such atrocities or provide aid or assistance (such as financing or arms supply) in maintaining the situation.[1253] Writers have also noted the theoretical possibility of organised responses to certain scenarios arising from atrocity crimes. These include the non-recognition of a government that came to power on the back of a genocidal campaign; in this regard, it seems logical to extend non-recognition of governance over illegal territorial acquisition also to situations where their governmental authority substantially arose from a breach of peremptory and *erga omnes* norms.[1254] Another possibility is that the Assembly apply the doctrine to potentially call for the non-recognition of an asserted State immunity where officials had violated peremptory norms.[1255]

However, the ultimate problem is that the non-recognition doctrine remains generally underutilised by the Assembly (and the other political organ, the Security Council, for that matter) despite the ILC's broad articulation of the rule applying to breaches of peremptory norms generally and not merely those narrow areas in which there is discernible practice.[1256] Nonetheless, there is room for the Assembly, as the primary forum in which collective solidarity can be harnessed, to develop this doctrine in a manner that addresses, to a greater extent, the consequence of atrocity crimes in the future and not just the narrower scenarios of territorial acquisition or colonial occupation.

5. Sanctions Authorised within the Framework of the UN Charter

The above analysis covers the influence that Assembly resolutions are capable of having outside of the UN Charter. Another possible argument is that Assembly resolutions provide authority for a group of Member States to take action within the framework of the UN Charter that in turn releases them from any conflicting obligations under other treaties. An 'authorisation', in this sense, is premised upon an entrustment of UN functions in willing Member States; an authorisation, for example, is a common device used to effectuate UN military action due to the absence of a standing army. It is apparent that the effect of an authorisation, as Article 59 of the ARSIWA indicates, is that those Articles 'are without prejudice to the Charter of the United Nations'.[1257] The ARSIWA also do not 'cover the case where action is taken by an international organization, even though the Member States may direct or control its conduct'.[1258] The concept that a resolution amounts to an authorisation for Member States to take action on behalf of the UN finds no direct textual support in the UN Charter. However, that has not prevented the Security Council from adopting resolutions that authorised

[1252] Dawidowicz (n 1233), 685; Talmon, 'Duty not to Recognize' (n 1235), 107.
[1253] Alison Pert, 'The "Duty" of Non recognition in Contemporary International Law: Issues and Uncertainties' (2012) 30 Chinese (Taiwan) Ybk Intl L Aff 48.
[1254] Talmon, 'Duty not to Recognize' (n 1235), 125.
[1255] Patricia Moser, 'Non-Recognition of State Immunity as a Judicial Countermeasure to Jus Cogens Violations: The Human Rights Answer to the ICJ Decision on the Ferrini Case' (2012) 4 Goettingen J Intl L 809.
[1256] Some writers regard the scope of the nonrecognition doctrine to be narrow given this lack of practice, see generally Pert (n 1253).
[1257] See further ARSIWA (n 861), 32.
[1258] ibid, 137.

willing Member States to use force; this is now established practice.[1259] As, too, is the understanding that Council authorisations fall within the ambit of Article 103 so as to release contributing Member States from any relevant conflicting obligations outside of the UN Charter.[1260] Could Assembly resolutions also provide authority to Member States to take action against a recalcitrant State that in turn occurs within the framework of the UN Charter?

