



Asia-Pacific Centre for the
Responsibility to Protect

THE POWERS OF THE UN GENERAL ASSEMBLY TO PREVENT AND RESPOND TO ATROCITY CRIMES: A GUIDANCE DOCUMENT

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PHOTO COVER PAGE:

Jamtoli refugee camp, Bangladesh - October 26, 2017.
Credit: Joel Carillet

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Responsibility to Protect

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FOREWORD

Around the world, atrocity crimes are being committed with devastating effect, and in many cases, seemingly with impunity. The United Nations is currently proving itself unable to either prevent such crimes, or adequately respond to them when they occur.

In 1945, the Charter of the United Nations was adopted to 'save succeeding generations from the scourge of war', 'reaffirm faith in fundamental human rights', and 'establish conditions under which justice and respect for the obligations arising from ... international law can be maintained'. It marked a high point in international cooperation and commitment to protect human rights; as did the affirmation by the UN General Assembly in 2005 that the 'international community, through the United Nations', has the 'responsibility to use appropriate diplomatic, humanitarian and other peaceful means ... to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.' These laudable statements must continue to serve as the benchmarks against which member states of the UN should hold themselves to account.

The UN Security Council, albeit having primary responsibility for maintaining international peace and security, is in many cases unable to effectively prevent atrocity crimes due to irreconcilable divisions amongst its permanent members. Civilians caught up in conflict, and the victims of atrocity crimes everywhere, are paying the price. It is, therefore, timely for UN member states to explore the various ways in which the UN General Assembly can more effectively utilise its own powers to prevent atrocity crimes, and respond to them when they occur.

The General Assembly cannot pass legally binding resolutions, nor does it have the power to enforce its recommendations. The General Assembly is, however, the only truly representative organ within the UN system, and is explicitly empowered by the UN Charter to make recommendations relating to human rights, and on matters of international peace

and security. It also has the distinct advantage of being unencumbered by the veto of any single member state.

This Guidance Document on the Legal Options Available to the UN General Assembly to Prevent and Respond to Atrocity Crimes is timely and relevant. It provides a much-needed resource regarding what the General Assembly can do, based on the UN Charter and other sources of international law, as well as the Assembly's own established practice.

Some of the interpretations of the General Assembly's powers described in this Guide are controversial. Because the Document is intended to facilitate an enhanced role for the General Assembly in preventing and responding to atrocity crimes, it inevitably, by its very nature, promotes an interpretation of the Assembly's powers that enables it to fulfil such a role. It does also, however, clearly acknowledge controversies, and where the Document includes interpretations that diverge from the traditional consensus regarding the Assembly's powers, this is explicitly recognised.

The Guidance Document describes what *could* be done, not what *should* be done. It provides political decision-makers and diplomats with a menu of available legal options, leaving to them the task of engaging in a cost-benefit analysis regarding which options might feasibly be used in any particular case, when the international community is faced with the threat or actual occurrence of atrocity crimes.

I sincerely hope this Guidance document will inspire member states to give renewed attention to the powers of the General Assembly to prevent and respond to atrocity crimes. It should, moreover, significantly assist legal advisors in Ministries of Foreign Affairs and Permanent Missions to the UN in New York to advise decision-makers on available options.

Right now, the Group of Friends of the Responsibility to Protect in New York is advocating

the adoption of a procedural resolution of the General Assembly, placing the Responsibility to Protect as a standing item on the agenda of the General Assembly, as well as requesting the UN Secretary General to report annually on the prevention of atrocity crimes. If successful, these developments will significantly increase the opportunities for all member states to contribute to better prevention of atrocity crimes, including through the General Assembly.

None of this means giving up on the Security Council. To the contrary, initiatives aimed at promoting the complementary engagement of the General Assembly in matters of international peace and security, as well as initiatives aimed at providing additional opportunities for all member States to assess the Security Council's performance, can surely serve only to strengthen the integrity and accountability of the international system as a whole. This, in turn, will benefit not only the populations suffering the effects of atrocity crimes, but the legitimacy of the international security system.

Ivan Šimonović

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This forward is written in Ambassador Šimonović's personal capacity and should not be construed as necessarily representing the position of the Government of Croatia.

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ACRONYMS

COI	Commission of Inquiry
FFM	Fact-finding Mission
DPRK	Democratic Republic of North Korea
ECCC	Extraordinary Chambers in the Courts of Cambodia
HRC	Human Rights Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIFFM	Independent Impartial Fact-Finding Mission for Myanmar
IIM	International Impartial and Independent Mechanism for Syria
IIMM	Independent Investigative Mechanism for Myanmar
ILC	International Law Commission
NGO	Non-Government Organisation
P5	Permanent five members of the UN Security Council
UNAT	UN Administrative Tribunal
UNEF	UN Emergency Force
UNGA	UN General Assembly
UNMIK	UN Mission in Kosovo
UNOC	UN Operation in Congo
UNOGIL	UN Observer Group in Lebanon
UNSC	UN Security Council
UNSCOB	UN Special Commission on the Balkans
UNSF	UN Security Force
UNSG	UN Secretary General
UNSMA	UN Special Mission to Afghanistan
UNTAET	UN Transitional Administration in East Timor
UNTEA	UN Temporary Executive Authority
U4P	Uniting for Peace (UNGA Resolution 377(V)(A))
VCLT	Vienna Convention on the Law of Treaties

Atmeh, Syria - January 14, 2013.
Credit: Joel Carillet

INTRODUCTION



A. BACKGROUND

Recent years have seen persisting global violence. In 2019 the number of state-based conflicts was at its highest since 1946, and the number of non-state conflicts was also considerably higher than it was a decade ago. In terms of the number of people killed in non-state conflicts, 2019 was one of the three deadliest years since 1989.¹ The 2020 Global Peace Index shows a deterioration in 'global peacefulness' since 2008, with rises in both the number and intensity of internal conflicts.²

This persisting conflict and violence has been associated with large-scale human rights violations, credibly documented by UN commissions of inquiry (COIs) and fact-finding missions (FFMs). In 2018, the UN Secretary General (UNSG) said that atrocity crimes were 'being committed at a scale and ferocity not seen in years, with little regard for international human rights and humanitarian law.'³ The UNSG's 2020 'Call to Action for Human Rights' lamented that 'egregious and systematic human rights violations' were persisting in many parts of the world.⁴

Conflict, violence, human rights violations and persecution are forcing unprecedented numbers of people from their homes. The number of people displaced at the end of 2019 was the highest ever recorded, and almost double that of a decade ago.⁵

In the framework of the UN Charter, the UN General Assembly (UNGA) has primary responsibility for human rights – the Charter provides that the UNGA 'shall ... make recommendations for the purpose of ... assisting in the realisation of human rights'.⁶ Where human rights violations are so widespread and systematic that they threaten international peace and security, responsibility falls to the UN Security Council (UNSC).⁷ But as highlighted by the situations in Syria, Myanmar and elsewhere, in many of today's most serious human rights and humanitarian crises, the UNSC is unable to take

effective action due to the political allegiances of one or more of its five permanent members (P5). The UNSC's paralysis in these contexts has contrasted with a desire on the part of the UNGA to see a stronger international response. In 2012, for example, the UNGA passed a resolution on the Syrian crisis 'deploring the failure of the Security Council'.⁸ In 2019 it passed a resolution on Myanmar, calling the UNSC's 'continued attention' to the situation 'with concrete recommendations for action'.⁹

The UN Charter empowers the UNGA to consider and make recommendations on any matter within the scope of the Charter. The UNGA is explicitly empowered to make recommendations to assist in the realisation of human rights, and to make recommendations on matters of international peace and security. In 1962 the International Court of Justice (ICJ) considered the provisions of the Charter describing the division of competence between the UNGA and the UNSC, and said that the UNSC's responsibility for international peace and security was 'primary, not exclusive'. The Court said that while only the UNSC could 'require enforcement by coercive action', the UN Charter 'makes it abundantly clear' that the UNGA 'is also to be concerned with international peace and security'.¹⁰ Several decades later, the ICJ observed that 'there has been an increasing tendency ... for the General Assembly and the Security Council to deal in parallel with the same matter concerning international peace and security'.¹¹ The Court observed that the UNSC tends to 'focus on the aspects of such matters related to international peace and security', while the UNGA 'has taken a broader view, considering also their humanitarian, social and economic aspects'.¹²

Throughout its history, the UNGA has made countless recommendations and taken a vast array of actions aimed at preventing and responding to atrocity crimes. Among other things, the UNGA has: established peacekeeping operations; called on states to impose economic and diplomatic sanctions; established FFMs, COIs and investigative mechanisms; called upon the UNSC to impose measures under Chapter VII of the UN Charter; requested advisory opinions from the ICJ; rejected the credentials of a member state's representatives, thus barring that state from participation in the

B. AIMS OF GUIDANCE DOCUMENT

UNGA; and recommended the use of force.

Since 1991, the UNGA has adopted resolutions titled 'the revitalization of the work of the General Assembly'. The resolutions reassert the UNGA's 'role and authority ... on questions relating to international peace and security', and recognise the need for the UNGA to 'fully play its role as set out in the Charter'.¹³ But currently the UNGA's secondary responsibility for international peace and security is under-utilised.

The competence of the UNGA to take action aimed at preventing and responding to atrocity crimes, either in parallel with the UNSC or in lieu of a failed UNSC, is not clearly spelled out in the UN Charter. In order to understand the UNGA's competence, it is necessary to interpret the Charter in light of the UNGA's evolving practice over time, decisions of the ICJ, the scholarly literature, and sometimes competing legal principles and doctrines. For those representing their states at the UNGA, there are not always readily accessible answers to what over time have been quite controversial questions regarding the UNGA's competence. Anecdotal evidence suggests that this lack of guidance undermines the UNGA's potential to play a more robust and constructive role in preventing and responding to atrocity crimes.

This document seeks to provide an easily navigable resource regarding the powers of the UNGA to prevent and respond to atrocity crimes. It focuses on what the UNGA can do in particular situations where there is a risk or occurrence of atrocity crimes; as such, the focus is on what the UNGA may include in country-specific, rather than thematic, resolutions.

This document aims to present a succinct and balanced summary of the relevant points of law. While controversies are acknowledged, and different interpretations presented, the aim is not to provide an in-depth analysis of any of the points discussed.

Albeit aimed at presenting a balanced interpretation of the law, it must also be acknowledged that this document is underpinned by a desire to see the UN as a whole more effectively achieving its purposes and adhering to its principles. Thus, this document seeks to strike a balance between objectively acknowledging controversies, and where reasonable to do so, preferencing a 'purposive' interpretation of the law – that is, one that enables the UNGA to more frequently, robustly and innovatively act upon its powers.

This document does not purport to canvass everything that the UNGA can do in the area of atrocity prevention and response. There is a vast array of things that the UNGA may do and/or recommend, such as calling upon states to adhere to their obligations under international human rights or humanitarian law, and in many cases there is no question regarding the UNGA's competence to undertake the actions or make the recommendations in question. This document focuses primarily on the more robust of the options available to the UNGA, including those more typically regarded as falling within the remit of the UNSC, in relation to which there may be questions regarding the UNGA's legal competence.

This document focuses on the legal competence of the UNGA as a whole. It does not interrogate the distribution of powers between the UNGA's committees, nor the pros and cons of particular

matters being dealt with – or recommendations being made by – the UNGA *vis-à-vis* its subsidiary body for human rights, the Human Rights Council (HRC). It must be acknowledged however that in the area of atrocity prevention and response, the HRC plays a critical role. The HRC is mandated to, *inter alia*, promote respect for human rights and ‘address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon’, as well as more broadly to make recommendations regarding the promotion and protection of human rights.¹⁴ Many of the recommendations that can be made by the UNGA in relation to atrocity crimes can similarly be made by the HRC, and indeed the HRC is in some cases able to respond more nimbly or to make bolder recommendations than the UNGA. That said, UNGA resolutions carry more weight than those of the HRC. Moreover, many of the ‘tools’ discussed in this document are not available to the HRC – these include requesting the UNSG to engage in preventive diplomacy, requesting reports from the UNSC, and requesting advisory opinions from the ICJ.

It should also be noted that, with the exception of a brief discussion in the concluding comments, this document does not consider the *responsibilities* of the UNGA, or of states acting through the UNGA, to prevent and respond to atrocity crimes. Such responsibilities might arise, for example, from the obligations of states parties to the Genocide Convention, or from the ‘responsibility to protect’, as expressed in the UNGA’s World Summit Outcome document in 2005 and subsequently endorsed by the UNSC.¹⁵ The focus of this document is not what the UNGA *must* do, but what it *can* do, in international law, when the political will is there.


Finally, this document does not recommend any particular course of action in any particular case. Nor does it assume that just because a particular course of action is legally permissible, it is politically feasible, or indeed likely to be effective. Such questions must generally be assessed on a case-by-case basis, and as such are beyond the scope of this document. What this document does seek to do is to provide a clearer ‘baseline’ regarding the UNGA’s competence, and in doing so, inspire more creative, ambitious thinking regarding the role the UNGA can play in preventing and responding to atrocity crimes.

C. STRUCTURE OF GUIDANCE DOCUMENT

This document is structured in two parts. The first reviews the sources of the UNGA’s powers in international law. The most important of these is the UN Charter, however the UNGA’s powers have evolved over time, and as such the provisions of the Charter do not explicitly describe the full scope of the UNGA’s powers. Thus, Part 1 describes the powers of the UNGA as founded in: relevant provisions of the UN Charter; the UNGA’s implied powers; the UNGA’s ‘subsequent practice’ (that is, subsequent to the signing of the Charter); and customary international law. Discussion of the UNGA’s Uniting for Peace (U4P) Resolution is also included in Part 1. The U4P Resolution is not technically an independent source of powers, however it is accorded its own section here due to its historical significance in the interactions of the UNSC and the UNGA.

Part 2, which forms the core of this guidance document, considers various ways in which the UNGA may act upon its powers. The various sections of Part 2 are not structured identically, however for the most part each section describes: the legal basis for the power described; how the UNGA has acted upon that power in the past; and the utility of the UNGA undertaking the action in question.

Suruc, Turkey - April 3, 2015: Syrian (Kurdish) people in refugee camp.
Credit: Radek Procyk



PART 1: SOURCES OF THE GENERAL ASSEMBLY'S POWERS

A. POWERS EXPRESSLY PROVIDED FOR IN THE UN CHARTER

1. *The Power to Discuss and Recommend*

Article 10 of the UN Charter empowers the UNGA to discuss any matters within the scope of the Charter or 'relating to the powers or functions of any organs provided for' in the Charter, and to make recommendations on such matters to member states or the UNSC or both. By reason of the broad scope of article 10, no question or matter of international concern is excluded from the UNGA's remit, except as provided by explicit exceptions found elsewhere in the Charter (see section 1.A.3, below).¹⁶

Article 11 more explicitly describes the UNGA's powers in relation to international peace and security. Article 11(2) empowers the UNGA to 'discuss any questions relating to the maintenance of international peace and security' brought before it by a state or by the UNSC, and to 'make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both'. Article 11(3) empowers the Assembly to 'call the attention of the Security Council to situations which are likely to endanger international peace and security.'

In granting the UNGA a general competence to discuss and make recommendations regarding matters of international peace and security, and to bring such matters to the attention of the UNSC, article 11 implicitly empowers the UNGA to make a finding that a situation *is* a matter of international peace and security.¹⁷ The UNGA's competence to determine the existence of threats to international peace and security has been frequently utilised in practice.¹⁸

Article 13(1)(b) provides that the UNGA shall make recommendations for the purpose of, among other things, 'promoting international co-operation in the economic, social, cultural, educational, and health fields' and 'assisting in the realization of human rights and fundamental freedoms'. As observed by Bruno Simma et al in their 2012 Commentary on the UN Charter, the UNGA has made 'countless' recommendations on such subjects, recommending a 'great variety of actions', and has made such recommendations to states as well as 'all kinds of

KEY POINTS:

- The UNGA is competent to consider and make recommendations on any matter within the scope of the Charter. It has explicit competence to make recommendations to assist in the realisation of human rights, and on matters of international peace and security. The UNGA may make its recommendations to states and/or to the UNSC.
- In addition to its general recommendatory powers, the UNGA has a number of other specific powers described throughout the Charter. These include the power to establish subsidiary bodies, the power to receive and consider reports from the UNSC, and the power to request an advisory opinion from the ICJ.
- The UNGA cannot impose binding obligations on its members, except in relation to particular matters related to the finances and administration of the UN. The UNGA is required to refer any matter in relation to which coercive or enforcement action is necessary to the UNSC. The UNGA must not make recommendations on a matter at the same 'moment' that the UNSC is exercising its functions in relation to that same matter.

organs and agencies of the UN system' and other international bodies and NGOs.¹⁹

Article 14 completes the quartet of provisions empowering the UNGA to consider and make recommendations on matters related to atrocity prevention and response. It empowers the UNGA to recommend measures for the peaceful adjustment of any situation which it deems 'likely to impair the general welfare or friendly relations among nations', including situations resulting from a violation of the purposes and principles of the UN Charter.

An analysis of the UNGA's practice shows that when it acts upon its powers to make recommendations related to atrocity prevention and response, or indeed on any other matter, it does not typically articulate the particular provision of the Charter on which its recommendations are based. Even on occasions when it has expressly or impliedly acted pursuant to a particular provision in the Charter, it has 'tended to show itself to be unconcerned with the wording of the particular provision.'²⁰

2. *Other Powers*

Scattered throughout the various section of the UN Charter are a range of other powers accorded to the UNGA. These are discussed further in Part 2 of this document, however are highlighted briefly here.

(a) *The power to establish subsidiary bodies*

Article 22 of the UN Charter empowers the UNGA to 'establish such subsidiary organs as it deems necessary for the performance of its functions'. This article has been interpreted broadly. The ICJ has said that article 22 'leaves it to the General Assembly to appreciate the need for any particular organ', and that 'the sole restriction placed by [article 22] on the General Assembly's power to establish subsidiary organs is that they should be "necessary for the performance of its functions"'.²¹ The UNGA's competence to establish subsidiary bodies pursuant to article 22 is discussed further in section 2.D, below, with reference to the establishment of FFMs, COIs, investigative mechanisms and judicial bodies.

(b) *The power to receive and consider reports from the UNSC*

Article 15(1) of the UN Charter empowers the UNGA to 'receive and consider annual and special reports from the Security Council', and states that 'these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security'. The corollary to this article is article 24(3), which provides that the UNSC shall 'submit annual, and when necessary, special reports to the General Assembly for its consideration'. The power of the UNGA to request special reports from the UNSC is discussed in section 2.B, below.

(c) *The power to request an advisory opinion from the ICJ*

Article 96(1) of the UN Charter empowers the UNGA to request an advisory opinion from the ICJ on 'any legal question'. The UNGA's competence to request advisory opinions from the ICJ, and restrictions thereto, are discussed in section 2.F, below.

3. *Explicit Restrictions on the UNGA's Powers*

The most significant limitation on the UNGA's powers is that, except with regards to particular matters related to the finances and administration of the UN, its resolutions are non-binding.²² In addition to being clear from the text of the Charter – which provides only that the UNGA may make recommendations – this is also clear from the statement of the ICJ in its *Certain Expenses* Advisory Opinion, that the UNSC has a monopoly over the power to 'impose an explicit obligation of compliance'.²³ This does not mean, however, that the UNGA's resolutions have no legal effect whatsoever. The legal effects of UNGA resolutions are discussed throughout this document, including in sections 2.E ('quasi-judicial' determinations), 2.G (sanctions recommendations) and 2.H (recommendations for the use of force).

In addition to its inability to impose binding obligations except on specified matters, the UNGA's competence to make recommendations on any matter within the scope of the Charter is subject to three restrictions explicitly described by the UN Charter. As observed by former president of the ICJ Rosalyn Higgins et al, these restrictions have all 'been interpreted in an extremely limited manner, thus denuding them of much, if not all, of their impact'.²⁴

The most significant of these explicit restrictions on the UNGA's competence is article 11(2), which provides that while the UNGA may discuss any question relating to the maintenance of international peace and security, any question 'on which *action* is necessary shall be referred to the Security Council'. The word 'action' as used here was interpreted by the ICJ in *Certain Expenses* as meaning 'coercive or enforcement action', or – put otherwise – "'action" which is solely within the province of the Security Council'.²⁵

Many scholars take the view that to fall within the exclusive province of the UNSC, 'action' must not only be coercive, but also *mandatory*. This is implied from the statement of the ICJ in *Certain Expenses*, cited above, that 'it is the Security Council which is given a power to impose an explicit obligation of compliance', and that it is 'only the Security Council which can *require* enforcement by coercive action against an aggressor'.²⁶ In other words, if the UNGA believes that 'obligatory execution of enforcement measures' is required, it must refer the matter to the UNSC, but the UNGA is 'not prevented from making *recommendations*

concerning the use of armed forces'.²⁷ Some scholars have gone further and asserted that article 11(2) places only a 'procedural' rather than a 'substantive' limitation on the UNGA, and that if the UNGA refers a matter to the UNSC and the UNSC fails to take action, the UNGA is not thereafter prohibited by article 11(2) from considering the matter again and making its own recommendations.²⁸

The second explicit restriction on the UNGA's competence is article 12(1) of the UN Charter, which provides that while the UNSC is exercising its functions in respect of a particular dispute or situation, the UNGA 'shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests'. This provision was initially interpreted to mean that the UNGA was barred from considering any matter on the agenda of the UNSC;²⁹ however as observed by the UN Legal Counsel in 1968, in an opinion much relied upon since, the UNGA has consistently interpreted the words 'is exercising' to mean 'is exercising *at this moment*'.³⁰ As alluded to above, the ICJ has accepted that 'there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security', and it has found this 'accepted practice' to be consistent with the UN Charter.³¹ Today, article 12(1) is generally regarded as having limited relevance; indeed, Higgins et al go so far as to suggest that the restriction is 'almost obsolete'.³²

The third restriction on the UNGA's competence is article 2(7) of the UN Charter, which provides that the UN has 'no authority to intervene in matters which are within the domestic jurisdiction of any state'. As with the other Charter-based restrictions on the Assembly's competence, interpretations of this restriction have narrowed over the years. It is now broadly agreed that matters pertaining to the purposes and principles of the Charter do not fall within domestic jurisdiction, because the promotion and protection of those purposes and principles is a matter of international law.³³ This includes, in particular, matters regulated by international human rights law.³⁴ As such, when the UNGA wishes to make recommendations aimed at preventing or responding to atrocity crimes, it may be assumed that its freedom to do so will almost never be excluded by reason of article 2(7).

