COLLECTIVE LEGALIZATION AS A STRATEGIC FUNCTION OF THE UN GENERAL ASSEMBLY IN RESPONDING TO HUMAN RIGHTS VIOLATIONS

MICHAEL RAMSDEN*

ABSTRACT

As the United Nations General Assembly ("assembly") has developed and its role has adapted to address changing exigencies in international affairs, collective legalization has emerged as one of its key functions. The collective legality instrument denotes the forging of a legal consensus by the community of states, which, in addressing violations of international law, falls to be evaluated in four ways: the declaration of international norms (quasi-legislative), the application of norms to a situation (quasi-judicial), a call for states to take specified action to conform with international law (recommendatory), and legal authority for states to act to bring offending states back into conformity with their obligations (authorizing). These four domains provide a framework for systematic research into the legal authority of the assembly in international affairs. This article unearths the use of the collective legality instrument in one such area: responses to human rights violations. While the assembly is lauded for its contribution to the legal development of human rights law, there has been no attempt to systematically analyze its use of the collective legality instrument across the enumerated four domains, including the relationship between these domains, within the international human rights system. This article fills that gap. Drawing upon a review of all human rights resolutions adopted by the assembly since 1946, this article classifies and analyzes their legal influence on a variety of human rights actors operating within the system. This article identifies the significant contribution of the assembly's quasi-legislative and quasi-judicial resolutions within this

* Associate Professor of International Law and Director of the Research Postgraduate Programme, Faculty of Law, The Chinese University of Hong Kong; Barrister Door Tenant, 25 Bedford Row, London (michaelramsden@cuhk.edu.hk). Some of the research underpinning this article was supported by a Direct Grant awarded by The Chinese University of Hong Kong in 2020/2021 (no. 4059047). The author expresses his gratitude to the editors of the Wisconsin International Law Journal for their invaluable editorial work. All errors remain the authors alone.

system, while also planting legal seeds to enhance the authority of the assembly in the future in responding to human rights violations (especially in the recommendatory and authorizing domains). In addition to being of value to international human rights scholars, this article provides scholarly insights into the legal significance of collective state action through international organizations as a general strategy in the advancement and realization of community goals.

INTRODUCTION

Inis Claude, in a seminal article published in 1966, famously described "collective legitimization" as a major political function of the United Nations ("UN").[1] Taking the perspective that state relations were

[1] Inis Claude, *Collective Legitimization as a Political Function of the United Nations*, 20 INT'L ORG. 367 (1966).

defined and controlled by political rather than legal considerations, Claude noted the important role that the UN General Assembly ("assembly") played in garnering an international consensus, as "a dispenser of politically significant approval and disapproval of the claims, policies, and actions of states."[2] According to Claude, it was politics, rather than law, that motivated, guided, and constrained relations between states.[3] The explanation for this state of affairs, to Claude, lay partly in the fact that the legitimacy of international law was widely challenged, with the existing mechanisms of international adjudication (i.e., the International Court of Justice ("ICJ")) inhibited from developing a more prominent role given the requirement of state consent to jurisdiction.[4] As Claude argued, on those occasions that states did use the ICJ, it was for the strategic purpose of obtaining a favorable judgment to augment a political interest or process, rather than to cede control over the dispute to judges as such.[5] On this view, rather than seeking a legal opinion rendered by an international court, it was a political judgment by their fellow practitioners of international politics that states primarily sought and valued.[6] The assembly, approximating a near universal state membership, was thus a key political agency for pronouncing on the international acceptability of national policies and positions.[7]

Although this political legitimization thesis continues to capture a major impetus of the assembly's function in international relations, it is also noteworthy that in the year that Claude penned his article, landmark changes in international law were afoot.[8] The year 1966 was the year that the two foundational human rights treaties—the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR")—were adopted by the assembly and opened for signature, thereby paving the way to their

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2 *Id.* at 367.

3 *Id.* at 370.

4 *Id.* at 371.

5 *Id.*

6 *Id.* at 370.

7 *Id.* at 373.

8 As to more recent iterations by practitioners on the political utility of assembly resolutions, *see* U.N. GAOR, 72nd Sess., 73rd mtg. at 27, U.N. Doc. A/72/PV.73 (Dec. 19, 2017); U.N. GAOR, 62nd Sess., 76th mtg. at 35, U.N. Doc. A/62/PV.76 (Dec. 18, 2007); U.N. GAOR, 52nd Sess., 71st mtg. at 18, U.N. Doc. A/52/PV.71 (Dec. 15, 1997). *See also* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 184 (3rd ed. 2014); D.H.N. Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97, 121 (1955–56).

coming into force a decade later.[9] These instruments, building upon the consensus obtained in the assembly's Universal Declaration of Human Rights ("UDHR"), became known collectively as the "International Bill of Rights."[10] They were joined by a large number of other assembly-adopted human rights treaties that obtained widespread state ratifications, including those that prohibit specific conduct (e.g., genocide, torture, and racial discrimination) and protect specific groups (e.g., women and children).[11] Most of these treaties provide for a treaty body, comprising independent experts monitoring the compliance by states of its obligations.[12] Many states also accepted the ICJ's jurisdiction to resolve disputes arising under these human rights treaties.[13] This pattern of human rights juridification also took hold outside of the UN system and has developed significantly ever since.[14] Three of the world's regions—Europe, Inter-America, and Africa—possess supranational human rights courts vested with the competence to judge state responsibility for human rights violations.[15] The enforcement of human rights violations has also led to the creation of several international criminal tribunals to try individual suspects, culminating in the establishment of the International Criminal Court ("ICC") as a permanent court.[16]

Set against this burgeoning international human rights system, this article argues that an important role of the General Assembly has

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[9] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Although the UN and assembly have been the major protagonists of the international human rights system, the UN's predecessor, the League of Nations, also played its part. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 784–85 (2006).

[10] *See* Zehra F. Kabasakal Arat, *Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights*, 28 HUM. RTS. Q. 416 (2006).

[11] *E.g.*, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; International Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD]; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[12] For an overview, see Buergenthal, *supra* note 9, at 789.

[13] Michael Ramsden, *Accountability for Crimes Against the Rohingya: Strategic Litigation in the International Court of Justice*, 26 HARV. NEG. L. REV. 153, 161–63 (2021) (discussing limitations of the I.C.J.'s human rights jurisdiction).

[14] Buergenthal, *supra* note 9, at 791–801.

[15] *Id.*

[16] *Id.* at 802.

been to provide collective legalization to support the legal claims of actors in their application of human rights law within this system.[17] Contrary to Claude's view that the assembly is, in the main, an arena for political legitimization, this article shows the significant role that this body has played as an interlocutor in the development and application of norms that support actors in the international human rights system. This article shows the depths of the assembly's strategic activity in adopting resolutions to support the development of international human rights law, as well as both providing a forum and a catalyst for campaigns aimed at securing redress for country-specific human rights violations. It shows that collective legalization has become a major function of the assembly, placing this body at the heart of the international human rights system in both stimulating prescriptive developments and emboldening the priorities of the international community in responding to human rights violations. Collective legalization supports the legal interpretive claims of actors when responding to human rights violations and is capable of doing so in four ways.[18]

The first is the process of construing the applicable law within a human rights regime. Human rights actors perform their role within a legal framework. For example, the various treaty bodies responsible for monitoring implementation of human rights treaties must form a view on the content and scope of the rights prescribed in these instruments.[19] While the text of a treaty will be a primary guide, and will sometimes curb interpretive evolution, there is also a general recognition that human rights treaties are living instruments, adapting to changing societal circumstances.[20] Scholars have studied extensively the phenomenon of

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[17] These actors vary quite widely, ranging from the political organs of international institutions (such as the Security Council or HRC, states acting on their own initiative to enforce international human rights law, secretariat (such as the UN Secretary-General), lawyers, prosecutors, judges and civil society. This Article focuses mainly on the sharp end of these legal claims, i.e., on the impact of resolutions in judicial proceedings, while also noting impact in other contexts as well, particularly on the decisions of states (*See infra* Part IV on the Assembly's authorizing instrument).

[18] The Assembly also performs other roles within the human rights system not explored here, such as to coordinate activity between different actors in the system. *See, e.g.*, G.A. Res. 62/118, ¶¶ 14–15 (Dec. 17, 2007). The focus here, rather, is on the legal significance of resolutions in responding to violations within the system.

[19] This interpretive function has been explored in the scholarly literature. *See, e.g.*, Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 VAND. J. TRANSNAT'L L. 905 (2009).

[20] Michael Ramsden & Luke Marsh, *Same Sex Marriage in Hong Kong: The Case for a Constitutional Right*, 19 INT'L J. HUM. RTS. 90, 93 (2015) (noting limits of reading a right to same sex marriage into the ICCPR based upon the text of art. 23).

actors transplanting interpretations made in one human rights regime into another.[21] Yet, less systematic attention has been placed on the corresponding influence of assembly resolutions on the legal interpretations taking place in human rights regimes.[22] The assembly's advantage is that it comprises a near universal membership of states (193, to be exact). Given that, based on an orthodox understanding, it is states that make international law, the widely representative character of the assembly thus provides a unique means for states to positivize a legal understanding both as to the meaning of provisions in human rights treaties as well as analogous principles in customary international law.[23] In this regard, the assembly's first function of collective legalization considered here is *quasi-legislative*, which, although not automatically binding within the human rights system, serve to persuasively influence the legal interpretive choices of actors within the system, as will be shown.

A second response of the human rights system is to make determinations pertaining to a human rights situation based upon legal norms. These legal determinations vary widely, from findings that a situation falls within the powers of the regime to the adjudication of state or individual responsibility for human rights violations. It would seem, at first blush, that the assembly, as a political body, would not, or ought not, be involved in the determination of legal questions within the international human rights system.[24] Yet, as will be shown in this article, the assembly has routinely pronounced on the occurrence of human rights violations in a country situation and weighed in on state disputes (such as on statehood or territory) that have had a bearing on human rights issues. As will be shown, the assembly's second collective legalization function is *quasi-judicial*, in bringing to bear collective state evaluation on a situation that supports decision-making within human rights regimes. At the same time, the ability of the assembly to make quasi-judicial determinations is largely contingent on the presence of independent fact-finding and adjudication to underpin its quasi-judicial

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[21] *See also* JUDICIAL REVIEW OF ADMINISTRATIVE ACTION ACROSS THE COMMON LAW WORLD: ORIGINS AND ADAPTATION (Swati Jhaveri & Michael Ramsden eds., 2021).

[22] *See, e.g.*, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995) (focusing specifically on the UDHR).

[23] *See* Statute of the International Court of Justice art. 38(1), Jun. 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

[24] *See, e.g.*, U.N. GAOR, 37th Sess., 108th mtg. at ¶ 121, U.N. Doc. A/37/PV.108 (Dec. 16, 1982) (challenging the assembly's quasi-judicial competence for procedural fairness reasons).

resolutions. Sometimes these determinations will be established already from mechanisms independent of the assembly; other times it has established commissions of inquiry and requested advisory opinions from the ICJ as part of a campaign to secure compliance with human rights.[25] In these situations, the assembly has played an enabling role, in bringing new players into the monitoring and quasi-adjudication of a human rights situation which has supported legal responses to these abuses within human rights regimes.

This then leads onto a third response to violations within the human rights system: to specify measures that a state must take to remedy such violations. It is axiomatic that the occurrence of human rights violations gives rise to an obligation to make reparations for any injury caused, as well as a continuing obligation to cease the breach and conform to the norm that was violated.[26] Human rights treaties thus variously call upon states to "respect," "ensure," "secure," "prevent and punish," "adopt measures," and "cooperate with each other" to achieve the rights protected in such instruments.[27] This also includes, according to the ICCPR's Human Rights Committee ("CCPR"), a requirement to cooperate in good faith with international mechanisms, as well to investigate and prosecute violations of human rights.[28] For its part, the assembly has recommended states to take measures to bring themselves back into compliance with international human rights law.[29] The third collective legalization function considered here then is *recommendatory*, which has served to define and consolidate the requirements outlined by different human rights regimes that specify the obligations of states to remedy and provide reparations for violations.[30] One interesting perspective, as will be discussed, is whether the assembly's recommendatory instrument can acquire binding force, thereby strengthening legal powers within the human rights system by adding an additional source of obligation. It is often stated that assembly recommendations do not generally possess binding force.[31] At the same time, Blaine Sloan famously argued that recommendations can become

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[25] *See infra* Part II.

[26] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 13 (3rd ed., 2015).

[27] *Id*.

[28] Hum. Rts. Comm., ¶ 28, U.N. Doc. C/GC/36 (Sep. 3, 2019).

[29] *See infra* Part III.

[30] *See infra* Part III.

[31] *See generally* Blaine Sloan, *The Binding Force of a Recommendation of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1 (1948).

binding with practice, where "the intention is to be so bound."[32] This was especially so in areas which lacked sufficient oversight but where states owe obligations; according to Sloan, it thus "might be argued that the protection of human rights falls or will be brought into a sphere of action where binding resolutions may be made."[33] It is thus worthwhile to evaluate whether this reflects a contemporary understanding of assembly recommendations that address human rights violations.

Finally, another form of response to human rights violations is to take measures to address the failure of states to remedy such violations. These measures vary quite widely and in severity, with some regimes having limited means to take enforcement measures against states.[34] The UN Charter, by comparison, provides the strongest machinery to address human rights violations; where these also threaten international peace and security, the Security Council is entitled to authorize measures, including economic sanctions, humanitarian assistance and the use of force, three courses of action that, where taken by states unilaterally and absent council authorization, raise complex questions of legality.[35] In this respect, there are instances where the assembly, in the name of human rights, has called for the sanction of offending states and support for humanitarian relief operations.[36] It has also recognized the need, in times of humanitarian crises, for the use of force to bring a halt to ongoing atrocious crimes.[37] An issue this practice raises, as will be discussed, is the extent to which the assembly is able to provide legal authority for states to adopt measures that would otherwise be inconsistent with their international legal obligations. The final collective legalization function explored here, then, is *authorizing* coercive measures: denoting those measures imposed on an offending state against their will and which, when taken by participating states, release such participants from any conflicting international obligations they owe to the offending state.

As this brief outline demonstrates, the assembly has not comprehensively used the collective legalization instrument to its fullest

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[32] *Id.* at 22.

[33] *Id.* at 24.

[34] *See generally* Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689 (2008); Douglas Donoho, *Human Rights Enforcement in the Twenty-First Century*, 35 GA. J. INT'L & COMP. L. 1 (2006); Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183 (2002).

[35] *See infra* Part IV; U.N. Charter art.1, ¶ 16.

[36] *See infra* Part IV; U.N. Charter, *supra* note 35, art.1, ¶ 16.

[37] *See infra* Part IV; U.N. Charter, *supra* note 35, art.1, ¶ 16.

extent in response to human rights violations. Some parts of the collective legalization instrument are more developed than others (the quasi-legislative and quasi-judicial instruments, as will be seen, being the most developed). This article is thus not only about what is, but also the *potential* for the assembly to perform a stronger collective legislative role within the international human rights system through the development of its recommendatory and authorizing instruments. The latent potential of the assembly, in this regard, is set in the context of growing frustration amongst states that the Security Council has failed to avert and secure accountability for human rights abuse.[38] Given the council's monopoly on coercive powers in the UN Charter, their failure to exercise these powers in grave human rights situations has prompted commentators to criticize the UN for failing to advance one of its primary objectives—promoting respect for human rights.[39] While this article is not advancing the position that the assembly is able to assume the powers of the Security Council (unlike other authors in recent times), the failure of the council to meaningfully act in human rights situations is a context that justifies the exploration of creative approaches to the collective legalization instrument beyond existing practice.[40] Cast in this light, collective legalization is partially a symptom of UN institutional failure, with the many members of the assembly attempting to do through collective legal interpretation what the few have failed to do through Chapter VII binding decisions.[41]

While an underlying assumption of this article is that the assembly is a strategic actor in responding to human rights violations, its major focus of enquiry is on the legal impact of its collective legality instruments rather than whether the specific goals underpinning its resolutions in a particular country or rights campaign, as such, had subsequently been fulfilled. Labelling an act as "strategic" itself implies a conscious selection of action from plausible alternatives and a perception of the goal that the selected action is directed toward.[42]

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[38] *See* JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO VETO POWERS IN THE FACE OF ATROCITY CRIMES (2020) for a discussion extensively cataloguing these frustrations.

[39] U.N. Charter, *supra* note 35, art. 1(3) (statement of the UN over the goal of the Security Council) ("[The] international co-operation in. . . promoting and encouraging respect human rights and for fundamental freedoms for all without distinction as to race, sex, or religion").

[40] *See* Andrew Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT. SEC. L. 453 (2013), for a discussion on a creative approach.

[41] *E.g.*, the 15 members of the Security Council.

[42] Anthony D'Amato, *Legal and Political Strategies of the South West Africa Litigation*, 4 L. TRANSITION Q. 8, 11 (1967).

Studies on organizational strategy thus delineate goals from results.[43] Assembly resolutions will often reveal goals in the text of the resolution or explanations of vote. In this respect, there are some case studies of occasions where groups have strategically invoked the assembly to achieve a collective goal, such as with the Global South in supporting resolutions against western states to end colonial rule (which ultimately contributed towards the desired impact), or the efforts of member states of the Organization of Islamic Cooperation in using the assembly as part of a campaign to secure accountability for crimes against the Rohingya (which, as will be shown, has had some success towards this goal).[44] At the same time, there are instances where the legal impact of a resolution go beyond what the assembly membership had intended at the time. A prominent example is Resolution 3314 (Definition of Aggression) which was originally intended in 1974 to guide the Security Council's exercise of discretion under Chapter VII but which, decades later, would be substantively incorporated into the ICC Statute as an authoritative restatement of the crime of aggression.[45] Therefore, while the strategic goals of an assembly campaign and the extent to which they have been met provide worthwhile case studies in their own right, the primary focus here is on the legal impact (intended or unintended) of the assembly's resolutions in responding to human rights violations.[46]

Finally, the assembly's collective legalization instrument is the focus of this article, rather than that of other plenary organs in international organizations, such as, for example, the ICC Assembly of States Parties ("ASP") or the Human Rights Council ("HRC"). There is interesting comparative research to be conducted into the relative contributions to collective legalization that these different plenary organs perform, although this is not the place for it.[47] The HRC's leadership on human rights since its creation by the assembly in 2006 itself raises a question about whether it is more appropriate to devote attention to this

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[43] Henry Mintzberg, *The Strategy Concept I: Five Ps for Strategy*, 30 CAL. MGMT. REV. 11, 12 (1987).