One way in which to conceive of UN action is that which triggers the applicability of Article 103 of the UN Charter. This provides that in '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. The effect of Article 103 is now settled: it serves to operate as a circumstance precluding the wrongfulness of any act taken to implement the UN obligation.[1261] Rather ambiguously, the ILC Commentary to Article 59 of the ARSIWA noted that 'competent *organs* of the United Nations have often *recommended or required* that compensation be paid following conduct by a State characterized as a breach of its international obligations, and article 103 may have a role to play in such cases'.[1262] Although envisaging competent 'organs' taking action, the ILC did not specifically reference the possibility that the Assembly could take action that triggers the applicability of Article 103. To do so would encounter the problem that Assembly 'recommendations' are not binding in the sense that they entail, intrinsically, an obligation 'under the present Charter'.[1263] Strictly speaking, Security Council resolutions that 'authorise' action are also not obligations despite being generally accepted as falling within Article 103.[1264] However, this is based upon an established practice grounded in the necessity to ensure the 'flexibility' and operability of Chapter VII powers, both pertaining to military force and economic sanctions.[1265] The point here is that the Security Council's enforcement powers under Chapter VII justify this reading of Article 103; by comparison, the Assembly is lacking in analogous enforcement powers so as to more readily justify a reading that its recommendations for Member States to take action trigger the applicability of Article 103.

While this is generally the case, there is an argument that the Assembly is able to authorise what would otherwise be unlawful through the invocation of the Uniting for Peace mechanism. This mechanism is triggered in circumstances where, due to lack of unanimity of the permanent members, the Security Council 'fails to exercise its primary responsibility for the maintenance of international peace and security'.[1266] In such scenario, the Assembly is able to 'consider the matter immediately with a view to

---

[1259] Niels Blokker, 'Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by "coalitions of the able and willing"' (2000) 11(3) EJIL 541, 568.
[1260] ibid.
[1261] Indeed, art 59 notes that it is without prejudice to the UN Charter. See further Marko Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20(1) Duke J Intl & Comp L 77.
[1262] ARSIWA (n 861), 143 (emphasis added).
[1263] *Corfu Channel* (UK v Albania) (Merits) [1947] ICJ Rep 4, 31-33. On art 103 as having a narrow scope to only include decisions: *Namibia* (Advisory Opinion) (n 108) (Separate op Vice-President Ammoun), 99.
[1264] Art 25 stipulates that Member States 'agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'. Art 94 provides that Member States undertake 'to comply with the decision of the International Court of Justice in any case to which it is a party'.
[1265] *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332, [33] (Lord Bingham). See *Libya v UK* (Provisional Measures) (n 613), 15. Indeed, on occasion, the Security Council has expressly invoked art 103 calling upon Members to implement sanctions irrespective of any conflicting obligations: UNSC Res 670 (1990).
[1266] UNGA Res 377 (V) A (1950), [1].

making appropriate recommendations to Member States for collective measures, *including* in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.'[1267] Such 'collective measures' recommended by the Assembly might include those types described in Article 41 of the UN Charter, which provides a non-exhaustive list of measures that the Security Council is able to take, falling short of the use of armed force, 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.'[1268] Before delving into the scope of the Uniting for Peace mechanism, and whether it endows upon the Assembly powers that go beyond recommendatory, it is necessary to address two possible objections to the use of this mechanism as a contemporary solution to Security Council deadlock in atrocity situations.

First, Uniting for Peace, a product of early Cold War exigencies was first invoked in response to inter-State uses of force with the overarching imperative of maintaining 'international peace and security'.[1269] However, as has been noted, securing accountability for serious violations of international law (including international criminal law and international human rights law) has been recognised by the Assembly and other UN organs as falling within the ambit of 'security' maintenance under the UN Charter.[1270] This not only reflects a contemporary imperative of the Assembly but also resonates to a limited extent in the text of the Uniting for Peace resolution. A key purpose of the mechanism was also to 'expose aggressors', a violation of international law that the Assembly recognised even before Uniting for Peace as giving rise to individual criminal responsibility.[1271] Furthermore, although one aspect of Uniting for Peace was to recognise the power of the Assembly to recommend the use of force, as the language in the resolution above indicates ('including') it was envisaged that the Assembly could take 'collective action' that fell short of using force.

