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

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CHAPTER 8: CONCLUSION

This dissertation has evaluated the practice and powers of the Assembly in advancing accountability for atrocity crimes. As a general matter, it was made clear that the Assembly's general impact in the field has exceeded the limited 'recommendatory' function envisaged for it in the text of the UN Charter. Upon a disaggregation of Assembly resolutions according to their quasi-legislative, quasi-judicial and recommendatory character, this dissertation has shown the effects that these various instruments have had in the advancement of international justice. Yet, beyond resolutions it was also noted that the Assembly is able to take tangible action to promote accountability in atrocity situations and has done so through the creation of commissions of inquiry, with the potential for it to take other forms of action. All of this practice justified a number of conclusions as to the response of the Assembly in atrocity situations and its potential to play a more active role in the future.

Firstly, it considered a subset of resolutions that are 'quasi-legislative' in character. The reference to 'quasi-legislative' acknowledges the lack of a formal role for the Assembly in adopting binding rules of international law, but rather appreciates the influential contribution that its resolutions have (or could have) on States or legal regimes in the identification, creation or interpretation of norms. As Chapter 2 established, the Assembly's quasi-legislative resolutions have had an impact on judicial decision-making in the field of international justice. Courts have thus attached weight to Assembly quasi-legislative resolutions, both in the interpretation of treaty norms and the identification of customary international law. Even resolutions that purport to be a mere expression of established international law have served a valuable function in defining, formulating, clarifying, specifying, authenticating and corroborating the rules contained within them. Given the definitional uncertainties that can arise in the construction of customary international law, these resolutions have assisted judges in developing the law. It was also shown that an appreciation of the Assembly's quasi-legislative influence will turn upon an understanding of the sources of international law and the conditions for the identification and creation of such norms. In relation to law under the UN Charter, it was shown that the Assembly, given its composition of all Member States, is able to form a 'subsequent agreement' or 'established practice' in the interpretation of Charter norms. Whether UN norm development arises by way of subsequent agreement or established practice, it is unnecessary for there to be Member State unanimity; 'general agreement' will suffice. There is thus procedural latitude on the part of Member States (via the Assembly) to develop Charter norms to advance international justice. Similarly, the judicial application of customary international law in relation to accountability norms under international criminal law/international humanitarian law/international human rights law has tended to place emphasis on deductive forms of reasoning and an emphasis on documentary sources to establish State acceptance (*opinio juris*). There is potential therefore for the Assembly to contribute towards the normative direction of international justice, at least insofar as international courts are concerned.

Secondly, it was also shown that the Assembly has developed a quasi-judicial function which has extended to addressing atrocity situations. It was noted that this practice has emerged for multiple reasons, be it to justify the adoption of specific recommendations, but also as part of a strategy to 'name and shame' offending States so as to exert pressure on them to conform with their international obligations. But this quasi-judicial practice has also produced other effects, including to contribute towards

the development of international law (as they did in crystallising proscriptions on apartheid and enforced disappearances as a crime against humanity). The legal basis for the Assembly to enquire into the affairs taking place within a Member State is now incontrovertible and is not impeded in any significant way by Article 2(7) of the UN Charter. It was shown that there is an established practice of the Assembly identifying the occurrence of serious violations of international law, be that under international criminal law, international humanitarian law or international human rights law. Still, there are inevitable limitations in the Assembly pronouncing upon the occurrence of violations by, or within, a Member State. The most obvious is informational; the Assembly is reliant upon the findings of others as a basis for their pronouncements in resolutions. Some of the earlier quasi-judicial practice was controversial because it was not based upon the findings of independent fact finders but seemed to be motivated by purposes extraneous to accountability. Nonetheless, more contemporary quasi-judicial resolutions have been grounded in the findings of commissions of inquiry. In this regard, resolutions and inquiry reports can become mutually reinforcing, the conclusions of the experts then obtaining the collective endorsement of the UN membership, thereby strengthening the case for accountability. A primary example of this shown in Chapter 4 is the Myanmar situation, where findings of the commission of inquiry were closely integrated into Assembly resolutions which, together, provided a basis for the ICJ to order provisional measures requiring Myanmar to meet its obligations under the Genocide Convention.