[44] *See* D'Amato, *supra* note 42; Ramsden, *supra* note 13.

[45] G.A. Res. 3314, ¶ 4 (Dec. 14, 1974) (recommending the Security Council should "take account of" the Definition of Aggression); Rome Statute of the International Criminal Court art. 8*bis*, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

[46] *See* HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION, 50–80 (1st. ed. 2018) (discussing of strategic litigation that has focused on impact rather than seeking to define the goals of the litigators).

[47] *See* Michael Ramsden & Tom Hamilton, *Uniting against Impunity: The UN General Assembly as a Catalyst for Action at the ICC*, 66 INT'L & COMP. L.Q. 893, 895–96 (2017).

body's practice on collective legalization rather than that of the assembly.[48] However, the fact remains that the assembly is vested with primary responsibility for the promotion of human rights under the UN Charter and remains the UN's most representative plenary organ (193 members compared to the HRC's 47), thereby best able to give the widest expression of the collective UN membership.[49] Indeed, this is borne out in practice, with state delegates often viewing assembly engagement with a human rights issue to be a means to elevate the importance of an issue within the UN system that the HRC alone cannot achieve.[50]

This article proceeds as follows. Part I surveys the assembly's quasi-legislative instrument, noting firstly the very extensive practice of this body in adopting declarations and then providing a taxonomy for appreciating their impact upon legal developments within the human rights system, both as a source for treaty interpretation and in the identification of customary international law. Part II shows the depths of the assembly's quasi-judicial practice on and related to human rights situations and its role in deepening understanding on human rights violations through its creation of commissions of inquiries and requests for ICJ advisory opinions. It then considers how this quasi-judicial practice has augmented the legal responses of actors within the human rights system. Part III provides a distillation of assembly recommendations calling upon offending states and other actors to take measures to address human rights violations, advancing the position that this instrument produces legal effects. Part IV then considers the scope for the assembly to support states in taking coercive action against offending states, including to support the imposition of economic sanctions, the provision of humanitarian intervention, and, at the most extreme, legal support for the use of military force to avert human rights violations within a state. Part V concludes.

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[48] G.A. Res. 60/251, ¶ 1 (Mar. 15, 2006); U.N. GAOR, 69th Sess., 73rd mtg. at 22, U.N. Doc. A/69/PV.73 (Dec. 18, 2014) (arguing that the HRC should be the UN's "primary tool" for human rights).

[49] U.N. Charter, *supra* note 35, art. 13(2).

[50] U.N. GAOR, 71st Sess., 65th mtg. at 34, U.N. Doc. A/71/PV.65 (Dec. 19, 2016). *See also* U.N. GAOR, 66th Sess., 89th mtg. at 24, U.N. Doc A/66/PV.89 (Dec. 19, 2011) (assembly "enrich[es] the international human rights dialogue with their discussion.").

I. QUASI-LEGISLATIVE

The UN Charter and its drafting history makes it clear that no UN organ, including the assembly, was envisaged to have legislative power, the ability to enact law binding upon states.[51] This is reinforced by Article 13, which empowers the assembly to "initiate studies and make recommendations" to support and encourage the "progressive development of international law and its codification."[52] This supports the inference that assembly resolutions are incapable of creating international law but might facilitate states in clarifying their understanding and in developing an emerging consensus. At the same time, the notion that the assembly's role is limited to "recommending" states to accept international norms does not appear to be consistent with the nomenclature of a category of resolutions described as "declarations," or those which use ostensibly mandatory language in the identification of international law (such as "affirms" or "reaffirms").[53] Indeed, the assembly has recognized that the "development of international law may be reflected, inter alia, by [its] declarations and resolutions."[54]

Although this practice is not legislative, in the sense of instantaneously promulgating binding law, such resolutions can influence the development of international human rights law. The earliest use of the quasi-legislative label in the context of assembly practice was provided in the work of Richard Falk, who noted in 1966 that that this term describes a halfway house between the formal recognition of a legislative status and the formal denial of a law-creating role.[55] The widely representative character of the assembly—comprising a near universal membership of states—provides it with the potential to influence the direction of international law given that these legal sources

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[51] *See, e.g.*, U.N. Conference on International Organizations, *Grouping of Suggested Modifications to Dumbarton Oaks Proposals*, at 316; U.N. Doc. CONF.25/9/2/7, annex II (May 12, 1945) (Philippine proposal rejected 26-1).

[52] U.N. Charter, *supra* note 35, art. 13.

[53] Richard Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 782–83 (1966).

[54] G.A. Res. 3232 (XXIX), pmbl. (Nov. 12, 1974); The assembly has also encouraged human rights bodies to codify international human rights law. *See, e.g.*, G.A. Res. 48/136, ¶ 6 (Mar. 4, 1994) (encouraging the Committee on the Rights of the Child to adopt a general comment on street children).

[55] Falk, *supra* note 53, at 782–83.

are orientated towards ascertaining state practice and opinion.[56] On this view, an assembly resolution is able to support an understanding as to the content of international law, but it must also be evidenced in the effective mobilization of these claims in state practice to support the validity of the norm contained in the resolution.[57] From this perspective, the following part first details the assembly's landmark human rights declarations before outlining a framework in which to appreciate their quasi-legislative influence in the wider international human rights system. The focus of this influence is on the two major sources of international law: treaty and customary international law, being those sources commonly applied in the international human rights system.[58] This outline, in turn, shows the potential for UN member states to adopt resolutions in the assembly to influence the normative development of international human rights law and its application in human rights regimes.

A. HUMAN RIGHTS DECLARATIONS

It is first instructive to outline some of the basic characteristics of resolutions that have purported to declare international law. According to the UN Office of Legal Affairs, a declaration is a "formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated."[59] This solemnity is reflected in the language used in a resolution, commonly "affirming," "reaffirming," or "proclaiming" a particular legal understanding or in specifying a form of conduct to be inconsistent with international law.[60] Some of these declarations have provided the first international definition of a norm (such as its declaration on torture), whereas others have endorsed definitions in existing legal regimes, such as obligations under multilateral human rights treaties, as well as the pronouncements of

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[56] *Id*. at 784.

[57] *Id.* at 788.

[58] *See* ICJ Statute, *supra* note 23, arts. 37, 38(1); Another lesser used source, not considered in depth here, is the influence of assembly resolutions on "general principles of law recognized by civilized nations." BLAINE SLOAN, UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD, 77–81 (1st ed., 1991).

[59] Memorandum from U.N. Off. Legal Aff. on Use of the Terms "Declaration and Recommendation," ¶ 1, U.N. Doc. E/CN.4/L.610 (Apr. 2, 1962).

[60] *See, e.g.,* G.A. Res. 47/133, ¶12 (Dec. 18, 1992) ("proclaim[ing]" the Declaration on the Protection of All Persons from Enforced Disappearance "as a body of principles for all States."); G.A. Res. 95(I) (Dec. 11, 1946) ("affirm[ing] the principles of international law."); G.A. Res. 96(I) (Dec. 11, 1946) ("affirm[ing] that genocide is a crime under international law.").

treaty bodies such as General Comments of the CCPR or Committee on Economic, Social, and Cultural Rights ("CESCR").[61] While declarations convey solemnity, it is also necessary to note instances where the assembly has sought to limit the scope of its involvement in declaring international law, in two forms. The first has been to include a caveat that its declarations are not intended to entail new international obligations, serving merely to identify "mechanisms, modalities, procedures and methods for the implementation of existing legal obligations."[62] The second limit on scope has come in the form of the membership's intention (often shown in the explanations of vote) that a declaration did not reflect a legal understanding; in this regard, it might be intended to be only programmatic in character or reflect aspired legal standards for future attainment, as, most prominently, with the UDHR.[63] Yet, as will be argued below, even declarations that were intended to serve only limited or exhortatory purposes have taken a life of their own and contributed to legal developments in the international human rights system.

The classic distinction between three generations of rights provides a useful, albeit not watertight, means to classify assembly declarations.[64] The first generation is concerned with negative rights,

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[61] *See, e.g.*, G.A. Res. 70/169, ¶ 9 (Dec. 17, 2015) (drawing from CESCR, General Comment No. 15, The Right to Water, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) when affirming the right to safe drinking water and sanitation); G.A. Res. 65/221, at 5 (Dec. 21, 2010) ("reaffirm[ing] the obligation of States, in accordance with article 4 of the International Covenant on Civil and Political Rights, to respect certain rights as non-derogable in any circumstances."); G.A. Res. 62/157, ¶¶ 2–3 (Dec. 18, 2007) (endorsing CCPR interpretations on the freedom to manifest religion); G.A. Res. 58/179, ¶ 11 (Dec. 22, 2003) (noting CRC, General Comment No. 3, HIV/AIDS and the rights of the child, U.N. Doc. CRC/GC/2003/3 (Mar. 17, 2003)); G.A. Res. 54/153, ¶ 13 (Feb. 29, 2000), (noting CERD, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination, U.N. Doc. A/48/18 (Mar. 17, 1993)); G.A. Res. 49/191, ¶ 2 (Mar. 9, 1995) (endorsing CCPR's interpretation of ICCPR art. 6); G.A. Res. 2840 (XXVI), at 4 (Dec. 18, 1971) ("refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principle of the Charter of the United Nations and to generally recognized norms of international law."); G.A. Res. 95(I), *supra* note 60 (affirming in international law "recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal.").

[62] *See, e.g.*, G.A. Res. 60/147, annex, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005).

[63] G.A. Res. 217 A (III) (Dec. 10, 1948); U.N. GAOR, 3rd Sess., 183rd plen. mtg. at 934, U.N. Doc. A/PV.183 (Dec. 10, 1948); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 70 (1989).

[64] For a recent exposition of these three generations and the connections between them, *see* Spasimir Domaradzki, Margaryta Khvostova & David Pupovac, *Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse*, 20 HUM. RTS. REV. 423 (2019); Indeed,

precluding state inferences with individual freedoms, and corresponds generally with civil and political rights.[65] The second generation imposes positive obligations on the state (to a greater extent than civil and political rights, at least) and include economic, social, and cultural rights.[66] Third generation rights are commonly referred to as collective in belonging to a group as a whole, including the right to self-determination, economic and social development, a healthy environment, natural resources, and participation in cultural heritage.[67] As will be shown, assembly declarations have covered a vast terrain of what is understood to constitute the contemporary field of international human rights law across these three generations of rights. Still, there are declarations that defy easy categorization according to this generational taxonomy; indeed, the assembly has explicitly noted the indivisibility and interdependence of rights.[68] It has adopted resolutions that have incorporated rights across the three generations, as with those on the rights of children, non-nationals, victims of crime, minorities, and indigenous peoples.[69] Nonetheless, the broader point here is that the assembly has, through a large body of declarations, contributed to an understanding on the legal nature of these three generations over time, including their overlap and distinctiveness.

The assembly has adopted numerous declarations on first generation rights. The starting point is the celebrated UDHR, an instrument which, given the politically western orientation of the assembly in 1948, focused mostly on defining a wide variety of civil and political rights concerned with freedom from state interference that are

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constitutional courts have increasingly interpreted civil and political rights as entailing a positive obligation on the part of the state to secure socioeconomic entitlements for persons. *See, e.g.*, Michael Ramsden & Luke Marsh, *Refugees in Hong Kong: Developing the Legal Framework to Socioeconomic Rights Protection*, 14 HUM. RTS. L. REV. 267, 267–268, 280–282, 291–293 (2014).

65 Domaradzki, *supra* note 64, at 424–25.

66 *Id.* at 424.

67 *Id.* at 425–26.

68 G.A. Res. 66/151 (Dec. 19, 2011); G.A. Res. 42/102 (Dec. 7, 1987).

69 G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992); G.A. Res. 40/144, Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (Dec. 14, 1985); G.A. Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985); G.A. Res. 1386 (XIV), Declaration of the Rights of the Child (Nov. 20, 1959); G.A. Res. 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Dec. 9, 1998).

now familiar to domestic constitutional law scholars worldwide.[70] Numerous declarations explicate upon these freedoms from state interference (along with positive obligations to redress such violations) in relation to torture, interference with property, religious intolerance, enforced disappearance, violence against women, and prisoners' mistreatment.[71] Freedom from discrimination has featured prominently in assembly declarations, both generally and in relation to particular groups (women, disabled) and situations (apartheid in sports).[72] The assembly has also elucidated on the scope of civil and political rights in particular circumstances, such as during armed conflict.[73]

There has been a myriad of assembly declarations on socioeconomic rights although it has been less definitive in articulating the nature of these legal obligations (see the discussion on "political declarations" below). Although the UDHR's main focus was on civil and political rights, it also contained five articles addressing numerous socioeconomic rights that provided the genesis for the ICESCR, including the right to social security, education, work, rest, health, and an adequate standard of living.[74] The assembly has on separate occasions

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[70] Andrew Clapham, *The Human Rights Mandate of the Principal Organs*, *in* THE UNITED NATIONS AND HUMAN RIGHTS, 99, 107–09 (Frédéric Mégret and Philip Alston eds., 2020); the considerable influence of the UDHR on national constitution-making and interpretation has been considered in numerous studies. *See, e.g.*, Hannum, *supra* note 22; MICHAEL RAMSDEN & STUART HARGREAVES, HONG KONG BASIC LAW HANDBOOK, 173 (Kemal Bokhary ed., 2019) (describing almost wholesale adoption of UDHR/ICCPR rights into Hong Kong's "mini-constitution").

[71] *See, e.g.*, G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (Dec. 17, 2015) (the Nelson Mandela Rules); G.A. Res. 53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Dec. 9, 1998); G.A. Res. 48/104, Declaration on the Elimination of Violence against Women (Dec. 20, 1993); G.A. Res. 45/113, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Dec. 14, 1990); G.A. Res. 45/111, Basic Principles for the Treatment of Prisoners (Dec. 14, 1990); G.A. Res. 45/98 (Dec. 14, 1990); G.A. Res 43/173, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Dec. 9, 1988); G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981).

[72] *See, e.g.*, G.A. Res. 32/105 M, International Declaration against Apartheid in Sports (Dec. 14, 1977); G.A. Res. 2263 (XXII), Declaration on the Elimination of Discrimination Against Women (Nov. 7, 1967); G.A. Res. 1904 (XVIII), United Nations Declaration on the Elimination of All Forms of Racial Discrimination (Nov. 20, 1963).

[73] *See, e.g.*, G.A. Res. 3318 (XXIX), Declaration on the Protection of Women and Children in Emergency and Armed Conflict (Dec. 14, 1974); G.A. Res. 2675 (XXV), Basic principles for the protection of civilian populations in armed conflicts (Dec. 9, 1970); G.A. Res. 2444 (XXIIX), Respect for Human Rights in Armed Conflicts (Dec. 19, 1968).

[74] G.A. Res. 217 A, *supra* note 63, arts. 22–27.

also provided greater textual specificity to a number of socioeconomic rights, including food, safe drinking water and sanitation, and culture.[75] Declarations have also been adopted with a predominantly socioeconomic rights focus for specific vulnerable groups: older persons, children, peasants/rural workers, and persons with disabilities.[76]

Finally, there are a catalogue of assembly declarations on third-generation rights.[77] A major—and successful—focus of the assembly has been to promote independence for colonial peoples, adopting several declarations underscoring the right to self-determination, including the seminal Resolution 1514 (Declaration on the Granting of Independence to Colonial Countries and Peoples).[78] Against this colonial backdrop, the assembly also recognized the right of peoples to enjoy permanent sovereignty over their natural resources.[79] To prevent statelessness of peoples arising from state succession, the assembly also declared the right of peoples to have the nationality of the successor state(s).[80] It has declared a right of all peoples to peace and a corresponding positive obligation on states to eliminate the threat of conflict.[81] The assembly also adopted a declaration recognizing the rights of people to be able to participate in, contribute to, and enjoy, economic, social and cultural development; this was accompanied by a series of requirements on states to realize this right.[82] This was followed by a declaration mandating

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[75] *See, e.g.*, G.A. Res. 76/162, Human Rights and Cultural Diversity (Dec. 16, 2021); G.A. Res. 71/191, The Right to Food (Dec. 19, 2016); G.A. Res. 70/169, *supra* note 61.

[76] *See, e.g.*, G.A. Res. 73/165, United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (Sept. 28, 2018); G.A. Res. 48/96, Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Mar. 4, 1994); G.A. Res. 46/119, Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (Dec. 17, 1991); G.A. Res. 46/91, United Nations Principles for Older Persons (Dec. 16, 1991); G.A. Res. 41/85, Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (Dec. 3, 1986); G.A. Res. 3447, Declaration on the Rights of Disabled Persons (Dec. 9, 1975); G.A. Res. 2856 (XXVI), Declaration on the Rights of Mentally Retarded Persons (Dec. 20, 1971).

[77] Fausto Pocar, *Some Thoughts on the Universal Declaration of Human Rights and the "Generations" of Human Rights*, 10 INTERCULTURAL HUM. RTS. L. REV. 43, 44 (2015) (noting the large body of third generation declarations).

[78] G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

[79] G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962).

[80] G.A. Res. 55/153, annex, Nationality of Natural Persons in Relation to Succession of States (Dec. 12, 2000).

[81] G.A. Res. 39/11, annex, Declaration on the Right of Peoples to Peace (Nov. 12, 1984).