Second, it might be questioned whether Uniting for Peace still serves any useful purpose, at least as a viable diplomatic tool: some might say that the conditions in international relations have changed such that Member States are reluctant to invoke the doctrine because it is a 'double-edged' sword; it was soon used against its protagonists.[1272] However, this overstates the position. Many of the salient features of Uniting for Peace have been successfully absorbed into Assembly practice, particularly in being able to act on a matter when the Security Council is 'exercising' its functions, which is, strictly speaking, textually prohibited under Article 12(1) of the UN Charter.[1273] Uniting for Peace has therefore inspired a realignment of powers under the UN Charter that continue to this day. Even without expressly invoking Uniting for Peace, there are many examples of the Assembly proposing action that originated as failed draft resolutions in the Security Council, as with the situations in Syria, Jerusalem and Ukraine.[1274] Furthermore, it is clear, as from the emergency session held in June

[1267] ibid.
[1268] Kelsen, 'Acheson Plan' (n 77) 520.
[1269] Ramsden, 'Authorising Function' (n 79) (and citations there).
[1270] See in particular Chapters 3 and 4; Ramsden, 'Age of International Justice' (n 44).
[1271] UNGA Res 377 (V) A (1950), preamble; UNGA Res 95 (I) (1946) (affirming the Charter and judgment of the Nuremberg tribunal, including the 'crime against peace').
[1272] Carswell (n 76), 456. See also Michael Reisman, 'The Constitutional Crisis in the United Nations' (1993) 87 AJIL 83, 84, fn2.
[1273] See further discussion in Chapter 1.
[1274] See eg UNGA Res ES-10/19 (2017) (Jerusalem); UNGA Res 68/262 (2014) (Ukraine); UNGA Res 66/253 B (2012) (Syria).

2018, pertaining to the protection of the Palestinian civilian population, that the Assembly has invoked Uniting for Peace in contemporary times, albeit on an extraordinary basis.[1275]

The more fundamental question concerns the legal effects of using the Uniting for Peace mechanism. Specifically, is use of the mechanism capable of enhancing the Assembly's powers in the management of international peace and security, such that the plenary is able to assume powers normally reserved to the Security Council (i.e. in being able to authorise Member States to take Chapter VII-analogous coercive action)? There are two possible interpretations of practice and powers under the Uniting for Peace mechanism.[1276] A narrow approach is that Assembly recommendations are not capable of modifying legal relations outside of the UN; if a Member State chooses to act on the recommendation under Uniting for Peace then they cannot rely on it as a basis to defeat legal obligations that conflict with the recommendation.[1277] A State would therefore have to find another ground to justify what might otherwise be an internationally wrongful act in implementing, as per the discussion here, a voluntary sanctions regime against a recalcitrant State (such as the doctrine of countermeasures, discussed above). A broader approach to powers under Uniting for Peace, on the other hand, treats this mechanism as arising out of an institutional necessity which therefore entails the Assembly assuming powers ordinarily the reserve of the Security Council.[1278] This would include being able to authorise the collective use of force against a State, or to impose a sanctions regime that defeats any such conflicting obligations owed by States to the sanctioned State.

The argument that Uniting for Peace merely reflects the narrow approach above rests upon the limited or uncertain practice of the Assembly in authorising enforcement action, as well as a textual interpretation of the resolution itself. This approach isolates the clause 'breach of the peace or act of aggression' as the basis in which the Assembly is able to recommend armed force; where the Assembly, for instance, recommends military action it is merely exhorting Member States to exercise their rights under international law to act in individual or collective self-defence.[1279] A recommendation by the Assembly to use force is thus simply declaratory of the pre-existing right to self-defence.[1280] Indeed, the deployment of various peacekeeping missions established under Assembly resolutions were predicated on host State consent.[1281] This interpretation is also consistent with the observations by the ICJ in *Certain Expenses*, where a distinction was drawn between an Assembly mandated peacekeeping operation (premised on consent of the host State) and 'enforcement action' under Chapter VII, the latter being the Security Council's exclusive preserve.[1282] The focus on the use of force here goes to illustrate the more general proposition that the Assembly cannot authorise enforcement action of any form, including those coercive measures falling