B. OTHER SOURCES OF THE UNGA'S POWERS

1. *Implied Powers: Essential to the Performance of Duties*

The ICJ has affirmed that 'under international law, the [UN] must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it *by necessary implication*, as being essential to the performance of its duties.'³⁵ Specifically in relation to the UNGA, the Court has said that 'when the Organisation takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the UN, the presumption is that such action is not *ultra vires* the organisation'.³⁶

The first-listed purpose of the UN in the UN Charter is to 'maintain international peace and security', and to that end, to (among other things) 'take effective collective measures for the prevention and removal of' threats to the peace, breaches of the peace and acts of aggression. Other purposes include 'achiev[ing] international cooperation in solving problems of an [*inter alia*] ... humanitarian character, and in promoting and encouraging respect for human rights'.³⁷ These purposes are not those of any particular organ of the UN, but of the UN organisation as a whole. Within the framework of the UN Charter, the maintenance of international peace and security is the primary responsibility of the UNSC (article 24(2) of the UN Charter), while the promotion and protection of human rights falls primarily within the purview of the UNGA (article 13(1)(b)). Thus, the application of the implied powers doctrine suggests that the UNGA may be assumed to have the powers necessary for the promotion and protection of human rights in the first instance, as well as for the maintenance of international peace and security when the UNSC fails to fulfil that function itself.³⁸

The implied powers of an international organization are subject to four limitations: (i) they must be necessary for the organization to perform its functions; (ii) they must not encroach upon, or detract from, the exercise of explicit powers; (iii) they must not violate fundamental principles of international law; and (iv) they must not disrupt the distribution of functions within an organization. These limitations apply to the UN as a whole, as well as to the organs of the UN.³⁹ The

KEY POINTS:

- Under the doctrine of implied powers, if the UNGA takes action aimed at maintaining international peace and security, solving problems of a humanitarian character or promoting and encouraging respect for human rights, there will be a presumption that the action is not *ultra vires*.
- The UNGA's practice may serve as a guide to the interpretation of the provisions of the UN Charter pertaining to the UNGA's powers.
- The practice of the UNGA, as an international organisation, when undertaken with a sense of legal right or obligation by the UNGA (*opinio juris*), may give rise or attest to a new rule of customary international law pertaining specifically to the UNGA.

last of these limitations would prevent, for example, the UNGA asserting an implied power to impose binding obligations on its members in matters of international peace and security – powers explicitly reserved for the UNSC.⁴⁰

Because of the UNGA's explicit recommendatory powers described in articles 10-11 and 13-14 of the UN Charter, it should not generally be necessary to invoke the UNGA's implied powers in order for it to make non-binding recommendations aimed at halting or averting the commission of atrocity crimes. But the doctrine of implied powers may assist insofar as it creates a *presumption* that if a particular course of action on the part of the UNGA is essential for the attainment of one of the purposes of the UN, then the UNGA is competent to pursue that course of action, subject to the limitations outlined above. This presumption can then assist in clarifying any ambiguities arising from the text of the Charter.

2. *Subsequent Practice*

The UN Charter is a treaty, and so – at least as a starting point – is subject to the interpretive rules described in the Vienna Convention on the Law of Treaties (VCLT).⁴¹ Article 31(3)(b) of the VCLT provides that treaties may be interpreted in light of '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Article 32 provides that when the text of a treaty is ambiguous, recourse may also be had to 'supplementary means of interpretation'. The International Law Commission's (ILC's) 2018 Draft Conclusions on Subsequent Agreement and Subsequent Practice state that the 'supplementary means of interpretation' referred to in article 32 includes subsequent practice which 'does not establish the agreement of all parties to the treaty'.⁴² The Draft Conclusions also state that subsequent practice for purposes of both article 31 and 32 'may arise from, or be expressed in, the *practice of an international organisation* in the application of its constituent instrument'.⁴³ The Commentaries to the Draft Conclusions affirm that the reference to the practice of the international organisation means the international organisation's "own practice", as distinguished from the practice of the member states'.⁴⁴ In other words, when the treaty being interpreted is the constituent instrument of an international organisation, such as the UN Charter,

the practice of the organization *itself* may serve as a proxy to the practice of the state parties.

In stipulating that, for purposes of interpreting the constituent instrument of an international organization, an international organisation's own practice may constitute 'subsequent practice' for purposes of article 31(3)(b) and 32 of the VCLT, the ILC was essentially codifying an interpretive rule already established by the ICJ. In a series of cases in which the Court has been called upon to interpret the provisions of the UN Charter pertaining to the functions and powers of the UNGA and the UNSC, the ICJ has consistently held that the practice of those organs may serve as a guide.⁴⁵ The Court has relied upon the practice of both the UNGA and the UNSC to support interpretations of provisions of the Charter even where those interpretations are seemingly at odds with the text;⁴⁶ and moreover, has accepted that UN resolutions may attest to the 'practice of the organisation' even if passed with dissenting votes.⁴⁷

The VCLT applies to the constituent instruments of international organisations 'without prejudice to any relevant rules of the organisation'.⁴⁸ These 'rules of the organisation' include the 'established practice of the organisation'.⁴⁹ This explicit inclusion of 'established practice' as a means of treaty interpretation has essentially the same effect as the ILC's recognition that the practice of an international organisation may count as 'subsequent practice' for purposes of VCLT article 31(3)(b) and 32, and also essentially the same effect as the ICJ's jurisprudence on the practice of the organisation.⁵⁰ In short, for purposes of interpreting a provision of the UN Charter pertaining to the functions or the powers of the UNGA, the UNGA's practice – evidenced by its resolutions, even if contentious – serves as a persuasive, albeit not irrefutable, guide.

The UNGA's actual practice in exercising the powers bestowed upon it by the UN Charter is described throughout the various sections of Part 2 of this guidance document, in support of the analysis of the ways in which the UNGA can act upon its Charter-based powers.

3. Customary International Law

The UNGA's competence to make recommendations aimed at averting or halting the commission of atrocity crimes is grounded in the UN Charter, aided by reference to the doctrines of implied powers and subsequent practice, discussed above. But as expansive as the ICJ's reliance on the UNGA's practice has been, such practice is still in essence a guide to the interpretation of the provisions of the Charter. When a question arises as to whether the UNGA has a power that cannot be gleaned from the text of the Charter itself, resort may also be had to customary international law.

The test for the identification of a new rule of customary international law is well established: there must be a 'general practice [part one] that is accepted as law (*opinio juris*) [part two].'⁵¹ The requirement of practice refers primarily to the practice of states; however in its 2018 Draft Conclusions on Identification of Customary International Law, the ILC recognised that 'the practice of international organisations' may also contribute to the formation of customary international law.⁵² In its Commentary to the Draft Conclusions, the ILC makes it clear that it is referring here to 'practice that is attributed to *international organisations themselves*, not practice of states acting within or in relation to them'.⁵³ The Commentary notes further that the practice of an international organisation, when accompanied by *opinio juris*, may only give rise or attest to a new rule of customary international law where the rule in question is addressed to the international organisation in question.⁵⁴ This customary international law pertaining specifically to international organisations has been described by some scholars as a 'quasi-customary law of the organisation', or 'customary constitutional law'.⁵⁵

The ILC's only guidance regarding how to ascertain the *opinio juris* of international organisations is that its guidance on the forms of acceptable evidence for *opinio juris* 'applies *mutatis mutandis* to the forms of evidence' of the *opinio juris* of international organisations.⁵⁶ From this, although not explicitly stated, it would appear to follow that the requirement of *opinio juris* itself also applies *mutatis mutandis* to the *opinio juris* of international organisations – that is, that the practice of the international organisation must be undertaken with a sense of legal right or obligation.⁵⁷ In other words, the UNGA's practice, if undertaken with a sense of legal right or obligation *by the UNGA*, may give rise or attest to a rule of customary international law pertaining to the powers or functions of the UNGA.⁵⁸

C. THE UNITING FOR PEACE RESOLUTION

As stated in the introduction, the U4P Resolution is not in fact an independent source of the UNGA's powers. It is more appropriately regarded as part of the UNGA's practice, which as discussed in section 1.B.2, above, may serve as a guide to the interpretation of the UNGA's powers described in the relevant articles of the UN Charter. The U4P Resolution is included as a separate section in Part 1 of this guidance document primarily due to its historical significance in the interactions between the UNSC and the UNGA, but also to reflect the fact that it may still be invoked by the UNGA if seen as necessary in order to pre-emptively rebut criticism that the UNGA is encroaching upon the UNSC's remit.

1. *The Resolution and its Constitutionality*

Resolution 377(V)(A), known as Uniting for Peace, was passed by the UNGA in 1950 in order to circumvent the Soviet veto on UNSC action on the Korean War. The Resolution provided that:

if the Security Council, because of a lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary.⁵⁹

The Resolution stated that if not in session at the time, the UNGA 'may meet in emergency special session', which shall be called 'if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations'.⁶⁰

The passage of the U4P Resolution sparked debate regarding its constitutionality. Some saw it as an unconstitutional encroachment by the UNGA on the UNSC's exclusive authority over enforcement action,⁶¹ while others asserted that

KEY POINTS:

- At the time of its passage, the U4P Resolution was regarded by some as an unconstitutional encroachment by the UNGA on the UNSC's powers. The validity of the U4P Resolution has now been implicitly accepted by the ICJ.
- The U4P Resolution elaborates the UNGA's recommendatory powers as already described under the UN Charter. The most controversial issue relating to the U4P Resolution is whether a UNGA recommendation for the use of armed force could have the effect of allowing states to engage in conduct that would normally breach article 2(4) of the UN Charter prohibiting the use of force.
- The UNGA is not required to invoke the U4P Resolution in order to make recommendations on matters of international peace and security. Nor is it necessary that a matter be referred to the UNGA by the UNSC, following the procedure described in the U4P Resolution. Other than introducing the concept of 'emergency special sessions', the U4P Resolution does not provide a procedural mechanism not already provided for in the UN Charter.
- In certain circumstances there may be political value in the UNGA invoking the U4P Resolution and convening an 'emergency special session'. Such a course could assist to convey the UNGA's assessment of the gravity of a situation, strengthen the political legitimacy of the UNGA's recommendations, and increase political pressure on the UNSC to fulfil its responsibilities.
- The U4P Resolution elaborates specific criteria that should be met in order for the UNGA to convene an 'emergency special session' and recommend collective measures: lack of unanimity amongst the UNSC's P5; UNSC failure to exercise its responsibility; and the existence of a threat to the peace, breach of the peace or act of aggression (or actual breach of the peace or act of aggression, if force is to be recommended). These thresholds are not found in the UN Charter. Under the UN Charter the UNGA may convene a special session and make recommendations, subject to the limitations described in the Charter, whether or not the thresholds articulated in the U4P Resolution are satisfied.

the Resolution did not give the UNGA powers it did not already have under the Charter, and merely laid out a procedural framework for the exercise of those powers.⁶² Today, while not completely uncontroversial, most scholars accept that whether or not the U4P Resolution was consistent with a strict reading of the Charter's text, it now serves as a valid interpretation by the UNGA of its own powers. This is supported by the fact that the Resolution was adopted with a strong majority and has been invoked since, as well as by the ICJ's recognition both of the competence of UN organs to interpret their own powers, and of the role of the 'practice of the organisation' as an aid to the interpretation of the Charter.⁶³ The ICJ itself has implicitly accepted the constitutionality of the U4P Resolution. In its *Wall* Advisory Opinion (2004), the Court considered the legality of a request by the UNGA for an ICJ Advisory Opinion made in the context of an emergency special session convened pursuant to the terms of the U4P Resolution. The Court did not question the validity of the U4P Resolution, but instead proceeded to consider whether the preconditions described in the Resolution had been fulfilled.⁶⁴ In its 2010 *Kosovo* Advisory Opinion, the Court again seemingly accepted the validity of the U4P Resolution, noting that it 'provides for the General Assembly to make recommendations for collective measures to restore international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression and the Security Council is unable to act because of lack of unanimity of the permanent members'.⁶⁵

2. *What Does the U4P Resolution Enable the UNGA to do?*

The U4P Resolution provides that where the stated pre-conditions are fulfilled, the UNGA 'shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary'. 'Collective measures' other than the use of armed force include measures such as those described in article 41 of the UN Charter, which provides a non-exhaustive list of measures that the UNSC is able to decide upon to give effect to its decisions, falling short of the use of armed force.⁶⁶

Acting pursuant to the U4P Resolution, the UNGA has in the past: established and/or strengthened the mandates of peacekeeping operations; established a COI; called for the withdrawal of foreign troops; called for the rescission by Israel of unilateral measures in Jerusalem; called for Israel to withdraw from occupied territories; recommended arms embargoes; called for assistance to refugees; called for assistance to liberation movements; called for military assistance to support states to defend themselves against aggression; and requested an advisory opinion from the ICJ.⁶⁷ Generally speaking these are measures the UNGA is competent to recommend or to do, pursuant to its recommendatory powers under articles 10-14 of the UN Charter, or its powers to establish subsidiary bodies (article 22) or to request an advisory opinion from the ICJ (article 96), with or without reference to the U4P Resolution. The UNGA's competence in all of these areas is discussed further in Part 2 of this guidance document.

The UNGA's competence to recommend the use of force is discussed in section 2.H, below. Suffice to note here that most scholars accept that the UNGA is permitted by the UN Charter to *recommend*, not require, the use of force. This is based on the understanding that, as discussed in section 1.A.3, above, the UNGA is only required by article 11 of the UN Charter to refer matters to the UNSC if it believes that *mandatory* enforcement action is required.

The more controversial question regarding the U4P Resolution is whether it bestowed upon (or gave expression to) a competence on the part of the UNGA not only to recommend the use of force, but also to authorise it. This is also discussed in section 2.H, below.

3. *Persisting Relevance of the U4P Resolution*

In light of what has been outlined in section 1.A regarding the evolution of the UNGA's powers over time, there is an argument that today the U4P Resolution has diminished relevance. On the procedural aspects, it is pertinent to note that the UN Charter empowers the UNGA to meet not only in regular annual sessions but also in 'such special sessions as occasion may require', and that these 'shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations'.⁶⁸ Thus, other than introducing the concept of 'emergency special sessions', the U4P Resolution does not provide a procedural mechanism not already provided for in the UN Charter.

As to matters of substance, as described above, the UNGA is competent to recommend a range of collective measures, arguably including the use of force, and it has done so in the past with and without reference to the U4P Resolution. Even if one accepts the (controversial) proposition that the U4P Resolution effectively expanded – through a process of interpretation – the UNGA's powers so as to include a competence to authorise the use of force, it should not then be necessary for the UNGA to explicitly invoke the U4P Resolution in order to act upon that power.⁶⁹

In particular circumstances, however, the U4P Resolution may serve a political purpose. In circumstances in which a majority of the UNGA feels that the UNSC is manifestly failing to respond to credible reports of atrocity crimes, the convening of an 'emergency special session' pursuant to the U4P Resolution may assist to convey the UNGA's assessment of the gravity of a situation, and the UNSC's failure to address it. It could also increase the political legitimacy of any recommendation subsequently made by the UNGA – pre-emptively rebutting, for example, critiques of the UNGA for encroaching upon the UNSC's remit – while at the same time increasing political pressure on the UNSC to fulfil its own responsibilities.

4. *Thresholds for 'Triggering' the 'Uniting for Peace Procedure'*

Proceeding on the assumption that the U4P Resolution may in particular circumstances still serve a useful purpose, this section considers the criteria outlined in the Resolution itself for the activation of the 'U4P procedure' – that is, the convening of an 'emergency special session' of the UNGA, in order to consider a matter 'immediately with a view to making appropriate recommendations to Members for collective measures'. It is necessary to note at the outset that the UN Charter does not prescribe any criteria for the convening of special sessions, other than that it be convoked by the UNSG at the request of the UNSC or of a majority of the members of the UN. Thus, if the criteria stipulated in the U4P Resolution cannot be satisfied, the Resolution need not be invoked. The UNGA can act upon its recommendatory powers provided for in the UN Charter (described in section 1.A, above) with or without reference to the U4P Resolution.⁷⁰

(a) *Lack of unanimity amongst the UNSC's permanent members*

The first threshold articulated by the U4P Resolution is that there must have been a lack of unanimity amongst the UNSC's permanent members. If the UNSC is unable to agree on a resolution because of a difference of opinion amongst the P5, it may generally be said that there is a lack of unanimity. Different views have been expressed regarding whether the lack of unanimity must be evidenced by the use of the veto.⁷¹ In practice, this question is unlikely to be critical, because if a member of the UNSC wants to firmly establish a lack of unanimity and then use that as a basis for subsequent UNGA action, it can settle the issue by putting the matter to a vote.

(b) *UNSC failure to exercise its responsibility*

The second criteria expressed in the U4P Resolution is that the UNSC must have failed to exercise its responsibility for international peace and security. The veto is a legitimate tool available to the P5 under the UN Charter, and the UN Charter does not place any explicit limits on its use. As such, it is generally understood that to denote UNSC failure, the veto must have been exercised in a manner that is inconsistent either with other provisions of the Charter, or with other

obligations owed by the P5 in international law. A number of possible approaches have been proposed to assist in determining when – if ever – the use of the veto violates international law. One is to rely on the requirement found in article 24(2) of the Charter, that the UNSC must act in accordance with the purposes and principles of the UN. If a veto prevents the UNSC from responding to atrocity crimes, it may be argued that the UNSC has not acted in accordance with the purposes and principles of the UN, and has thus failed.⁷² A second approach is to rely on the general principle of international law that parties to a treaty must act in good faith;⁷³ and a third is to borrow from the ‘abuse of rights’ doctrine – that the abusive exercise of the rights provided for in a treaty amounts to a violation of the treaty.⁷⁴ Some scholars have argued that pursuant to the abuse of rights doctrine, where a member of the P5 exercises their veto in a manner that is ‘arbitrary, taken for an extraneous purpose, or in bad faith’, it can be said that the rights provided for in the UN Charter have been abused, and that the UNSC has failed.⁷⁵ A fourth approach asserts that the power of veto is ‘subordinate to the highest-level *jus cogens* norms’, and that as such the veto cannot lawfully be used with the effect of facilitating *jus cogens* violations (including genocide, crimes against humanity and war crimes), or undermining the duty of UNSC members to cooperate in response to *jus cogens* violations, or in any manner inconsistent with *jus cogens* protections.⁷⁶

It is generally accepted that the UNGA is competent to determine for itself whether the UNSC has failed to exercise its responsibility, for purposes of convening an emergency special session pursuant to the U4P Resolution.⁷⁷ This is supported by the text of the U4P Resolution, and the UNGA’s practice of convening emergency special sessions both with and without referral from the UNSC.⁷⁸ The UNGA’s competence to make its own assessment regarding the failure of the UNSC was implicitly accepted by the ICJ in its Wall advisory opinion, in which the Court

found that an emergency special session had been ‘duly convened’ pursuant to the U4P Resolution, despite the matter in question not having been referred by the UNSC.⁷⁹ Irrespective of the UNGA’s competence, however, it may be more politically palatable for the assessment regarding UNSC failure to be made by the UNSC itself, and for the UNSC to confirm that assessment by passing a procedural resolution requesting the UNGA to convene an emergency special session to consider the matter in relation to which the UNSC has failed.⁸⁰ Such a referral assists in ensuring that the UNSC retains primacy in relation to matters of international peace and security, thus assuaging concerns about an unconstitutional usurpation of power by the UNGA.