[82] *See* G.A. Res. 41/128, annex, Declaration on the Right to Development (Dec. 4, 1986).

international economic cooperation with the purpose of revitalizing economic growth and development of developing countries.[83]

The assembly also has a longstanding practice in declaring particular conduct to amount to an international crime that requires investigation and prosecution as a means to enforce violations of international human rights law.[84] Aside from those crimes specified in the Nuremberg Charter, the assembly has also specifically declared genocide, rape, apartheid, and enforced disappearances to constitute international crimes.[85] A corollary of these developments has been assembly declarations on state obligations to investigate and punish those responsible, with a duty on states to cooperate with each other with a view to halting and preventing these crimes.[86] The effect of gross violations of international human rights law on victims, too, led to a declaration of basic principles on the right to a remedy and reparations ("Reparations Principles").[87]

In terms of the future, there are at least two major possible sources that can influence the formulation of new assembly declarations. The first is to convert some of their "political declarations" into more precisely formulated legal norms. These political declarations engage with the protection and realization of a variety of human rights, on the combatting of trafficking in persons, attainment of universal health coverage, the elimination of HIV and AIDS, prevention and control of non-communicable diseases, questions on large movements of refugees and migrants, and action against racism, racial discrimination, xenophobia, and related intolerance.[88] Most such political declarations, as the name implies, describe the members' policy and programmatic commitments rather than offer a clear articulation of the content of particular rights, positive obligations or prohibitions as a matter of

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[83] GA. Res. S-18/3, annex, Declaration on International Economic Cooperation, in Particular Revitalization of Economic Growth and Development of Developing Countries (May 1, 1990).

[84] *See generally* MICHAEL RAMSDEN, INTERNATIONAL JUSTICE IN THE UNITED NATIONS GENERAL ASSEMBLY (2021).

[85] G.A. Res. 50/192, ¶ 3 (Dec. 22, 1995); G.A. Res. 47/133, *supra* note 60, at 3; G.A. Res. 2202 (XXI) A, ¶ 1 (Dec. 16, 1966); G.A. Res. 96(I), *supra* note 60.

[86] G.A. Res. 3074 (XXVIII), ¶ 3, Principles of international cooperation in detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (Dec. 3, 1973).

[87] G.A. Res. 60/147, *supra* note 62.

[88] *See, e.g.*, G.A. Res. 75/284, annex (June 8, 2021); G.A. Res. 74/72, annex (Oct. 10, 2019); G.A. Res. 73/3, ¶ 2 (Oct. 10, 2018); G.A. Res. 71/1, ¶ 5 (Sept. 19, 2016); G.A. Res. 65/240, ¶ 2 (Dec. 24, 2010).

international human rights law.[89] Nonetheless, there are areas where legal clarification in an assembly resolution would be particularly useful as a means to advance these particular causes. For example, while the Political Declaration to Combat Trafficking in Persons reaffirms that trafficking in persons is a "serious crime" and an "abuse of human rights," there remain open questions about the extent to which trafficking qualifies as a separate international crime or indeed as a crime against humanity.[90] The second potential source for future assembly declarations comes from the HRC which has adopted a number of eye-catching resolutions since its creation (by the assembly) in 2006.[91] In 2011, the HRC endorsed the Guiding Principles on Business and Human Rights, which seeks to place an onus on companies and private actors to respect human rights, such obligations traditionally understood to be owed only vertically by states to individuals (and thus not horizontally).[92] This is likely to be particularly relevant in the attempts to address news misinformation, with the assembly already drawing upon the Guiding Principles on Business and Human Rights when affirming the responsibility of states "to counter, as appropriate, and in accordance with international human rights law, the dissemination of disinformation."[93] Most recently, in 2021, the HRC recognized the "right to a clean, healthy and sustainable environment as a human right" that required the "full implementation of the multilateral environmental agreements under the principles of international environmental law."[94] Based upon past habits of cooperation between the assembly and HRC, there is certainly scope for the assembly to support a movement towards an enlargement of the scope of international human rights law as it applies to the environment and business.[95] Indeed, as this part has demonstrated, the assembly has a rich practice in acting purposefully in developing international human rights law through the adoption of declarations.

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89 *See, e.g.*, G.A. Res. 75/284, annex (June 8, 2021).

90 G.A. Res. 76/7, ¶ 5, annex (Nov. 22, 2021); *Also see generally* Michael Ramsden, *The International Responsibility of War Profiteers for Trafficking in Persons*, *in* THE INTERNATIONAL CRIMINAL RESPONSIBILITY OF WAR'S FUNDERS AND PROFITEERS 232 (Nina H. B. Jørgensen ed., 2020).

91 G.A. Res. 60/251, *supra* note 48.

92 Human Rights Council Res. 17/4, U.N. Doc. A/HRC/RES/17/4, ¶ 1 (June 16, 2011).

93 G.A. Res. 76/227, ¶ 4 (Dec. 24, 2021).

94 Human Rights Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13, ¶¶ 1, 3 (Oct. 8, 2021).

95 *See* Ramsden & Hamilton, *supra* note 47, at 896.

B. INTERACTION WITH HUMAN RIGHTS TREATIES

Evaluating the quasi-legislative influence of assembly resolutions starts with existing human rights treaties. The assembly has performed a central role in stimulating an international consensus to support the eventual promulgation of the core human rights treaties.[96] The assembly's adoption of resolutions that preceded the promulgation of a treaty have, in turn, been used by actors as an aid in ascertaining the meaning of treaty terms, such resolutions effectively being used as part of these treaties' drafting history.[97] The assembly's contribution to the development and codification of international law has, on this measure, been significant.[98] However, the focus here is on the potential for assembly resolutions to influence the normative evolution of established human rights treaty regimes in response to violations. In this respect, the assembly has frequently drawn from human rights treaties in its resolutions, both in proffering an interpretation of the norms contained in these instruments and applying them in particular countries' situations.[99] The invocation of human rights treaties in assembly resolutions raises two issues.

The first is the legal basis for the assembly to purport to interpret human rights treaties, especially given that they have their own assigned mechanisms for interpretation and dispute resolution. Amongst several examples, some states thus resisted the assembly's construction of apartheid as a form of genocide as an impermissible overreach into an autonomous treaty regime (i.e., the Genocide Convention).[100] It was, on this view, a matter to be decided "by the appropriate legal bodies" pursuant to Article VIII of the Genocide Convention.[101] Yet, quite aside from the particulars of a specific treaty regime (the Genocide Convention

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[96] There are numerous treaties that have been based upon prior resolutions. *See, e.g.*, ICERD, *supra* note 11; International Convention on Suppression and Punishment of Crime of Apartheid, July 18, 1976, 1015 U.N.T.S. 243; CAT, *supra* note 11; CRC, *supra* note 11; *See also* Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28); Louis B. Sohn, *The Shaping of International Law*, 8 GA J. INT'L & COMP. L. 1, 19-20 (1978).

[97] *See, e.g.*, Prosecutor v Stakić, Case No. IT-97-24-A, Appeal Judgment, ¶ 22 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); G.A. Res. 96 (I), *supra* note 60; Genocide Convention, *supra* note 11.

[98] *See* Ramsden, *supra* note 84, at 68, 69.

[99] *See, e.g.*, G.A. Res. 74/143, Torture and other cruel, inhuman or degrading treatment or punishment, ¶ 4 (Dec. 18, 2019).

[100] 1986 U.N.Y.B. 750, U.N. Sales No. E.90.I.1.

[101] U.N. GAOR, 37th Sess., 108th plen. mtg., ¶ 121, U.N. Doc. A/37/PV.108 (Dec. 16, 1982).

does provide a mechanism for involving the assembly in advancing the object and purpose of this treaty), the assembly does have the legal power to draw from and interpret human rights treaty provisions in its resolutions.[102] Under Article 14 of the UN Charter, the assembly is able to recommend "measures for the peaceful adjustment of any situation," a provision which, according to Blain Sloan, is advanced where the assembly brings to bear on a situation rules of international law as a means towards peaceful adjustment.[103] Alongside Article 14, the assembly is competent under the charter to act within the fields in which human rights treaties operate, the maintenance of international peace and security and the promotion of human rights.[104] The assembly is also responsible within the UN Charter for the promotion and codification of international law as a means to further the principles and purposes of the charter.[105] The elucidation of multilateral treaties in assembly resolutions serves to add texture to the membership's understanding as to the content of these commitments, which, in turn, advance the UN Charter objectives.

Having established the legal power of the assembly to interpret multilateral treaties, the second issue is to determine the extent to which such constructions carry legal effects. According to the Vienna Convention on the Law of Treaties ("VCLT"), a treaty is to be interpreted textually in context and in light of its object and purpose.[106] Any "subsequent agreement" or "subsequent practice" of the parties concerning the interpretation of the treaty is also material to the construction of the treaty provisions.[107] While a "subsequent agreement" derives from a formal act of agreement between the parties to a treaty, "subsequent practice" involves a more holistic assessment of practice to establish "the agreement of the parties."[108] Aside from the "original" meaning of a treaty according to the drafting history, there is scope, as

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[102] Genocide Convention, *supra* note 11, art. VIII (explaining that state parties may "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide.").

[103] *See* SLOAN, *supra* note 58, at 77–81.

[104] *Id.* at 66.

[105] G.A. Res. 1686 (XVI), pmbl. (Dec. 18, 1961); G.A. Res. 1505 (XV), pmbl. (Dec. 12, 1960).

[106] Vienna Convention on the Law of Treaties art. 31(1), Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT].

[107] *Id.*, art. 31(3).

[108] Int'l Law Comm'n, *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, at 24, *reprinted in* [2018] 2 Y.B. Int'l L. Comm'n 199, U.N. Doc. A/73/10.

will be developed here, for assembly resolutions to provide evidence as to the treaty parties' interpretive consensus so as to support a subsequent agreement or subsequent practice as to the meaning of provisions in a human rights treaty.

This is, ultimately, an empirical question that requires a methodical evaluation as to how such resolutions have received the acceptance of parties within the treaty regime. In a major study, albeit one that did not provide much in-depth consideration of the legal effect of resolutions, the ILC has noted the assembly's affirmation of CCPR and CESCR General Comments to be subsequent agreements of the ICCPR and ICESCR respectively.[109] The common denominator here, of course, is that the assembly membership are also parties to these major multilateral treaties.[110] An assembly resolution is therefore capable of carrying interpretive weight with respect to treaties precisely because it provides a window into understanding the perspective of the multilateral treaty parties as to the meaning of such treaties. The second legal effect of assembly resolutions in this context reflects the structure of human rights treaties as embracing broad principles that gain specificity with practice.[111] The value of the assembly's declaration is that it adds texture and precision to broadly framed principles. This, in turn, serves to persuade and guide human rights decision-makers tasked with applying analogous principles on the ground.[112] In this regard, there are numerous examples where human rights treaty bodies draw from assembly human rights declarations to provide an authoritative and specified understanding of the principles outlined in such treaties.[113] As the

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[109] G.A. Res. 65/221, *supra* note 61, ¶ 5 n. 8; G.A. Res. 68/178, ¶ 5 n. 8 (Dec. 18, 2013); G.A. Res. 70/169, *supra* note 61.

[110] The ICCPR currently has 173 parties, with 171 parties to the ICESCR. *See* ICCPR, *supra* note 9; ICESCR, *supra* note 9.

[111] Clapham, *supra* note 70, at 112.

[112] *Id.* at 113.

[113] *See, e.g.*, Economic and Social Council: General Comment No. 24: State Obligations Under the ICESCR in the Context of Business Activities, Comm. on Econ., Soc, and Cultural Rts., ¶ 40, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017); Reparations Principles, *supra* note 85, ("[P]rovide useful indications as to the obligations that follow for states from the general obligation to provide access to effective remedies."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 3: Implementation of Article 3 by States Parties, Comm. Against Torture, ¶ 6, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012) (citing the Reparations Principles, *supra* note 85); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 3: Implementation of Article 3 by States Parties, Comm. Against Torture, ¶ 6, U.N. Doc. CAT/C/GC/3 (Dec. 13, 2012) (citing the Reparations Principles, *supra* note 85); Convention on the Elimination of all Forms of Discrimination Against Women: General Recommendation No. 27: Older Women and

CESCR observed in General Comment No. 5 (on Rights of Persons with Disabilities), a relevant assembly declaration on this topic was "of major importance and constitute[d] a particularly valuable reference guide in identifying *more precisely* the relevant obligations of states parties under the Covenant."[114] Similarly, the ICC has frequently been guided by assembly resolutions—for example, the Reparations Principles (above)—in the construction of provisions contained in the ICC Statute.[115] On this basis, even if assembly resolutions were not intended directly to modify the content of a multilateral treaty, such resolutions can be used to support interpretive claims regarding the precise meaning of general principles contained within those treaties.

On the other hand, assembly resolutions have a reduced capacity to influence the interpretive evolution of human rights treaties that are structurally less amenable to adaptation. This will arise where the nature of a treaty precludes legal developments that stray from the text. For example, the proscription of international crimes must conform with the principle of legality (*nullum crimen sine lege*).[116] A good illustration of this point arose when the ICJ considered the scope of resolutions' ability to inform the interpretation of "genocide" in the Genocide Convention.[117] In Resolution 47/121, the assembly declared the practice of "ethnic cleansing" (mass expulsion of populations) in Bosnia and Herzegovina

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Protection of their Human Rights, Comm. on the Elim. of Discrimination Against Women, ¶ 3, U.N. Doc. CEDAW/C/GC/27 (Dec. 16, 2010) (citing G.A. Res. 46/91, *supra* note 76); International Covenant on Economic, Social and Cultural Rights: General Comment No. 6: Economic, Social and Cultural Rights of Older Persons, Comm. on Econ., Soc, and Cultural Rts., ¶ 9 U.N. Doc. E/1996/22 (Dec. 8, 1995); International Covenant on Civil and Political Rights: General Comment No. 12: Article 1, The Right to Self-determination of Peoples, Hum. Rts. Comm., ¶ 7, U.N. Doc. HRI/GEN/1/Rev.9 (Mar. 13, 1984).

[114] Economic and Social Council: General Comment. No. 5: Persons with Disabilities, Comm. on Econ., Soc, and Cultural Rts., ¶ 7 ,U.N. Doc. E/1995/22 (1994), (citing G.A. Res. 48/96 (Dec. 20, 1993) (emphasis added)); *See also* Economic and Social Council: General Comment No. 21: Right of Everyone to Take Part in Cultural Life, Comm. on Econ., Soc, and Cultural Rts., ¶ 7, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) (citing G.A. Res. 48/96, *supra* note 76).

[115] *See, e.g.*, Prosecutor v. Lubanga, Reparations, ICC–01/04–01/06, ¶¶ 177, 185 (Aug. 7, 2012); Prosecutor v. Lubanga, Reparations, ICC–01/04–01/06, ¶ 100 (Mar. 3, 2015); Prosecutor v. Katanga, Reparations, ICC–01/04–01/07, ¶ 267 (Mar. 24, 2017); Prosecutor v. Bemba, Reparations, ICC–01/05–01/08, ¶ 19 (May 5, 2017); Prosecutor v. Al Mahdi, Reparations, ICC–01/12–01/15, ¶¶ 24–26 (Aug. 17, 2017); Prosecutor v. Lubanga, Victims' Participation, ICC–01/04–01/06, ¶ 92 (Jan. 18, 2008).

[116] As to the constraints placed on legal interpretive evolution by this principle, *see* Luke Marsh & Michael Ramsden, *Joint Criminal Enterprise: Cambodia's Reply to Tadić*, 11 INT'L CRIM. L. REV. 137 (2011).

[117] Genocide Convention, *supra* note 11.

was genocide.[118] However, the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro* was not prepared to read the Genocide Convention subject to Resolution 41/121.[119] Rather, the Genocide Convention was to be read according to its text and drafting history; the text did not include ethnic cleansing as a form of genocide, and the drafters explicitly rejected a proposal to include "measures intended to oblige members of a group to abandon their homes" as genocide.[120] In rejecting the relevance of Resolution 47/121, the ICJ held that "[n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous,' nor the operations that may be carried out to implement such policy, can as such be designated as genocide."[121]

Therefore, it can be gleaned that assembly resolutions are capable of contributing to the interpretive evolution of human rights treaties. Where an assembly resolution that seeks to articulate the meaning of a treaty provision is supported by that treaty's membership, the resolution is evidence of a subsequent agreement of those parties. The assembly, in this situation, is able to accelerate and enhance international consensus on the meaning of a treaty, as well as supplement the interpretive mechanisms within that treaty regime, as seen most prominently within the ICC.[122] In this respect, the proliferation of human rights treaty regimes provides scope for dialogue in the evolution of treaty norms.

C. INTERACTION WITH CUSTOMARY INTERNATIONAL LAW

Customary international law, as noted previously, is classically understood to contain two elements: state practice and *opinio juris*.[123] It is now generally recognized that assembly resolutions contribute to the establishment of customary international law.[124] The ILC's major 2018 study of customary international law noted that, although resolutions are acts of the organization, where they purport to touch upon legal matters,

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[118] G.A. Res. 47/121 (Dec. 18, 1992).

[119] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v Serb. & Mont.), Judgment, 2007 I.C.J. Rep. 43, ¶ 190 (Feb. 26).

[120] *Id.*

[121] *Id.*; *See also* Michael Ramsden, *The Crime of Genocide in General Assembly Resolutions: Legal Foundations and Effects*, 21 HUM. RTS. L. REV. 671, 679–681 (2021).

[122] *See supra* note 113.

[123] ICJ Statute, *supra* note 23, art. 38(1)(b).

[124] U.N. Doc A/73/10, *supra* note 108, at 147.

they offer insight into the attitudes of states towards such matters.[125] The ILC further noted that the assembly has a special role given its "virtually universal participation," that provides important evidence of collective state opinion.[126] The ICJ similarly noted that "*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of states towards certain General Assembly resolutions. . ."[127] While there is little doubt as to the possibility of the assembly supporting the identification of customary international law, the issue remains defining the extent to which it plays this role in the international human rights system.