Thirdly, the Assembly has a practice of recommending States and the Security Council to take action to secure accountability for atrocity crimes. Recommendations have thus been made for various types of action to be taken by Member States, including to investigate or prosecute alleged crimes, to cooperate with UN investigations and to respond to allegations. The Assembly has also recommended the Security Council to exercise Chapter VII powers as a means to secure accountability for atrocity crimes. Unlike quasi-legislative and quasi-judicial forms of resolutions, recommendations of this nature have a clear textual basis in the UN Charter (Articles 10-14). More difficult is assessing the impact of recommendations in achieving an accountability outcome. Even if the impact of recommendations on any subsequent response cannot be easily appreciated, recommendations have been perceived by actors as have effects in broader ways, including to crystallise a common institutional position and to pressure a Member State into dialogue. While recommendations are capable of having, in a broad sense, impact, the membership could take specific steps to enhance this instrument. In particular, despite the use of mandatory language in some situations (‘demand’ or ‘request’) there remains a general lack in Assembly practice of any recognition that ‘recommendations’ carry with them legal requirements. While recommendations might not be ‘binding’ as such, it was argued that Member States are still obliged to give regard to them in good faith and to consult with the Assembly on ways to achieve it. Although the Assembly has occasionally noted the persistent disregard of its recommendations to be incompatible with UN membership, there is certainly scope for them to do so more, grounded in the legal principle of good faith. Furthermore, the Assembly could also use its recommendations to articulate and monitor the implementation of international legal obligations as they pertain to accountability for atrocity crimes. This would not only mean that recommendations have behind them the force of pre-existing obligations but would also likely contribute to the development of these obligations as they are articulated and applied by States in Assembly recommendations.

Fourthly, it was also noted that the Assembly has the capacity to empower judicial and quasi-judicial entities to take action. Firmly within Assembly practice has been the creation of commissions of inquiry to investigate allegations of atrocity crimes, these subsidiary organs justified as a means for the Assembly to fulfil its recommendatory functions under the UN Charter. The Assembly's power to request advisory opinions (as it did in three instances relevant to the field of atrocity crimes accountability) is similarly premised upon the empowerment of another body to render an expert legal opinion so as to help the Assembly carry out its functions. The Assembly's creation of IIIM-Syria by contrast represents a broader approach where the express purpose also includes to build capacity for the eventual prosecution of those most responsible for crimes in Syria. It represents, in this way, a creative solution in the absence of a Security Council referral to the ICC Prosecutor that would have enabled an international investigation into conduct of named suspects. The creation of an analogous mechanism for Myanmar indicates a possible future trend in collective membership action to address accountability gaps through the creation in the Assembly of commissions vested with quasi-prosecutorial functions. This also raises the question as to the possibility of the Assembly going a step further, in establishing an *ad hoc* tribunal particularly in situations where there is little prospect of the ICC assuming jurisdiction over a situation, be that because a State is not party to the ICC Statute, or due to the unlikelihood of a Security Council referral. It was argued that there is a legal basis for the Assembly to establish a tribunal that could be legally analogous to one established under Chapter VII of the UN Charter, although this would also rely upon a creative reading of international legal sources to do so. Yet, even if an *ad hoc* tribunal is not established there is potential for the Assembly to make greater use of its power to request advisory opinions from the ICJ, as part of a strategy to obtain a judicial opinion on the legal consequences in a situation that might involve the occurrence of atrocity crimes. Although the ICJ advisory opinion would not be binding as such, it would offer another dimension to Assembly campaigns for accountability in a situation.

Fifthly, there exists legal possibilities for the Assembly to support sanctions against Member States that are allegedly responsible for, in the particular context of international justice, gross and systematic violations of human rights. In terms of institutional sanctions, the Assembly is able to deprive an offending State of some of its rights of UN membership. Article 6 of the UN Charter provides the basis for the Assembly to expel a Member State that has persistently violated the Charter but this power itself depends upon a Security Council recommendation which has not been forthcoming on previous occasions. Nonetheless, it was also shown, in the case of South Africa, that the Assembly has creatively used its credentials-approval power so as to take into account the human rights record of the government purporting to represent the Member State in the Assembly. The potential for the Assembly to support the legality of economic sanctions was also considered on several bases. It was argued that Assembly resolutions are capable of performing a function in coordinating sanctions, signalling that the particular conditions under the laws of 'fundamental change of circumstances' and collective countermeasures have been met. It was also argued that the Uniting for Peace mechanism could be used to support an Assembly function in authorising sanctions, although practice in doing so is rather limited and contentious. The duty not to recognise *jus cogens* violations was noted to be particularly amenable to application by the Assembly, as a forum in which States are able to organise so as to collectively abstain from recognizing the asserted claims of an offending States, including to refrain from entering into economic relations in relation to the illegal situation. In short, there are multiple possibilities for the Assembly, as a multilateral

forum, to support the imposition of economic sanctions that might otherwise be said to conflict with the sanctioning States' international legal obligations. Even if the Assembly has never consciously sought to take up this role there is potential for movement in this direction.