[1275] UNGA Res ES-10/20 (2018).
[1276] Ramsden, 'Authorising Function' (n 79), 279-285.
[1277] See eg Talmon, 'Legalizing' (n 75); Zaum (n 79); International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001).
[1278] Andrassy (n 77), 563; Reicher (n 78),17-18; Ramsden, 'Authorising Function' (n 79), 304.
[1279] Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2011), [906]
[1280] Josef Kunz, 'Sanctions in International Law' (1960) 54(2) AJIL 324, 336-337; Christian Tomuschat, 'Uniting for Peace' (2008) UN Audiovisual Lib Intl L 3 <http://legal.un.org/avl/pdf/ha/ufp/ufp_e.pdf>.
[1281] UNGA, 'Summary Study of the Experience Derived from the Establishment and Operation of the Force' (9 October 1958) UN Doc A/3943, [10]; UNGA Res 1474 (ES-IV), [2] (1960) (recommending Members to 'assist' the Congo in upholding 'law and order').
[1282] *Certain Expenses* (n 108), 165.

short of the use of force. On this weaker account, the major purpose of Uniting for Peace was to recognise the possibility for the Assembly to adopt recommendations on a situation even where the Security Council was 'exercising its functions'. Uniting for Peace thus supported a slight institutional realignment, departing from Article 12(1) of the UN Charter, that would allow the Assembly to act in 'parallel' with the Security Council on a situation.[1283]

The broader reading of Assembly powers under Uniting for Peace, on the other hand, treats this resolution as a 'constitutional moment' which supported the conditional realignment of security powers within the UN where the Security Council has 'failed'.[1284] Such moment arose given the urgent need to act following the USSR's veto of continued enforcement action in Korea in 1950. Uniting for Peace, on this broader reading, was intended to allow the plenary to make recommendations to Member States that would amount to authorisations to act under the authority of the UN Charter. Indeed, it is apparent from the Korea intervention that the Assembly *did* go beyond merely recommending States to act in pursuit of their right of collective self-defence; Resolution 376 (V) (1950) sought to achieve 'a unified, independent and democratic government of Korea', objectives that manifestly went beyond the stricter confines of self-defence principles.[1285] Major powers at the time also recognised this to be a UN operation underpinned by coercive powers.[1286] Therefore, there is some practice to support a broader reading of the Uniting for Peace mechanism. But what about the Assembly's authorising effects on measures that fall short of the use of force, particularly in authorising sanctions?

To be sure, the extent of the Assembly's capacity to 'authorise' sanctions has not been fully tested, as on many occasions the Security Council took parallel action (even if belatedly) to authorise the imposition of sanctions against deviant States.[1287] But the authorisation of 'collective measures', as the text of Uniting for Peace indicates, is not solely limited to 'breaches of the peace or acts of aggression'. As noted, the word 'including' in Resolution 377(V) envisages that 'collective measures' can be taken in instances where a 'threat to the peace' has arisen also, save that such recommended measures have to fall short of armed force.[1288] On this basis, there is room for the Assembly to recommend sanctions as a collective measure as UN action, where it has first determined that a given situation constitutes a threat to peace and security. Still, there is limited practice to support this reading. It is necessary to go back to the Korean resolutions in 1950 to find practice that appeared to authorise sanctions as a form of collective action, and even then it followed the determination that a 'breach of the peace or act of aggression' had occurred. On this basis, the Assembly also recommended the imposition of an arms embargo against China.[1289] But there are more general endorsements of the Assembly's capacity to authorise sanctions. Numerous reports of