At the outset, there is a conceptual distinction between an assembly resolution that declares the presence of pre-existing custom (*lex lata*) and one that crystallizes what was—until that point—emerging custom (*in statu nascendi*).[128] The declarative version fits most closely with the text of assembly resolutions (outlined in Part I(A) above), which have invariably been framed as recognizing preexisting laws rather than overtly supplying the missing element to transform an aspired norm into reality.[129] Moreover, some resolutions such as the Reparations Principles also expressly specify that the instrument is not designed to create new rules of custom.[130] This preference to confine resolutions to a declaratory role likely reflects reluctance on the part of some states to recognize the assembly as a legislative body.[131] Yet, although the assembly's quasi-legislative practice is ostensibly *lex lata*, it is an oversimplification to say it has never contributed towards the formation of new customary international law—or, at least, refined a vaguely-framed customary rule.

First, part of the nature of customary international law is that it often lacks the precision of a texts that outline the contours rules. This is especially problematic when identifying "early" custom or custom that predates the promulgation of an international convention on the topic.[132]

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[125] *Id.*

[126] *Id.*

[127] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.), Judgment, 1986 I.C.J. 14, ¶ 188 (June 27) (citing G.A. Res. 2625(XXV) (Oct. 24, 1970)).

[128] SLOAN, CHANGING WORLD, *supra* note 58, 68–70.

[129] *Id.*

[130] G.A. Res. 60/147, *supra* note 62, pmbl. (stating that the declaration does not "entail new international or domestic obligations").

[131] *See, e.g.*, recent statements by the U.S. representative in the Assembly: U.N. GAOR, 74th Sess., 50th mtg. at 17–18, U.N. Doc. A/74/PV.50 (Dec. 18, 2019) ("[R]esolutions adopted in the General Assembly are non-binding documents that do not create rights or obligations under international law.").

[132] SLOAN, CHANGING WORLD, *supra* note 58, at 69.

As Blaine Sloan once noted, the utility of a quasi-legislative resolution is in defining and specifying the rule contained within it.[133] Therefore, although the crime of genocide was said to have existed since time immemorial, it was Resolution 96(I) (1946) that first codified this crime in an international instrument.[134] This codification added texture and specificity to the offence that did not exist previously.[135] Courts have thus drawn from Resolution 96(I) to define elements of the crime, including the requirement of specific intent to "destroy the group as a separate and distinct entity."[136] The utility of assembly quasi-legislative resolutions is particularly apparent in the jurisprudence concerning post-World War II atrocity crimes, which at that time lacked the sophisticated international legal framework that exists today. It was Resolution 95(I) (1946) that affirmed the Nuremberg principles and established the legal foundation for the trials of members of the Third Reich.[137] As the Israeli Supreme Court noted in 1968, "any doubt" over the legal basis for Adolph Eichmann's trial was removed by the adoption of Resolution 95(I), which was "*all but conclusive evidence* of such a rule."[138] The absence of documentary sources to attest to customary international law in earlier times was also a problem in tribunals established to try historical crimes with a limited temporal jurisdiction, such as the Extraordinary Chambers in the Courts of Cambodia ("ECCC").[139] The ECCC has thus liberally referenced assembly resolutions adopted prior to the atrocities committed by the Khmer Rouge in 1975, including, most prominently, the UDHR.[140] In a similar manner, the European Court of Human Rights ("ECHR"), Inter-American Court of Human Rights ("IACHR"), and the African Court on Human and Peoples' Rights ("ACHPR") have all cited assembly resolutions to support its judicial interpretations of customary

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[133] *Id.*

[134] *See* RAMSDEN, INTERNATIONAL JUSTICE, *supra* note 84, at 29.

[135] *See, e.g.*, Reservations Advisory Opinion, *supra* note 96, at 23 (crime of genocide was binding "even without conventional obligation", referencing G.A. Res. 96(I), *supra* note 60).

[136] Prosecutor v Blagojević, Case No. ICTY-02-60-T, Judgment, ¶ 665 (Jan. 17, 2005).

[137] *See* RAMSDEN, INTERNATIONAL JUSTICE, *supra* note 84, at 25.

[138] CrimC 40/61 (Jer) Israel v. Eichmann, PM 5721(2), ¶ 11 (1961) (Isr.) (emphasis added).

[139] *See generally* Tom Hamilton & Michael Ramsden, *The Politicisation of Hybrid Courts: Observations from the Extraordinary Chambers in the Courts of Cambodia*, 14 INT'L CRIM L. REV. 115 (2014).

[140] Prosecutor v. Chea, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgment, ¶ 584 (Extraordinary Chambers in the Courts of Cambodia Nov. 23, 2016).

international law.[141] In short, despite the assembly's quasi-legislative role being confined to *lex lata*, its resolutions still have a persuasive effect on the development of custom by placing it in context of formulated rules accepted by the international community.

Second, quasi-legislative assembly resolutions serve to consolidate and elevate developments in specific legal regimes into a set of universally accepted principles (*in statu nascendi*). A prominent early example is Resolution 95(I) that affirmed the "principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal."[142] As the United States Military Tribunal III in *Justice* noted, the treaty and judgment were "declaratory of the principles of international law *in view of its recognition* as such by the General Assembly of the United Nations."[143] Similarly, the ICJ noted in *Chagos Islands* that Resolution 1514 represented "a *defining moment* in the consolidation of state practice on decolonization," giving expression to the customary international law right to self-determination.[144] The assembly's role as interpreter and consolidator of custom is also evident with the Reparations Principles, which are concerned with the rights of victims and draw from multiple sources of international human rights law.[145] The United Kingdom ("UK") Supreme Court in *Keyu* thus drew upon these principles when considering whether customary international law establishes a duty to investigate extrajudicial killings.[146] In noting that the duty to investigate emerged over the past twenty-five years (as of 2015), the court cited ECHR jurisprudence alongside the Reparations Principles, and noted the important role of the assembly in elevating the regional human rights principle to one of universal acceptance.[147] In this regard, although the assembly adopted the formal nomenclature of "declaration," it is also clear they have supplied the missing element—

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[141] *See, e.g.*, Aydın v Turkey, App No. 25660/94, Judgment, Eur. Ct. H.R., ¶ 153 (Aug. 24, 2005); Blake v Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 36 (Jul. 2, 1996); Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso, No. 204/97, Judgment, Afr. Ct. H.P.R., ¶ 44, (Apr. 23-May 7, 2001).

[142] G.A. Res 95(I), *supra* note 60.

[143] U.S. v Alstötter, 3 TWC 954, Opinion and Judgment, 968 (1951) (emphasis added).

[144] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95, ¶¶ 150–153 (Feb. 25) (emphasis added).

[145] G.A. Res. 60/147, *supra* note 62.

[146] Keyu v Secretary of State for Foreign and Commonwealth Affs., [2015] UKSC 69.

[147] *Id.* ¶¶ 113–14 (Lord Neuberger) (citing McCann v U.K. 21 Eur. Ct. H.R. 97 (1995) and the Reparations Principles).

universal acceptance—that brings cohesion to disparate regional or local human rights developments.

Third, a subset of assembly resolutions not originally intended to declare international law (*de lege ferenda*) have nonetheless had pre-substantive effects in explicating an aspired standard which has then been used to inspire norm convergence (or, at least, a dialogue between actors on the present state of custom).[148] The UDHR stands as the classic example of a resolution that was originally upheld as "common standard of achievement" but which gradually acquired, through usage, a status beyond that originally intended for it.[149] The influence of the UDHR both on the judicial development of human rights norms and international criminal law has been considerable—so much so that the ICTY Appeals Chamber in *Tadić* confidently noted it "*brought about* significant changes in international law."[150] This supports the notion that assembly quasi-legislative resolutions have gone beyond the mere restatement of existing law and contributed to the development of customary international law regarding human rights. That said, the assembly's aspirational standards have not always been adopted by other actors. The Reparation Principles, for example, open the door to corporate responsibility for human rights violations. Principle 15 notes that reparations should be provided to victims of any "person, a legal person, or other entity."[151] The Special Tribunal for Lebanon considered this principle to be "evidence of an emerging international consensus regarding what is expected in business activity, where legal persons feature predominantly, in relation to the respect for human rights."[152] Although not supporting the identification of custom at present, the assembly's articulation of aspired standards stimulates dialogue regarding standards around which future consensuses may emerge.

This analysis therefore shows the differing utility that resolutions have served, and can serve, in the identification and development of customary international human rights law. Resolutions *lex lata*, although restating existing law rather than purporting to establish new law, have

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[148] Marko Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT'L L. 879, 903–904 (2006).

[149] ILC, Survey of International Law, ¶¶ 196–7, U.N. Doc. A/CN.4/245 (Apr. 23, 1971); MYRES MCDOUGAL, HUMAN RIGHTS AND WORLD PUBLIC ORDER, 272–74 (1980).

[150] Prosecutor v Tadić, Case No. ICTY-94-1-T, Jurisdiction, ¶ 97 (Oct. 2, 1995) (emphasis added).

[151] G.A. Res. 60/147, *supra* note 62.

[152] Prosecutor v New TV SAL, STL-14-05/PT/AP/AR126.1, Interlocutory Appeal, ¶ 46, n.89. (Oct. 2, 2014).

still contributed to the development in the field of human rights given the specificity and precision it has given to previously vague or unwritten customs. Although never acknowledged by the assembly as such, resolutions have supplied the missing element (*opinio juris communis*) previously lacking in regional or local practices. Finally, resolutions *de lege ferenda* have also gained customary legal status in international life, as they provide a common standard around which an emerging consensus might emerge. The common theme across these three categories has been the very considerable contribution of assembly resolutions to the identification and formation of customary international human rights law. More generally, it also supports the assembly's involvement in the continued evolution of international human rights law, with, for example, the articulation of customary duties to combat human trafficking and to mitigate climate change.[153]

II. QUASI-JUDICIAL

As previously noted, a quasi-judicial power denotes the mandate of a political body to monitor compliance with a set of norms or to make evidence-based factual determinations.[154] The assembly is not explicitly bestowed a quasi-judicial power in the UN Charter. However, this part will show, it has a rich practice in legally evaluating human rights country situations and pronouncing on states of affairs in international relations. Yet, even this practice aside, reasonable interpretive claims can be advanced that this quasi-judicial power is permitted under the UN Charter as an incidence of the assembly's power to "discuss" and "recommend" measures on any "matters within the scope of the present charter," which include the promotion of human rights.[155] This is only subject to the rule that the UN is unable to "interfere" in a state's domestic jurisdiction. This provision has been read in an increasingly narrow manner over time so that it does not include human rights abuses and questions that implicate the "purposes and principles" of the UN.[156] More has been written elsewhere on the legality of quasi-judicial

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[153] *See* Ramsden, *supra* note 90; Human Rights Council Res. 17/4, *supra* note 92.

[154] *See generally* Mara Tignino, *Quasi-judicial bodies*, *in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING, 242–261 (Catherine Brölmann & Yannick Radi eds., 2016).

[155] U.N. Charter, *supra* note 35, arts. 10–14.

[156] *See* RAMSDEN, INTERNATIONAL JUSTICE, *supra* note 84, 109–11.

resolutions under the UN Charter.[157] Rather, the purpose of this part is to consider the general contours of this practice as it relates to human rights violations and to provide an overview of legal effects in the international human rights system. In turn, this practice supports future uses of the assembly to promote human rights in particular situations, as recent examples further demonstrate.

A. QUASI-JUDICIAL RESOLUTIONS PRACTICE

There are two broad categories in which the assembly's quasi-judicial resolutions in the field of human rights fall. The first has been recognition of "facts" and, conversely, the nonrecognition of certain facts. Both of these categories have had impact in human rights situations. As will be shown, not all this recognition is exclusively concerned with human rights, as it applies to other norms in general international law and UN institutional law. However, it is also clear from the resolutions that the promotion of human rights has been a factor underlying such practice of recognition. The second broad category of quasi-judicial resolutions involve the assembly in condemning human rights abuses in a country situation, typically by drawing upon the findings of commissions of inquiry.[158] In this regard, the assembly has applied a wide variety of human rights instruments to country situations, including human rights treaties, its own declarations, and provisions of the UN Charter (be that the human rights clauses, Articles 55–56, or more generally the "principles and purposes" of the charter).[159]

1. Resolutions that Recognize a State of Affairs

At the outset, there are several assembly resolutions addressing the governance of colonial territories and affirming the right of a people to self-determination. These have included resolutions to not recognize ongoing colonial occupation, to terminate a UN mandate, to establish an administrating authority, and to recognize the legitimacy of a group

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[157] *See generally* Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AM. J. INT'L L. 960, 960 (1964).

[158] *See, e.g.*, G.A. Res. 54/188, ¶¶ 1, 2 (Dec. 17, 1999); G.A. Res. 49/206, pmbl. (Dec. 23, 1994).

[159] *See, e.g.*, G.A. Res. 76/180, pmbl. (Dec. 16, 2021) ("*Guided* by the Charter of the United Nations and the Universal Declaration of Human Rights, the International Covenants on Human Rights and other relevant international law and human rights law instruments.").

purporting to represent an indigenous population.[160] A prominent example is provided in Resolution 36/121 (1981), in which the assembly recognized facts in relation to the Namibia question: that the South West People's Organization was the "sole and authentic representative of the Namibian people," thereby eschewing the continued illegal occupation of South Africa and affirming the rights of the people of Namibia to self-determination.[161] The most prominent recent example involving the assembly in supporting a claim of a people for statehood has been that of Palestine.[162] The assembly had long reaffirmed the right of Palestinians to self-determination but took this a step further in Resolution 67/19 (2012) in according Palestine nonmember observer state status in the UN, thereby augmenting the claim that Palestine meets the statehood criteria.[163]

The assembly also formed a view on the legal validity of factors related to the identification of human rights violations. This has arisen in a context where a people have been removed from their historical homeland or denied *en masse* human rights that are afforded to others. In response to the removal of the Azerbaijani from their homeland, Resolution 62/243 (2008) reaffirmed "the inalienable right of the population expelled from the occupied territories of the Republic of Azerbaijan to return to their homes."[164] Such findings have also extended to recognizing territory as belonging to a particular state, such as Resolution 69/286 (2015), that affirmed "the right of return of all internally displaced persons and refugees and their descendants, regardless of ethnicity, to their homes throughout Georgia, *including in* Abkhazia and the Tskhinvali region/South Ossetia."[165] Similarly, the assembly emphasized in Resolution 74/246 (2019) that the Rohingya Muslims "lived in Myanmar for generations prior to the independence of Myanmar" and were made stateless by the enactment of a national law and disenfranchised from the electoral process.[166] Conversely, the assembly also determined that particular conduct that negatively impacts human rights should not be recognized. This has arisen in the context of foreign occupations and the imposition of laws on indigenous

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[160] *See* G.A. Res. 2145 (XXI), at 3 (Oct. 27. 1966); G.A. Res. 2248 (May 19, 1967).
[161] G.A. Res. 36/121 A, pmbl. (Dec. 10, 1981).
[162] *See*, *e.g.*, G.A. Res. 66/17, ¶ 1 (Nov. 30, 2011); G.A. Res. 43/176, ¶ 2 (Dec. 15, 1988).
[163] G.A. Res. 67/19, ¶ 2 (Dec. 4, 2012).
[164] G.A. Res. 62/243, ¶ 3 (Mar. 14, 2008).
[165] G.A. Res. 69/286, ¶ 1 (Jun. 3, 2015) (emphasis added).
[166] G.A. Res. 74/246, pmbl. (Dec. 27, 2019).

populations. The assembly thus once proclaimed that the "racist regime of South Africa is illegitimate and has no right to represent the people of South Africa."[167] In relation to Israel's imposition of laws over the occupied Syrian Golan Heights, the assembly also declared that all legislative and administrative measures of the occupying regime that purport to alter its legal status were "null and void."[168] Similarly, Resolution 68/262 (2014) declared Russia's annexation of Crimea to be of "no validity" and recognized "the rights of all persons in Ukraine, including the rights of persons belonging to minorities."[169] All of these examples show that assembly resolutions on a wider set of international issues can also facilitate responses to human rights violations.

2. Resolutions that Condemn Human Rights Violations

Resolutions condemning human rights violations have arisen in several contexts. First, the assembly, with the purpose of advancing decolonization, adopted numerous resolutions condemning the human rights records of administering powers within colonial territories, including the failure to realize the right to self-determination of indigenous populations.[170] These have focused on particular events, such as extrajudicial use of force, treatment of prisoners, as well as systemic issues of a larger scale, like racial segregation in Rhodesia and South West Africa.[171] Second, another group of resolutions is concerned with human rights abuses arising during armed conflict or occupation, for example, the situations in Israel, Ukraine, Myanmar, and Syria.[172] Such resolutions typically provide a detailed catalogue of large scale human rights abuses, noting that, in some instances, such abuse rises to the level of international criminality and requires accountability.[173] Third, there are country-specific resolutions initiated outside of the colonial/conflict/occupation context, albeit less frequently and motivated

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[167] G.A. Res 31/6 I, ¶ 1 (Nov. 9, 1976); *see also* G.A. Res. 1883 (XVIII), on the government of Southern Rhodesia opposed by the population (Oct. 14, 1963).

[168] G.A. Res. 58/100, ¶ 3 (Dec. 17, 2003).

[169] G.A. Res. 68/262, ¶¶ 4–5 (Mar. 27, 2014).

[170] G.A. Res. 2184 (XXI), at 3 (Dec. 12, 1966); G.A. Res. 1567 (XV), at 1 (Dec. 18, 1960).

[171] *See* G.A. Res. 2074 (XX), at 4 (Dec. 17, 1965) (South West Africa); G.A. Res. 2022 (XX), at 4 (Nov. 5, 1965) (Southern Rhodesia).