(c) *Threat to the peace, breach of the peace or act of aggression*

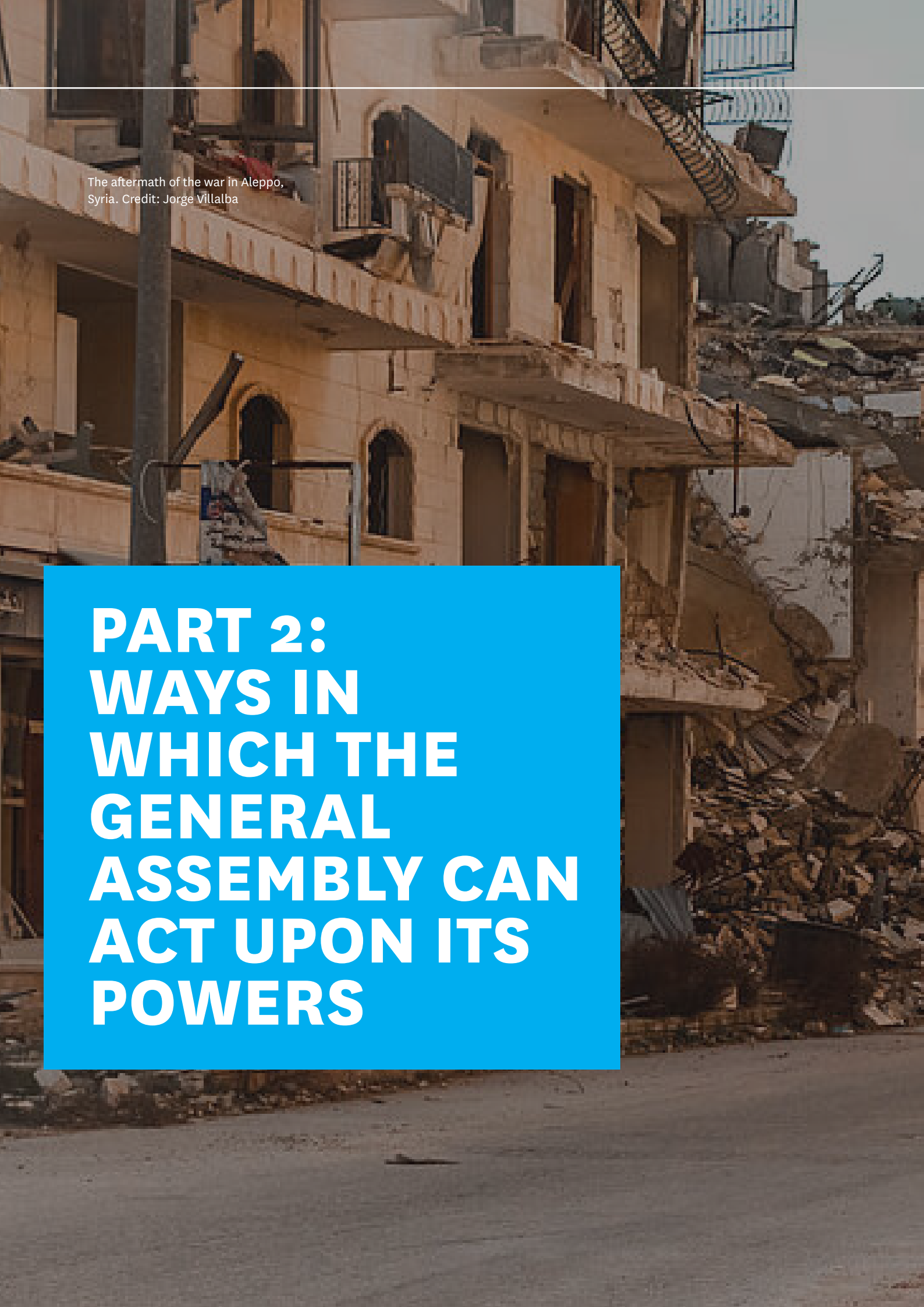
The third threshold criteria articulated by the U4P Resolution is that there must ‘appear’ to be a threat to the peace, breach of the peace or act of aggression; or, if the use of force is to be recommended, an actual breach of the peace or act of aggression.⁸¹

Satisfying the lower threshold (threat to the peace) will rarely be an issue. The UNSC has classified a wide range of issues as threats to international peace and security – examples include policies of apartheid, refugee flows, humanitarian crises, and violations of human rights and international humanitarian law.⁸² Where the U4P Resolution is invoked in relation to a matter that is also on the agenda of the UNSC, the classification of the matter as a threat to the peace may be apparent from the terms of a previous UNSC resolution, or it may be inferred if the UNSC refers the matter to the UNGA.

If the UNSC does not itself classify a matter as a threat to international peace and security, the UNGA may do so. The fact that the UNGA is empowered by the UN Charter to consider and make recommendations on matters of international peace and security, and to bring such matters to the UNSC’s attention, necessarily implies a competence on the part

of the UNGA to decide for itself which matters threaten international peace and security.⁸³ Indeed, the whole premise of the U4P Resolution, that the UNGA may act where the UNSC fails to exercise its responsibility in any case where there *appears to be* a threat to the peace, breach of the peace or act of aggression, suggests that the UNGA may make such a determination. The UNGA has frequently classified matters as threats to international peace and security in the past, irrespective of any such pronouncement by the UNSC.⁸⁴

This threshold poses greater difficulty in the event that the UNGA wishes to classify a matter as a 'breach of the peace', so as to justify a recommendation for the use of force. The term 'breach of the peace' is not frequently employed by the UNSC, because matters are more frequently classified as either threats to the peace or acts of aggression, either of which suffice to justify the imposition of Chapter VII measures.⁸⁵ As such, the meaning of 'breach of the peace' is not well-developed. Professor Nico Krisch, in his 2012 commentary on article 39 of the UN Charter, asserts that the term should be interpreted broadly, encompassing 'all situations in which a "threat to the peace" is no longer merely a threat but has materialized.'⁸⁶ Thus, because large-scale human rights violations have been recognized as threatening the peace, it would appear to follow as a matter of logic that these violations, and in particular atrocity crimes, may also *breach* the peace once they have materialized to a certain degree. It is worth also recalling here that this 'breach of the peace' threshold for use of force recommendations is stipulated in the U4P Resolution, not the UN Charter itself. The articles of the UN Charter that describe the UNGA's competence, in particular article 11 which empowers the UNGA to make recommendations on matters of international peace and security, do not limit the UNGA's recommendatory powers to situations in which there is a breach of the peace.⁸⁷ As such, if this threshold is in issue, the UNGA may – as discussed above – opt not to invoke the U4P Resolution and instead rely the UN Charter for the source of its powers.



The aftermath of the war in Aleppo,
Syria. Credit: Jorge Villalba

PART 2: WAYS IN WHICH THE GENERAL ASSEMBLY CAN ACT UPON ITS POWERS

A. RECOMMENDATIONS TO AND CRITIQUE OF THE UNSC

1. *Legal Basis for UNGA Recommendations to the UNSC*

The UNGA's competence to make recommendations to the UNSC is uncontroversial. Article 10 of the Charter empowers the UNGA to make recommendations to the UNSC on 'any matters within the scope of the present Charter or related to the powers and functions of any organs'. Article 11 empowers the UNGA to make recommendations to the UNSC specifically on 'questions relating to the maintenance of international peace and security', and also to 'call the attention' of the UNSC to 'situations which are likely to endanger international peace and security.' These provisions are subject to Article 12, which as discussed above, is most commonly understood as requiring the UNGA to refer matters to the UNSC only if it believes that mandatory coercive action is required.

2. *UNGA Practice of Making Recommendations to the UNSC*

The UNGA has frequently made recommendations to the UNSC; indeed, in 2017, Higgins et al observed that 'the number of General Assembly resolutions directed at the Security Council, or its members, has increased exponentially between the UN's early years and now.'⁸⁸ Such recommendations have ranged from merely drawing the UNSC's attention to a situation,⁸⁹ to asking the UNSC to adopt appropriate measures or 'concrete recommendations for action',⁹⁰ to explicitly recommending the sorts of measures the UNSC should impose. Among other things, the UNGA has in the past recommended that the UNSC: broaden the scope of existing sanctions to 'include all the measures laid down in Article 41 of the Charter';⁹¹ impose mandatory oil and arms embargoes;⁹² impose 'comprehensive and mandatory sanctions';⁹³ authorise member states to use 'all necessary means' to uphold a state's sovereignty and territorial integrity;⁹⁴ take steps relating to humanitarian flights, emergency airdrops of humanitarian aid and safe areas for civilians;⁹⁵ establish an ad hoc international criminal tribunal (former Yugoslavia);⁹⁶ and refer situations to the International Criminal Court (ICC).⁹⁷

KEY POINTS:

- The UNGA may call the UNSC's attention to matters likely to endanger international peace and security, including a risk or actual occurrence of atrocity crimes, and may make recommendations to the UNSC. The UNGA may also critique the performance of the UNSC.
- The UNSC is not obliged to act on the UNGA's recommendations, and it is difficult to assess the effectiveness of recommendations made by the UNGA to the UNSC in the past. Nevertheless, in the context of UNSC inaction in response to a risk or occurrence of atrocity crimes, UNGA recommendations may contribute to a build-up of momentum that may ultimately pressure the UNSC to act.

The UNGA has also utilised its powers to critique the performance of the UNSC. It has done so in various terms, including by 'deploring' or expressing dismay at the Council's failure to discharge its responsibilities,⁹⁸ critiquing the Council's permanent members for blocking Council action,⁹⁹ and calling on the permanent members to exercise their powers responsibly.¹⁰⁰

3. *Effectiveness of UNGA Recommendations to the UNSC*

It is difficult to assess the extent to which UNGA recommendations influence the UNSC. UNSC decisions are influenced by many factors, most not explicitly acknowledged. Whether or not a causal connection can be established, however, it is a fact that the UNSC has sometimes acted on the UNGA's recommendations. In relation to South African apartheid in the 1970s, for example, the UNSC finally imposed a mandatory arms embargo, more than a decade after the UNGA began calling for it to adopt Chapter VII measures.¹⁰¹ In relation to Bosnia and Herzegovina, the UNSC established a no-fly zone and authorised states to use all necessary measures to ensure compliance, following the UNGA's call for Chapter VII measures, and it also established safe areas following the UNGA's request for it to 'study the possibility of and the requirements for the promotion of' such areas.¹⁰² In relation to the Democratic Republic of North Korea (DPRK), the UNSC finally considered the human rights situation – as opposed to the disarmament issue – as a separate agenda item, following a UNGA resolution calling for the situation to be referred to the ICC.¹⁰³ In all these cases, it seems reasonable to assume that the UNGA's resolutions contributed to a build-up of momentum that ultimately pressured the UNSC to act in a particular way.

Some jurists and scholars have also proposed that states have a 'duty to consider in good faith' recommendations of the UNGA, and to 'inform the General Assembly with regard to the attitude [they have] decided to take in respect of the matter' – albeit generally recognising that such duty is more of a moral character than a 'true legal obligation'.¹⁰⁴ As such, it might be argued that where the UNGA recommends a specific course of action to the UNSC, the UNSC is under at least a moral duty to consider the recommendation in good faith, and to report back to the UNGA on measures taken.

B. REQUESTING SPECIAL REPORTS FROM THE UNSC

1. *Legal Basis for the UNGA to Request Reports from the UNSC*

Article 15(1) of the UN Charter provides that the UNGA 'shall receive and consider annual and special reports from the Security Council', and that the reports 'shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.' The corollary of article 15(1) is article 24(3), which provides that the UNSC shall 'submit annual, and when necessary, special reports to the General Assembly for its consideration'.

The Charter does not specify the circumstances in which special reports should be submitted; nor does it state explicitly that the UNGA may request such reports. It is presumed, however, that the UNGA's competence to 'receive and consider' special reports also entails a competence to request them.¹⁰⁵

The existence of a reporting relationship between the UNSC and the UNGA does not mean that the UNGA has a supervisory function *vis-à-vis* the UNSC. At the time of the drafting of the Charter, a right on the part of the UNGA to approve or disapprove the UNSC's reports was discussed, and rejected.¹⁰⁶ Neither article 15(1) nor 24(3) empower the UNGA to hold the UNSC accountable for failing to report, or for providing unsatisfactory reports. Moreover, there is nothing in either article 15(1) or 24(3) that provides for any specific action to be taken by the UNGA upon receipt of a report from the UNSC.¹⁰⁷ Nevertheless, there is nothing preventing the UNGA from forming conclusions regarding the matters reported upon, and from making recommendations – or indeed taking any of the other actions described throughout this document – following receipt of a report from the UNSC.

KEY POINTS:

- The UN Charter empowers the UNGA to request special reports from the UNSC. These reports shall include an 'account of the measures that the Security Council has decided upon or taken to maintain international peace and security'. Following receipt of such a report the UNGA may form its own conclusions regarding the matter reported upon, and may make recommendations accordingly.
- With the exception of reports relating to the admission of new members to the UN, the UNGA has never requested a special report from the UNSC. This is a lost opportunity. In circumstances in which the UNSC fails to respond to a threat or occurrence of atrocity crimes, a request by the UNGA for a special report from the UNSC could assist to raise the public profile of the crisis and increase pressure on the UNSC to act.

2. *UNGA Practice of Requesting Special Reports from the UNSC*

Special reports have only rarely been provided by the UNSC to the UNGA. The only special reports that have been provided were in the UN's early years, and related to the admission of new members to the UN. A UNSC Presidential Note in 1997 stated that 'the members of the Security Council will continue to consider and to review ways to improve the Council's documentation and procedure, including the provision of special reports as referred to in article 24(3)', however this has not transpired.¹⁰⁸

The issue of UNSC reporting has long been on the agenda of the UNGA, in the context of its work on the 'revitalization of the work of the General Assembly'. In its 2005 resolution on that subject, the UNGA invited the UNSC to 'submit periodically, in accordance with article 24 of the Charter, special subject-oriented reports to the General Assembly for its consideration on issues of current international concern', and also to 'update the General Assembly on a regular basis on the steps it has taken or is contemplating with respect to improving its reporting to the Assembly'. In that same resolution, the UNGA committed to consider 'the [UNSC's] annual reports as well as special reports ... through substantive and interactive debates'.¹⁰⁹ In 2015 the UNSC committed to a series of specific improvements to its annual reporting,¹¹⁰ however it has made no such commitments regarding special reports. Nor have there been any requests from the UNGA regarding special reports, beyond the 'special subject-oriented reports' alluded to above. While there has been considerable discussion in the UNGA debates over the past decade regarding the UNSC's annual reporting,¹¹¹ there has been little attention paid to the issue of special reports.

3. *Prospects for, and the Utility of, the UNGA Requesting Special Reports from the UNSC*

With a view to enhancing the UN's performance in the area of atrocity prevention and response, a number of possibilities exist regarding the circumstances in which the UNGA might request special reports from the UNSC. Special reports might be requested, for example: following the report of a UN-mandated FFM, COI or investigatory mechanism which raises concerns regarding the risk or occurrence of atrocity crimes; following the passage of a UNGA resolution which contains specific recommendations to the UNSC; or following the casting of a veto in the UNSC. This latter possibility was recently suggested by the Government of Leichenstein, as part of a broader 'veto accountability initiative'. That initiative proposes that a formal meeting of the UNGA be convened every time a veto is cast in the UNSC, and that in such instances, 'the Security Council in accordance with article 24(3) of the UN Charter, will have the opportunity to submit a special report on the use of the veto in question to the General Assembly ahead of the Assembly's convening'.¹¹²

As with most of the other tools described in this document, requesting a special report from the UNSC is unlikely on its own to result in quick results in the prevention of, or response to, atrocity crimes. This is so particularly in light of the fact that the UNSC would be under no obligation to comply with the request. But when coupled with the UNGA's other powers, such as the power to critique or make recommendations to the UNSC, requesting a special report from the UNSC could assist to raise the public profile of a crisis and, in turn, increase pressure on the UNSC to act.

C. PREVENTIVE DIPLOMACY

1. *Legal Basis for the UNGA to Engage in Preventive Diplomacy*

Article 14 of the UN Charter authorises the UNGA to ‘recommend measures for the peaceful adjustment of any situation ... 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 Charter. In practice, this article has not frequently been invoked as a basis for UNGA recommendations,¹¹³ however it is broadly accepted that, together with articles 10, 11 and 13, it provides the UNGA with authority to pursue diplomatic action with a view to preventing the escalation of conflict or large-scale human rights violations.

The UNGA’s role in preventive diplomacy was affirmed by the UNSG in his 1992 Agenda for Peace report. That report stated that ‘the most desirable and efficient deployment of diplomacy is to ease tensions before they result in conflict’, and that preventive diplomacy could be performed by the UNSG, the UNGA, the UNSC and regional organisations. It defined preventive diplomacy as involving confidence-building measures, information gathering and fact-finding, and preventive deployment.¹¹⁴ The preventive diplomacy function of the UNGA was further affirmed by the UNGA in its 2006 Agenda for Peace Resolution. That resolution emphasised the UNGA’s ‘important role in preventive diplomacy’, and ‘decided to explore ways ... to promote the utilisation of the General Assembly ... so as to bring greater influence to bear in pre-empting or containing any situation which is potentially dangerous or might lead to international friction or dispute’.¹¹⁵

The UNGA may exercise its preventive diplomacy function either directly, for example by establishing ‘good offices committees’, or by making requests to the UNSG. Article 99 of the UN Charter empowers the UNSG to ‘bring to the attention of the UNSC any matter that in his opinion may threaten international peace and security’, and this has been interpreted to include, by necessary implication, a competence on the part of the UNSG to conduct inquiries and engage in informal diplomatic activity in regard to matters which ‘may threaten the maintenance of international peace and security’,

including the potential commission of atrocity crimes.¹¹⁶ Article 98 of the UN Charter instructs the UNSG to perform functions entrusted to him by the primary organs of the UN, including the UNGA. Thus, the UNSG may engage in preventive diplomacy either on his own initiative or when requested to do so by either the UNGA or another principal organ of the UN.¹¹⁷

KEY POINTS:

- Pursuant to its recommendatory powers described in the UN Charter, the UNGA may pursue diplomatic action with a view to averting or halting the commission of atrocity crimes. The UNGA may exercise its preventive diplomacy function either directly, for example by establishing good offices committees, or by requesting the UNSG to utilise his/her good offices.
- Instances in which the UNGA has exercised its own preventive diplomacy function have not been successful, however instances in which the UNGA has requested the UNSG to exercise his good offices have arguably had better results. The UNSG’s good offices function is regarded as one of the UN’s most important preventive diplomacy tools, due to the UNSG’s competence to conduct independent, impartial diplomacy.

2. *UNGA Practice of Engaging in Preventive Diplomacy*

The UNGA has exercised its preventive diplomacy function on just a few occasions, and with limited success. Initiatives have included: direct appeals from the UNGA President to the states concerned, aimed at bringing the parties to the negotiating table; the establishment of good offices committees to arrange and assist in negotiations; and requests to the UNSG to exercise his own good offices.

In 1948, when the Soviet Union blockaded the western powers' enclaves in Berlin, the UNGA President together with the UNSG wrote to the US, UK, France and the Soviet Union appealing for 'immediate conversations' to settle the dispute.¹¹⁸ In 1951 in relation to the Korean War, the UNGA established a Good Offices Committee, tasked with working towards a peaceful resolution to the conflict.¹¹⁹ In the 1940s-1950s, in relation to the 'treatment of Indians in South Africa', the UNGA passed a series of resolutions aimed at bringing South Africa, India and later Pakistan to the negotiating table. In 1946 it requested India and South Africa to report on measures taken to achieve a satisfactory settlement to the dispute; in 1949 it called upon India, South Africa and Pakistan to convene a 'round-table conference'; and then in 1952 it established a Good Offices Commission to arrange and assist in negotiations.¹²⁰ Also in the 1950s, the UNGA made a series of efforts to facilitate negotiations with South Africa with regards to its administration of the territory of South West Africa. In 1950 the UNGA established a committee of five countries to confer with South Africa regarding its reporting obligations as the administering power; in the following years it passed resolutions appealing to South Africa to cooperate with the committee; and then in 1957 it refashioned the committee as the Good Offices Committee, tasked with negotiating an agreement on the international status of South Africa.¹²¹

None of the UNGA's efforts in these instances were successful. In the case of the Berlin crisis, the Korean war and the treatment of Indians in South Africa, the UNGA was unable to bring the parties to the negotiating table.¹²² In relation to the administration of South West Africa, the UNGA's Good Offices Committee did succeed in getting South Africa to negotiate, however the Committee's report was ultimately rejected by the UNGA.¹²³

On other occasions, the UNGA has requested the UNSG to exercise his good offices with a view to peacefully resolving disputes. The UNSG has a long history of engagement in preventive diplomacy, both directly or via the deployment of special envoys/representatives, and more recently through rapidly-deployable mediation teams.¹²⁴ The UNSG's activities have included the deployment of COIs/FFMs, the convening of diplomatic conferences, the development of framework agreements, the establishment of special political missions, and various other initiatives aimed at facilitating dialogue between conflicting parties.

Situations in relation to which the UNGA has requested the UNSG to exercise good offices include the Western Sahara, Cambodia, Afghanistan, and more recently, Myanmar. Typically the requests are made in broad terms, allowing the UNSG wide discretion to engage in diplomatic initiatives he deems necessary for the achievement of the purposes outlined by the UNGA. In relation to Western Sahara, in the early 1980s the UNGA requested the UNSG to ensure UN participation in the referendum, and ever since it has made requests to the UNSG to facilitate negotiations with a view to achieving self-determination for the people of Western Sahara.¹²⁵ In relation to Afghanistan, the UNGA in the 1980s requested the UNSG to appoint a special representative, and engage in a diplomatic process, 'with a view to promoting a political solution' and 'securing appropriate guarantees for non-use of force'.¹²⁶ In relation to Cambodia, the UNGA in the 1980s requested the UNSG to 'exercise his good offices in order to contribute to a comprehensive political settlement', including by supporting the International Conference on Kampuchea.¹²⁷ Most recently in relation to Myanmar, the UNGA has repeatedly requested the UNSG to 'provide his good offices and to pursue his discussions relating to Myanmar, ... and to offer technical assistance to the Government in this regard'.¹²⁸ As many scholars have observed, the overall success of these initiatives is difficult to evaluate, because the negotiations have for the most part been conducted in private.¹²⁹

3. *Prospects for, and the Utility of, Future UNGA or UNGA/UNSG Preventive Diplomacy*

The importance of prioritising conflict prevention, and preventive diplomacy in particular, has received high-level political support in recent years. The UNSG's 2015 'Agenda for Action' identified strengthening UN 'capacities for conflict prevention and mediation' as its first pillar.¹³⁰ The UNSG's 2020 'Call to Action for Human Rights' describes prevention as a 'top priority and common thread across the work of the Organisation', and commits to 'creatively us[ing] the full spectrum of ... tools and channels, including leverage with others, to ... prevent crisis and protect people effectively'.¹³¹

In light of these commitments, the UNGA's preventive diplomacy function arguably warrants renewed attention. That said, the UNGA's track record of engaging in preventive diplomacy directly, either by means of appeals from the UNGA President or the establishment of committees, is not encouraging. The UNGA's efforts have for the most part been rejected by one or more of the states concerned, with the UNGA seen as preferencing one side and ill-equipped to provide an impartial platform for negotiation.