---

[1283] A point recognised in *Wall* (Advisory Opinion) (n 108), 28; UNGA, 66th plenary meeting (n 642), 28-29.
[1284] Carswell (n 76), 456-458.
[1285] UNGA Res 376 (V) (1950); White, 'Relationship' (n 8), 311.
[1286] Nigel White, 'From Korea to Kuwait: The Legal Basis of United Nations' Military Action' (1998) 20 Intl History Rev 597, 614. See also UNGA, 'Report of the Collective Measures Committee' (1951) UN Doc A/1891, 32-33.
[1287] UNSC Res 221 (1966); UNSC Res 181 (1963); UNSC Res 180 (1963).
[1288] UNGA Res 377 (V) A (1950), [1] ('…General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, *including* in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.')
[1289] White, 'Relationship' (n 8) 308-311; UNGA Res 500 (V) (1951).

the Collective Measures Committee, established to implement Uniting for Peace, acknowledged the use of sanctions as collective measures available to the Assembly to recommend. In perhaps the most direct endorsement of the coercive effect of Assembly recommendations under Uniting for Peace, the Collective Measures Committee noted that 'in the event of a decision or recommendation of the United Nations to undertake collective measures . . . States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures.'[1290] Indeed, the Assembly even overwhelmingly affirmed this committee's work on the possibility of either it or the Security Council recommending the 'application of a selective embargo'.[1291] This would tend to support the possibility that an Assembly resolution is able to provide legal cover for Member States to impose sanctions that might conflict with prior international obligations.[1292]

If it is accepted, then, that the Assembly may replace the Security Council to authorise sanctions where the latter is deadlocked, it is still necessary to consider the conditions in which it may do so. This turns upon two predicates in Resolution 377 (V) (1950) a finding of Security Council 'failure' and a determination that a given situation constitutes a 'threat to international peace and security'.[1293] The latter can be addressed briefly because, as the ICJ in *Certain Expenses* observed, the UN Charter makes it 'abundantly clear' that the Assembly shares responsibility for the maintenance of peace and security with the Security Council.[1294] It is also accepted that the characterisation of a 'threat' includes the violation of human rights and the commission of international crimes.[1295] This accords with the Assembly's promotion of human rights in its own right and as an aspect of peace and security, a view reinforced by the ICJ in *Wall*: while the 'Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects'.[1296] In short, the Assembly is able to determine on its own that a situation constitutes a 'threat'.[1297]

Issues also arise in determining what constitutes a Security Council 'failure'. For the Assembly (or indeed the Security Council) to trigger Uniting for Peace, it is necessary for a permanent member to exercise the veto power, which then in turn results in the Security Council 'failing' to exercise its primary responsibility.[1298] There is a debate as to whether the 'pocket' veto also amounts to a 'failure', where a resolution is not voted on due to an inevitability of its not passing, but this point would make little difference in practice: a determined group of Security Council members could push for a vote so as to force a veto.[1299] It is thus apparent that there is room for a finding that the Security Council did not 'fail' despite exercising the veto, this being a legitimate technique within the UN Charter to ensure the selective regulation of international peace and security.[1300] The problem here is that the Assembly has not tended to explain

[1290] UNGA, 'Report of Collective Measures Committee' (n 1286), 32.
[1291] UNGA Res 703(VII) (1953), [1].
[1292] But also see Talmon, 'Legalizing' (n 75), 126; Barber, 'Revisiting the Legal Effect' (n 476).
[1293] UNGA Res 377 (V) A (1951), [1].
[1294] Certain Expenses (n 108), 163.
[1295] See Chapter 4; Ramsden, 'Age of International Justice' (n 44).
[1296] *Wall* (Advisory Opinion) (n 108), [27]-[28]. See also UN Charter arts 1, 13(1), 55, 60.
[1297] But also see Carswell (n 76), 472-473.
[1298] Krasno and Das (n 78) 188-190
[1299] ibid.
[1300] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (OUP 1994), 262; Philippa Webb, 'Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria' (2014) 19(3) *JCSL* 471.