[172] *See* G.A. Res. 76/228, pmbl. (Dec. 24, 2021); G.A. Res. 76/180, *supra* note 159, ¶ 1; G.A. Res. 76/179, ¶ 6 (Dec. 16, 2021); G.A. Res. 76/80, ¶ 3 (Dec. 9, 2021).

[173] *See, e.g.*, G.A. Res. 72/191, ¶ 32 (Dec. 19, 2017) (noting human rights abuse "some of which may constitute war crimes or crimes against humanity.").

by considerations peculiar to each situation.[174] In the seventy-sixth session, for example, the assembly condemned systematic human rights abuses in Iran and the Democratic People's Republic of Korea ("DPRK").[175] Common to these three categories, the assembly's quasi-judicial resolutions regarding country situations are typically accompanied by recommendations that exhort states to fulfil its positive obligations under human rights law, explain their conduct, and cooperate with UN investigatory mechanisms.[176]

The three generations of rights provide a further vantage point from which one can evaluate the scope of the assembly's quasi-judicial practice in condemning human rights abuses.[177] The full catalogue of civil and political rights violations have been used in quasi-judicial resolutions, although these have tended to focus on the most serious violations.[178] In the few instances where the assembly has inquired into human rights situations outside of the colonial/conflict/occupation context (see above), it has broadened its condemnation to cover civil and political rights violations arising typically in peacetime. For example, the efficacy or absence of anti-discrimination laws, the scope of the right to marry, and the continued imposition of the death penalty.[179] The assembly has also adopted resolutions covering a range of economic, social, and cultural rights, although these (as with civil and political rights) tend to focus on the most egregious violations.[180] Thus, given the major focus of the assembly's practice on conflict/occupation contexts, emphasis has thus been placed on the deleterious socioeconomic impact of such events on a civilian population (such as erosions to their cultural identity and their fair access to drinking water, food, and medical supplies) and the destruction of cultural heritage.[181] The occupation context has also seen the assembly be more prescriptive on the

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[174] *See generally* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 187–95 (3rd ed. 2014) (tracing the rise of the Assembly's quasi-judicial practice, as being attributed to a rise in international legality and human rights institutionalization).

[175] *See* G.A. Res. 76/178 (Dec. 16, 2021) (Iran); G.A. Res. 76/177 (Dec. 16, 2021) (Democratic People's Republic of Korea).

[176] *See infra* Part III.

[177] *See supra* Part I.

[178] *See, e.g.*, G.A. Res. 73/264, ¶¶ 1–2 (Dec. 22, 2018).

[179] *See* G.A. Res. 76/178, ¶¶ 5, 11 (Dec. 16, 2021).

[180] *See, e.g.*, G.A. Res. 76/177, *supra* note 175, ¶ 2(vii) (addressing "severe hunger, malnutrition, widespread health problems and other hardship" for the DPRK population).

[181] *See, e.g.*, G.A. Res. 76/228, *supra* note 172, ¶ 57; G.A. Res. 76/180, *supra* note 159, ¶ 1; G.A. Res. 76/179, *supra* note 172, ¶ 6; G.A. Res. 47/145, ¶¶ 3, 5, 9 (Dec. 18, 1992); G.A. Res. 47/143, ¶ 3 (Dec. 18, 1992).

socioeconomic standards that must be met by the occupying power, such as the restrictions imposed by Russia on the Crimea Tatars, "including the right to work, as well as the ability to maintain their identity and culture and to education in the Ukrainian and Crimean Tatar languages."[182] Finally, there is a large body of quasi-judicial resolutions on group rights, especially pertaining to decolonization, self-determination, and economic development.[183] As noted above in the context of derecognition, where the right to self-determination was denied in a timely manner by colonial authorities, the assembly has expressed disapproval.[184] However, not all group rights feature equally; there remains little sustained attention, as of yet, to the extent to which the right to a healthy environment has been met by states (although the HRC's recent adoption of a declaration on this topic might indicate the assembly's movement in this direction going forward).[185]

The assembly has also used its resolutions to advance novel or evolving interpretive legal claims in the application of international law. As noted above, the assembly characterized Serbia's forcible displacement on ethnic populations in Bosnia and Herzegovina as ethnic cleansing, a form of genocide.[186] It also once described apartheid in South Africa as genocide before shifting to an evaluation of such conduct as a crime against humanity.[187] As the next part shows, this practice (apartheid as a crime against humanity) did support the development of international law, unlike its notion of ethnic cleansing as genocide. Another recent development—despite the assembly having yet to adopt a declaration—has been for actors to observe the Guiding Principles on Business and Human Rights.[188] In Resolution 76/180 (2021), the assembly called upon "all business enterprises, including transnational corporations and domestic enterprises operating in Myanmar, to respect human rights."[189]

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[182] G.A. Res. 76/179, *supra* note 172, pmbl.

[183] *See, e.g.*, G.A. Res. 2184, *supra* note 170, at 3.

[184] *See, e.g.*, G.A. Res. 2151 (XXI), at 3 (Nov. 17, 1966).

[185] G.A. Res. 45/94 (Dec. 14, 1990) (affirming the need to ensure a healthy environment in 1990, although not thereafter).

[186] G.A. Res. 47/121, *supra* note 118, pmbl.

[187] G.A. Res. 41/103, pmbl. (Dec. 4, 1986).

[188] *See supra* note 92.

[189] G.A. Res. 76/180, *supra* note 159, ¶ 21; *See also* G.A. Res. 71/97, ¶ 12 (Dec. 6, 2016) (calling upon the HRC to apply the Guiding Principles to the Israeli occupation situation).

While the assembly is able to act quasi-judicially to condemn human rights abuses, it must also be acknowledged that there has been unease in this body to do so without the assistance of an independent judicial or fact-finding organ.[190] There have been occasions where the assembly has reacted to judgments, such as decisions from the ICJ and *ad hoc* international criminal tribunals, in its quasi-judicial resolutions on human rights situations.[191] The assembly has also introduced new actors into the quasi-judicial space through its creation of commissions of inquiry and requests to the ICJ for advisory opinions. These actors have, in turn, produced findings that added further legal support to the assembly's quasi-judicial resolutions, while also being of value within the human rights system. In this regard, it is helpful to briefly address assembly strategies to authenticate and deepen the persuasive force of its quasi-judicial instruments.

First, the assembly has created commissions of inquiry ("commissions") to investigate gross and systematic human rights violations.[192] Although the features of commissions are far from homogenous, a key function is fact finding, including the taking of statements from complainants and witnesses and gathering evidence.[193] Commissions will then produce a report (or a series of reports) identifying violations of human rights alongside a series of recommendations for action by UN organs and member states.[194] The rationale for these commissions has been to ensure that member states are in possession of the "fullest and best available information regarding a situation," as well as to enable the assembly to perform its responsibilities in the maintenance of international peace and security and the promotion of human rights.[195] Commission reports, in this respect, will frequently be referenced in assembly resolutions, for

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[190] *See supra* note 23, art. 38.

[191] *See generally* Michael Ramsden & Zixin Jiang, *The Dialogic Function of ICJ Provisional Measures Decisions in the UN Political Organs: Assessing the Evidence*, AM. UNIV. INT'L L. REV. (forthcoming 2022).

[192] *See generally* Michael Ramsden, *Cooperation with United Nations Atrocity Inquiries*, 45 FORD. INT'L L. J. 473, 474 (2022).

[193] Dapo Akande & Hannah Tonkin, *International Commissions of Inquiry: A New Form of Adjudication?*, EJIL:TALK! (Apr. 6, 2012), https://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/ [https://perma.cc/33DV-KQSD].

[194] *See, e.g.*, Rep. of the Detailed Findings of the Comm. of Inquiry on Hum. Rts. in N. Kor., Hum. Rts. Council on its Twenty-Fifth Session, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014) [hereinafter DPRK Report].

[195] *See, e.g.*, G.A. Res. 50/190, pmbl. (Dec. 22, 1995) (Kosovo); G.A. Res. 1132 (XI) (Jan. 10, 1957), pmbl. (Hungary); G.A. Res. 46/59, ¶ 10 (Dec. 9, 1991).

example, a conclusion that there were reasonable grounds to believe a genocide of the Rohingya minority occurred in Myanmar.[196]

Second, the assembly has requested advisory opinions from the ICJ.[197] The vast majority of these have not concerned human rights violations, or only tangentially.[198] Nonetheless, the assembly has on three occasions requested advisory opinions as part of a campaign to promote compliance with human rights law. In 1994, the assembly asked the ICJ whether "the threat or use of nuclear weapons in any circumstance [is] permitted under international law?"[199] The request did not expressly refer to the human rights implications of nuclear weapons use, although it did note the "serious threat to humanity" these weapons present and reminded the ICJ of prior assembly declarations declaring their use as a "crime against humanity."[200] In 2003, the assembly considered the legality of state conduct when it asked the ICJ to provide an advisory opinion on

> the legal consequences arising from the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem . . . considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions.[201]

Finally, in 2017, the assembly requested the ICJ to determine whether the process of decolonization was lawfully completed "when Mauritius was granted independence in 1968" and the "consequences under international law" arising from the UK's "continued administration of the Chagos Archipelago."[202] In making this request, the assembly noted that "all peoples have an inalienable right to the exercise of their sovereignty and the integrity of their national territory," citing Resolution

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[196] G.A. Res. 73/264, *supra* note 178, ¶ 1.

[197] Pursuant to U.N. Charter, *supra* note 35, art. 96.

[198] The full list of advisory opinions can be found here: *Advisory Proceedings*, https://www.icj-cij.org/en/advisory-proceedings (last visited Oct. 9, 2022) [https://perma.cc/ZQ5A-2KWU]; for those that tangentially raise human rights issues, *see, e.g.*, G.A. Res. 942 (X) (Dec. 3, 1955) (granting oral hearing to petitioners relating to the Territory of South West Africa); G.A. Res. 904 (IX) (Nov. 23, 1954) (discussing Assembly voting procedure on reports and petitions on South West Africa); G.A. Res 478 (V), at 74 (Nov. 16, 1950) (noting a context of the request being the ILC's study on "the whole subject of the law of treaties, including the question of reservations."); G.A. Res. 294, ¶ 3 (Oct. 22, 1949) (discussing certain obligations under peace treaties); G.A. Res. 338 (IV) (Dec. 6, 1949) (discussing the international status of South West Africa and obligations of South Africa).

[199] G.A. Res. 49/75 (K) at 16 (Dec. 15, 1994).

[200] *Id.*

[201] G.A. Res. ES-10/14 at 1 (Dec. 8, 2003).

[202] G.A. Res. 71/292, ¶ 1 (Jun. 22, 2017).

1514 (above).[203] Key aspects of the ICJ's findings from these three opinions were then incorporated into assembly resolutions, emboldening the assembly's quasi-judicial determinations that the relevant conduct was inconsistent with international law.[204] It can therefore be seen that the assembly has made use of the mechanisms available to it (advisory opinions and commissions of inquiry) to support its findings in country human rights situations.

B. Legal Effects of Quasi-Judicial Resolutions

There is a material distinction when evaluating the legal effects of the assembly's quasi-judicial resolutions between internal effects (i.e., within the UN Charter) and external (i.e., human rights regimes). Internally, the issue is whether and to what extent the assembly's quasi-judicial resolutions are capable of being considered "decisions," which bind UN membership.[205] Externally, the legal effect of assembly resolutions is primarily dialogic in that they support the application of legal norms to human rights actors. Both internal and external legal effects are considered.

1. Legal Effects Within the UN system

The legal effect of quasi-judicial resolutions within the framework of the UN Charter is tied to the debate regarding the binding nature of assembly resolutions. Here, the UN Charter draws a distinction between "recommendations" and "decisions." Only the latter, from a traditional perspective, can generate obligations for UN membership and other UN organs. Articles 25 and 94 also explicitly require members to comply with decisions of the Security Council and ICJ, respectively.[206] However, it is wrong to assume that the assembly is unable to make decisions. In being called upon to address the assembly's determination that South Africa had breached its mandate in Namibia (see above), the ICJ thus noted that:

> it would not be correct to assume that, because [the assembly] is in principle vested with recommendatory powers, it is debarred from adopting, in special cases within

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[203] *Id.*, pmbl.

[204] *See, e.g.*, G.A., 10th Em. Special Sess., 23rd mtg. at 12, U.N. Doc. A/ES-10/PV.23 (Dec. 8, 2003); G.A., 51st Sess., 79th mtg. at 3, U.N. Doc. A/51/PV.79, 3 (Dec. 10, 1996).

[205] S*ee* U.N. Charter, *supra* note 35, arts. 25, 94.

[206] *Id.*

> the framework of its competence, resolutions which make determinations or have operative design.[207]

In this regard, there are numerous provisions in the UN Charter that vest in the assembly decisional competencies concerning internal operational matters: membership admission and expulsion, acceptance of state delegate credentials, budget approval, and the validity of mandates over colonial territories.[208] These decisional powers necessarily involve the assembly making legal determinations. For example, when deciding whether to admit an entity to UN membership, the assembly must decide if the preconditions for membership are met, and particularly, if the entity is a "state."[209] Similarly, questions regarding the validity of a government can also arise in the course of determining the credentials of those seeking to represent a state in the assembly.[210] Where the credentials are uncontested, this poses few issues. But where there are rival claims to represent a state, the assembly must evaluate each claim according to a set of norms "in light of the purposes and principles of the charter and the circumstances of each case."[211]

It is therefore apparent that the assembly does make decisions. The issue, then, is the extent to which these decisions are based upon human rights considerations. As an incidence of its UN membership admission powers, the assembly thus played a significant role in supporting the realization of the right to self-determination through its recognition of new states in the Global South, thereby permanently rebalancing international relations by incorporating postcolonial states.[212] Conversely, assembly determinations of human rights abuse have been used to deprive states of some of their membership rights and privileges, like the decision to remove Libya's HRC membership by applying the norm that no state that "commits gross and systematic violations of human rights" should have a seat in this body.[213] In a similar manner, the

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[207] Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 105 (June 21).

[208] *See*, *e.g.*, U.N. Charter, *supra* note 35, arts. 17, 4, 5, 6.

[209] *Id.*, art. 4.

[210] *See* G.A. Rules of Procedure, U.N. Doc. A/520/Rev.18, at 8 (Feb. 21, 2017); ROSALYN HIGGINS, PHILIPPA WEBB, DAPO AKANDE, SANDESH SIVAKUMARAN, & JAMES SLOAN, OPPENHEIM'S INTERNATIONAL LAW: UNITED NATIONS, 183–184 (2017) (noting practice of the Assembly's Credentials Committee).

[211] G.A. Res. 396, ¶ 1 (Dec. 14, 1950).

[212] *See* Chagos Advisory Opinion, *supra* note 144, ¶ 132–163 (noting that the General Assembly played a "crucial role").

[213] *See* G.A. Res. 60/251, *supra* note 48, ¶ 9; G.A. Res. 65/265, ¶ 1 (Mar. 1, 2011) (suspending Libya's membership of the Human Rights Council).

assembly rejected credentials of the delegate of the apartheid regime of South Africa on the basis that this regime was not acting faithfully to the UN Charter's purposes and principles.[214] This is not to claim, however, that the assembly has consistently applied human rights so rigorously as a factor in its decision-making. In contrast to its denial of South Africa's credentials on human rights grounds, the assembly continued to recognize the credentials of the genocidal Khmer Rouge regime despite the fact it lacked the characteristics of a government given that it was forced into exile.[215] Nonetheless, the broader point here is that the assembly's quasi-judicial determinations are capable of producing legal effects within the UN order with human rights as an important factor in its decisions.

2. Legal Effects in the Wider Human Rights System

The assembly's quasi-judicial resolutions have supported legal responses using human rights regimes in numerous ways. First, they have supported the evidentiary conclusions of courts and international institutions in addressing specific human rights violations. Second, quasi-judicial resolutions have contributed towards an understanding as to an international state of affairs that has in turn been used by actors to support investigations into human rights abuses. Third, quasi-judicial resolutions have also contributed towards the prescriptive development of international human rights law. Each will be dealt with in turn.

Assembly resolutions have been used by courts to support their evidentiary conclusions in the implementation of human rights norms. In *Chiragov v. Armenia*, the ECHR used Resolution 62/243 (2008) to establish that a population expelled from their homes in Azerbaijan during the Nagorno-Karabakh conflict had a right to return.[216] In doing so, it supported the finding of interference with the right to peaceful enjoyment of possessions.[217] Similarly, the European Court of Justice drew upon the assembly's characterizations on Palestine and Middle

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[214] *See* G.A. Res. 3207 (XXIX) at 2 (Sept. 30, 1974) (rejecting credentials due to South Africa's "flagrant violation" of the U.N. Charter); G.A. Res. 2636 (XXV) at 6 (Nov. 13, 1970); KONSTANTINOS MAGLIVERAS, EXCLUSION FROM PARTICIPATION IN INTERNATIONAL ORGANIZATIONS, 203–229 (1999).

[215] *See* Suellen Ratliff, *UN Representation Disputes: A Case Study of Cambodia and a New Accreditation Proposal for the Twenty-First Century*, 87 CALIF. L. REV. 1207, 1208 (1999).

[216] Chiragov v. Armenia, App. No. 13216/05, ¶ 195 (Jun. 16, 2015), https://hudoc.echr.coe.int/eng?i=001-155353 [https://perma.cc/UBP2-LH96].

[217] *Id.* ¶ 196.

Eastern conflicts to ascertain particular facts in these situations, including displacement.[218] In the Bosnian genocide case, the ICJ's conclusion that "mass killings" occurred was corroborated by assembly resolutions and the ICTY took judicial notice as to the occurrence of genocide in Rwanda, drawing again from the assembly's pronouncements.[219] Yet, there are also instances where the assembly's findings have gone beyond merely corroborating events, instead providing the factual foundation for a court's exercise of jurisdiction. The ICJ's recent provisional measures order in *The Gambia v. Myanmar* liberally referenced determinations made in assembly resolutions, together with a commission report, to support the conclusion that the Rohingya risked irreparable prejudice if an interim order was not granted.[220] The feasibility of the allegations made was integral to the ICJ being able to exercise jurisdiction under the Genocide Convention and was bolstered by numerous findings in assembly resolutions.[221] These resolutions established that there were reasonable grounds to believe that genocide had occurred.[222] In this regard, the assembly supported the ICJ's jurisdiction through its factual focus regarding the crime.