Conversely, the UNSG's good offices function is widely regarded as one of the UN's most important preventive diplomacy tools.¹³² This is in part because of the independence and impartiality of the UNSG within the framework of the UN Charter. Article 100 of the UN Charter provides that the UNSG must not receive directions from any government and must 'respect the exclusively international character' of the position of the UNSG, and this provides him/her with a unique competence to conduct independent, impartial diplomacy without threatening the sovereignty of member states. The UNSG has recently re-committed himself to engagement in preventive diplomacy: in 2017 he laid out a 'vision for prevention', which among other things affirmed his readiness to 'make greater use of [the UNSG's] powers under the Charter, including with respect to early warning and good offices'.¹³³ As such, requesting the UNSG to exercise his good offices is an important tool available to the UNGA as part of a broader strategy to avert or halt the commission of atrocity crimes.

In the analysis of factors influencing the likelihood of success of preventive diplomacy carried out by the UNSG, scholars have stressed the importance of maintaining the UNSG's independence from the UN's political organs. Thus, where the UNGA requests the UNSG to exercise good offices, the request should be phrased so as to allow the UNSG the 'margin of discretion he needs to act as a credible intermediary',¹³⁴ including by being able to distance himself/herself from any prior UNGA resolutions condemning the parties in question.

D. FACT-FINDING AND SUPPORTING INTERNATIONAL ACCOUNTABILITY EFFORTS

The UNGA, either directly or through its subsidiary body, the HRC, has a rich history of establishing subsidiary bodies to assist with the collection, analysis and preservation of evidence in the field of international criminal justice. Indeed, establishing such bodies is one of the primary ways in which the UNGA may act upon its competence enshrined in article 13(1)(b) of the UN Charter to make recommendations to ‘assist in the realisation of human rights’. Bodies in this field that the UNGA has either established (directly or through the HRC) or could feasibly establish fall into three broad categories: FFMs and COIs; investigative mechanisms (sometimes called ‘quasi-prosecutorial’ or ‘pre-prosecutorial’ bodies); and judicial bodies.

The following discussion focuses on the role of the UNGA and the HRC in *establishing* bodies in the field of international criminal justice. However, it should be noted that the UNGA may also support accountability efforts by approving the allocation of funds to bodies established by other actors, including the UNSC. In 2004, for example, the UNGA approved a subvention grant to the Special Court of Sierra Leone, which was established by the UNSC in 2002;¹³⁵ and since 2014 the UNGA has authorised multiple subventions to support the operations of the Extraordinary Chambers in the Courts of Cambodia (ECCC), which was established by way of agreement between the UN and the Cambodian Government in 2003.¹³⁶ The UNGA may also allocate funds to the ICC to support the investigation and prosecution of cases referred by the UNSC – even, arguably, if the UNSC’s referring resolution provides that no funding should accompany the referral, as some have done.¹³⁷

KEY POINTS:

- The UNGA is competent to establish subsidiary bodies. It may establish FFMs and COIs, as well as investigatory mechanisms such as those established for Syria and Myanmar. Such bodies may be established by the UNGA directly, or by the HRC. They may be established either with or without host state consent.
- FFMs/COIs play an important role in the response to atrocity crimes by producing information regarding the occurrence of violations, giving voice to victim testimony, galvanising support for accountability and in some cases making recommendations aimed at preventing further crimes. They can also make factual and/or legal determinations that may be relied upon by states or international organisations as a basis for their own actions, or that may be accorded evidentiary value in international courts or tribunals.
- Investigatory mechanisms established by the UNGA or the HRC play a significant role in the response to atrocity crimes by collecting, preserving and analysing evidence for use in future criminal proceedings.
- The UNGA is arguably competent to establish ad hoc international criminal tribunals. The UNGA has never established such a body, however the possibility has been flagged by UN FFMs and COIs.
- A UNGA-established ad hoc criminal tribunal could not compel states to cooperate, nor enforce its findings. However, in relation to certain crimes, states have treaty-based obligations to extradite or prosecute alleged perpetrators, and that obligation could arguably be satisfied by surrendering a suspect to a UNGA-established tribunal. Moreover, states would likely be under significant political pressure to cooperate with a UNGA-established international tribunal.

1. *Fact-Finding Missions and Commissions of Inquiry*

(a) *Legal basis for the UNGA/HRC to establish such bodies*

Article 22 of the UN Charter empowers the UNGA to ‘establish such subsidiary organs as it deems necessary for the performance of its functions’. As discussed in section 1.A.2, this provision has been interpreted broadly. The ICJ has said that article 22 ‘leaves it to the General Assembly to appreciate the need for any particular organ’, and that ‘the sole restriction placed by [article 22] on the General Assembly’s power to establish subsidiary organs is that they should be “necessary for the performance of its functions”’.¹³⁸

The UNGA expressly articulated its competence to establish FFMs in 1991, in its *Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security*. That declaration stated that ‘in performing their functions in relation to the maintenance of international peace and security, the competent organs of the United Nations should endeavour to have full knowledge of all relevant facts’, and ‘to this end ... should consider undertaking fact-finding activities’. It said that in this regard, consideration should be given to the establishment of FFMs, and that such missions could be established by the UNSC, the UNGA or the UNSG.¹³⁹

FFMs and COIs may also be established by the HRC, a subsidiary body of the UNGA. The constitutive resolution of the HRC empowers the HRC to address situations of gross human rights violations, to respond promptly to human rights emergencies, and to make recommendations on the protection of human rights.¹⁴⁰ Following the practice of the HRC’s predecessor, the Commission on Human Rights, this is interpreted as encompassing an implied power to establish FFMs and COIs.¹⁴¹

(b) *UNGA/HRC practice*

Both the UNGA and the HRC have frequently acted upon their powers to establish FFMs and COIs to investigate violations of international human rights and humanitarian law. Since the establishment of the HRC in 2006, most such bodies have been established by the HRC –

these include the COIs/FFMs established for Lebanon (2006), Libya (2011), Cote d’Ivoire (2011), Syria (2011), Palestine (2012), the DPRK (2013), South Sudan (2016) and Myanmar (2017).¹⁴² Earlier situations in which FFMs/COIs were established by the UNGA include Hungary (1956), South Vietnam (1963), Mozambique (1973), Cambodia (1998) and Afghanistan (1999).¹⁴³

The mandates of FFMs/COIs are determined on a case-by-case basis. In the case of contemporary bodies, typically the assigned tasks encompass two broad spheres of action: the investigation of violations of international human rights law, international humanitarian law and sometimes also international criminal law; and the articulation of broad-based transitional justice reform proposals. Over the past decade, such bodies have increasingly been mandated not only to establish facts and circumstances regarding violations, but also in some cases to identify perpetrators and to ‘legally characterize the facts’.¹⁴⁴ Such bodies typically employ a ‘reasonable grounds’ standard in making determinations regarding individual cases, incidents and patterns of conduct.¹⁴⁵ Some FFMs/COIs have been created with the consent of the host state, while others have been created without such consent (in the case of Syria, DPRK and Myanmar, for example). The standards to be followed by such bodies are laid out in the 2015 publication of the Office of the High Commissioner for Human Rights, ‘International Commissions of Inquiry and Fact-Finding Missions on International Human Rights Law and International Humanitarian Law – Guidance and Practice’.¹⁴⁶

(c) *The utility of the UNGA/HRC establishing such mechanisms*

FFMs and COIs play an important role in the response to atrocity crimes by producing credible information regarding the occurrence of violations, giving voice to victim testimony, galvanising global support for accountability, and in some cases making recommendations aimed at addressing the causes of conflict and preventing the commission of further crimes. More tangibly, FFMs/COIs can make factual and/or legal determinations that, albeit not irrefutable, may subsequently be relied upon by states or international organisations as

a basis for their own actions – a possibility highlighted by Gambia’s reliance on the report of the Independent Impartial Fact-Finding Mission for Myanmar (IIFFM) to file a genocide case against Myanmar in the ICJ.¹⁴⁷ Similarly, the findings of FFMs/COIs may be accorded evidentiary value in international courts or tribunals, as demonstrated by the extensive reliance by both the ICJ and ICC on the findings of the IIFFM.¹⁴⁸ The findings of FFMs/COIs may also be endorsed in UNGA resolutions, the ‘determinative’ effect of which may then in turn be relied upon by states, international organisations, or courts/tribunals – as discussed in section 2.E, below.

FFMs/COIs also have limitations. They are often minimally resourced; they frequently lack territorial access; they cannot compel cooperation; and because they do not themselves operate according to international criminal law standards, any information collected must be subsequently verified and authenticated prior to being used in criminal prosecutions. Some scholars have also raised concerns regarding the fact that, despite FFMs/COIs not operating according to criminal law standards, they nevertheless in some cases make findings regarding the identity of perpetrators and the qualification of violations as international crimes – thus tainting the individuals concerned with the stigma of criminal guilt, without the benefit of a fair trial.¹⁴⁹ Others have suggested that the shift towards an increasingly ‘legal discourse’ – as seen in recent FFM/COI mandates – might be ‘less effective than a moral frame for mobilising domestic support for accountability measures’.¹⁵⁰ Finally, some scholars assert that expecting FFMs/COIs to make findings regarding the occurrence of violations, and at the same time to make broad-based proposals for transitional justice reform, results in the missions being spread too thin – leading to recommendations that ‘provide little actionable insight’.¹⁵¹ Reflecting these criticisms, several scholars have advocated a shift away from ‘one-size-fits-all’ mandates, towards mandates tailored more specifically to achieve the unique goals and purposes of each mission.

2. *Investigatory (Pre-Prosecutorial) Mechanisms*

(a) *Legal basis for the UNGA/HRC to establish such bodies*

Recent years have seen a shift in the practice of the HRC and UNGA from a focus merely on fact-finding, towards the establishment of investigative, ‘pre-prosecutorial’ mechanisms mandated to gather, analyse and preserve evidence for use in future criminal trials. The legal basis for the UNGA and the HRC to establish such mechanisms is the same as that described in section 2.D.1, above, in relation to FFMs/COIs. The UNGA’s competence to establish the International Impartial and Independent Mechanism (IIIM) for Syria was challenged by some states on the grounds that it breached article 12 of the UN Charter; however, the legal challenge was rejected by the UNGA President.¹⁵² The UNGA’s (and the HRC’s) competence to establish such mechanisms now appears to have been affirmed in practice.

(b) *UNGA practice*

The two most significant of the pre-prosecutorial, investigatory mechanisms established by the UNGA and the HRC, respectively, are the IIIM for Syria (2016) and the Independent Investigative Mechanism for Myanmar (IIMM) (2018). The IIIM was mandated to: ‘collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses’; ‘prepare files in order to facilitate and expediate fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals’; and to ‘seek to establish the connection between crime-based evidence and the persons responsible ... for such alleged crimes’.¹⁵³ The IIMM was modelled on the IIIM, and was mandated in almost identical terms to collect, consolidate, preserve and analyse evidence, and to prepare files for future prosecution.¹⁵⁴ Both mechanisms are required to operate according to prosecutorial standards, so that the evidence gathered may be used in future criminal proceedings. They are also explicitly mandated to share information with national and international prosecutors. Both were established without the consent of the host government.

(c) *Utility of the UNGA establishing such bodies*

In contexts in which political blockages within the UNSC prevent the referral of a situation to the ICC or the establishment of an ad hoc criminal tribunal, pre-prosecutorial, investigative mechanisms established by the UNGA or the HRC can play a significant role by collecting, preserving and analysing evidence, thus supporting criminal proceedings in domestic jurisdictions, while at the same time paving the way for future trials at the international level. The value of such mechanisms in facilitating prosecutions in national courts is being borne out by the experience of the IIM. Criminal proceedings relating to Syria have been initiated in several national jurisdictions, and the IIM – with its central repository of information holding more than two million records, and ongoing structural investigations – offers an important service to these efforts. As of August 2020, the IIM had received 66 requests for assistance from 11 jurisdictions and concluded 56 frameworks for cooperation.¹⁵⁵ The IIM has not received a comparable volume of requests for assistance from national jurisdictions, however is uniquely placed to contribute to the ongoing proceedings against Myanmar and its senior officials before the ICJ and the ICC.¹⁵⁶

The obvious limitations of such mechanisms are that they cannot compel cooperation, and that – pending the existence of an international criminal court or tribunal with jurisdiction over the crimes in question – their ability to contribute to accountability ultimately depends on the ability of domestic courts to establish jurisdiction over the alleged perpetrators. Such limitation is highlighted by the Syria-related cases currently underway in Europe, the majority of which focus on lower-level perpetrators from opposition groups – as such ‘the cases in the aggregate are not representative of the full scope of the international crimes being committed in Syria’.¹⁵⁷ The scope for such mechanisms to usefully contribute to accountability efforts is also critically contingent on the availability of sustainable funding. Up until 2020, both the IIM and the IIMM were dependent on voluntary contributions from member states – as opposed to being included in the UN’s annual budget – problematising planning and undermining the mechanisms’ perceived impartiality, due to excessive reliance on individual member states.¹⁵⁸

3. *Judicial Bodies*

(a) *Legal basis to establish such a body*

On the basis of its powers described in section 2.D.1, above, the UNGA is arguably also competent to establish ad hoc criminal tribunals. Judicial (and ‘quasi-judicial’) bodies established by the UNGA have in the past been found by the ICJ to have been duly established, albeit in relation to administrative rather than criminal matters. In its 1954 *Effect of Awards* advisory opinion, the ICJ found the UNGA competent to establish the UN Administrative Tribunal (UNAT) to adjudicate staff disputes, and in its 1973 *Application for Review* advisory opinion, the Court found the UNGA competent to establish the Committee on Applications for Review of Administrative Tribunal Judgments (‘the Committee’).¹⁵⁹ In *Effect of Awards*, the Court relied on both article 22 of the UN Charter and the doctrine of implied powers (that the UNGA must be deemed to have powers essential to the performance of its duties – see discussion in section 1.B.1, above), and concluded that the UNGA’s powers under the UN Charter to regulate staff relations encompassed ‘the power to establish a tribunal to do justice as between the organisation and the staff members’.¹⁶⁰ In *Application for Review*, the ICJ cited *Effect of Awards*, and said that if the UNGA had the power to establish a tribunal to do justice between the UN and its staff, it necessarily followed that the UNGA also had the power to ‘create an organ designed to provide machinery for initiating the review by the Court of judgments of such a tribunal’.¹⁶¹ In both cases, the ICJ said that the UNGA had not attempted to delegate the performance of its own functions to a subsidiary body; rather, it was exercising its Charter-based powers to regulate staff relations, utilizing the means of its choosing.¹⁶² Thus, it was unnecessary to show that the particular functions vested in the new bodies – which the ICJ described as judicial in the case of UNAT, and ‘quasi-judicial’ in the case of the Committee – were functions vested in the UNGA itself.¹⁶³ Indeed, in *Effect of Awards* the Court stated explicitly that the UNGA ‘had the legal capacity under the Charter’ to ‘establish a judicial body’, despite the Charter ‘not confer[ring] judicial functions on the General Assembly’.¹⁶⁴

The ICJ’s *Effect of Awards* Advisory Opinion

was subsequently relied upon by the International Criminal Tribunal for the Former Yugoslavia (ICTY), to affirm the UNSC's competence to establish an international criminal tribunal. Article 29 of the UN Charter allows the UNSC to establish 'such subsidiary organs as it deems necessary for the performance of its functions', in identical terms to article 22 pertaining to the UNGA. Responding to an argument that article 29 did 'not contemplate the creation [by the UNSC] ... of an international judicial body', the ICTY Trial Chamber said that the article was 'expressed in the broadest terms and nothing appears to limit its scope to non-judicial organs'.¹⁶⁵ The Trial Chamber referred to the fact that the ICJ in *Effects of Awards* had 'specifically held that a political organ of the United Nations – in that case, the General Assembly – could and had created an "independent and truly judicial body"'.¹⁶⁶ The ICTY Appeals Chamber, similarly, affirmed the UNSC's competence to establish the ICTY 'as an instrument for the exercise of its own principle function of maintenance of peace and security', despite the UNSC not itself being a judicial organ and not possessing judicial powers.¹⁶⁷ It noted by analogy that the UNGA did not 'have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT', and 'nor did it need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East'.¹⁶⁸

The possibility of the UNGA establishing an ad hoc criminal tribunal has been flagged on at least four occasions by UN COIs and FFMs. In 1999, the Group of Experts for Cambodia recommended that if the UNSC did not establish an international tribunal, an alternative 'possibility' was the 'creation of a tribunal by the General Assembly under its recommendatory powers under Chapter VI of the Charter, especially articles 11(2) and 13'.¹⁶⁹ In 2009, the FFM on the Gaza Conflict recommended to the UNGA that it 'remain appraised of the matter' until it was satisfied that appropriate action had been taken to ensure justice and accountability, and suggested that it 'may consider whether action within its powers is required in the interests of justice, including under its resolution 377(V) on uniting for peace'.¹⁷⁰ In 2014, the COI on

Human Rights in the DPRK recommended that if the UNSC failed to refer the situation to the ICC or establish an ad hoc tribunal, 'the General Assembly could establish a tribunal', relying on 'its residual powers recognized inter alia in the "U4P" resolution and the combined sovereign powers of all individual member states to try perpetrators of crimes against humanity on the basis of the principle of universal jurisdiction'.¹⁷¹ Most recently, in 2019 the IFFM (Myanmar) recommended that if the UNSC failed to establish an ad hoc international criminal tribunal, the UNGA 'should consider using its powers within the scope of the Charter ... to advance such a tribunal'.¹⁷² The possibility of a UNGA-established international tribunal was also raised by some states in the aftermath of the downing of MH17 in 2014,¹⁷³ and in relation to the Syrian conflict, Sweden – albeit not explicitly referencing the UNGA – has urged that 'the conditions for establishing a possible tribunal ... must be thoroughly investigated'.¹⁷⁴ Scholars have also flagged the possibility for the UNGA to 'upgrade' the IIIM 'into a full-fledged tribunal'.¹⁷⁵

(b) *UNGA practice*

The UNGA has not established an international criminal tribunal, however it provided institutional support for the ECCC – established, as noted above, by way of an agreement between the UN and the Cambodian Government that was formally approved by the UNGA.¹⁷⁶ In the years preceding the agreement, the UNGA laid the ground for the ECCC's establishment by requesting the UNSG to appoint a Group of Experts to consider options for accountability,¹⁷⁷ and subsequently urging the Cambodian Government to cooperate with the UN to ensure the prosecution of serious violations of human rights, and specifically to conclude an agreement with the UN for the operation of the ECCC.¹⁷⁸ In the years following the agreement, as noted above, the UNGA supported the ECCC's operations by approving multiple subvention grants.

(c) *The utility of the UNGA establishing such a body*

An ad hoc criminal tribunal established by the UNGA would be reliant on the voluntary cooperation of states. The UNGA could not compel states to cooperate; nor could it enforce the findings of such a tribunal.

However, these limitations do not mean that the possibility of the UNGA establishing such a mechanism should be discounted, for a number of reasons. First, some international treaties relating to atrocity crimes contain an obligation to extradite or prosecute persons suspected of having committed the crimes the subject of the treaty. Most significantly, the Geneva Conventions require states to extradite or prosecute persons suspected of having committed grave breaches of the Geneva Conventions – grave breaches include ‘wilful killing, torture or inhuman treatment, causing great suffering or serious injury, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.’¹⁷⁹ The obligation to extradite or prosecute persons suspected of having committed grave breaches of the Geneva Conventions is generally regarded as enshrined in customary international law, although it is unsettled whether the obligation applies in non-international as well as international armed conflicts.¹⁸⁰ The Convention Against Torture also contains an obligation to extradite or prosecute,¹⁸¹ and the Genocide Convention, while not going so far as to articulate a duty to extradite or prosecute, does state that persons charged with genocide are to be tried by a court of the state where the crimes were committed, or by an international tribunal with jurisdiction.¹⁸² The ILC’s 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity assert moreover that the obligation to extradite or prosecute applies in relation to persons alleged to have committed crimes against humanity.¹⁸³ As such, even though a UNGA-established tribunal would not itself be empowered to require cooperation from states, in relation at least to the grave breaches of the Geneva Conventions and the crimes covered by the Convention against Torture, and arguably also in relation to crimes against humanity, states parties (or all states, in the case of crimes against humanity – according to the ILC)

are required to either extradite or prosecute suspects, and could satisfy this obligation by surrendering a suspect to a UNGA-established tribunal.

Second, irrespective of the existence of an obligation to extradite or prosecute, it is generally accepted that customary international law requires states to at least *cooperate* in the prosecution of war crimes. The 2005 study of the International Committee of the Red Cross on customary international humanitarian law asserts that ‘there appears to be ... general acceptance of the principle that States must make every effort to cooperate with each other, to the extent possible, in order to facilitate the investigation and trial of suspected war criminals and, in this regard, no distinction has been made between war crimes committed in international armed conflicts and war crimes committed in non-international armed conflicts.’¹⁸⁴ States would thus arguably be required by customary international law to cooperate with a UNGA-established international tribunal to facilitate the prosecution of war crimes.

Third, irrespective of states’ legal obligations to cooperate with a UNGA-established international tribunal, states would have the option of providing such cooperation voluntarily, and indeed there could be significant political pressure to do so. Such cooperation could include assisting with investigations, responding positively to arrest and transfer requests, or even domestically executing judgments, in the case of proceedings conducted by a UNGA-established tribunal in absentia.¹⁸⁵

E. 'QUASI-JUDICIAL' DETERMINATIONS

The UN Charter does not endow the UNGA with judicial authority, however in some situations UNGA resolutions may have a determinative effect – that is, they can make a determination regarding the application of existing legal principles to a particular set of facts. Examples of such 'quasi-judicial' determinations include determinations regarding the right to statehood, or the legitimacy of a particular regime, or the legality or illegality of state conduct. The following discussion sets out the legal basis for the UNGA's competence to pass resolutions with 'determinative' effect; then describes the UNGA's practice in passing resolutions of this nature; then provides three examples of the way in which the UNGA's determinative competence may be used.