This dissertation has viewed the Assembly's contribution to international justice from an institutional perspective, as a single unitary actor, rather than to examine at any length Member State political interactions within this body. This is not to deny or reduce the relevance of Member State support or motivations in evaluating the effectiveness of Assembly resolutions. It was thus noted, in the quasi-legislative context, that the prescriptive influence of Assembly resolutions will turn upon the obtaining of a 'large majority' or 'general acceptance' of the norm in question. An Assembly recommendation that seeks to exert pressure on a Member State is likely to be more effective in doing so if it has attracted widespread support. Another aspect of this analysis is the relevance of particular States, or groups of States, and their influence on Assembly action. For example, the campaigning efforts of blocs such as the Non-Aligned Movement in advancing accountability for atrocity crimes is worthy of a study in its own right. As too is the extent to which the effectiveness of Assembly resolutions is way tied to their obtaining the support of the most powerful States. This dissertation has not overly explored these political correlations although some studies have suggested the support of powerful States has had a bearing both on the degree of Assembly activism at any one time and the extent to which a resolution is implemented at an institutional and State level.[1313] That said, this critique should not be overstated; many of the most important resolutions in international justice have in fact enjoyed broad support, from big and small States alike. Furthermore, not all aspects of international justice overtly depend on these power dynamics, particularly when identifying the existence of customary international law. For instance, international criminal tribunals have construed international norms based upon Assembly resolutions that were lacking support of the most powerful States (at least initially), as did the ICTY in using the highly contentious Resolution 37/123 (D) (1982) to support the proposition that genocide can be committed in a limited geographical zone.

In a similar manner, another line of enquiry that has not been considered at great length here is the composition and nature of voting blocs in the Assembly and the relevance of this to the likelihood that a resolution or other action is adopted. The consequence of bloc resistance to international justice has been highlighted in more recent times with the AU's coordination of an ICC withdrawal strategy for its Members.[1314] The possible adverse consequence of plenary activism was evidenced by South Africa's attempt in the ICC-ASP to amend the ICC Statute so as to confer a power to suspend an ICC investigation on the Assembly, using the Uniting for Peace mechanism.[1315] Although unsuccessful, the South African proposal illustrates potential

[1313] See eg Ramsden and Hamilton (n 4), 898 (emergence of an increasingly muscular UNHRC coincided with renewed US engagement with the UN); Falk (n 12), 787 (need for major power support for a resolution to assume normative authority); Axel Dreher and others, 'Does US aid buy UN General Assembly votes? A disaggregated analysis' (2008) 136(1-2) Public Choice 139 (effect of strong Member States on voting patterns); Diana Pane, *Unequal Actors in Equalising Institutions: Negotiations in the United Nations General Assembly* (Palgrave Macmillan 2013).

[1314] See further Kurt Mills and Alan Bloomfield, 'African resistance to the International Criminal Court: Halting the Advance of the Anti-Impunity Norm' (2018) 44(1) Rev Intl Studies 101; Manisuli Ssenyonjo, 'State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia' (2018) 29 Crim LF 63.

[1315] ICC, 'Proposed amendment to the Rome Statute of the International Criminal Court, Report of the Working Group on the Review Conference' Appendix VI (November 2009) ICC-ASP/8/20/Annex II.

structural weaknesses in pluralising State involvement in international justice within a plenary body made up of fluid and potentially unsympathetic coalitions. Still, the notion that there is a stable geopolitical bloc of members seeking to frustrate international justice, such as from aggrieved African States, is not borne out in the voting records that have been subject to scholarly analysis (perhaps because the grievance of African States is not with international justice generally but rather more specifically with the way in which the Security Council has exercised its power to refer situations to the ICC). In fact, one study has shown African States to generally support country-specific resolutions on international justice, even where the recommendations pertained to the securing of accountability for atrocities on the African continent, such as in Côte d'Ivoire, Libya and Eritrea.[1316] In the Assembly it is also apparent that resolutions calling for accountability had not led to a unified resistance from African States. For instance, Assembly recommendations that the Security Council refer the situations in Syria and DPRK to the ICC were supported by up to half of all African States voting.[1317] In a similar manner, other regional blocs have also actively supported accountability measures concerning atrocities that have occurred within its region: the establishment of IIIM-Syria was supported by Member States from every UN regional group, which itself followed a call for accountability by the League of Arab States.[1318]