The ICC's ability to consider the occurrence of international crimes has, similarly, been enabled by a variety of assembly pronouncements. The assembly's conferral of "non-member observer state status" on Palestine in Resolution 67/19 (2012) was thus used by the ICC Prosecutor to support the opening of an investigation into crimes committed in Palestine.[223] According to the Prosecutor, Resolution 67/19 was "*determinative* of Palestine's ability to accede to the [ICC]

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[218] Case C-31/09, Bolbol v. BAH, 2010 E.C.R. I-5572.

[219] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, at 153-54 (Feb. 26); Prosecutor v. Stanišić, Case No. IT-08-91-T, Judicial Notice, 67 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 1, 2010), https://www.icty.org/x/cases/zupljanin_stanisicm/tdec/en/100401.pdf [https://perma.cc/GM7Y-HKVQ]; Prosecutor v. Karemera, Case No. ICTR-98-44-AR73(C), Judicial Notice, ¶ 35 (Int'l Crim. Trib. for Rwanda Jun. 16, 2006), https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/ICTR-98-44/MSC22557R0000550490.PDF [https://perma.cc/WF3X-A8AD].

[220] Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measure Decision, 2020 I.C.J. 3, ¶¶ 30, 55, 56, 75 (Jan. 23).

[221] *See* Ramsden, *supra* note 13, at 180.

[222] *Id.*

[223] Press Release, International Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination of the Situation in Palestine (Jan. 16, 2015); Ramsden & Hamilton, *supra* note 47, at 904.

Statute. . . ."[224] Similarly, when considering the capacity of Palestine to accede to the ICC Statute, the ICC Pre-Trial Chamber noted that it did not have the authority to challenge the validity of assembly resolutions, noting Resolution 67/19 "*drastically changed the practice* of the United Nations secretary-general as regards its acceptance of Palestine's terms of accession to different treaties," given that the secretary-general now accepted Palestine was able to enter into international agreements.[225] In other situations, assembly resolutions have helped to resolve contested territorial questions. Assembly resolutions—including Resolution 69/286 (2015)—recognizing South Ossetia as a part of Georgia later supported the exercise of jurisdiction over the Georgia situation, finding that, "for the purposes of the application," South Ossetia was "part of Georgia at the time of the commission of the alleged crimes."[226] Finally, the ICC Prosecutor drew from the assembly's determination over the invalidity of the Crimea referendum and annexation (Resolution 68/262 (2014) above) to support the conclusion that the "situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation."[227] In turn, this provided "the legal framework for the Office's ongoing analysis of information concerning crimes alleged to have occurred."[228] Assembly resolutions, at least in these contexts, have thus had a considerable influence in supporting accountability before the ICC. While the ICC is the master of its own jurisdiction, problems arise when this institution pronounces on contested issues in international relations, like statehood recognition and territorial disputes.[229] Assembly resolutions, in this respect, have augmented the ICC's jurisdiction by resolving contested issues of international law.

Furthermore, the legal impact of the assembly's quasi-judicial instrument also must consider those bodies it empowers to furnish legal conclusions as part of a legal compliance strategy: commissions of inquiry and the ICJ. There is nascent literature forming on the impact of commissions of inquiries in the international legal system: *The Gambia*

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[224] International Criminal Court Press Release, *supra* notes 223.

[225] Situation in the State of Palestine, Case No. ICC-01/18, Decision on the Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ¶¶ 95–98 (Feb. 5, 2021) (emphasis added).

[226] Situation in Georgia, Case No. ICC-01/15, Request for Authorisation of an Investigation Pursuant to Article 15, ¶ 54 (Oct. 13, 2015).

[227] Int'l. Crim. Ct., *Report on Preliminary Examination Activities*, at 35 (Nov. 14, 2016).

[228] Int'l. Crim. Ct., *Report on Preliminary Examination Activities*, at 20 (Dec. 4, 2017).

[229] *See* Ramsden & Hamilton, *supra* note 47, at 904.

v. Myanmar case shows their potential to not only embolden the quasi-judicial claims in resolutions, but also to also augment a strategic litigation campaign seeking redress for victims of human rights abuses.[230] Similarly, while ICJ advisory opinions are "advisory,"[231] the Court's opinions have produced "legal findings with significant legal and political implications."[232] The legal significance of advisory opinions, in this respect, is tied to other legal effects noted in this article—particularly in strengthening the legal claims stated in resolutions.[233] Yet, beyond resolutions, the advisory opinions have also taken on a life of their own in the international human rights system, offering a more sophisticated understanding of the content and scope of human rights norms, including their relevance in armed conflict and occupied territories.[234] They have augmented the decision-making of other international organizations and also prompted the assembly to take remedial action in specific human rights situations, as with the creation of the UN Register of Damage to enable individual victims to file reparations claims against Israel following the *Israeli Wall* advisory opinion.[235]

Quasi-judicial resolutions have overlapped with those of a quasi-legislative character in contributing towards the development of international law. In this regard, sometimes the declaration of a norm (quasi-legislative) and its application (quasi-judicial) are fused in the same resolution, thereby supporting the evolution of norms through application. For example, the assembly's repeated condemnation of apartheid in South Africa as a crime against humanity ultimately led to the crystallization of this proscription in customary international law.[236] The crime against humanity of enforced disappearances, similarly,

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[230] *See* Ramsden, *supra* note 13; *See also* Eliav Lieblich, *At Least Something: The UN Special Committee on the Problem of Hungary, 1957–1958*, 30(3) EUR. J. INT'L L. 843, 844 (2019), (discussing the impact of commissions of inquiry on stimulating dialogue and action).

[231] *Compare* U.N. Charter, *supra* note 35, art. 94(1) *with* art. 96.

[232] Jorge Contesse, *The Rule of Advice in International Human Rights Law*, 115 AM. J. INT'L L. 367, 376 (2021).

[233] *See* Lee Deppermann, *Increasing the ICJ's Influence as a Court of Human Rights: The Muslim Rohingya as a Case Study*, 14 CHI. J. INT'L L. 291, 314 (2013) (illustrating how an advisory opinion might also be used by international institutions to support action, as with international financial institutions denying State aid).

[234] *See, e.g.*, Andrea Bianchi, *Dismantling the Wall: The ICJ's Advisory Opinion and its Likely Impact on International Law*, 47 GERMAN Y.B. INT'L L. 1, 1 (2004); Dale Stephens, *Human Rights and Armed Conflict - The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 YALE HUM. RTS. & DEV. L.J. 1, 1 (2001).

[235] G.A. Res. ES-10/17, pmbl. (Dec. 15, 2006).

[236] *See, e.g.*, G.A. Res. 36/172 A, pmbl. (Dec. 17, 1981).

emerged from a series of resolutions condemning such practices.[237] The situational application of norms has also been used by courts to aid in the identification of custom. Thus, when the assembly determined genocide occurred in a Beirut refugee camp, the ICTY was able to deduce from this the proposition that genocide is capable of being committed in a small geographical area (similarly, that it does not need to be geographically widespread).[238] A series of quasi-judicial resolutions have also been cited by international bodies such as the International Committee on the Red Cross to support their interpretive claims in relation to customary international humanitarian law.[239] The assembly's quasi-judicial resolutions are thus able to support a dialogue with human rights regimes in identifying state consensus on the content of international law, including an emerging consensus.[240]

III. RECOMMENDATORY

Having analyzed the reception of the assembly's quasi-legislative and quasi-judicial resolutions in the international human rights system, the following part will consider practice that has a clearer textual basis in the UN Charter: the power to recommend states or other actors to take a course of action specified in the resolution. Article 10 of the UN Charter thus grants the assembly the power to discuss any matter falling within the charter's scope and to make recommendations on such matters to states, the Security Council, or both.[241] Article 11, similarly, recognizes a power of recommendation specifically in the area of international peace and security, allowing it to "make recommendations with regard to any such questions to the state or states concerned or to

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[237] *See* Prosecutor v. Chea, Case No. 002/19-09-2007-ECCC/TC, Judgment, ¶ 446 (Extraordinary Chambers in the Courts of Cambodia Aug. 7, 2014), https://www.eccc.gov.kh/en/document/court/case-00201-judgement [https://perma.cc/K9VZ-9HTZ] (following Trial Chamber Judgment hyperlink).

[238] Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 589 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), https://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf [https://perma.cc/VM7Y-FAFY].

[239] *See* INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME II: PRACTICE (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2015).

[240] *See, e.g.*, Prosecutor v. Chea**,** Case No. 002/19-09-2007/ECCC/TC, Ne Bis In Idem Decision, ¶¶ 48–49 (Extraordinary Chambers in the Courts of Cambodia Nov. 3, 2011); Prosecutor v. Ayyash, Case No. STL-11-01/1, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 106 (Special Tribunal for Lebanon) (Feb. 16, 2011).

[241] U.N. Charter, *supra* note 35, art. 10.

the Security Council or to both."[242] Article 14 also permits the assembly to recommend measures "for the peaceful adjustment of any situation" in which it "deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present charter."[243]

A. RECOMMENDATIONS PRACTICE AND EFFECTS

As these charter provisions show, the assembly is plainly able to recommend that states and the Security Council take measures to address human rights violations, having done so extensively. Recommendations are closely tied to quasi-judicial determinations: a finding that human rights violations have occurred is invariably accompanied by a recommendation that the state take steps to address such violations.

Recommendations to offending states have thus taken various forms that correspond broadly with the legal requirements on such states to remedy human rights violations.[244] The assembly has called upon, often in very strong terms, the cessation of ongoing unlawful acts against civilian populations and to undertake their positive obligations to realize rights.[245] There is a large cluster that requires the offending state to investigate or prosecute human rights violations, including the repeal of domestic laws that stand in the way of the effective discharge of these obligations.[246] Another cluster calls for states to cooperate with international bodies to discharge human rights obligations, especially UN commissions of inquiry.[247] The assembly has also sought to bolster its own authority by calling for human rights offending states to explain and account for their actions before this body, including to submit reports to

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[242] *Id.* art. 11.

[243] *Id.* art. 14.

[244] SHELTON, *supra* note 26, at 13.

[245] *See, e.g.*, G.A. Res. 76/228, *supra* note 172, ¶ 29; G.A. Res. 76/178, ¶¶ 5, 28 (Dec. 16, 2021); G.A. Res. 67/262, ¶ 4 (May 15, 2013); G.A. Res. 49/205, ¶ 3 (Dec. 23, 1994); G.A. Res. 48/153, ¶ 15 (Dec. 20, 1994); G.A. Res. 44/143, ¶ 4 (Nov. 15, 1989); G.A. Res. 40/161, ¶ 4 (Dec. 16, 1985); G.A. Res 40/64, ¶ 7 (Dec. 10, 1985); G.A. Res. 33/182, ¶ 17 (Dec. 21, 1978); G.A. Res. 35/227, ¶ 20 (Mar. 3, 1981); G.A. Res. 32/122, ¶ 4 (Dec. 16, 1977); G.A. Res. 1600 (XV), at 23 (Apr. 15, 1961).

[246] G.A. Res. 74/246, *supra* note 166, pmbl; G.A. Res. 57/179, pmbl. (Dec. 18, 2002); G.A. Res. 52/135, ¶ 9 (Dec. 12, 1997); G.A. Res. 1567, *supra* note 170, ¶ 1.

[247] G.A. Res. 74/246, *supra* note 166, ¶ 4; G.A. Res. 72/191, *supra* note 173, ¶ 33; G.A. Res. 67/262, *supra* note 245, pmbl; G.A. Res. 38/79, ¶ 16 (Dec. 15, 1983); G.A. Res. 385 (V), at 16 (Nov. 3, 1950); As to other bodies, *see, e.g.*, G.A. Res. 71/253, ¶ 17 (Dec. 23, 2017) (ICC); G.A. Res. 54/184, ¶¶ 6, 37 (Dec. 17, 1999) (ICTY).

future sessions, thereby forming a view whether such explanations were satisfactory.[248] This has included a requirement for states to "clarify the fate" of those that were missing or unaccounted for.[249] From the perspective of victims, there are also a large body of recommendations for offending states to provide reparations for human rights violations, including compensation.[250] These have drawn from ICJ advisory opinions that they strategically requested (as discussed in Part II above), including in demanding Israel to "make reparation for all damage caused by the construction of the wall."[251] Finally, recommendations to offending states have also incorporated those adopted by human rights bodies, such as the CCPR and CESCR, calling upon states to take various measures to conform with their treaty obligations.[252]

Aside from recommendations to offending states, the assembly has also called for others to take action against this offender. These recommendations have thus extended beyond the offending state in calling upon the international community, including business enterprises, to take steps available to them to advance human rights in relation to a particular situation.[253] In instances where the territorial state has failed to comply, the assembly has also invited other member states to conduct investigations where feasible: for example, it encouraged states to "prosecute crimes within their jurisdiction committed in the Syrian Arab Republic."[254] The assembly has also recommended the Security Council to act under Chapter VII in a variety of contexts relating to the enforcement of human rights violations, including to establish *ad hoc* criminal tribunals, impose economic sanctions, refer a situation to the

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[248] *See, e.g.*, G.A. Res. 39/95, ¶ 1 (Dec. 14, 1984); G.A. Res. 385 (V), *supra* note 247, at 16; G.A. Res. 44 (I), ¶ 3 (Dec. 8, 1946).

[249] G.A. Res. 38/100, ¶ 6 (Dec. 16, 1983); G.A. Res. 37/183, ¶ 5 (Dec. 17, 1982); G.A. Res. 49/203, ¶ 5 (Dec. 23, 1994); G.A. Res. 40/140, ¶ 6 (Dec. 13, 1985); G.A. Res. 33/175, ¶ 2 (Dec. 20, 1978).

[250] G.A. Res. 65/208, ¶ 3 (Dec. 21, 2010); G.A. Res. 65/205, ¶ 19 (Dec. 21, 2010); G.A. Res. 62/134, ¶ 1 (Dec. 18, 2007); G.A. Res. 59/200, ¶ 6 (Dec. 20, 2004); G.A. Res. 58/238, ¶ 15 (Dec. 23, 2003); G.A. Res. 48/153, *supra* note 245, ¶ 13; G.A. Res. 1567, *supra* note 170, ¶ 5; G.A. Res. 50/193, ¶ 12 (Dec. 22, 1995); G.A. Res. 41/39 A, ¶¶ 7, 59 (Nov. 20, 1986); G.A. Res. 41/38, ¶ 4 (Nov. 20, 1986); G.A. Res. 41/12, ¶ 3 (Oct. 29, 1986); G.A. Res 49/203, *supra* note 249, ¶ 5.

[251] G.A. Res. 70/90, ¶ 11 (Dec. 9, 2015).

[252] *See, e.g.*, G.A. Res. 76/177, *supra* note 175, pmbl.; G.A. Res 64/238, ¶ 16 (Dec. 24, 2009); G.A. Res. 58/146, ¶ 8 (Dec. 22, 2003).

[253] *See, e.g.*, G.A. Res. 76/180, *supra* note 159, ¶¶ 19, 21.

[254] G.A. Res. 72/191, *supra* note 173, ¶ 36.

prosecutor of the ICC, and to consider supporting the termination of South Africa's UN membership due to its apartheid policies.[255]

These "remedial" recommendations in turn raise the question about their efficacy in the international human rights system. Whereas the previous two parts of this article focused on the role of quasi-legislative and quasi-judicial resolution in augmenting the legal claims of actors in human rights regimes, the recommendations instrument should primarily be measured by the extent to which its subject implements its terms.[256] The extent to which recommendations have been politically effective, in exerting pressure on states or the Security Council to modify their behavior, is not explored in detail here, although some correlations have been drawn by scholars and diplomats between recommendations and the alteration of these actors' preferences.[257] On the other hand, assembly recommendations have been less effective in the "hard cases" of internal armed conflict and state failure.[258] In any event, understanding recommendations as having legal effects, as the next part argues, would in turn augment the collective legalization instrument by providing the assembly with a legal tool to hold to account human rights violators.

B. RECOMMENDATIONS AS BINDING

The assembly's exercise of recommendatory powers raises the question about the extent to which its recipients are under a legal requirement to observe them. Blaine Sloan once theorized that assembly recommendations are capable of acquiring legal force through practice and where there is an intention on the part of the membership to be

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[255] G.A. Res. 74/246, *supra* note 166, ¶ 16; G.A. Res. 71/203, pmbl. (Dec. 19, 2016); G.A. Res. 71/202, ¶ 9 (Dec. 19, 2016); G.A. Res. 69/189, pmbl. (Dec. 18, 2014); G.A. Res. 47/121, *supra* note 118, ¶ 10; G.A. Res. 31/61, ¶ 6 (Dec. 9, 1976); Higgins, *supra* note 210, at 961 (assembly recommendations to the Security Council "has increased exponentially").

[256] Assembly recommendations are frequently referenced in commission of inquiry reports as steps that the state under study should observe. *See, e.g.*, DPRK Report, *supra* note 194, ¶ 1220; Rep. of the Indep. Int'l. Comm'n. of Inquiry on the Protests in the Occupied Palestinian Territory, Hum. Rts. Council on its Fortieth Session, U.N. Doc. A/HRC/40/74, ¶ 125 (2019).

[257] *See, e.g.*, Ramsden & Hamilton, *supra* note 45, at 899 (discussing the Security Council's referral to the ICC of the Libya situation); Igor Lukashuk, *Recommendations of International Organisations in the International Normative System*, *in* INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 31, 40 (William Butler ed., 1987); U.N. GAOR, 73rd Sess., 65th mtg. at 10, U.N. Doc. A/73/PV.65 (Dec. 21, 2018); Zeray Yihdego, *The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding*, 13 MEL. J INT'L L. 1, 53 (2012).