why the Security Council has failed, or indeed even addressed this apparent precondition to the use of Uniting for Peace when convening sessions under this mechanism. Thus, despite there being 10 emergency special sessions arising from permanent member vetoes under the Uniting for Peace mechanism, the Assembly has seldom premised this upon Security Council failure, and even then the language used has not been consistent.[1301] Even so, it is unnecessary to give too much attention to what constitutes a 'failure' under Uniting for Peace as this falls within the discretion of the Assembly to determine.[1302] Indeed, the Assembly's competence to determine Security Council 'failure' was accepted in *Wall*, where the ICJ found that the emergency special session at issue had been 'duly convened' under the Uniting for Peace resolution.[1303] Resolution 377(V) does not prescribe any restrictions on determining 'failure'; the adoption of a quasi-judicial resolution with the requisite two-thirds majority would therefore suffice to establish that the Security Council has 'failed' under Uniting for Peace.[1304]

In any event, there are certain advantages in elucidating on the expectations that Members have with respect to action in the Security Council, in not only building practice on Uniting for Peace, but to exert pressure on the Security Council to act.[1305] An important recent study by Jennifer Trahan has considered instances of resistance to the Security Council veto inside the UN system.[1306] This study is set in the context of recent initiatives by States to encourage the permanent members to voluntarily abstain from using the veto in the face of atrocity crimes.[1307] The proposition that the veto is, as such, constrained by legal standards, including being subordinate to *jus cogens* norms, is more contentious.[1308] It is possible, as Trahan argues, that the Assembly could confirm this understanding, of the Security Council being subjected to legal limits, in a resolution.[1309] Given the focus of the analysis here, on the use of the Assembly to authorise sanctions, rather than legal restrictions on the Security Council power, an analysis on this proposition is beyond the scope of the present work. Nonetheless, as

---

[1301] UNGA Res ES-10/19 (2017), preamble ('deep regret'); UNGA Res ES-10/10 (2002), preamble ('yet to take the necessary measures'); UNGA Res ES-10/2 (1997), preamble ('regret' that the SC 'twice failed to adopt a resolution'); UNGA Res ES-7/6 (1982), preamble ('deep regret' that the SC has 'failed to take effective and practical measures in accordance with the Charter of the United Nations to ensure implementation of its resolutions…'); UNGA Res ES-8/2 (1981), preamble ('Noting with regret and concern' that the SC 'failed to exercise its primary responsibility for maintenance of international peace and security'); UNGA Res 498 (V) (1951), preamble; UNGA Res ES-7/2 (1980), preamble ('regret and concern' that the SC 'failed to take a decision').

[1302] Ramsden, 'Authorising Function' (n 79) 302; Reicher (n 78) 15; Kenny (n 79) 26. But also see Carswell (n 76) 472.

[1303] *Wall* (Advisory Opinion) (n 108), 151.

[1304] This is not to deny, however, the benefit of having the Security Council itself certifying that it had failed to exercise its responsibilities previously and to confirm this in a procedural resolution requesting the Assembly to convene an emergency special session: Barber, 'Uniting for Peace not Aggression' (n 76), 107; Ramsden, 'Authorising Function' (n 79) 298; Carswell (n 76) 466; Melling and Dennett (n 79) 302.

[1305] See also Chapter 3 which considers the possible role for the Assembly in harmonising general acceptance of the membership as to the Charter based limitations on the exercise of the veto power in atrocity situations.

[1306] Trahan, 'Existing Legal Limits' (n 66).

[1307] Including a 'code of conduct' that would involve a voluntary suspension of the veto where there is evidence of 'overwhelming human catastrophe' and 'mass atrocity' respectively: UNSC, Sixty-seventh year, 6849th meeting (12 September 2012) UN Doc S/PV6849, 23 (French delegate referred to the 'code of conduct' in a Security Council debate on the ICC).

[1308] Trahan, 'Existing Legal Limits' (n 66), 142-259.