A related point is whether the scope for the Assembly to respond to atrocity crimes is likely to be inhibited by Member States seeking to avoid setting institutional 'precedents' that can be used against them in the future. This might be seen to be particularly acute in relation to more creative uses of Assembly powers, as with the creation of *ad hoc* tribunals or the authorisation of lawful sanctions. In this respect, Member States might treat the Uniting for Peace mechanism as a cautionary tale in vesting too much power in the Assembly; the mechanism, promoted initially by the major western powers to overcome the Russian veto, would soon be used against them (as with the UK and France in relation to the Suez crisis). As Schachter once observed, '[r]arely will responsible national officials lose sight of the possibility that a failure on their part to observe the rules can be used "against" them in the future and thereby weaken the basis for their own reliance on commonly accepted restraints.'[1319] Does the 'double-edged' sword critique inhibit the scope for the Assembly assuming more powers to advance accountability for international justice? This consideration is likely to have some impact on the voting positions of some Member States, particularly those whose human rights records have come under scrutiny in the Assembly. However, as noted in the previous paragraph, this concern is also overstated as Assembly practice has shown a general consensus in the promotion of international norms for the accountability of atrocity crimes, as well as their application in specific situations. The Assembly's most innovative contribution to international justice of the past decade, the creation of the IIIM-Syria, was supported by 105 Member States, which, although far from unanimous (with 15 against and 52 abstaining), shows that even more progressive uses of Assembly powers have enjoyed wide support. Indeed, in the context of the ICC, Stuart Ford noted the cohesiveness in voting patterns in the Assembly of those States

[1316] Eduard Jordaan, 'The African Group on the United Nations Human Rights Council: Shifting Geopolitics and the Liberal International Order' (2016) 115(460) Afr Aff 490 (although this study examined votes in the UNHRC rather than the Assembly).
[1317] UNGA Res 69/189 (2014) (Syria) (127 in favour, 13 against, with 48 abstentions: of those, 27 African States voted yes, 21 abstained, and only one voted against (Zimbabwe); UNGA Res 70/172 (2015) (DPRK) (119 yes, 19 no, 48 abstentions: of those, 22 African States voted yes, 7 no, 21 abstentions).
[1318] UNGA, 66th plenary meeting (n 642), 36 (Saudi Arabia).
[1319] Schachter, 'Quasi-Judicial Role' (n 31), 963.

that are also States Parties to the ICC Statute.[1320] But more generally, it is also likely that the 'international justice consensus' in the Assembly itself contributes towards goals such as deterrence of crimes and punishment of those responsible, although data to establish this effect is often unavailable or fragmentary.

Although there is a range of Assembly practice pertaining to the seeking of accountability for atrocity crimes, which has enjoyed wide support, a recurring criticism has been that this body has acted selectively in calling for accountability. This has arisen at two levels, both in the failure to give the appropriate response to comparable situations and in the inconsistent language used in resolutions in the application of atrocity crime norms. As Chapters 4 makes clear, there is some element of truth in this proposition: during the height of the decolonization movement, it is apparent that the language of international justice was occasionally used as a tool in a campaign to marginalize a colonial regime, rather than with the aim of securing prosecutions for the condemned (alleged) atrocities as such. By contrast, for large periods, the conduct of some States from the 'global south' remained largely unchecked in the Assembly. Indeed, this selectivity was exacerbated by the continued recognition of the credentials of the Pol Pot regime in the Assembly, even though, by that time, it lacked the characteristics of a government given that it was forced into exile. Similarly, it was also noted that the Assembly has not been immune from the criticism of 'victor's justice', in calling for accountability for crimes committed by one side to a conflict, despite the existence of credible allegations that the other party also committed crimes (as with the singling out of pre-Gaddafi forces for prosecution). There is no doubt that addressing these perceptions of selectivity remain an important part of the narrative in justifying Assembly involvement in advancing international justice, both generally and in specific situations. At the same time, while a lack of even-handedness has sometimes left the Assembly open to criticism, this should not be overstated and needs to be put in context.