[258] *See* U.N. GAOR, 60th Sess., 58th mtg. at 27, U.N. Doc. A/60/PV.58 (Nov. 30, 2005).

bound by them.[259] In this respect, the focus here is to consider the legal nature of recommendations, which, once conceived in legal terms, can be used to add impetus behind a campaign to modify state or Security Council preferences to implement such recommendations. This legal analysis has two parts. The first part considers the possibility, as Blaine Sloan once anticipated, that recommendations legally acquire binding force in the international human rights context.[260] The second part is whether, even if no usage has emerged, recommendations entail some minimal legal requirements of observance. This legal debate centers around the obligations of states arising from their UN membership to act in good faith.

1. Binding Nature of Recommendations

The scope for recommendations to acquire binding force requires application of the sources of international law (i.e., treaties and custom) together with the principles of treaty interpretation under the VCLT.[261] In relation to treaties, there are two possible avenues. Within the UN Charter, a subsequent agreement or subsequent practice might emerge that treats assembly recommendations as binding.[262] Yet, within the field of human rights no such subsequent agreement or practice is readily discernible. The assembly has not directly affirmed in general terms the binding force of its recommendations in the field of human rights, although it has frequently used language that suggests its observance to be mandatory, such as "demands" or "requests," while also expressing condemnation in instances where a recommendation is not observed.[263] However, all of these iterations do not establish a subsequent practice in the interpretation of the UN Charter. Notwithstanding the mandatory language contained in some recommendations, there is little evidence that member states intended the use of such language to instill in recommendations a binding character; in the instances where states have

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[259] SLOAN, *supra* note 31, at 22.

[260] *Id.*

[261] VCLT, *supra* note 106, art. 31.

[262] Some assembly resolutions have been recognized as subsequent agreements in the interpretation of the UN Charter. *See* ILC, Draft conclusions on subsequent agreements, *supra* note 108, 99, n.545; NIGEL WHITE, THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE 38 (2002) (Assembly resolutions adopted by consensus may be regarded as subsequent agreements).

[263] *See, e.g.*, G.A. Res. 74/168, ¶ 1 (Dec. 18, 2019); G.A. Res. 67/262, *supra* note 245, pmbl., ¶ 7.

indicated as much, these have tended to be isolated remarks.[264] Nor is the assembly always consistent; for example, a "demand" to cooperate in one resolution is replaced with a mere "call" for that state to do so in another.[265] A more plausible explanation for the selective use of mandatory language in recommendations is that it seeks to deepen the moral imperative for compliance or otherwise reflects the international obligations that are referenced.[266] This is a subtle difference, but the basis for the demand flows not from the assembly's legal authority but from the preexisting, independent, human rights obligation specified in the recommendation.[267] Another possible basis for recommendations being binding within the UN Charter is where a member state agrees to be bound by a recommendation, thereby engaging the general principle of estoppel.[268] However, there are only rare instances of member states so agreeing to be bound.[269] Outside of the UN Charter, other treaty regimes might attach a binding quality to an assembly recommendation within their specific regime. One successful example is the Peace Treaty with Italy, where the major post World War II powers agreed that, in the event that they were unable to arrive at agreement on the future of Italian colonies, the matter should be "referred to the [assembly] for a recommendation, and the four powers agree to accept the recommendation and to take appropriate measures for giving effect to it."[270] Still there is limited practice of this nature and other attempts to incorporate assembly recommendation into human rights treaty regimes have met with less success.[271]

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[264] Ramsden, *supra* note 192, at 481–494.

[265] *Id.*

[266] *Id.*

[267] *See* U.N. Secretary-General, *Question Concerned by the First Emergency Special Session of the General Assembly from 1 to 10 November 1956: report of the Secretary-General in pursuance of the resolution of the General Assembly of 2 February 1957 (A/Res 461)*, U.N. Doc. A/3527, ¶ 20 (Feb. 11, 1957) (referencing pre-existing obligations as strengthening a recommendation).

[268] A prominent example of this is the statement by Comoros when applying for membership of the U.N., which included the pledge that it "undertakes to abide by the Charter and by *all the resolutions which have been or will be* adopted by the General Assembly." U.N. Secretary-General, *Application of the Comoros for Admission to Membership in the United Nations*, U.N. Doc. A/10293 & S/11848, 2 (Oct. 9, 1975) (emphasis added).

[269] *See id.*

[270] Treaty of Peace with Italy, annex XI, ¶ 3, Feb. 10, 1947, 61 Stat. 1245, T.I.A.S. 1648 (emphasis added).

[271] *See* Final Record of the Diplomatic Conference of Geneva of 1949, *Seventh Report drawn up by the Special Committee of the Joint Committee*, 121, Vol. II, Sec. B (July 16, 1949) (proposing to confer a role on the Assembly in the Geneva Conventions and ICC Statute); Prosecutor v. Limaj, Case No. ICTY-06-66-T, Judgment, ¶¶ 85–86 (Nov. 30, 2005); Rep. of the Preparatory Comm'n

In relation to customary international law, it is possible that states come to recognize assembly recommendations in a particular field as binding, although there is no evidence of states having done so. A variation of this theme is that states treat a course of action recommended by the assembly to be reflective of custom. For example, it is arguable that a series of assembly recommendations calling upon various states to "clarify the fate" of those who disappeared or were unaccounted for led to the formulation of an obligation in customary international law to so explain their whereabouts.[272] A recommendation of this nature thus has a mutually reinforcing relationship with customary international law, both in authenticating the customary rule while strengthening the impetus to comply with the recommendation. In this regard, as the assembly recommendation is underpinned with the force of a customary obligation, it increases the pressure on the recipient state to engage as a means to discharge its customary obligation.[273] For example, as already noted, the assembly has frequently recommended states to investigate and prosecute human rights violations, as well as to ensure reparations for victims, all of which are international obligations that exist independently of the assembly recommendation.[274] The assembly has often followed up by condemning states where they fail to observe the recommendations and the international obligations that underpin them.[275] In this case, the value of a recommendation derives from the interpretive claim advanced by a sizeable portion of the international community (be that by consensus or a voting super majority) that the obligations set out in the recommendations require observance for the relevant state to be on the right side of international law.[276] The incorporation of obligations into recommendations also brings with it the benefit of supporting the progressive development of international law, in that the assembly is able to provide greater specificity and precision to such international

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for the ICC: Part II, Proposals for a Provision on the Crime of Aggression, at 2, U.N. Doc. PCNICC/2002/2/Add.2 (2002); Rep. of the Informal Inter-sessional meeting of the Special Working Grp. on the Crime of Aggression, at 13–14, U.N. Doc. ICC-ASP/4/SWGCA/INF.1 (2005); Turin Rep., U.N. Doc. ICC-ASP/6/INF.2, at 27–29 (2007).

[272] *See, e.g.*, G.A. Res. 38/100, *supra* note 249, ¶ 6; G.A. Res. 37/183, *supra* note 249, ¶ 5.

[273] Secretary-General, *supra* note 267, ¶ 2; Schachter, *supra* note 157, at 961.

[274] *See, e.g.*, *supra* note 85.

[275] *See, e.g.*, G.A. Res. 1663 (XVI), ¶ 1.

[276] This interpretive claim is sometimes contained in explanations of vote, *e.g.*, U.N. GAOR, 67th Sess., 80th plen. mtg. at 34, U.N. Doc. A/67/PV.80 (May 15, 2013) ("It is important that a clear message be sent today to demand that the Syrian authorities strictly observe their obligations under international law.").

obligations. However, these developments do not, as such, establish binding assembly recommendations as a form of subsequent practice in the interpretation of the UN Charter.

2. Good Faith Consideration of Recommendations

Even if assembly practice has not developed to encompass binding recommendations in the field of human rights, it is instructive to also consider whether the adoption of recommendations entail any form of legal requirement. Even if recommendations are not binding, there are good arguments to support the proposition that member states are still required to give a good faith consideration to what is recommended, including to account to the assembly. The requirement to act in good faith is a general principle of treaty interpretation and is enshrined in Article 2(2) of the UN Charter, which defines this duty to apply to the fulfilment of "obligations assumed by them in accordance with the present charter."[277] It could be argued that recommendations are not "obligations" and therefore the duty to act in good faith does not apply to such exhortations. However, it is reasonable to construe good faith to apply to all aspects of member states' interactions within the UN system, including their consideration of assembly recommendations.

This view has some basis in assembly and wider UN practice. Although assembly resolutions have not tended to explicate a requirement for recommendations to be considered in good faith, the assembly's Fact-Finding Declaration noted that member states should give "timely consideration" to any UN request to them to cooperate with commissions of inquiry, informing the "organ of its decision without undue delay," "giving reasons for its decision" if it refuses the request.[278] Although the Fact-Finding Declaration addresses expectations incumbent upon member states in a particular field of UN activity (i.e. fact-finding), it is submitted that these statements are of general application to instances in which UN organs call upon member states to do particular things (also including assembly recommendations).[279] Judge Hersch Lauterpacht reinforced this point in *South West Africa Voting Procedure*, concerning the administration of colonial trust territories, where he noted

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[277] U.N. Charter, *supra* note 35, art. 2, ¶ 2; VCLT, *supra* note 106, art. 26.

[278] G.A. Res. 46/59, *supra* note 195, ¶¶ 19–20.

[279] Indeed, the use of the phrase "declaration," as already noted in Part I of this Article, is intended to convey greater solemnity to the prescriptive force of an expressed principle. *See* U.N. Office of Legal Affairs, *supra* note 59, ¶ 3.

that while a state was not required to accept or implement an assembly recommendation, it was "bound to give it due consideration in good faith."[280] According to Judge Lauterpacht, those recommendations entailed "some legal obligation which, however rudimentary, elastic, and imperfect, is nonetheless a legal obligation."[281] In turn, the freedom of a state to reject a recommendation was "not a discretion tantamount to unrestricted freedom of action."[282] In the event that a state decided to disregard the recommendation it was still "bound to explain the reasons for its decision."[283] Similar reasoning can be found in *Whaling*, where, in the context of recommendations of the International Whaling Commission ("IWC"), the ICJ noted that Japan was obliged to give "due regard" to such recommendations.[284] This was grounded in the "duty to cooperate" incumbent upon states of an international authorization and, according to Judge Hilary Charlesworth, the duty "to consider these resolutions in good faith."[285] Although comments were made in the context of a different plenary organ (i.e., the IWC), the ICJ was espousing a general principle of international institutional law; that its members have to act in good faith in relation to its interactions with the relevant institution.

Still, it is open to question the extent to which the good faith principle is meaningful in the context of assembly recommendations, given that it only imposes a requirement for member states to consider the recommendation and to give reasons where it refuses to implement it. Even the most recalcitrant of states that have resisted international accountability for human rights abuses, such as apartheid South Africa and the Tatmadaw in Myanmar, have been consistent in the reasons as to why they reject assembly recommendations (these reasons mostly centering on the alleged bias of the assembly's quasi-judicial

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[280] South West Africa Voting Procedure, Advisory Opinion, 1955 I.C.J. Rep. 67, 119 (Jun. 7) (separate opinion by Lauterpacht, J.).

[281] *Id.* at 218–19.

[282] *Id.* at 120.

[283] *Id.*; *See also* Interpretation of the Agreement between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. at 95, 97 (Dec. 20) (requirement to "consult together in good faith"); Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. Rep. 3, ¶ 75 (Jul. 25) (duty to consult "corresponds to the principles and provisions of the Charter of the United Nations on peaceful settlement of disputes.").

[284] Whaling in the Antarctic (Aust. v. Jap.), Judgment, 2014 I.C.J. Rep. 226, 270, ¶ 137 (Mar. 31).

[285] *Id.* at 457–58 (separate opinion by Charlesworth, J.).

determinations).[286] Nonetheless, the good faith principle provides the assembly with some measure of supervision over member states, imposing a burden of explanation and providing an additional source of legal pressure on recalcitrant states. The assembly has thus requested member states to answer accusations of human rights violations, as with Sudan to "explain without delay the circumstances of the repeated air attacks on civilian targets," and forming a view in subsequent sessions whether the response provided a "satisfactory refutation" of the accusations.[287] There have also been repeated calls, as noted above, for states to "clarify the fate" of those who have disappeared, including very specific requests on Iraq to furnish "detailed information" on all persons deported from or arrested in Kuwait, records of those who were executed, as well as their grave locations.[288] It has also requested member states to submit reports at future designated sessions "on the measures it has undertaken in the implementation of the present resolution."[289]

Accordingly, this practice supports the requirement on member states, pursuant to the good faith principle, to provide a substantive explanation on its conduct and to indicate the measures it has taken to address the human rights concerns set out in the recommendation. This raises the question about when a member state should be deemed to have acted in "bad faith." This is ultimately a matter for the assembly to determine and articulate in its subsequent recommendations. Indeed, there have been numerous occasions in which the assembly has condemned member states for failing to engage with recommendations and the processes that support them.[290] Reference to conduct amounting to bad faith can also be gleaned from the UN Charter as arising in situations of "persistent" breaches, as specified in Article 6, as supplying the basis for the assembly to expel a member state (upon recommendation of the Security Council).[291] Judge Lauterpacht explained bad faith in similar terms as abuse of right, noting that the "cumulative effect of the persistent disregard of the articulate opinion of the organization is such as to foster the conviction that the state in question has become guilty of disloyalty to the principles and purposes of the

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[286] *See, e.g.*, U.N. GOAR, 74th Sess., 52d mtg., at 32, U.N. Doc. A/74/PV.52 (Dec. 19, 2019); Ramsden, *supra* note 13, at 170.

[287] G.A. Res. 49/198, ¶ 6 (Dec. 23, 1994); G.A. Res. 385 (V), *supra* note 247, ¶ 4.

[288] G.A. Res. 49/203, *supra* note 249, ¶ 5.

[289] G.A. Res. 1742 (XVI), ¶ 9 (Jan. 30, 1962); *see also* G.A. Res. 38/79, *supra* note 247, at 67.

[290] *See* Ramsden, *supra* note 84, at 162.

[291] U.N. Charter, *supra* note 35, art. 6.

charter."[292] On this basis, the recalcitrant state "may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right."[293]

It can therefore be seen that, while assembly practice has not developed to instill in recommendations a binding character in the field of international human rights law, the duty to act in good faith extends to member states' considerations of assembly recommendations. In turn, the assembly has sought to monitor country situations by imposing a burden of explanation on states, coupling this with a condemnation in those instances where states have failed to cooperate.[294] Conceiving of the good faith duty as imposing some obligations on states in relation to recommendations in turn supports the assembly's closer engagement with this duty in future recommendations, including to determine instances where states have failed to discharge this duty.

IV. AUTHORIZING COERCIVE MEASURES

The final power to discuss here is the extent to which the assembly is able to authorize coercive action against a state. Coercion here means the taking of action against a state without their consent.[295] Under Chapter VII of the UN Charter, it is the Security Council that is granted with power to take coercive action, which includes two relevant tools in particular: the imposition of economic sanctions and authorizing intervention into a state's territory to advance a humanitarian objective.[296] However, the council has failed to use these powers in response to documented human rights violations, despite strong calls to do so from the international community of states.[297] To overcome this impasse, creative solutions explored here include the possibility for the assembly to assume an analogous authorizing function. This possibility is explored both in relation to the imposition of economic sanctions and the use of force, particularly in the use of the doctrines of humanitarian intervention

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[292] South West Africa Voting Procedure, *supra* note 280, at 120.

[293] *Id.*

[294] *See* G.A. Res. 49/198, *supra* note 287, ¶ 6; however, this practice is by no means consistent and there are countless occasions in which the Assembly has criticized state recalcitrance without tying this to an underlying legal obligation. *See, e.g.*, G.A. Res. 38/79, *supra* note 247, ¶ 1.

[295] *See* G.A. Res. 2625, *supra* note 127, pmbl.

[296] U.N. Charter, *supra* note 35, arts. 41–42.

[297] *See* TRAHAN, *supra* note 38.

and humanitarian assistance to avert human rights violations within a state.

A. ECONOMIC SANCTIONS

Within the text of the UN Charter, the power to sanction is textually the reserve of the Security Council, who, pursuant to Article 41, is able to take measures to restore or maintain international peace and security.[298] Still, there is a body of assembly practice in recommending member states to sanction offending states so as to promote compliance with international law and obligations under the UN Charter.[299] Often these recommendations have been adopted in a context of Security Council inaction, with the failure of this body to impose mandatory sanctions leading the assembly to recommend member states to sanction deviant states on the basis of their own legal authority.[300] These "voluntary sanctions" recommendations have arisen to address a variety of deviant conduct, including systematic human rights violations and denial of the right to self-determination, with the assembly believing such measures to be necessary to prevent further violations.[301] The nature of the recommended sanctions have also varied widely, including the breaking of diplomatic relations; closure of sea and air ports; trade boycotts; severance of cultural relations; targeted sanctions against individual perpetrators; and arms embargoes.[302] In relation to the latter, the assembly called upon member states to "prevent the flow of arms into Myanmar" in response to the 2021 coup d'état that led to violence against protestors.[303]

The assembly's voluntary sanctions resolutions raise questions of internal legality and legal effects. There is also a separate question, explored in detail elsewhere, whether such recommendations have been politically effective and, more generally, whether sanctions are the most

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[298] U.N. Charter, *supra* note 35, art. 41.

[299] G.A. Res. 1742, *supra* note 289, ¶ 7 ("requests [members] to use their influence to secure the compliance of Portugal with the present resolution."); G.A. Res. 1593 (XV), pmbl. (Mar. 16, 1961).

[300] Higgins, *supra* note 210, at 972, 977.