1. *The Legal Basis for the UNGA to Make 'Quasi-Judicial' Determinations*

The ICJ has accepted that in certain situations, the UNGA is competent to pass resolutions with determinative effect. In its 1971 *Namibia* Advisory Opinion, the Court was called upon to consider the validity of a determination by the Assembly that South Africa had breached its mandate in Namibia. It found that the Assembly was 'not making a finding on facts, but formulating a legal situation', and 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 the framework of its competence, resolutions which make determinations or have operative design.¹⁸⁶

The competence of the UNGA to pass resolutions with determinative effect has been recognised by several scholars.¹⁸⁷ Such determinations are not irrefutable and have no binding effect, however they may attest to the existence of international consensus – or majority view – regarding the characterisation of a situation that may be difficult to refute.¹⁸⁸ They may also, as discussed below, be subsequently relied upon by other international institutions, such as international courts or tribunals.

KEY POINTS:

- The UNGA is competent to pass resolutions which make determinations regarding the application of existing legal principles to a particular set of facts. The UNGA has frequently acted upon this competence in practice.
- UNGA determinations are not irrefutable, however they may be relied upon by states or international organisations as a basis for action. UNGA determinations may also be, and have been, accorded evidentiary value by international courts and tribunals.
- The passing of resolutions with 'determinative effect' is an important tool available to the UNGA, that can be utilised in a variety of ways in the area of atrocity prevention and response.

2. UNGA Practice of Making 'Quasi-Judicial' Determinations

The making of 'quasi-judicial' determinations is firmly entrenched in the UNGA's practice. Among other things, the UNGA has made determinations regarding the legitimacy of particular regimes,¹⁸⁹ and the acts carried out by those regimes, and the uprisings against them.¹⁹⁰ It has made findings regarding a state's entitlement to statehood,¹⁹¹ and the validity of referendums and purported annexations,¹⁹² and it has frequently made findings regarding the characterisation of particular state conduct. It has, variously, characterised state conduct as aggression,¹⁹³ illegal,¹⁹⁴ genocide,¹⁹⁵ a violation of the territorial integrity of another state,¹⁹⁶ a threat to international peace and security,¹⁹⁷ a gross and systematic violation of human rights,¹⁹⁸ and a violation of the UN Charter,¹⁹⁹ the Geneva Conventions²⁰⁰ and international humanitarian law.²⁰¹ It has found states to be in breach of their international obligations,²⁰² and has made findings regarding a state's entitlement to self-defence.²⁰³ In certain instances it has found states to be entitled to compensation due to the wrongful conduct of another state.²⁰⁴ It has made findings regarding the identity of parties to a conflict²⁰⁵ and the characterisation of a conflict,²⁰⁶ and has affirmed the applicability of the Geneva Conventions to particular contexts.²⁰⁷ It has expressed its view on the need for particular courses of action, such as sanctions²⁰⁸ or assistance to national liberation movements.²⁰⁹ In the context of humanitarian crises, the UNGA has on a number of occasions expressed its views on the urgent need for food and medical supplies, or for humanitarian assistance more broadly, or for access for humanitarian agencies.²¹⁰

UNGA determinations of this nature have been relied upon by both the ICJ and the ICC. In its 2007 judgment in the *Bosnian Genocide Case*, the ICJ noted the fact that the UNGA had condemned 'the killing of civilians in connection with ethnic cleansing' in Bosnia and Herzegovina and 'express[ed] alarm at reports of mass killings', and it concluded that 'massive killings' had occurred.²¹¹ The UNGA resolutions in that case assisted by corroborating the 'overwhelming evidence' regarding the occurrence of atrocity crimes.²¹² Not dissimilarly, in January 2020 the ICJ relied on UNGA resolutions when it ordered provisional measures to prevent genocide in Myanmar – including UNGA Resolution 74/246 expressing

'deep distress' that individuals in Rakhine state were being subjected to 'violations of human rights and international humanitarian law by the military and security and armed forces'.²¹³

In 2016 in relation to Crimea, the ICC Prosecutor referred to the UNGA's determination that the referendum preceding the purported incorporation of Crimea into Russia had been invalid, and found that the 'situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation'.²¹⁴ More substantively, in 2015 the ICC Prosecutor referred to the UNGA's resolution granting Palestine 'non-member observer State' status in the UN, and found it to be '*determinative* of Palestine's ability to accede to the [ICC] Statute'.²¹⁵ When that same UNGA resolution arose for consideration by the ICC's Pre-Trial chamber in February 2021, the Pre-Trial Chamber said that it was not 'endowed with the authority to challenge [its] validity'. It noted moreover that the resolution had 'drastically changed the practice of the United Nations Secretary-General as regards its acceptance of Palestine's terms of accession to different treaties', because – following the UNGA's 'determination' regarding Palestine's 'non-member observer state' status – the UNSG now accepted that Palestine was able to become a party to any treaties open to all states.²¹⁶

3. Possible Uses for the UNGA's Determinative Competence

It is not possible to exhaustively describe the ways in which the UNGA's determinative competence can be utilised, so as to enable the UNGA to play a role in preventing and responding to atrocity crimes. Three examples are described here, for illustrative purposes. The first two describe courses of action that have been pursued by the UNGA, while the third provides an example of a course of action that could feasibly be pursued in the future.

(a) Supporting accountability efforts through the ICJ

The genocide case against Myanmar currently being heard by the ICJ illustrates two distinct ways in which UNGA resolutions can support accountability efforts through the ICJ. The first is by strengthening the evidence base upon which an applicant state may rely to file a contentious case. The ICJ can only exercise jurisdiction in relation to disputes that states

have agreed to have settled by the ICJ, such as is provided for by the Genocide Convention. Thus, in the case of Myanmar, the ability of the applicant state (Gambia) to file a case with the ICJ hinged on the feasibility of the case being framed as one of genocide. Such feasibility was enhanced when the UNGA passed Resolution 73/264 (2018), reiterating a number of the factual findings of the IIFFM that were suggestive of the crime of genocide, and expressing concern at the IIFFM's finding that there was sufficient information to warrant investigation and prosecution for genocide.²¹⁷ Gambia's genocide case against Myanmar was filed less than a year after UNGA Resolution 73/264.²¹⁸

The second way in which the UNGA can support the pursuit of accountability through the ICJ, also illustrated by the Myanmar case, is by strengthening the evidence upon which the ICJ may base its conclusions. In Resolution 73/264 (2018), the UNGA expressed 'deep distress' that the Rohingya continued to be 'subjected to the excessive use of force and violations of human rights and international humanitarian law by the military and security and armed forces'.²¹⁹ Less than a month later, the ICJ found that the Rohingya faced a 'real and imminent risk of genocide', and ordered Myanmar to take provisional measures to prevent the commission of genocide. The Court's ruling relied heavily on the UNGA's resolutions.²²⁰

An order for provisional measures relies upon a lower evidentiary standard than a decision on the merits, and so it cannot be assumed that the ICJ would rely so heavily on UNGA resolutions throughout the judicial proceedings. Moreover, the UNGA resolutions were not treated by the ICJ as *sources* of evidence; rather, their value was in their restatement and endorsement of the findings of the IIFFM.²²¹ Nonetheless, the results to which the UNGA resolutions were able to contribute in the Myanmar case are significant. As Professor Michael Ramsden has observed, the order 'allowed the ICJ to ... legally require Myanmar to cooperate'; and while the UNSC may be 'unlikely to enforce any recalcitrance, ... an ICJ finding of non-compliance will certainly impose reputational costs on Myanmar'.²²²

(b) *Facilitating the establishment of ICC jurisdiction*

Country-specific UNGA determinations may assist to establish a legal framework in which the preconditions for the ICC's jurisdiction (that a prescribed crime has been committed on the territory or by a national of a state that has accepted the jurisdiction of the Court) may be deemed to have been satisfied. As noted above, the UNGA has passed 'determinative' resolutions on issues such as the identity of parties to a conflict, the legitimacy of regimes, the entitlement to statehood, and the validity of an alleged annexation of territory. Such issues can be relevant to the question of whether an alleged crime was committed on the territory or by a national of a state that has accepted the jurisdiction of the court.²²³

The UNGA's resolution granting Palestine 'non-member observer state' status in the UN, for example, allowed Palestine to accede to the ICC statute, which in turn gave the Court jurisdiction over crimes committed in the Occupied Palestinian Territories.²²⁴ UNGA resolutions recognising South Ossetia as part of Georgia led the ICC Prosecutor to say that 'for the purposes of the application' South Ossetia was considered 'part of Georgia at the time of the commission of the alleged crimes', and that therefore the Court could exercise jurisdiction.²²⁵ The UNGA Resolution declaring Russia's alleged annexation of Crimea to be invalid was relied upon by the ICC Prosecutor for purposes of asserting that the situation within Crimea and Sevastopol was a state of occupation, which in turn 'provide[d] the legal framework for the Office's ongoing analysis of information concerning crimes alleged to have occurred'.²²⁶ UNGA resolutions of this nature are not irrefutable, and courts are free to form their own views on such matters.²²⁷ But as a criminal court, the ICC is not particularly well-equipped to resolve questions of general international law such as questions of statehood or state responsibility. As such, on a number of occasions the ICC Prosecutor appears to have appreciated the potential for the UNGA to augment its criminal jurisdiction by resolving preliminary questions of international law.²²⁸

(c) *Making a determination of ‘necessity’, so as to facilitate the provision of humanitarian assistance*

The UNGA could also feasibly utilise its determinative competence to provide a legal basis for states or international organisations to provide humanitarian assistance without the consent of the host state.

It is generally regarded that the provision of humanitarian assistance without host state consent violates the host state’s territorial integrity, and is therefore illegal.²²⁹ Where consent is withheld, humanitarian agencies may nevertheless operate if they are authorised to do so by the UNSC. Such has been the case in Syria since 2014, when the UNSC authorised the UN and its partners to provide humanitarian assistance inside Syria from across international borders.²³⁰

Where humanitarian assistance is required but the necessary authorisation cannot be obtained either from the host state or the UNSC, there is scope for the UNGA to play a role. Customary international law recognises a defence of necessity, as a ground for ‘precluding the wrongfulness of an act not in conformity with an international obligation.’²³¹ Necessity may preclude the wrongfulness of an otherwise unlawful act, if that act is the only way of safeguarding an essential interest threatened by a grave and imminent peril.²³²

In a context such as Syria, the UNGA could feasibly pass a resolution declaring that the ability of a particular population group to enjoy basic rights essential for their survival is an essential interest of the international community which faces grave and imminent peril, and that the only way of safeguarding that interest is for states and/or international organisations to provide humanitarian assistance via any possible access routes. The UNGA would effectively be making a pre-emptive determination that the wrongfulness of what might otherwise be an unlawful interference in a state’s territorial integrity ought to be precluded on the grounds of necessity. It would not be irrefutable, but – as with the UNGA’s resolutions on Myanmar – it could strengthen the evidence base for a later ruling by the ICJ. More immediately, such a ruling could feasibly provide UN agencies with the assurance they require to provide humanitarian assistance without host government consent – in the rare circumstances where it would be practically feasible to do so.²³³

F. REQUESTING ADVISORY OPINIONS FROM THE ICJ

1. *The UNGA's Legal Authority to Request an Advisory Opinion*

Article 96(1) of the UN Charter empowers the UNGA to request an advisory opinion from the ICJ on 'any legal question'. While this competence appears to be unlimited, the ICJ has indicated that in assessing the competence of the UNGA to request an advisory opinion on a particular matter, it may consider the relationship between the subject matter of the request and the activities of the UNGA.²³⁴ This restriction is of little significance to the UNGA's competence to request advisory opinions relevant to atrocity prevention and response, because the UNGA is explicitly empowered under the UN Charter to consider and make recommendations with regards to human rights, and on matters of international peace and security. The ICJ has held, moreover, that it is 'not for the Court itself to determine the usefulness of its request to the requesting organ', and that 'it should be left to the requesting organ ... to determine "whether it needs the opinion for the proper performance of its functions"'.²³⁵

The UNGA may request an advisory opinion from the Court regarding a matter of international peace and security even if that matter is simultaneously on the agenda of the UNSC. This was affirmed by the ICJ in its *Wall* advisory opinion, in which the Court affirmed an earlier opinion of the UN Legal Counsel, that article 12(1) of the UN Charter (discussed in section 1.A.3, above) only prevents the UNGA from making recommendations on a matter if the UNSC is considering the matter 'at this moment'.²³⁶ The Court has held, moreover, that a request for an advisory opinion is not in itself a 'recommendation', and as such, article 12(1) 'does not in itself limit the authorisation to request an advisory opinion which is conferred upon the General Assembly by article 96, paragraph 1'.²³⁷

Requests for advisory opinions are not included in the list of items defined by the UN Charter as 'important questions', in relation to which a 2/3 majority of the UNGA is required.²³⁸ Thus, such requests need only be approved by a simple majority of the UNGA.

KEY POINTS:

- The UNGA may request an advisory opinion from the ICJ on 'any legal question', including on matters of international peace and security even if those matters are also on the agenda of the UNGA. The UNGA may inform the ICJ that it deems the answer to be a matter of urgency.
- The UNGA has made numerous requests to the ICJ for advisory opinions, including in relation to situations simultaneously on the agenda of the UNSC. The ICJ has never declined to provide an advisory opinion requested by the UNGA.
- ICJ's advisory opinions are not binding on states, and the track record of states responding positively to the Court's pronouncements is not high. Nevertheless, an ICJ advisory opinion that a state is engaging in illegal conduct may result in significant political pressure on the state concerned.

When requesting an advisory opinion, the UNGA may inform the ICJ that it deems the answer to be a matter of urgency. If the UNGA so requests, the Court is obliged to accept this assessment without making its own assessment regarding the urgency of the case.²³⁹

In considering a request for an advisory opinion, the ICJ is required to assess not only the competence of the requesting UN organ/agency, but also whether the question asked is a legal one.²⁴⁰ On this matter, the Court has stated that 'the fact that a question has political aspects does not suffice to deprive it of its character as a legal question', and that 'in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have'.²⁴¹

2. UNGA Practice of Requesting Advisory Opinions

The UNGA has made 19 requests to the ICJ for advisory opinions. Among other things, the UNGA has requested advisory opinions on: whether Western Sahara was *terra nullius* at the time of colonisation (1975); the legality of the threat or use of nuclear weapons (1996); the legal consequences of the construction of the wall in the Occupied Palestinian Territories (2004); the legality of the declaration of independence in Kosovo (2010); and the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (2019).²⁴² All these cases were accepted by the ICJ as having been validly made, irrespective of the political motivations underpinning the requests and the political implications of the opinions.²⁴³ The ICJ has never declined to provide an advisory opinion on a question requested by the UNGA.

On several occasions the UNGA has made requests in relation to situations that were simultaneously on the agenda of the UNSC. On one occasion – the UNGA's request for an advisory opinion on the construction of a wall in the Occupied Palestinian Territories – the resolution containing the request was passed in an emergency special session, convened in accordance with the procedure prescribed by the UNGA's U4P Resolution (see section 1.C, above).²⁴⁴ The resolution requesting the advisory opinion referred explicitly to the U4P Resolution. In assessing the validity of the request, the ICJ assessed whether the conditions described in the U4P Resolution – failure of the UNSC to exercise its responsibility for international peace and security, due to lack of unanimity of the permanent members – had been met, however it did not suggest that the UNGA's competence to request an advisory opinion on matters of international peace and security simultaneously on the agenda of the UNSC was limited to situations in which the conditions described in the U4P resolution had been met. In its 2010 *Kosovo* advisory opinion the ICJ again affirmed the UNGA's competence to request an advisory opinion on a matter that was also on the agenda of the UNSC, this time without the UNGA's request having been made in the context of an emergency special session convened in accordance with the procedure described in the U4P Resolution.²⁴⁵

3. The Legal and Political Authority of ICJ Advisory Opinions

The ICJ's advisory opinions are not binding on states. While they do provide an authoritative assessment of the law, in politically contentious situations, the track record of states who did not support the exercise of the Court's jurisdiction in the first place responding positively to the Court's pronouncements is not high. One study in 2001 found that '[i]n the six opinions of the ICJ, where individual nation states requested and indeed were expected to follow the decision and take the appropriate action, none, with the exception of those involved in the *Reparations case*, have done so'.²⁴⁶ Even in contentious cases, in which the judgment of the ICJ is binding on the parties to the dispute, compliance is not assured – as seemingly suggested by the impact thus far (or lack thereof) of the ICJ's order in January 2020 that the Government of Myanmar take provisional measures to prevent the commission of genocide against the Rohingya.²⁴⁷

Nevertheless, the potential for ICJ advisory opinions to influence state behaviour should not be dismissed. Albeit non-binding, ICJ advisory opinions may influence states to re-evaluate diplomatic, economic and trade relations with states found to have engaged in illegal conduct; and they may also be used by international organisations as a basis for punitive action – for example, by international finance institutions as a basis for the suspension of aid.²⁴⁸ Finally, ICJ advisory opinions may be relied upon as evidence by the UNGA itself in subsequent resolutions on the same situation. Following the advisory opinion of the ICJ in the *Chagos* case, for example, the UNGA passed a resolution demanding that the UK withdraw its colonial administration from the Chagos Archipelago as soon as possible, and calling on states as well as international, regional and intergovernmental organisations to support the decolonisation process.²⁴⁹

Finally, it is worth noting that while there may be limited scope for an ICJ advisory opinion to immediately avert or halt the commission of atrocity crimes, there is scope for the UNGA to pose questions with a view to developing a legal framework that might better facilitate UNGA action in the future. One suggestion recently advanced, for example, is that the UNGA request an advisory opinion from the ICJ regarding the legality of members of the UNSC using their power of veto to block UNSC action in relation to atrocity crimes.²⁵⁰

G. RECOMMENDING MEASURES OTHER THAN MILITARY FORCE (SANCTIONS)

Economic and diplomatic sanctions – arms embargoes, asset freezes, travel bans, and various other measures – are a core component of the diplomatic toolkit of states. They have particular value as a means of punishing or deterring perpetrators of atrocity crimes; and they also have value as a way of depriving individuals, entities and in some cases states of the means to commit those crimes. They also have the potential to negatively impact the human rights of the population in the targeted state.²⁵¹

Economic sanctions are typically described as either multilateral or unilateral/autonomous. In the analysis of most scholars, as well as in UN documents, ‘multilateral’ means mandated by the UNSC under Chapter VII of the UN Charter.²⁵² In practice there is a third category of sanctions, namely, sanctions imposed by a group of states acting pursuant to the recommendation of a regional or international organisation—including the UNGA. While such measures may not be truly ‘unilateral’ from a foreign policy perspective, they lack the legal basis of ‘multilateral’ sanctions imposed by a competent international organisation against its members pursuant to the terms of its constituent instrument.²⁵³ As such, the discussion here focuses on UNGA recommendations for measures that may legally be categorised as autonomous/unilateral sanctions.

The following discussion first addresses the legal basis for states to impose sanctions not authorised by the UNSC, then considers the legal basis for the UNGA to recommend such measures. It then considers the legal effect of UNGA sanctions recommendations, and the UNGA’s practice in making such recommendations, and then finally considers the feasibility of the UNGA issuing future sanctions recommendations, consistently with the principles it has expounded in its own resolutions condemning coercive economic measures.

KEY POINTS:

- The UNGA is competent to recommend measures not involving the use of military force, and has previously recommended a wide range of diplomatic, economic and other sanctions. Sanctions recommended by the UNGA but not mandated by the UNSC are generally characterised in legal terms as unilateral sanctions.
- Unilateral sanctions aimed at averting or halting the commission of atrocity crimes ought not to be regarded as breaching the international law principle of non-intervention. Such sanctions may nevertheless be illegal if they breach international treaties, or international law principles of jurisdiction. There is an argument that ‘human rights sanctions’ may be characterised as countermeasures taken in the collective interest, which would have the effect of precluding the wrongfulness of a breach of a legal obligation by the sanctioning state(s).
- UNGA sanctions recommendations are generally regarded as recommendatory only. There are arguments that can be made to support an assertion that a UNGA recommendation for sanctions effectively authorises the recommended measures, however such arguments are controversial.
- Research shows that sanctions can influence state behaviour, however success rates are low. Sanctions have been found to be more effective at ‘signalling’ than they are at coercing behavioural change. As such, it is generally recognised that sanctions have value as a means to promote international norms.
- Even targeted sanctions can negatively impact human rights in the sanctioned state. This is so particularly where sanctions target entire sectors of economic activity.
- In terms of state compliance, UNGA sanctions recommendations do not have a strong track record. Nevertheless, a UNGA recommendation for sanctions may have a stigmatizing / signalling effect.
- The UNGA has passed numerous resolutions condemning unilateral coercive measures. If the UNGA wishes to recommend sanctions in the future, it would be advised to articulate the consistency of the proposed measures with its past resolutions. This could be achieved by stipulating that any measures adopted by states pursuant to a UNGA recommendation should comply with the principles outlined in the UNGA’s Draft Declaration on Unilateral Coercive Measures and the Rule of Law.

1. *The Legal Basis for the UNGA to Recommend Sanctions Not Authorised by the UNSC*

There is nothing in the UN Charter that allows the UNGA to 'decide' to employ collective measures on member states, equivalent to the powers of the UNSC under Chapter VII of the UN Charter. Under the terms of the UN Charter, the only way that the UNGA itself may sanction a member state is to suspend or expel that state from the UN, however this can only be done following a recommendation from the UNSC.²⁵⁴ Alternatively, the UNGA's procedural rules can arguably be interpreted as allowing the UNGA to sanction a state for violating the purposes and principles of the UN Charter by rejecting the credentials of its representatives. The UNGA's competence in this regard is discussed in section 2.J, below.