[1309] ibid 259.

noted in this section, Security Council failure and Assembly action are not mutually exclusive; it is patently arguable that an indicator of 'failure' to justify the invocation of Uniting for Peace is the Council's inaction over atrocity crimes. Although outside of the Uniting for Peace context, there are many instances in which the Assembly has confronted veto use in relation to atrocity crimes and serious violations of international law.[1310] Quite prominently, the Assembly 'deplored' the Security Council's failure to agree on measures to ensure compliance of the Syrian authorities with its decisions, regretting also a failure to refer the situation to the ICC.[1311] Another indicator of 'failure' might derive from Article 24(2) of the UN Charter, which provides that the Security Council 'shall act in accordance with the Purposes and Principles of the United Nations'. The Assembly has, as Chapters 3 and 4 explored, often articulated what these 'Purposes and Principles' entail and might do so more concretely in evaluating compatibility of Security Council conduct with them.[1312] As initiatives develop to challenge the veto, the use of the 'failure' standard in the Uniting for Peace mechanisms offers a potential avenue into which such norms can find concrete expression.

6. Conclusion

This Chapter has explored broadly possible bases for the Assembly to coordinate sanctions against States or perpetrators of atrocities. It noted that the legality of sanctions, particular where taken unilaterally, remain legally contentious. Accordingly, this Chapter has identified various avenues in which the Assembly is able to play a role in supporting the legal application of sanctions in atrocity situations.

The extent of the Assembly's authority in this regard turns upon the interaction between a resolution that reflects general State opinion and various rules of State responsibility. It was noted generally that Assembly resolutions are unable to automatically release a State from any obligations that conflict with the intended imposition of sanctions against an offending State. However, an Assembly resolution, which is widely supported by the membership, offers strong evidence that the conditions excusing breaches of international law have been met, including 'fundamental change of circumstances' and collective countermeasures. In turn, an Assembly resolution that certifies the existence of circumstances that justify the imposition of sanctions against an offending State is likely to cast a very strong presumption of legality upon the actions of the sanctioning States, even if not a formal certification in and of itself. It was also shown that the non-recognition doctrines offer some scope for the Assembly membership to collectively abstain from recognising the asserted claims of an offending States, although this doctrine has limited application in the atrocity crimes accountability context. By contrast, it was argued that the Uniting for Peace resolution is amenable to being refashioned to address Security Council

[1310] UNGA Res 37/233 A (1982), preamble ('grave concern' that the Security Council has been prevented from taking effective action 'in discharge of its responsibilities under Chapter VII of the Charter' on account of permanent member vetoes); UNGA Res 32/105 F (1977), preamble ('expressing serious regret' that three permanent members continued to resist the comprehensive embargo with South Africa); UNGA Res 31/6 D (1976), [10] (called on France, UK and US 'to desist from misusing their veto power…to protect the racist regime of South Africa.').

[1311] UNGA Res 66/253 B (2012), preamble.

[1312] In an earlier innovation, Judge Alvarez spoke of abuse of rights by permanent members: *Competence of the General Assembly* (Advisory Opinion) (n 590). See also Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer 1998); Michael Byers, 'Abuse of Rights: An Old Principle, A New Age' (2002) 47 McGill LJ 389, 401; Michael Ramsden, 'Authorising Function' (n 79), 300; Carswell (n 76), 471.

inaction on atrocity crimes, with there being some practice in which the Assembly has purported to authorise States to act within the framework of the UN Charter (and Article 103) in imposing sanctions on an offending State.

However, it also has to be acknowledged that Assembly resolutions that have recommended States to sanction an offending State (or officials within that State) have never clearly indicated that such resolution acts as a legal authorisation for sanctions. The Assembly membership, with the possible exception of the Korean example under the Uniting for Peace mechanism, have never perceived of its role in this way. There are any number of reasons that might explain this, from a lack of political will, to a concern about the aggregation of power to a politically uncertain body, to perhaps a lack of belief that Assembly 'recommendations' can serve an authorising function. This Chapter has shown, properly conceived, that the UN membership, acting collectively through the Assembly, can promote the legality of a sanctions regime, particularly as a means to overcome Security Council inaction in an atrocity situation.