For a start, some scholars have readily acknowledged that victor's justice, in not only being accurate in describing case selection in many international trials, is an unavoidable feature of international justice.[1321] The question is not whether international justice can be completely separated from politics; rather it is whether the international politics is of a nature and quality to instill confidence in the process of finding perpetrators responsible.[1322] The Assembly's advantage, in this regard, is its near universal membership of States, which has the potential to support a broader reach than mechanisms subject to closer control by powerful States, as with the Security Council and its permanent membership. As Chapter 4 explained, resolutions calling for accountability in the DPRK, Myanmar, Syria and Israel occurred in the Assembly, which would be an impossibility in the Security Council due to shielding of these States by respective permanent members. It is also a mischaracterisation to claim that the Assembly always perpetuates a friend-enemy distinction when it adopts resolutions; in relation to the Gaza conflict, for example, it called for the accountability of perpetrators to both sides of the conflict, based upon the findings of a UNHRC-established commission of inquiry.[1323] As already emphasised, the scope in this regard for Assembly resolutions to be linked to fact-finding mechanisms composed of experienced and independent jurists, such as commissions of inquiry, offers some

[1320] Stuart Ford, 'The ICC and the Security Council: How Much Support Is There for Ending Impunity?' (2016) 26 Ind Intl & Comp L Rev 33, 47.
[1321] Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2011) 21 EJIL 941.
[1322] ibid 964.
[1323] See further Yihdego (n 644), 20.

promise in the future for situations to be treated in an even-handed way, or at least will bring into the open more readily any bias in calling for the accountability of only one group of perpetrators in a conflict.

Another part of the broader picture in which to assess Assembly practice in the field of international justice is with regard to the multiple, perhaps sometimes, conflicting imperatives that this body is mandated to promote. In this regard, the Assembly will often be motivated by a broader set of imperatives than that of atrocity crimes accountability in performing its functions of maintaining international peace and security and promoting human rights. Rather than seeking to attribute blame, using precise legal standards, to a particular State or group, resolutions might instead be drafted with strategic ambiguity, in balancing the need to censure such conduct while providing an incentive for those allegedly responsible to comply with the resolution. There are a complex range of factors that might steer the Assembly away from placing an overarching emphasis on the accountability imperative, even in the face of documented atrocity crimes. For example, this might reflect a desire to change focus in a situation to address more urgent exigencies, such as the prevention of crimes during an intensification of hostilities, or to respect the authority of a new Assembly-friendly government that has come to power. On the latter, despite the Assembly calling consistently on South Africa to prosecute apartheid under the Apartheid Convention, this soon changed upon the promulgation of a new national constitution containing amnesty clauses so as to facilitate societal and democratic transition.[1324] The lack of consistency in the Assembly's response to atrocity crimes across situations therefore also has to be evaluated in light of these broader imperatives, situated within the ongoing debate over the appropriate balance to be achieved in a post-conflict situation between accountability and reconciliation.

In analysing the Assembly's practice and powers it is necessary to locate these within the context of the UN system and the role of the Security Council. It was noted at various points of this dissertation that the Assembly, based on the force of the Uniting for Peace resolution and as reflected in established practice, is able to act on a situation in parallel with the Security Council. The effect has been to render Article 12 (which limits the Assembly exercising its functions in relation to a dispute where the Security Council is already exercising its functions) effectively otiose. Still, whether the Assembly is able to assume analogous powers to the Security Council is contentious. As it was in 1950 with the Uniting for Peace resolution, the extent to which the Assembly is used as a creative outlet will be closely tied to the general perceptions as to the legitimacy of the Security Council monopoly on enforcement powers under the UN Charter, specifically here in relation to atrocity crimes. Recent efforts by States have sought to exert pressure on the Security Council to voluntarily abstain from exercising the veto in atrocity situations, with increased scholarly focus on the possible legal constraints on Council members in these situations. One proposal has envisaged a role for the Assembly to certify that a crisis poses an imminent threat of mass atrocity as a basis for the veto to be suspended in that situation.[1325] The extensive quasi-judicial practice covered in Chapter 3 would certainly support the Assembly performing this function. The scope for the Assembly to hold the Security Council to account has also attracted recent proposals, including for Assembly discussion to be triggered in any instance in which the permanent members of the Security Council exercise their veto.[1326] This growing international attention on the limits of the veto power also

[1324] UNGA Res/36/13 (1981); UNGA Res 37/47 (1982); UNGA Res 48/159 (1993).
[1325] See Trahan, 'Existing Legal Limits' (n 66), 133 (and citations there).
[1326] ibid, 126-127 (and citations there).

justifies greater reflection on the possibilities for the Assembly to remedy veto misuse, be that in holding the Security Council to account or in providing an alternative legal channel in which powers entrusted by the UN are to be exercised. As States continue to negotiate the supposed 'new Cold War', there is a legal basis for the Assembly to fill the void created by Security Council deadlock to not only unite for peace but also against impunity.