Other than this controversial and rarely-used possibility, the role of the UNGA in relation to sanctions is limited to recommending to states that they impose such measures themselves. As discussed in section 1.A.1, articles 10-11 and 13-14 of the UN Charter empower the UNGA to make recommendations on any matter within the scope of the Charter, and specifically relating to international peace and security and human rights. The UNGA's recommendatory powers on matters of international peace and security are limited by Article 11(2), which provides that the UNGA shall refer any question 'on which action is necessary' to the UNSC, however as outlined in section 1.A.3, above, most scholars take the view that it is only mandatory enforcement action that must be referred to the UNSC. It is broadly accepted that the UNGA is competent to recommend measures not involving the use of military force, such as economic sanctions.²⁵⁵

2. *The Legal Basis for States to Impose Sanctions not Authorised by the UNSC*

Some sanctions, such as the suspension of diplomatic relations or international aid, typically do not raise questions of legality, because their imposition falls clearly within the sovereign rights of the sanctioning state.²⁵⁶ Other types of sanctions such as trade restrictions or arms embargoes may breach the obligations of the sanctioning state(s) under trade treaties, unless they can be justified on the basis of national security exceptions.²⁵⁷ Depending on their nature they may also, or

alternatively, breach the customary international law principle that prohibits states from intervening in each other's affairs.

The principle of non-intervention was defined by the ICJ in *Nicaragua* as prohibiting the use by a state of coercive methods to intervene in the affairs of another state, where those affairs are 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely'.²⁵⁸ Since the decision of the ICJ in the *Barcelona Traction* case, it has been broadly accepted that a state's exclusive domestic jurisdiction – that is, those matters on which it is permitted to decide freely, by virtue of its sovereignty – does not encompass an unlimited freedom to violate international human rights law. The Court said in that case that the 'principles and rules concerning the basic rights of the human person' are 'the concern of all states', and that 'all states ... have a legal interest in their protection'.²⁵⁹ Thus, if sanctions are aimed at preventing or halting gross violations of human rights, they ought not generally to be regarded as matters on which the targeted state is permitted to decide freely; accordingly, the question of whether the measures are coercive – for purposes of determining whether the measures breach the non-intervention principle – should not arise.

The assertion that unilateral sanctions imposed in response to large-scale human rights violations do not breach the customary international law prohibition of intervention is supported by state practice. Such practice includes, most notably, the adoption by several states in recent years of 'Magnitsky-style' sanctions legislation, authorising the imposition of sanctions targeting individuals responsible for human rights violations anywhere in the world.²⁶⁰

Even where sanctions may be permitted on the basis that they do not breach international treaties or the customary international law principle of non-intervention, sanctioning states are nevertheless bound to respect their own obligations under international human rights law. This means respecting internationally recognised principles of due process with regards to targeted individuals, and for states parties to the International Covenant on Economic, Social and Cultural Rights, ensuring that sanctions do not negatively impact economic, social and cultural rights in the targeted state.²⁶¹ Additionally, sanctioning states are bound to respect established international law principles of jurisdiction, which generally prohibit states

from attempting to regulate the activities of non-nationals or foreign entities in foreign states, and thus prohibit so-called ‘secondary sanctions’.²⁶²

Some scholars assert that sanctions imposed in response to serious human rights violations can be justified as countermeasures taken in the collective interest.²⁶³ Countermeasures are recognised in the ILC’s Articles on State Responsibility (2001) as one of six circumstances precluding the wrongfulness of conduct that breaches an international legal obligation.²⁶⁴ The Articles on State Responsibility do not recognise a right of states to take countermeasures ‘in the general interest as distinct from [the sanctioning state’s] own individual interest’; however, article 54 of the Articles on State Responsibility says that the provisions on countermeasures do ‘not prejudice’ the right of a state to take ‘lawful’ measures against a state in the interests of the beneficiaries of the obligation breached.²⁶⁵ The ILC’s commentaries describe this as a ‘savings clause’, which ‘leaves the resolution of the matter [whether countermeasures may be taken in the collective interest] to the further development of international law’.²⁶⁶

In light of what has been said about the legality of sanctions that do not coercively encroach upon a state’s *domaine reserve*, it should not generally be necessary to characterise sanctions imposed for the purpose of averting or halting the commission of atrocity crimes as countermeasures. If such sanctions can be characterized as countermeasures, however, this would have the effect of exonerating the sanctioning state(s) from competing legal obligations, including obligations contained in bilateral/multilateral treaties.

3. *The Legal Effect of UNGA Sanctions Recommendations*

UNGA sanctions recommendations are generally regarded as recommendatory only. States are free to decide how to respond to such recommendations, provided they adhere to their existing legal obligations. What is not completely settled is whether UNGA recommendations for unilateral sanctions may have the effect of allowing states to breach competing legal obligations, such as those contained in trade treaties, or other principles of international law such as those relating to extraterritorial jurisdiction.

The question of whether UNGA is competent to authorise states to engage in conduct that

would otherwise be unlawful is discussed more substantively in section 2.H.3, below, in relation to UNGA recommendations for the use of force. In relation to sanctions in particular, it is possible to argue that the UNGA appears to have assumed such a competence in practice. Throughout its history the UNGA has recommended to states that they impose sanctions of various types, seemingly without regard for the legal basis for those measures.²⁶⁷ The UNGA’s silence as to the legality of states acting on its recommendations might be interpreted as suggesting an understanding on the part of the UNGA that its resolutions are recommendatory only, and that as such, it may rely on states to make their own assessments regarding the legality of acting pursuant to the UNGA’s recommendations. Alternatively, it might be argued that the UNGA has proceeded on the assumption that its recommendations provide the necessary legal basis for states wishing to act. If one accepts this latter interpretation, then read together with the ICJ jurisprudence on the relevance of the ‘practice of the organisation’ as a guide to UN Charter interpretation, and the ILC’s more recent affirmation that the practice of international organisations may serve as a guide to the interpretation of their constitutive instruments (discussed in section 1.B.2, above), it may be argued that the UNGA’s practice of seemingly purporting to authorise conduct that might otherwise be unlawful attests to the UNGA’s competence to do so.²⁶⁸ Such arguments are controversial, however, and diverge from the traditional consensus regarding the legal effect (in general, recommendatory-only) of UNGA resolutions.

It should be noted that if one accepts the argument (discussed in section 2.G.2, above) that sanctions imposed in response to large-scale human rights violations do not breach the international law principle of non-intervention, then the question of whether a UNGA recommendation can effectively authorise such measures need not arise – unless the sanctions breach other rules of international law. However, in the context of atrocity crimes, a UNGA sanctions recommendation may nevertheless play a role in buttressing the political and legal case for the imposition of unilateral sanctions. A UNGA resolution could, for eg: affirm that large-scale human rights violations have occurred; express the view of the UNGA that the severity of the situation warrants the imposition of collective measures; and recommend particular measures that expressly comply with the conditions

required by international law for the imposition of countermeasures (proportionality, temporarily, etc). Such a resolution could, in the first place, affirm the legal basis for states to impose sanctions, based on the law of countermeasures. Secondly, in situations in which states might in any case be inclined to impose sanctions autonomously with or without a UNGA recommendation, a UNGA recommendation for particular measures could increase the likelihood of such measures being imposed consistently and coherently (hence, increasing their effectiveness), as well as the likelihood of the measures complying with the well-established criteria for non-forcible countermeasures.²⁶⁹

4. *UNGA Practice of Recommending Sanctions*

The UNGA has on various occasions in the past recommended diplomatic, economic and other sanctions. The most robust of the UNGA's sanctions recommendations were made in the 1960s, 1970s and 1980s, in response to South African aggression and apartheid, and in support of the independence struggles in the Portuguese Territories and Southern Rhodesia. In these contexts the UNGA over a sustained period made bold recommendations to states, including that they adopt 'comprehensive and mandatory sanctions', prevent the sale and supply of arms and military equipment to the hostile regimes, sever diplomatic relations, boycott trade, and more generally adopt legislative, administrative and other measures in order to isolate the concerned regimes 'politically, economically, militarily and culturally.'²⁷⁰ Other contexts in which the UNGA has recommended sanctions and/or the cessation of the sale and supply of arms include the Korean War,²⁷¹ the Congolese civil war,²⁷² Israeli aggression against Iraq,²⁷³ and Israel's occupation of and aggression against the Palestinian territories.²⁷⁴ Most of the Assembly's sanctions recommendations have been made without the UNSC having imposed mandatory sanctions. As such, the Assembly's recommendations have been for states to act autonomously – insofar as that term is used to mean without UNSC authorisation – in imposing the recommended measures.²⁷⁵

5. *The Effectiveness of Sanctions, and Unintended Consequences*

There is a vast volume of literature on the effectiveness of sanctions as a tool to promote human rights, as well as to promote compliance with other goals such as counter-terrorism and non-proliferation. In general, research shows that sanctions can in some circumstances influence state behaviour, but that success is limited. One oft-cited study of 174 sanctions regimes (unilateral/autonomous as well as multilateral) from the First World War through to 2000 found sanctions to be 'at least partially successful' in 34 percent of cases.²⁷⁶ A more recent (2016) analysis focusing only on multilateral sanctions found that sanctions were more effective at 'constraining' a target (depriving a target of access to resources needed to engage in a proscribed activity) or 'signalling' (publicly asserting the target's deviation from an international norm) than they were at coercing a change of behaviour. That study found that 27 percent of the sanctions episodes examined were effective at 'constraining', 27 percent were effective at 'signalling', and just 10 percent were effective at coercing behavioural change.²⁷⁷ Another study has found that sanctions in some cases have a deterrent effect, however the research on this is limited.²⁷⁸

There is a similarly vast volume of literature on sanctions' unintended consequences, including in particular negative impacts on human rights. In 1997, the Committee on Economic, Social and Cultural Rights observed that sanctions 'almost always have a dramatic impact' on economic, social and cultural rights.²⁷⁹ In the 2016 study referred to above, 94 percent of the sanctions episodes analysed had unintended consequences. These included increases in corruption and criminality (58 percent of cases) and negative humanitarian consequences (44 percent).²⁸⁰ Since the 1990s the humanitarian impacts of sanctions have been somewhat alleviated by the shift from comprehensive to targeted sanctions, however research shows that even targeted sanctions can negatively impact human rights in the targeted state. This is so particularly in the case of 'sectoral sanctions' – those targeting entire sections of economic activity.²⁸¹

Nevertheless, few scholars dispute that sanctions have a role to play, if only as a means for sanctioning states to publicly promote international norms.²⁸² This is the 'signalling' effect referred to in the 2016 study discussed above – the authors of that

study observed that ‘because the affirmation of an international norm is embedded in the signalling aspect of every episode, sanctions function as a central mechanism for the strengthening and/or negotiation of international norms’.²⁸³ In a similar vein, the authors of the earlier study referred to above conclude that if sanctions are found to have been ineffective in bringing about policy change, it ‘does not mean it was a mistake to impose them’, but merely that ‘presidents and publics should not count on sanctions alone to achieve the declared objectives’.²⁸⁴

6. *The Effectiveness of UNGA Recommendations for Sanctions: Do States Comply?*

It is difficult to assess the degree of state compliance with UNGA sanctions recommendations, however generally speaking, it may be observed that such recommendations do not have a strong track record. Examples of state compliance with UNGA sanctions recommendations are relatively few, and where incidents of compliance can be found, it is difficult to assess the causal link between the sanction imposed and the relevant UNGA recommendation(s).

Following the UNGA’s recommendation for an arms embargo against Korea in the 1950s, a US assessment found that 43 states had given ‘generally satisfactory’ reports regarding measures taken, and that the embargo had had an ‘appreciable ... impact on the aggressors’.²⁸⁵ Conversely, the UNGA recommendations for comprehensive sanctions against Portugal in the 1960s were not widely adhered to.²⁸⁶

The UNGA’s recommendations for sanctions in relation to South African apartheid in the 1960s through to the 1980s arguably had some measure of success. For many years the UNGA’s recommendations had little impact, however in the 1980s many states adopted policies in line with those recommended by the UNGA. It is almost impossible to assess the causal link between the UNGA resolutions and the sanctions imposed, however the UNGA has been credited for its role in mobilising an international ‘campaign against apartheid that eventually outflanked and defeated the anti-sanctions opposition represented by western nations’.²⁸⁷ That international campaign drove the UNSC to impose a mandatory arms embargo in 1977; and moreover, drove national

governments to impose their own sanctions (in the 1980s) along the lines of those recommended by the UNGA.²⁸⁸ In other words, it cannot be said that states sanctioned South Africa because of the UNGA resolutions; but it can be said that the UNGA recommendations helped mobilise (and give voice to) the international campaign that eventually forced them to do so.

Similar comments may be made regarding the UNGA’s recommendations, since the 1980s, for sanctions against Israel.²⁸⁹ Recent years have seen a growing international campaign which advocates for an international boycott of Israeli products, divestment of investments in Israel, and sanctions.²⁹⁰ The boycott is not supported by western states, however many non-western states have severed diplomatic relations with Israel, and banned travel to/from Israel. Moreover, even in western states, many companies and social, cultural and sporting institutions practice some degree of compliance with the recommendations of both the UNGA and the ‘boycott, divestment and sanctions’ movement. As with the sanctions on South Africa in the 1980s, these policies and practices cannot be attributed to the UNGA, but the UNGA resolutions play a role as part of a broader international campaign.

7. *UNGA Condemnation of Economic Intervention, and Scope for Future Sanctions Recommendations*

In the 1960s and 1970s the UNGA passed a series of thematic resolutions, including most significantly the 1970 Friendly Relations Declaration, denouncing economic intervention in the affairs of states.²⁹¹ These resolutions all assert that ‘no state may use ... economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights’. Additionally, since 1991 the UNGA has adopted resolutions titled ‘economic measures as a means of political and economic coercion against developing countries’;²⁹² and since 1996 it has adopted resolutions on ‘human rights and unilateral coercive measures’.²⁹³ Both sets of resolutions urge states to cease adopting unilateral coercive measures that do not accord with international law.

If the UNGA wishes to recommend sanctions in the future, it would be advised to articulate the consistency of the proposed measures with its past

resolutions condemning economic intervention in states' affairs, as well as with those calling for the elimination of unilateral coercive measures not in accordance with international law.

It is possible for the UNGA to recommend sanctions consistently with its past condemnation of intervention in states' affairs. The UNGA's resolutions on non-intervention in the 1960s and 1970s for the most part apply specifically to measures aimed at subordinating a state's sovereign rights.²⁹⁴ As discussed above, sanctions aimed at encouraging a state to comply with its international human rights obligations should not be regarded as aimed at subordinating state sovereignty; thus, they should not be regarded as those towards which the UNGA's resolutions – according to a strict reading of the text of those resolutions – have been directed.

The UNGA's resolutions on unilateral coercive measures and human rights, and those on unilateral economic measures and developing countries, urge states only to cease adopting unilateral measures that are not in accordance with international law. These resolutions do also contain sweeping statements that unilateral coercive measures *'are contrary to international law'*, however when read in light of the related reports of the UN High Commissioner for Human Rights and the Special Rapporteur on the negative impacts of unilateral coercive measures, it is apparent that what is being asserted by the UNGA is that unilateral coercive measures are illegal if they: (a) negatively impact human rights; (b) involve extraterritorial application of domestic measures; or (c) fail to respect established principles of due process.²⁹⁵

Since 2017, the UN Special Rapporteur on the negative impact of unilateral coercive measures has been engaged in the development of a Draft UNGA Declaration on Unilateral Coercive Measures and the Rule of Law.²⁹⁶ Among other things, the draft text affirms that unilateral coercive measures are illegal if they negatively impact human rights in the targeted state, purport to apply extra-territorially, or violate well-established legal principles regarding due process. In the interest of consistency, any future UNGA recommendations for unilateral sanctions could stipulate that any measures adopted by states pursuant to the UNGA's recommendation should comply with the principles outlined in the Draft Declaration on Unilateral Coercive Measures and the Rule of Law.

H. RECOMMENDING THE USE OF FORCE

1. *Legal Basis for the UNGA to Recommend the Use of Force*

As discussed in section 1.A.1, article 11 of the UN Charter empowers the UNGA to make recommendations to states on matters of international peace and security. The UNGA's competence in relation to the use of force is restricted by article 11(2), which provides that any question 'on which *action* is necessary shall be referred to the Security Council'. As discussed above in section 1.A.3, 'action' has been interpreted to mean 'coercive or enforcement action'.²⁹⁷ As also discussed in that section, there is strong support for the proposition, including implicitly by the ICJ, that to fall within the exclusive province of the UNSC, 'action' must not only be coercive, but also *mandatory*. In other words, if the UNGA believes that *binding* enforcement measures are required, it must refer the matter in question to the UNSC, but if it takes the view that a mere recommendation for enforcement action may suffice, there is nothing preventing it recommending as such.²⁹⁸

In its 1950 U4P Resolution, the UNGA interpreted its powers as including the competence to recommend the use of force. As discussed in section 1.C, above, that resolution provided that if the UNSC failed to exercise its responsibilities, 'in any case where there appears to be a threat to the peace, breach of the peace or act of aggression', the UNGA would 'consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of the peace or act of aggression, the use of armed force when necessary'.²⁹⁹ That Resolution articulated a procedure for the UNGA to meet in such situations, as well as particular thresholds for UNGA action. These are discussed in section 1.C, above. Suffice to recall here that if a situation of sufficient gravity were to arise in which the UNGA wished to recommend the use of force, it could opt to explicitly invoke the U4P Resolution and follow the procedure (and satisfy itself of the thresholds) described therein, or it could opt *not* to invoke the U4P Resolution and instead rely upon its inherent, Charter-based powers. The implications of the UNGA explicitly invoking the U4P Resolution as a basis to recommend the use of force, or alternatively recommending the use of force without invoking U4P, have been discussed above.

KEY POINTS:

- The UNGA is competent to make recommendations to states regarding the use of force. It may do so in regular session or in special session, with or without invoking the U4P Resolution, and with or without a referral of the matter in question from the UNSC.
- Although the UNGA may make recommendations to states regarding the use of force with or without a referral from the UNSC, and with or without the U4P resolution being explicitly invoked, in some circumstances a reference to the U4P Resolution may serve a political purpose.
- The conventional view holds that UNGA recommendations for the use of force do not provide a legal basis for the recommended measures, and in particular, do not exonerate states from their obligation under article 2(4) of the UN Charter prohibiting the use of force. On this view, while the UNGA may recommend the use of force, states are only legally entitled to act on such a recommendation if the force is to be used in support of the right to self-defence, or with the consent of the host state.
- Scholars have advanced a range of arguments in support of the proposition that a UNGA recommendation for the use of force provides a legal basis for the recommended conduct. These approaches present a range of possible interpretations available to states wishing to make the case for a more robust UNGA response to the threat or occurrence of atrocity crimes.
- Irrespective of the legal effect of a UNGA recommendation for the use of force, a UNGA recommendation may increase the political *legitimacy* of an intervention aimed at averting or halting the commission of atrocity crimes.

2. *UNGA Practice of Recommending the Use of Force*

Throughout its history, the UNGA has on a number of occasions recommended the use of force. Some of its recommendations have been made in the context of peace-keeping operations, in which case, the recommended use of force has been premised on the consent of the host state. These cases are discussed in section 2.I, below. Most of the UNGA's other recommendations for the use of force have arisen in the context of collective self-defence. In relation to South African aggression in the 1980s, for example, the UNGA called upon states to extend military assistance to front-line states in order to enable them to defend their sovereignty and territorial integrity.³⁰⁰ In resolutions on Southern Rhodesia, the UNGA asked states to assist Botswana, Mozambique and Zambia to 'strengthen their defence capability in order to safeguard effectively their sovereignty and territorial integrity'.³⁰¹ In relation to Bosnia and Herzegovina in 1994, the UNGA urged member states to cooperate with Bosnia and Herzegovina 'in exercise of its inherent right of self-defence'.³⁰² The UNGA's recommendation to states in 1950 that they 'continue to assist' the UN action in Korea is also typically regarded as having been a request for support for collective self-defence.³⁰³

On occasions, the UNGA has recommended that force be used in circumstances not justified either by the context of a UN mandated peacekeeping operation or collective self-defence. In relation to South Africa in the 1980s, for example, the UNGA called upon states to provide 'all ... forms of necessary assistance' to the people of South Africa and their national liberation movements;³⁰⁴ and it also called upon states to assist the South West Africa People's Organisation to 'intensify its struggle for the liberation of Namibia'.³⁰⁵ In relation to Southern Rhodesia, the UNGA called upon the UK (the colonial authority) to 'take all the necessary measures, including in particular the use of force, ... to put an end to the illicit racist minority regime'.³⁰⁶ The requests for support for national liberation movements were grounded broadly in the legitimacy of struggles for independence,³⁰⁷ and the requests to the UK in Southern Rhodesia were based on the responsibilities of the UK as the administering power.³⁰⁸ Both these legal bases were disputed, however, and the UNGA did not in any case explicitly stipulate the legal basis for its recommendations. As discussed above in relation

to UNGA sanctions recommendations (section 2.G.4), the UNGA's silence as to the legality of the recommended conduct might be interpreted as affirming the UNGA's understanding that its resolutions are recommendatory only, and that it is up to states to determine whether they may act on the recommendation; or alternatively, it may be interpreted as suggesting an assumption on the part of the UNGA that its recommendations provide the necessary cover for states wishing to act accordingly.

With the exception of the UNGA's engagement in establishing and/or strengthening peacekeeping operations (discussed in section 2.I, below), the UNGA has never invoked the U4P Resolution as a basis for a recommendation to use force.

3. *The Utility of a UNGA Recommendation for the use of Force: Legal and Political Effects*

Some scholars and governments have argued that states have a legal right to use military force to avert or halt the commission of atrocity crimes – the so-called right of 'humanitarian intervention' – however the prevailing view is that this argument is not well supported by international law.³⁰⁹ As such, if it is to be argued that states may act on a UNGA recommendation to use force to avert or halt the commission of atrocity crimes, it must be shown that such a recommendation has the effect of exonerating states from their obligation under article 2(4) of the UN Charter to refrain from the use of force.