[301] *See, e.g.*, G.A. Res. 2054 (XX) A, ¶ 6 (Dec. 15, 1965); G.A. Res. 1807 (XVII), ¶¶ 6–7 (Dec. 14, 1962); G.A. Res. 1761 (XVII), ¶ 8 (Nov. 6, 1962).

[302] G.A. Res. 69/188, ¶ 8 (Dec. 18, 2014); G.A. Res. 41/35, ¶ 7 (Nov. 10, 1986); G.A. Res. 37/184, ¶ 5 (Dec. 17, 1982); G.A. Res. 37/69, ¶ 2 (Dec. 9, 1982); G.A. Res. 34/93, ¶ 12 (Dec. 12, 1979); G.A. Res. 2107 (XX), ¶ 7 (Dec. 21, 1965); G.A. Res. 1474 (ES-IV), ¶ 6 (Sept. 20, 1960).

[303] G.A. Res. 75/287, ¶ 7 (Jun. 18, 2021).

efficacious way to deter and prevent human rights violations.[304] Whatever the answer to this question, it is clear that the assembly is legally able to recommend member states to sanction offending states. This authority stems from a combination of textual powers (as a form of recommendation that promotes, amongst other objectives, the realization of human rights under Article 13 of the UN Charter) and based upon the subsequent practice in the interpretation of the charter.[305] In relation to legal effects, a more theoretical question is whether the assembly would be permitted to directly authorize sanctions that would otherwise be inconsistent with international law. By this it means to provide the legal authority for states to impose sanctions on an offending state. It refers to what Judge Lauterpacht once referred to as the scope for assembly resolutions to, "on proper occasions," provide a "legal authorization" for states to act.[306] To be clear, a state's decision to sanction another state is not automatically unlawful, even if unfriendly. However, the legality of sanctions continues to be debated and, ever increasingly, their legality is subjected to particular treaties, including trade agreements, development aid treaties, or human rights treaties.[307] Indeed, the assembly has also disapproved of "unilateral coercive measures" (i.e., those taken by states of their own volition) as contrary to international law.[308] On what legal basis or bases might the assembly therefore serve to legally authorize sanctions?

The answer to this partially depends upon the effect of resolutions within the UN order and partly on the scope for resolutions to interact with established doctrines of state responsibility. Within the UN system, as already noted, it is the Security Council that is empowered to take enforcement action, including to authorize sanctions under Chapter VII, a decision which, pursuant to Article 103 of the Charter, has the effect of releasing states from any conflicting obligations in implementing sanctions against the offending state.[309] Article 103 therefore serves a useful legal purpose where the implementation of

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[304] *See, e.g.*, Arne Tostensen & Beate Bull, *Are Smart Sanctions Feasible?*, 54 WORLD POL. 3, 373 (2002); Dursun Peksen, *When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature*, 30 DEF. & PEACE ECON. 6, 635 (2019).

[305] *See supra* Part I.

[306] South West Africa Voting Procedure, *supra* note 280, at 115.

[307] *See* Devika Hovell, *Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions*, 113 AJIL UNBOUND 140, 145 (2019).

[308] *See, e.g.*, G.A. Res. 74/154, pmbl. (Dec. 18, 2019).

[309] U.N. Charter, *supra* note 35, art. 103.

Security Council mandated sanctions by states would otherwise violate international law. Yet, even without having effect within the UN system, assembly resolutions are still capable of having an extrinsic effect.[310] Given their quasi-judicial character, resolutions can certify the existence of a state of affairs that have the effect of precluding otherwise wrongful acts.[311] This invites consideration over the possible interaction between assembly resolutions and the laws of state responsibility, as articulated in the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA").[312]

One clear route is the doctrine of countermeasures, which serves to preclude wrongful acts of a state taken to incentivize another state to comply with its obligations.[313] In this respect, as the International Law Commission has observed, the commission by one state of an internationally wrongful act may justify another state injured by that act in taking nonforcible countermeasures in order to procure its cessation and to achieve reparation for the injury.[314] For a countermeasure to preclude a wrongful act, it must meet a number of conditions, in being made proportionately, aimed at inducing compliance of the offending state, limited temporally to the period the breach, and not operating in a manner that undermines peremptory norms.[315] There is, however, a limit as to which states are able to invoke countermeasures against an offending state. Ordinarily, countermeasures are limited to the "injured state," although this concept can be extended where the international obligations are owed to a group of states or are of an *erga omnes* character.[316] The scope of *erga omnes* obligations have long been debated, but in general terms incorporates, as the ICJ in *Barcelona Traction* originally noted, "the basic rights of the human person" (i.e.,

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[310] RAMSDEN, *supra* note 84, at 214.

[311] *Id.*

[312] *See* ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. Doc. A/56/10 (2001).

[313] *Id.* at 31.

[314] *Id.* passim.

[315] *Id.* at 76, 131.

[316] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, at 32 (Feb. 5); Linos-Alexandre Sicilianos, *Countermeasures in Response to Grave Violations of Obligations Owed to the International Community*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, 1137, 1146–47 (James Crawford et al. eds., 2010).

human rights) including protection from slavery and racial discrimination.[317]

Although a course of action that has never been taken, there is scope for the assembly to expressly invoke the doctrine of countermeasures in its resolutions to support state action brought with an aim to induce an offending state into compliance with its human rights obligations. There are some assembly resolutions that have engaged with the conditions for the valid invocation of countermeasures, such as the recommendation that states introduce sanctions of limited duration and only for the limited purpose of bringing the offending state back into compliance.[318] However, this practice is lacking in depth and not, as such, intentionally directed towards assisting states in overcoming conflicting obligations owed to the offending state.[319] Due to this lack of assembly practice, neither the ARISWA nor customary international law recognizes the authorizing effect of assembly resolutions under the doctrine of countermeasures.[320] Assembly resolutions that engage with the doctrine of countermeasures would therefore have a persuasive force, but not, as such, definitely provide a legal justification under this doctrine. That said, the involvement of the assembly in certifying these conditions can serve to alleviate concerns arising from abuse that might arise in a single state, or a small group, determining this unilaterally.[321]

B. HUMANITARIAN INTERVENTION AND ASSISTANCE

Having noted the possibility that assembly resolutions provide a legal authorization for states to impose sanctions, another mooted possibility is for the assembly to authorize incursions into a state in order to prevent or halt large-scale human rights abuses and other humanitarian crises including natural disasters and the structural effects of armed conflicts on civilians.[322] Possible assembly responses to such abuses and crises, in this respect, can be viewed through two concepts. First, a

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[317] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, at 32 (Feb. 5); 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*, 77 BRIT. Y.B. INT'L L. 333, 347 (2007).

[318] G.A. Res. 37/184, ¶ 5 (1982).

[319] RAMSDEN, *supra* note 84, at 215.

[320] *Id.*

[321] *See* Hovell, *supra* note 307, at 140.

[322] *See, e.g.*, Carswell, *supra* note 40, at 453.

"humanitarian intervention" entails the use of military force within a state against agents or installations responsible for atrocity crimes against a civilian population with the purpose of averting or halting abuses and to secure the long-term interests of that population.[323] Second, "humanitarian assistance," by contrast, is focused on the more limited purpose of providing aid, such as food or medical supplies, to a civilian population within a state affected by an armed conflict.[324] While these doctrines involve radically differing levels of response, it is also clear that international law does not generally recognize the legality of such forms of intervention absent host state consent.[325] Before delving into these legal issues, it is also necessary to note that the scope for assembly involvement in providing legal justification for these operations remains largely hypothetical. The assembly has never recommended or purported to authorize a humanitarian intervention, although it has often expressed its concern at escalating crises, with member states occasionally mooting the possibility of a resolution to support military intervention.[326] Similarly, the assembly has also never called on states or other groups to enter a state to provide humanitarian assistance without host state consent, although it has expressed on numerous occasions its view on the urgent need for assistance to civilian populations, or for the territorial state concerned to provide access to humanitarian agencies.[327] Yet, as states continue to explore creative solutions to overcome Security Council deadlock, there are legal possibilities for the assembly to obviate humanitarian crises through the adoption of resolutions that legally augment state responses to such crises.

The starting point is to acknowledge that the scope for the assembly to authorize humanitarian intervention or assistance is circumscribed by the UN Charter and customary international law. Article 2(4) prohibits states "from the threat or use of force against the territorial integrity or political independence of any state," with Article 51 enshrining the "inherent right of individual or collective self-defense if an

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[323] *See* Michael Ramsden, *Uniting for Peace and Humanitarian Intervention: The Authorising Function of the UN General Assembly*, 25 WASH INT'L L. J. 267, 273 (2016).

[324] DAPO AKANDE & EMANUELA-CHIARA GILLARD, OXFORD GUIDANCE ON THE LAW RELATING TO HUMANITARIAN RELIEF OPERATIONS IN SITUATIONS OF ARMED CONFLICT 46 (2016).

[325] Ramsden, *supra* note 323, at 281.

[326] *See* Nigel White, *Relationship between the Security Council and General Assembly*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 293, 306 (Marc Weller ed., 2015).

[327] *See, e.g.*, G.A. Res. 76/124, ¶ 3 (Dec. 10, 2021); G.A. Res. 71/93, ¶ 20 (Dec. 6, 2016); G.A. Res. 49/21, ¶ 7 (Dec. 20, 1994); G.A. Res. 33/183, ¶ 2 (Jan. 24, 1979).

armed attack occurs" against a UN member state.[328] A humanitarian crises within a state, such as food or water insecurity, is not an "armed attack," which denotes a cross border incursion involving military force.[329] By contrast, a humanitarian crises typically occurs within a state and the effects of such crises, such as a mass exodus of refugees, cannot constitute an armed attack.[330] That said, a humanitarian assistance will not typically involve the "use of force," provided, of course, that the aid agencies do not use force within the territory as part of their humanitarian assistance operation. Although not covered by the Article 2(4) prohibition, the provision of humanitarian assistance violates the host state's territorial integrity and therefore, absent the host's consent, is illegal.[331] Within the UN system, it is the Security Council that is empowered to overcome these legal obstacles, having the power to take coercive measures under Chapter VII, i.e., against the will of the host state concerned.[332] There are instances where humanitarian factors have influenced the council's authorization of military force and provided legal authority for UN agencies and their partners to provide humanitarian assistance (as with Syria).[333] Nonetheless, and in keeping with the theme of this article, the Security Council has exercised these powers only selectively and occasionally against the will of a large body of states that have called for firmer action in given situations.[334] Is there scope for the assembly to overcome the legal obstacles to humanitarian intervention and humanitarian assistance so as to support the taking of action by willing states?

In relation to humanitarian intervention, the assembly could theoretically certify that the conditions for a humanitarian intervention exist, which is typically formulated as being concerned with averting or halting atrocities against a civilian population.[335] However, the difficulty here is that the permissibility of humanitarian intervention outside the framework of Security Council action under Chapter VII remains highly

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[328] U.N. Charter, *supra* note 35, arts. 2(4), 51.

[329] Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgment, 1986 I.C.J. 14, ¶ 194 (June 27).

[330] Bruno Simma, *NATO, UN And Use Of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 5 (1999).

[331] *See* AKANDE & GILLARD, *supra* note 324, ¶ 143.

[332] U.N. Charter, *supra* note 35, arts. 41–42.

[333] *See, e.g.*, S.C. Res. 688, ¶ 3 (Apr. 5, 1991) (discussing no-fly zones in Iraq).

[334] *See* S.C. Res. 2165, ¶ 3 (Jul. 14, 2014) (discussing the gradual watering down of the humanitarian assistance clause in Security Council resolutions on the Syria situation); S.C. Res. 2533, ¶ 1 (Jul. 11, 2020).

[335] *See* Ramsden, *supra* note 192, at 509.

debatable and practice is by no means uniform on the permissibility of states taking military action in the territory of another state.[336] The assembly had also affirmed the primacy of council power in responding to atrocity situations in its Responsibility to Protect resolution.[337] This reflects a reluctance on the part of states generally to clothe unilateral humanitarian interventions with legal authority, operations which have tended to operate within a space of normative and strategic ambiguity.[338] Nonetheless, it is possible for the assembly to specify that the requirements of a putative customary international law of humanitarian intervention have been met in a particular case, thereby supporting the legal claims of intervening states. However, the contentious nature of this issue will likely lead to many negative votes and abstentions, thereby weakening its quasi-judicial claims.[339] The likelihood of significant opposition was a reason, in fact, why NATO states ultimately decided against obtaining an assembly resolution to support its intervention in Yugoslavia.[340]

There is more room, given the narrower ambit of humanitarian assistance operations, for the assembly to make quasi-judicial determinations that the conditions are met to justify the provision of such assistance by humanitarian agencies. In this respect, the utility of an assembly resolution will be in providing evidence to supporting states and humanitarian agencies that the conditions for assistance are met. In December 2021, the assembly has moved in the direction of evaluating the necessity of humanitarian assistance in the Syrian situation, which, until a point, had occurred across the Turkish and Syria border:

> *Emphasizing* that the humanitarian cross-border mechanism remains an essential and life-saving channel to address the humanitarian needs of a significant portion of the population of the Syrian Arab Republic, which cannot be reached through existing operations within the Syrian Arab Republic, and emphasizing the importance of cross-line operations and also that an immediate and significant improvement to cross-line access and respect for principled humanitarian action are essential to prevent further unnecessary suffering and loss of life.[341]

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[336] *Id.*

[337] G.A. Res. 60/1, ¶ 139 (Sep. 16, 2005).

[338] *See* Ramsden, *supra* note 323.

[339] *See* WHITE, *supra* note 326, at 306.

[340] *Id.* at 312.

[341] G.A. Res. 76/228, *supra* note 172, pmbl.

Still, the assembly did not ultimately go the next step and purport to provide a legal authority for humanitarian assistance, instead urging the Security Council to take action to ensure the reopening of the cross-border mechanism for humanitarian aid.[342] But on what basis would humanitarian assistance be permissible, especially given the customary right of non-intervention that states enjoy? There is arguably a duty on host states to consent to humanitarian assistance from third parties under the ICESCR to secure "minimum essential levels" of the rights enshrined in the covenant, which includes the rights to food, water and medicine.[343] Yet, this duty would not, as such, serve to preclude the wrongfulness of an intervention by a third-party state; it would, rather, simply place the host state in violation of its obligation. However, there is scope for the assembly to confirm an understanding of the ICESCR, as a subsequent agreement in the interpretation of this treaty, that in turn strengthens the nature of a duty to grant consent to humanitarian assistance operations.[344] But in terms of actually precluding action by third parties that would otherwise be inconsistent with international law (i.e., entering the host state to provide humanitarian assistance) there is arguably a basis in the doctrine of necessity, as recognized under the ARSIWA.[345] In a situation of "grave and imminent peril," the doctrine of necessity will preclude the wrongfulness of an intervention where it is the only way of "safeguarding an essential interest."[346] In advancing this possibility, Rebecca Barber noted that the doctrine of necessity provides a feasible basis in which to support humanitarian assistance given the threat that inaction poses to fundamental human rights, including threats to the right to life arising from starvation or a devastating epidemic.[347] In this respect, the assembly could feasibly adopt a resolution in a country situation

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[342] *Id.* ¶ 20.

[343] ICESCR, *supra* note 9, art. 2(1); International Covenant on Economic, Social and Cultural Rights: General Comment No. 12: The Right to Adequate Food, Comm. on Econ., Soc, and Cultural Rts., ¶¶ 14–17, U.N. Doc. E/C.12/1999/5 (1999); International Covenant on Economic, Social and Cultural Rights: General Comment No. 3: The Nature of States Parties Obligations, Comm. on Econ., Soc, and Cultural Rts., ¶ 10, U.N. Doc. E/C.12/1999/5 (1990).

[344] *See infra* Part I (discussing the subsequent agreement doctrine).

[345] G.A. Res. 56/83, art. 25 (Jan. 28, 2002); The other circumstances precluding wrongfulness are countermeasures, consent, self-defence, force majeure, and distress. *Id.*, arts. 20–24.

[346] Int'l Law Comm., Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 80 (2012) (Supp. 10). Int'l Law Comm., Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at 118 (2011).

[347] *See generally* Rebecca Barber, *Does International Law Permit the Provision of Humanitarian Assistance Without Host State Consent? Territorial Integrity, Necessity and the Determinative Function of the General Assembly*, 23 Y.B. INT'L HUMANIT. L. 85 (2020).

declaring that the conditions of the necessity doctrine exist and that humanitarian assistance is necessary for the survival of the civilian population at issue. As with most other quasi-judicial resolutions, while it will not be irrefutable, it will strengthen the evidentiary basis for such action in the rare event that the matter was ever litigated and would provide, in the immediate term, an assurance of legality for humanitarian actors in providing assistance to civilians without host state consent.[348]

V. CONCLUSION

Despite the rise of an international human rights system, little attention has, until now, been devoted to systematic analysis of the collective legality instrument as a function of the assembly in responding to human rights violations. Exploring the broad contours of the assembly's collective legality instrument opens up strategic possibilities for states to use the assembly to address gaps in the protection of human rights as well as to mitigate existing limitations in the system of human rights governance. These governance gaps arise from a lack of political will in the institutions allocated legal powers to act (i.e., the Security Council) and also due to the fragmentation of approach arising from the proliferation of human rights mechanisms in the international system. The strength and potential of the assembly's collective legality instrument flows from its democratic institutional advantage, in comprising a near universal membership of states with equal voting rights. In evaluating four domains of the assembly's collective legality instrument—quasi-legislative, quasi-judicial, recommendatory, and authorizing, including the relationship between them—this article contributes towards a more specified and holistic understanding of the very significant influence and latent potential of this body in supporting actors within the international human rights system through a collective legalization strategy. This article provides a foundation for future research into the efficacy of assembly collective legalization strategies in specific country situations and in supporting new frontiers in the prescriptive direction of human rights law. Although focused on the assembly's legal authority within the international human rights system, it also provides general insights to support comparable studies into collective state action in other areas of international affairs, including in the plenary bodies of other international organizations.

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[348] *Id.* at 112.