The conventional view is that UNGA resolutions do not exonerate states from their existing legal obligations. On this view, the UNGA's recommendatory powers must be understood in the framework of the other provisions in the UN Charter, including in particular article 2(4). The UN Charter permits force to be used with UNSC authorisation or in self-defence, or otherwise with the consent of the host state, but provides no exception for force recommended by the UNGA. Accordingly, while the UNGA may recommend the use of force, it cannot authorise it. In other words, the UNGA can only expect states to act on a use of force recommendation if the recommendation calls for force to be used in support of the right to self-defence, or with the consent of the host state.³¹⁰

Other arguments regarding the legal effect of a UNGA recommendation for the use of force are

available, albeit controversial. Some scholars have made arguments based on the ‘authoritative influence’ of the U4P Resolution, describing the resolution as ‘quasi-constitutional’, and as a ‘step in the evolution of the law of the United Nations’.³¹¹ It has been asserted that: the U4P Resolution was clearly designed to enable collective action to be taken through the UNGA when the UNSC failed; that this necessarily implied a competence on the part of the UNGA not only to recommend that enforcement measures be taken, but also to ‘decide ... [that such measures] *may be taken*’; that the UNGA was competent to interpret the Charter in this way; and that this ‘effectively amounts to ... [an] exception to the central principle in article 2(4) [prohibiting the use of force]’.³¹²

Other scholars have argued that article 2(4) only prohibits ‘unilateral action *beyond the [UN] Organisation*’, and as such, leaves scope for military action recommended by the UNGA.³¹³ It is argued that in certain circumstances, a UNGA recommendation for the use of force may effectively render the recommended action compatible with article 2(4) by rendering it an ‘effective collective measure’ within the meaning of article 1(1) of the UN Charter – or, put otherwise, placing the recommended action ‘within the collective security framework’.³¹⁴ Such an approach has been used, for example, to support an assertion that where the UNSC is unable to respond to atrocity crimes, the UNGA – in lieu of a paralysed UNSC – may serve as the ‘legitimate [authorising] authority’ for ‘limited force [such as the enforcement of non-fly zones or humanitarian safe-havens] for genuinely humanitarian purposes’.³¹⁵

Finally, some scholars assert that the UNGA may delegate to member states its ‘authority to act on behalf of the UN Organisation’.³¹⁶ It is argued that provided there is an effective delegation of authority (the power delegated must be within the powers of the delegator, and the delegation must be explicit), member states acting pursuant to such a recommendation would then be ‘subsumed within the authority of the UN Organisation’, and as such would not be subject to article 2(4) – which applies only to member states.³¹⁷

These approaches are best regarded as presenting a range of possible interpretations, available to states wishing to make the legal case for a more robust role for the UNGA in recommending/authorising the use of force, rather than as necessarily reflecting the current state of international law.

Regardless of the competence of the UNGA to authorise (not just recommend) the use of force, it is in any case possible that a UNGA recommendation for the use of force may confer political *legitimacy* on an intervention aimed at averting or halting the commission of atrocity crimes. Such was the view of the Canadian-sponsored International Commission on Intervention and State Sovereignty in its 2001 ‘Responsibility to Protect’ report, which stated that ‘while the Assembly lacks the power to direct that action be taken, a decision by the General Assembly in favour of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention which subsequently took place’.³¹⁸ The issue of the UNGA’s competence to confer political legitimacy on otherwise unlawful operations is not the focus of this guidance document, however it is worth noting that there are occasions in recent history where member states opted to circumvent the UNSC – Kosovo in 1999 and US-led interventions in Syria in 2017 and 2018, among others – where a UNGA recommendation for the use of force could have conferred additional legitimacy on interventions that were widely regarded as unlawful. There are different views on whether recognising so-called ‘humanitarian interventions’ as unlawful but legitimate promotes or undermines respect for the international rules-based order,³¹⁹ but at the very least, a UNGA recommendation for intervention could in these instances have avoided – and could in the future avoid – the situation of the UN being circumvented altogether.

I. PEACEKEEPING

1. *Legal Basis for the UNGA to Engage in Peacekeeping*

The UNGA's authority to establish and/or modify the mandates of peacekeeping operations may be regarded as encompassed within either the power provided by article 22 of the UN Charter to create subsidiary bodies it deems necessary for the performance of its functions (discussed in section 1.A.2, above), or by its broad powers provided by articles 10-14 to provide recommendations to states, including on matters of international peace and security. Additionally, the UNGA's power to establish and/or modify the mandates of peacekeeping operations may be regarded as implied by the organisational responsibility of the UN for the maintenance of international peace and security.³²⁰

The UNGA's competence to establish consensual peacekeeping operations was explicitly affirmed by the ICJ in *Certain Expenses*. The Court in that case considered the UNGA's establishment of the UN Emergency Force (UNEF) for the Suez in 1956, and its modification of the mandate of the UN Operation in Congo (UNOC) in 1960, and affirmed that article 11(2) of the UN Charter 'empowers the General Assembly, by means of recommendations to States or to the Security Council, or to both, to organise peacekeeping operations, at the request, or with the consent, of the States concerned'.³²¹

The Court said that neither UNEF nor UNOC were 'enforcement actions within the compass of Chapter VII of the UN Charter', and that as such, the UNGA's engagement in their establishment/modification was not precluded by the stipulation in article 11(2) of the UN Charter that the UNGA should refer any question 'on which action is necessary' to the UNSC.³²² In relation to UNOC in particular, the Court noted that the operations did not constitute 'action' within the meaning of article 11 of the UN Charter because UNOC 'was not authorised to take military action *against any State*'.³²³ In stating as such, the Court seemingly left open the possibility of the UNGA mandating peacekeeping operations authorised to use force against non-state armed groups, provided such mandate was provided with the consent of the host state.³²⁴

KEY POINTS:

- Pursuant to its power to establish subsidiary bodies, and its general recommendatory powers described by the UN Charter, the UNGA is competent to establish peacekeeping operations at the request or with the consent of the host state.
- On a number of occasions in its early years, the UNGA established peacekeeping operations and strengthened the mandates of operations established by the UNSC. In all cases, the UNGA's intervention followed a referral of the matter to the UNGA by the UNSC. The UNGA remains competent to establish peacekeeping operations, however since the 1960s all such operations have been established by the UNSC.

Despite the UNGA's authority to establish peacekeeping operations having been recognised as deriving from its Charter-based powers, in practice whenever the UNGA has intervened to either establish or modify the mandates of peacekeeping missions, such intervention has followed a referral of the matter to the UNGA by the UNSC. Such referral has been achieved either implicitly, by the UNSC removing a matter from its agenda, or explicitly, by a UNSC resolution formally invoking the U4P Resolution or using the language of the U4P Resolution (failure of the UNSC to fulfil its responsibility for international peace and security).³²⁵

2. *UNGA Practice of Engagement in Peacekeeping*

On several occasions in its early years, when the UNSC was paralysed by lack of unanimity amongst the P5, the UNGA intervened to either establish peacekeeping or military observer missions, or to reinforce the mandate of a mission already established by the UNSC. Missions established by the UNGA include the UN Special Commission on the Balkans (UNSCOB) (1947), established to help settle disputes between Greece and its northern neighbours;³²⁶ and the UNEF (1956), established to secure the cessation of hostilities over the Suez Canal.³²⁷ UNSCOB was established by the UNGA after the UNSC passed a resolution removing the situation in Greece from its agenda; UNEF was established following referral of the Suez crisis from the UNSC to the UNGA.³²⁸ Peacekeeping operations that were established by the UNSC, but in which the UNGA later played a role, include the UN Observer Group in Lebanon (UNOGIL) (1958) and UNOC (1960). Both were referred to the UNGA by the UNSC, subsequent to their establishment. In the case of UNOGIL, the UNGA provided the mission with an additional task,³²⁹ and in the case of UNOC, the UNGA requested the UNSG to 'continue to take vigorous action' in accordance with the original UNSC resolution.³³⁰ All these operations were premised on the principle of consent.

Another mission established under the overall authority of the UNGA was the UN Temporary Executive Authority (UNTEA) in West New Guinea in 1962, and the associated UN Security Force (UNSF). UNTEA and UNSF were provided for in an agreement between Indonesia and the Netherlands, which requested the UN to facilitate the transfer of West Irian from Dutch to

Indonesian rule by establishing an interim UN administration, 'with full authority ... to administer the territory'. The Agreement tasked the UNSG to appoint a head of UNTEA, and to provide security forces.³³¹ The UNGA approved the Agreement between Indonesia and the Netherlands, and authorised the UNSG 'to carry out the tasks entrusted to him in the Agreement'.³³² The legal basis for the vesting of administrative control in the UNSG was not explicitly stated, but nor was it disputed. The relevant UNGA resolution was passed without dissent. The UNSG described the arrangement as an 'epoch-making precedent', and a 'step in the gradual evolution of the United Nations as an increasingly effective instrument for carrying out policies agreed upon between member governments for the peaceful resolution of their differences'.³³³ Thus, UNTEA serves as a precedent for the UNGA to authorise the UNSG to assume direct and exclusive authority for the administration of territory, at the request or with the consent of the territorial state, in a scenario akin to the establishment by the UNSC of the interim administrations in Kosovo (UNMIK) and East Timor (UNTAET) in 1999.

Since the 1960s, all peacekeeping missions have been established by the UNSC. Mention may also be made, however, of the UN Special Mission to Afghanistan (UNSMIA), which was established by the UNSG in 1993 at the request of the UNGA.³³⁴ UNSMIA was a political mission, but when the UNGA subsequently tasked it with facilitating a ceasefire and endorsed the intention of the UNSG to give it a 'peacemaking' role,³³⁵ it began to look increasingly like a peacekeeping operation – and indeed it was duly replaced by the UNSC-mandated UN Assistance Mission in Afghanistan. Similarly to the other missions in which the UNGA has engaged, UNSMIA was premised on the principle of consent.

J. REJECTING THE CREDENTIALS OF THE REPRESENTATIVE(S) OF A MEMBER STATE

Article 5 of the UN Charter provides that if the UNSC has taken 'preventive or enforcement action' against a UN member state, the UNGA may 'upon the recommendation of the Security Council' suspend that state 'from the rights and privileges of membership'. Article 6 provides further that the UNGA may, again 'upon the recommendation of the Security Council', expel a member state that has 'persistently violated' the principles of the Charter. The ICJ has ruled that the UNGA is not competent to make decisions regarding the admission of states to the UN without a UNSC recommendation, and scholars have interpreted this as applying also to the UNGA's competence to suspend or expel members from the UN.³³⁶

While the UNGA's competence to make decisions regarding the suspension or expulsion of members is contingent upon a recommendation from the UNSC, the UNGA may autonomously make decisions regarding the credentials of the representatives of member states. The approval of credentials is typically a procedural exercise, however the UNGA has on occasions declined to approve the credentials of the representatives of a state it regards as illegitimate, and/or as responsible for large-scale human rights violations.

1. *The Credentials Process, and the Legality of the UNGA Using it as a Political Tool*

The issuance of credentials is provided for in the UNGA's Rules of Procedure. Rule 27 states that the credentials of representatives and the names of members of a delegation 'shall be submitted to the Secretary-General if possible not less than one week before the opening of the session', and that they 'shall be issued either by the Head of State or Government or by the Minister for Foreign Affairs'.³³⁷ The UNGA's Credentials Committee verifies that the requirements described in Rule 27 have been satisfied (that is, that the credentials have in fact been issued by the Head of State or Government or the Minister for Foreign Affairs, and have been submitted to the UNSG in time),

KEY POINTS:

- The UNGA is competent to suspend or expel a state from the UN, but only following a recommendation from the UNSC.
- The UNGA may autonomously decide to accept or reject the credentials of a member state's representative(s). The approval/rejection of credentials is typically a procedural exercise, with the UNGA accepting the credentials of a member state's representative(s) provided the administrative requirements outlined in the UNGA's procedural rules have been satisfied.
- In the event of competing authorities both claiming to represent a member state, the UNGA's decision regarding credentials is to be made 'in light of the Purposes and Principles of the Charter and the circumstances of each case'.
- Some scholars assert that the UNGA's authority to accept/reject credentials encompasses an authority to enquire into the 'representativeness' of the delegate(s), even in the absence of competing claimants. In practice the UNGA has on occasions declined to approve the credentials of a regime's representatives, on the basis of a regime's illegitimacy and/or human rights record.
- In particular circumstances, a decision by the UNGA to reject the credentials of a member state's representative(s) on human rights grounds could arguably be justified as a countermeasure.
- In situations in which an incumbent regime is allegedly responsible for atrocity crimes, a rejection by the UNGA of a regime's credentials, or deferral of a credentials decision, could serve as a powerful expression of international condemnation with significant political ramifications for the state concerned.

and on that basis makes a recommendation to the UNGA. The UNGA may then approve or reject the recommended credentials, or defer the decision. The UNGA's procedural rules do not articulate any further criteria to guide the UNGA's credentials decisions. In the event that two or more competing authorities claim at once to represent a member state, the question – according to UNGA Resolution 396(V) (1950) – is to be decided 'in light of the Purposes and Principles of the Charter and the circumstances of each case'.

The extent to which the UNGA may use the credentials process to protest against an allegedly illegitimate regime is contested. The traditional view holds that because rejecting credentials has essentially the same effect as suspending a state from the UN, which under article 5 of the UN Charter requires a UNSC recommendation, a decision by the UNGA to reject the credentials of a member state's representative(s) for any reason other than that they do not satisfy the requirements outlined in the UNGA's procedural rules would be contrary to the UN Charter. Such was the view expressed by the UN Legal Counsel in a memorandum to the UNGA in 1970, which described the credentials process as a 'procedural matter limited to ascertaining that the requirements of Rule 27 have been satisfied'.³³⁸

Conversely, some scholars assert that the act of rejecting the credentials of a state's representative should not be equated with the suspension of that state from the UN, and that the UNGA's authority with regards to the credentials process encompasses an authority to make a substantive inquiry into the 'representativeness' of the proposed delegate(s). Such substantive enquiry, it is asserted, should be made 'in light of the purposes and principles of the Charter', as envisaged by Resolution 396(V) – regardless of whether there are competing authorities claiming to represent the state, or only one.³³⁹ Albeit contrary to the 1970 opinion of the UN Legal Counsel, this view is arguably supported by the UNGA's practice, discussed below, including its suspension of South Africa in 1974³⁴⁰ and its limited use of the credentials process through the 1990s to support democratisation.

Some scholars have also asserted that the rejection of the credentials of a state's representative,

even with the effect of suspending the state from the UNGA, may legally be justified as a countermeasure. The ILC's Draft Articles on the Responsibility of International Organisations provide that the 'wrongfulness of an act of an international organisation not in conformity with an international obligation' is precluded if the act constitutes a countermeasure.³⁴¹ The Draft Articles state further that countermeasures may only be taken if 'no appropriate means are available for otherwise inducing compliance with the obligations of the responsible state'.³⁴² It would thus appear that an international organisation may take countermeasures against a member state responsible for an internationally wrongful act, such as violations of international human rights or humanitarian law, provided that the sanctions stipulated by the rules of the organisation have proved inappropriate or ineffective.³⁴³ Accordingly, if the UNGA were to effectively suspend a state from participation in the UN, this could arguably be justifiable as a countermeasure if it could be established that it was not possible to employ the sanctions provided for by the UN Charter – that is, suspension of a state on the recommendation of the UNSC.³⁴⁴

In a 2008 opinion on the feasibility of challenging the credentials of Myanmar's ruling military junta, nine eminent legal scholars interpreted the UNGA's practice as affirming that although the UNGA typically accepts credentials without question, 'where a situation arises from internal or external repression ... the Credentials Committee may consider other factors such as the legitimacy of the entity issuing the credentials, the means by which it achieved and retains power, and its human rights record'.³⁴⁵ In relation to Myanmar, the opinion concluded that it was 'open to the Credentials Committee to recommend to the [UNGA] that the credentials issued by the [military junta] should be rejected', on the basis of – among other things – the junta's consistent violation of the 'fundamental principles and peremptory norms of international human rights law' and 'blatant disregard for the Purposes and Principles of the UN Charter'.³⁴⁶

2. UNGA Practice of Issuing and Rejecting Credentials

While the issuance of credentials is typically a procedural matter, on occasions, the credentials process has prompted the UNGA to enquire into the legitimacy of governmental authorities. Most often, the issue has arisen in situations in which competing authorities have issued documents accrediting delegations to the UN, and the UNGA has then been called upon to decide which authority is entitled to issue documents of accreditation on behalf of the state. The situations in China (1950s-60s), the Congo (1960s), Yemen (1962) and Kampuchea (1970s-80s) provide examples.³⁴⁷ In all cases, the UNGA rejected the credentials of one of the claimant representatives, but did not make a decision that resulted in the member state itself being precluded from participation in the UNGA. In the 1950s the UNGA declined to accept the credentials of the Hungarian delegates, in the absence of any rival claimants, however continued to allow the participation of the rejected delegates (provisionally) in the UNGA.³⁴⁸ Between 1982 and 1989 some member states advocated for the UNGA to reject the credentials of Israel's delegation on the basis that Israel had, among other things, violated principles of international law and refused to abide by UNGA and UNSC resolutions, however these efforts were unsuccessful.³⁴⁹ The only state that has been effectively excluded from the UN by way of a UNGA decision to reject the credentials of its representatives is South Africa. In the context of international condemnation of apartheid in the 1960s and 1970s, a series of attempts were made to have the UNSC recommend South Africa's expulsion from the UN, pursuant to article 5 of the UN Charter. The attempts were unsuccessful, and in 1974 the UNGA passed a resolution approving the rejection of South Africa's credentials.³⁵⁰ The UNGA President subsequently ruled that the rejection had the effect of precluding South Africa from participating in the work of the UN.³⁵¹

There is also limited practice from the 1990s of the UNGA using the accreditation process to support democratic governments, even those that 'possess few, if any, of the attributes of government', and to discredit the representatives of incumbent regimes.³⁵² In the cases of Liberia (1990-1996), Haiti (1992) and Sierra Leone (1997), the UNGA recognised the credentials of deposed democratically-elected governments, despite those governments wielding no effective control. In

other cases the UNGA's Credentials Committee has deferred its decision on credentials, with the effect either that the incumbent delegation continues to provisionally occupy the member state's seat, or that the seat remains unoccupied, pending a final decision. This latter approach allowed the representatives of Afghanistan's Rabbani government to continue to represent Afghanistan in the UNGA in 1996-1999 despite the Taliban's effective control; and allowed Cambodia's seat to remain unoccupied in 1997-1998 following Hun Sen's coup.³⁵³

There is, equally, practice of the UNGA *not* using the credentials process to support a democratically elected government, in favour of an incumbent regime. In September 2008, for example, candidates elected to parliament in Myanmar's 1990 democratic election wrote to the UNSG, requesting that their own representatives be appointed to represent 'the legitimate, democratically elected members of parliament in all organs of the United Nations', in place of the ruling military regime.³⁵⁴ The request was rejected on the basis that it did not comply with the requirement in the UNGA's Rules of Procedure, that credentials be issued 'either by the Head of State or Government or by the Minister for Foreign Affairs'.³⁵⁵ The UNGA thus accepted the credentials of Myanmar's military junta.³⁵⁶ The following day, the UNGA passed a resolution condemning Myanmar for its violations of international human rights and humanitarian law, and for the 'absence of effective and genuine participation of the representatives of the National League for Democracy'.³⁵⁷ Seemingly, the UNGA did not on that occasion regard the credentials process as a tool through which to take action in relation to the poor human rights record, or the illegitimacy, of an undemocratic regime.

3. *The Utility of Rejecting Credentials as a Political Tool*

A rejection of a regime's credentials, or a deferral of a decision on credentials, amounts to a powerful statement regarding the legitimacy of the regime in question. As observed in the legal opinion referred to above on the Myanmar credentials challenge, while UNGA decisions to reject the credentials of undemocratic regimes have never 'in themselves operate[d] to change the internal political situation', they have been significant in 'marking the international illegitimacy of the questioned regime' and 'add to the pressure to remedy the situation'.³⁵⁸ One study cites the 'symbolic damage to a regime' flowing from a loss of credentials as follows:

The international community will likely take steps to isolate the regime. International organisations may withhold financial assistance. The loss of accreditation may result in the loss of jurisdictional immunities and the right to sue in the name of the member state in domestic as well as international tribunals. Other states can freeze assets of the member state abroad and provide assistance to the opponents of the regime. The momentum generated by delegitimizing a government may prompt the Security Council and individual member states to impose sanctions. Regional organisations may take actions pursuant to the General Assembly vote. In sum, discreditation is powerful medicine.³⁵⁹

The author of this study cautions, however, that 'using the credentials process merely as a tool to punish non-democratic governments would not be constructive', and that the credentials process should only be used as a tool to promote democracy 'where the granting or denial of credentials is likely to effect a transition to democratic government'.³⁶⁰ Other cautions flagged with regards to using the credentials process as a political tool include the possibility that it may convey an 'unwanted impression that all governments whose credentials are accepted are considered legitimate', and moreover that it may 'introduce a "fault line" between democratic and non-democratic UN members'.³⁶¹ In sum, in the area of atrocity prevention and response the credentials process is one tool legally available to the UNGA, but its application is likely to be extremely limited and cautiously applied.



Rohingya Muslims from Myanmar walk to Balukhali refugee camp, Bangladesh, October 2, 2017. Credit: Suvra Kanti Das

CONCLUDING COMMENT: STATE RESPONSIBILITY TO PREVENT AND RESPOND TO ATROCITY CRIMES

In the introduction to this guidance

document, it was noted that the document aims to provide guidance regarding what international law *allows* the UNGA to do, rather than what either the UN as an organisation, or member states individually, may be legally obliged to do. That said, it must be acknowledged by way of conclusion that member states individually and the UN as an organisation have legal responsibilities to prevent and respond to atrocity crimes. Article 55 of the UN Charter states that the UN shall promote universal respect for, and observance of, human rights and fundamental freedoms. Article 56 stipulates that all member states ‘pledge themselves to take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55’. In 2005, the UNGA affirmed that ‘the international community, through the United Nations, ... has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, ... to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity’.³⁶² And perhaps most substantively, states parties to the Genocide Convention have undertaken to ‘prevent and punish’ genocide.³⁶³ The ICJ has said that this obligation requires states to ‘employ all means reasonably available to them, so as to prevent genocide so far as possible’, and that responsibility may be incurred ‘if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide.’ The ICJ has said further that it is ‘irrelevant whether the State whose responsibility is in issue claims, ... that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide’, because ‘*the possibility remains that the combined efforts of states, ... might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.*’³⁶⁴

This guidance document does not focus only on genocide, however this ruling of the ICJ nevertheless serves to affirm one of the central themes of this document: the importance of states using all tools at their disposal, collaboratively, to achieve results that could not be achieved by any state acting alone. It is not likely that any of the tools described in this document would, used in isolation, be instrumental in preventing or immediately halting the commission of atrocity crimes. However, used in conjunction with each

other, as well as in conjunction with other strategies employed individually by member states, the combined effect of a range of different measures may just create sufficient pressure to achieve the desired result – averting or halting the commission of atrocity crimes.

As is evident through the various sections of this guidance document, the provisions of the UN Charter describing the powers of the UNGA can be interpreted in different ways. They can be interpreted in a manner that preferences the UNSC’s primacy in the field of international peace and security, as described in article 24(1) of the Charter, or they can be interpreted in a manner that preferences the achievement of the purposes and principles of the UN as described in article 1 of the Charter. Those purposes and principles are, *inter alia*, to maintain international peace and security, achieve international cooperation in solving humanitarian problems, promote and encourage respect for human rights, and ‘be a centre for harmonising the actions of nations in the attainment of these common ends’. It is a political reality that in some cases, there is a collective lack of political will to utilise the primary organs of the UN to promote these purposes and principles. But recent debates in the UNGA and the UNSC affirm that there are also many cases in which political will *does* exist, and is shared by many concerned member states. This guidance document seeks to raise awareness regarding the tools available to the UNGA in such situations. Not all of the tools described are well-known, many are under-utilised, and some are controversial. But in situations in which the UNSC is indisputably failing to respond to credible reports of atrocity crimes, it is incumbent upon concerned states to at the very least consider and explore – boldly, creatively and proactively – the limits of what international law allows the UNGA to do. This guidance document has been developed in the hope that it will inspire and assist member states to do so.

ENDNOTES

- 1 Julia Palik, Siri Aas Rustad and Fredrik Methi, 'Conflict Trends: A Global Overview, 1946-2019' (Peace Research Institute Oslo 2020) <<https://reliefweb.int/sites/reliefweb.int/files/resources/Palik%2C%20Rustad%2C%20Methi%20-%20Conflict%20Trends%20A%20Global%20Overview%201946-2019%2C%20PRIO%20Paper%202020.pdf>>.
- 2 Institute for Economics and Peace, 'Global Peace Index: Measuring Peace in a Complex World' (2020) <https://www.visionofhumanity.org/wp-content/uploads/2020/10/GPI_2020_web.pdf> 2, 20.
- 3 UNSG, 'Secretary-General's Remarks to the General Assembly on the Responsibility to Protect' (25 June 2018) <<https://www.un.org/sg/en/content/sg/statement/2018-06-25/secretary-generals-remarks-general-assembly-debate-responsibility>>.
- 4 António Guterres, 'The Highest Aspiration: A Call to Action for Human Rights' (UN 2020) <https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/The_Highest_Aspiration_A_Call_To_Action_For_Human_Right_English.pdf> 1.
- 5 UN High Commissioner for Refugees, 'Global Trends: Forced Displacement in 2019' (2020) <<https://www.unhcr.org/5ee200e37.pdf>> 2.
- 6 UN Charter art 13(1)(b).
- 7 Article 24(1) of the UN Charter provides that the UNSC has primary responsibility for international peace and security. It is well established in the practice of the UN that widespread and systematic human rights violations may constitute threats to international peace and security: see, eg, UNSC Res 1986 (2000) and successive annual resolutions on the protection of civilians in armed conflict, noting that 'violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security'.
- 8 UNGA Res 66/253B (2012).
- 9 UNGA Res 74/246 (2019).
- 10 *Certain Expenses of the United Nations* [1962] ICJ Rep 151 ('*Certain Expenses*'), 163.
- 11 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* [2004] ICJ Rep 136 ('*Wall*'), 149.
- 12 *Ibid* 149-50.
- 13 UNGA Res 60/286 (2006); UNGA Res 59/313 (2005).
- 14 UNGA Res 60/251 (2006).
- 15 Under art I of the Genocide Convention, states parties 'undertake to prevent and to punish' genocide: Convention on the Prevention and Punishment of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 ('*Genocide Convention*'); 2005 World Summit Outcome, UNGA Res 60/1 (2005); UNSC Res 1674 (2006) (reaffirming the paragraphs of the World Summit Outcome document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity).
- 16 Juraj Andrassy, 'Uniting for Peace' (1956) 50 *American Journal of International Law* 563, 564; Eckart Klein and Stefanie Schmahl, 'Article 10', in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2012) 463.
- 17 Nigel D White, 'The Relationship between the UN Security Council and the General Assembly in Matters of International Peace and Security' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 304.
- 18 See discussion in Rebecca Barber, 'A Survey of the General Assembly's Competence in Matters of International Peace and Security: In Law and Practice' (2020) *Journal on the Use of Force and International Law* 1, 19.
- 19 Carl-August Fleischhauer and Bruno Simma, 'Article 13', in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2012) 525.
- 20 Rosalyn Higgins et al, *Oppenheim's International Law: United Nations* (Oxford University Press 2017) 965-66.
- 21 *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* [1973] ICJ Rep 66 ('*Application for Review*'), 172.
- 22 Art 17 of the UN Charter empowers the UNGA to consider and approve the UN's budget and to apportion expenses amongst the members, while articles 4-6 empower the Assembly to make binding decisions relating to membership.
- 23 *Certain Expenses* (n 10) 163.
- 24 Higgins et al (n 20) 961.
- 25 *Certain Expenses* (n 10) 164-5. See also Hans Kelsen, 'Is the Acheson Plan Constitutional?' (1950) 3(4) *The Western Political*

- Quarterly* 512, 516; Leland M Goodrich, 'Expanding Role of the General Assembly: The Maintenance of International Peace and Security' (1951) 29 *International Conciliation* 231, 249.
- 26 *Certain Expenses* (n 10) 163 (emphasis added).
- 27 Andrassy (n 16) 567. See also Klein and Schmahl, 'Article 10' (n 16) 473; Eckart Klein and Stefanie Schmahl, Article 11' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2012) 501; Higgins et al (n 20) 972; L H Woolsey, 'The "Uniting for Peace" Resolution of the United Nations' (1951) 45(1) *American Journal of International Law* 129, 134; Nigel White, *The Law of International Organisations* (Manchester University Press 2005) 78. For a contrary view see Larry D Johnson, "'Uniting for Peace": Does it Still Serve any Useful Purpose?' (2014) 108 *AJIL Unbound* 106.
- 28 See Klein and Schmahl, 'Article 11' (n 27) 501; Patrick Butchard, *The Responsibility to Protect and the Failures of the United Nations Security Council* (Hart Publishing 2020) 207.
- 29 See L Johnson (n 27) 109; Klein and Schmahl, 'Article 11' (n 27) 290.
- 30 Eckart Klein and Stefanie Schmahl, 'Article 12' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press 2012) 511.
- 31 *Wall* (n 11) 149-50.
- 32 Higgins et al (n 20) 59-60.
- 33 See *ibid* 56; Klein and Schmahl, 'Article 10' (n 16) 465; White, 'Relationship between the UN Security Council and the General Assembly' (n 17) 296.
- 34 See, eg, Louis Henkin, 'An Agenda for the Next Century: The Myths and Mantra of State Sovereignty' (1994) 35(1) *Virginia Journal of International Law* 115, 45.
- 35 *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, 182 (emphasis added); see also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66 ('*Nuclear Weapons*'), 79.
- 36 *Certain Expenses* (n 10) 168.
- 37 UN Charter, art 1.
- 38 Andrassy (n 16) 574; White, 'Relationship between the UN Security Council and the General Assembly' (n 17) 294-96; Henry G Schermers and Niels M Blokker, *International Institutional Law* (Brill Nijhoff 2018) 195.
- 39 Schermers and Blokker (n 38) 194-98; A I L Campbell, 'The Limits of the Powers of International Organisations' (2008) 32 *International and Comparative Law Quarterly* 523.
- 40 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1970] ICJ Rep 16 ('*Namibia*') (dissenting opinion of Fitzmaurice J), discussed in Campbell (n 39).
- 41 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') art 5 (stating that the Convention applies to any treaty which is the constituent instrument an international organisation). The VCLT post-dates the UN Charter, however is regarded as codifying customary international law rules of treaty interpretation: see Ulf Linderfolk, *On the Interpretation of Treaties* (Springer 2007) 7. In its 1996 *Nuclear Weapons* Advisory Opinion, the ICJ affirmed that the UN Charter was to be interpreted in light of the 'principles and rules applicable in general to the interpretation of treaties': *Nuclear Weapons* (n 35) 74.
- 42 ILC, 'Report on the Seventieth Session' (30 April – 1 June and 2 July – 10 August 2018), UN Doc A/73/10, 20.
- 43 *Ibid* 15.
- 44 *Ibid* 101.
- 45 See *Certain Expenses* (n 10) 175-79; *Namibia* (n 40) 22; *Wall* (n 11) 149. For discussion see: Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organisations' (2013) 38 *Yale Journal of International Law* 289, 295; Irena Buga, *Modification of Treaties by Subsequent Practice* (Oxford University Press 2018) 35-41; Peter Quayle, 'Treaties of a Particular Type: The ICJ's Interpretive Approach to the Constituent Instruments of International Organisations' (2016) 29 *Leiden Journal of International Law* 853.
- 46 In *Namibia*, for example, the ICJ relied on the practice of the UNSC in order to interpret art 23(3) of the UN Charter, which provides that the UNSC's decisions should be made 'with the concurring votes of the permanent members', to allow abstentions in lieu of affirmative votes: *Namibia* (n 40) 22. In its *Wall* Advisory Opinion, the ICJ relied upon the UNGA's 'accepted practice' in order to interpret art 12(1) of the UN Charter, which prohibits the UNGA from making recommendations on a dispute in relation to which the UNSC is exercising its functions, so as to allow the UNGA and the UNSC to 'deal in parallel

with the same matter': *Wall* (n 11) 150.

- 47 In *Certain Expenses*, for example, the ICJ relied upon a series of UNGA resolutions adopted with substantial negative votes, finding it sufficient that the resolutions in question were adopted 'by the requisite two-thirds majority' (*Certain Expenses* (n 10) 174); and in *Wall*, the ICJ similarly relied upon resolutions adopted with substantive negative votes: *Wall* (n 11) 149. Note that the ICJ took a different approach in the *Whaling Case (Australia v. Japan: New Zealand Intervening)* [2014] ICJ Rep 226. The Court in that case held that the International Whaling Commission's non-consensual resolutions could *not* be considered subsequent practice for purpose of article 31(3)(b) of the VCLT. Scholars have offered various explanations for the difference between the Court's approach in the *Whaling* case, and its earlier approach in the UN Charter interpretation cases: see Julian Arato, 'Subsequent Practice in the Whaling Case, and what the ICJ Implies about Treaty Interpretation in International Organisations' (*EJIL:Talk*, 31 March 2014) <<https://www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations/>>; Stefan Raffaeiner, 'Organ Practice in the Whaling Case: Consensus and Dissent between Subsequent Practice, Other Practice and a Duty to Give Due Regard' (2017) 27 *European Journal of International Law* 1043; Malgosia Fitzmaurice, 'The Whaling Convention and Thorny Issues of Interpretation' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: The ICJ Judgment and its Implications* (Brill Nijhoff 2014) 117. Generally speaking, scholars have not interpreted the *Whaling Case* as overturning the ICJ's well-established jurisprudence on the relevance of UN resolutions to the interpretation of the UN Charter.
- 48 VCLT (n 41) art 5.
- 49 Vienna Convention on the Law of Treaties between States and International Organisations, or between International Organisations (opened for signature 21 March 1986), art 2(1)(j).
- 50 See ILC, 'Third Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Report by Georg Nolte, Special Rapporteur' (2015) UN Doc A/CN.4/683, 31; and see discussion in Rebecca Barber, 'Revisiting the Legal Effects of General Assembly Resolutions: Can an Authorising Competence for the Assembly be Grounded in the Assembly's "Established Practice", "Subsequent Practice" or Customary International Law?' (2020) *Journal of Conflict and Security Law* (advance online access).
- 51 ILC, 'Report on the Seventieth Session' (n 42) 124; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14 ('*Nicaragua*'), 97; *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3, 44.
- 52 ILC, 'Report on the Seventieth Session' (n 42) 130 (Draft Conclusion 4).
- 53 Ibid 130.
- 54 Ibid 131.
- 55 Christopher Peters, 'Subsequent Practice and Established Practice of International Organisations: Two Sides of the Same Coin?' (2011) 3(2) *Goettingen Journal of International Law* 631-2; White, *Law of International Organisations* (n 27) 71; Christiane Ahlborn, 'The Rules of International Organisations and the Law of International Responsibility' (2011) 8(2) *International Organisations Law Review* 397, 418.
- 56 ILC, 'Report on the Seventieth Session' (n 42) 141.
- 57 Ibid 138.
- 58 For discussion see Barber, 'Legal Effects of General Assembly Resolutions' (n 50) 17-19.
- 59 UNGA Res 377A (V) (1950).
- 60 Ibid.
- 61 See, eg, Kelsen, 'Acheson Plan' (n 25); Hans Kelsen, 'Recent Trends in the Law of the United Nations' (1951) 18(2) *Social Research* 135; Woolsey (n 27); Andrassy (n 16).
- 62 Jean Krasno and Mitushi Das, 'The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council' in Bruce Cronin and Ian Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008) 191; L Johnson (n 27) 106; White, 'Relationship between the UN Security Council and the General Assembly' (n 17) 311-12; Harry Reicher, 'The Uniting for Peace Resolution on the Thirtieth Anniversary of its Passage (1981) 10(1) *Columbia Journal of Transnational Law* 1, 48; Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2005) 316.
- 63 Reicher (n 62) 37 (asserting that the question of the validity of the U4P Resolution is 'truly a non-issue'); Christian Henderson, 'Authority without Accountability? The UN Security Council's Authorization Method and Institutional Mechanisms of Accountability' (2014) 19(3) *Journal of Conflict and Security Law* 489, 506.
- 64 *Wall* (n 11) 150-151, discussed in Higgins et al (n 20) 61.
- 65 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [2010] ICJ Rep 403 ('*Kosovo*') 421.
- 66 See L Johnson (n 27); Kelsen, 'Acheson Plan' (n 25) 520.
- 67 See summary in L Johnson (n 27) 110.

- 68 UN Charter, art 20.
- 69 See Henry Richardson, 'Comment on Larry Johnson, Uniting for Peace' (2014-2015) 108 *AJIL Unbound* 135, 138; L Johnson (n 27); Higgins et al (n 20) 59-60.
- 70 See Reicher (n 62) 40.
- 71 Ibid 16. See also Andrew Carswell, 'Unlocking the UN Security Council: The Uniting for Peace Resolution (2013) 18(3) *Journal of Conflict and Security Law* 453, 469; Krasno and Das (n 62) 188, 190.
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- 176 UNGA Res 52/228B (2003).
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- 179 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field (opened for signature 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ('GCI'), art 50. Grave breaches are similarly defined in Geneva Conventions II (art 51), III (art 30) and IV (art 147). The obligation to prosecute or extradite is contained in GCI art 49, GCII art 50, GCIII art 129, and GCIV art 146.

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- 182 Genocide Convention (n 15) art VI. For an argument that the Genocide Convention contains an implied obligation to extradite or prosecute see Lee A Steven, 'Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligation' (1999) 39 *Virginia Journal of International Law* 425, 461.
- 183 ILC, 'Report on the Seventy-First Session (29 April - 7 June and 8 July - 9 August 2019)', UN Doc A/74/10, 92. The ILC's assertion that all states have an obligation to extradite or prosecute alleged offenders of crimes against humanity aligns with scholars who have argued that such an obligation is recognised in customary international law. See: R van Steenberghe, 'The Obligation to Extradite or Prosecute: Clarifying its Nature' (2011) 9 *Journal of International Criminal Justice* 1089, 1095; M C Bassiouni and E Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Publishers 1995); Christopher Soler, *The Global Prosecution of Core Crimes under International Law* (TMC Asser Press 2019) 324. The assertion that customary international law recognises an obligation to extradite or prosecute is challenged by the fact that most states require bilateral or multilateral treaties in order to extradite, and that 'most states typically will have in place such an extradition agreement with only some other states, leaving no treaty-based extradition with many other states': see discussion in ILC, 'Third Report on Crimes against Humanity by Sean Murphy, Special Rapporteur' (2017) UN Doc A/CN.4/704.
- 184 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press 2005). See also UNGA Res 3074(XXVIII) (1973), stating that 'states shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them'.
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- 186 *Namibia* (n 40) 79-80.
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- 189 UNGA Res 31/61 (1976) on South Africa; UNGA Res. 1883 (XVIII) (1963) on Southern Rhodesia.
- 190 UNGA Res 37/233A (1982); UNGA Res 36/226A (1981); UNGA Res A/ES-9/1 (1982); UNGA Res ES-10/6 (1999); UNGA Res 31/61 (1976); UNGA Res 37/233A (1982); UNGA Res 68/262 (2014).
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- 234 *Wall* (n 11) 13; *Kosovo* (n 65) 413.
- 235 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [2019] ICJ Rep 95, 115 ('*Chagos Archipelago*'), citing *Kosovo* (n 65), para 34.
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- 241 *Kosovo* (n 65) 16. For discussion see Lailach (n 239) 421; Jesse Cameron Glickenhau, 'Potential ICJ Advisory Opinion: Duties to Prevent Transboundary Harm from GHG Emissions' (2015) 22 *New York University Environmental Law Journal* 117, 123.
- 242 UNGA Res 3292 (XXIX) (1974) (Western Sahara); UNGA Res 49/75L (1994) (nuclear weapons); UNGA Res ES-10/14 (2003) (Occupied Palestinian Territories); UNGA Res 63/3 (2008) (Kosovo); UNGA Res 71/292 (2017) (Chagos Archipelago).
- 243 See: *Western Sahara* [1975] ICJ Rep 12; *Nuclear Weapons* (n 35); *Wall* (n 11); *Kosovo* (n 65); *Chagos* (n 235).
- 244 UNGA Res ES-10/14 (2003).
- 245 *Kosovo* (n 65) 420-423.
- 246 Andrew Coleman, 'War Crimes and the ICJ's Advisory Jurisdiction' (2001) 26(1) *Alternative Law Journal* 32; and see also Falk (n 239) 53. For a recent example see the UK's response to the ICJ's 2019 *Chagos* Advisory Opinion, described in UNGA, 'Letter dated 28 September 2020 from the Charge d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary General' (28 September 2020) UN Doc A/75/359.
- 247 See Global Justice Centre, 'Myanmar Files Second Report to World Court on Compliance with Order to Protect Rohingya' (23 November 2020) <<https://www.globaljusticecenter.net/press-center/press-releases/1392-myanmar-files-second-report-to-world-court-on-compliance-with-order-to-protect-rohingya>>; Prachiti Venkatraman and Ashley Jordana, 'Myanmar's Compliance with the ICJ Provisional Measures Order and the Road Ahead' (*UK Human Rights Blog*, 3 September 2020) <<https://ukhumanrightsblog.com/2020/09/03/myanmars-compliance-with-the-icj-provisional-measures-order-the-road-ahead/>>.
- 248 See discussion in Lee J. F. Deppermann, 'Increasing the ICJ's Influence as a Court of Human Rights: The Muslim Rohingya as a Case Study' (2013) 14 *Chicago Journal of International Law* 291, 314. For a list of actions taken by international organisations in response to the judgment of the ICJ in the *Chagos* case see UNGA, 'Letter dated 14 August 2020 from the Permanent Representative of Mauritius to the United Nations addressed to the President of the General Assembly' (14 August 2020) UN Doc A/74/991.
- 249 UNGA Res 73/295 (1999).
- 250 See International Centre for Transitional Justice, 'Legal Limits to the Veto Power in the Face of Atrocity' (4 November 2019) <<https://www.ictj.org/news/legal-limits-veto-power-face-atrocity-crimes>>.
- 251 See UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 8: The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights' (1997) UN Doc E/C.12/1997/8; UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (2018) UN Doc A/HRC/39/54; Seyed Razavi and Fateme Zeynodini, 'Economic Sanctions and Protection of Fundamental Human Rights: A Review of the ICJ's Ruling on Alleged Violations of the Iran-US Treaty of Amity' (2020) 29 *Washington International Law Journal* 303; Amy Howlett, 'Colloquium: Deborah L Rhodes Access to Justice: Getting "Smart": Crafting Economic Sanctions that Respect all Human Rights' (2004) 73 *Fordham Law Review* 1199; Michael Reisman and Douglas Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programs' (1998) 9 *European Journal of International Law* 86.
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- 255 White, 'Relationship between the UN Security Council and the General Assembly' (n 17) 305; L Johnson (n 27) 110; Higgins et al (n 20) 977; Stefan Talmon, 'The Legalizing and Legitimizing Function of UN General Assembly Resolutions' (108) *AJIL Unbound* 123.
- 256 See ILC, 'Report on the Fifty-Third Session' (n 232) 128.
- 257 Some scholars argue that sanctions can generally be justified under the national security exceptions included in trade treaties, because the provisions are typically 'entirely self-judging': see Mohamed Helal, 'On Coercion in International Law' (2019) 52 *New York University Journal of International Law and Policy* 1, 104. For a contrary argument see CM Vázquez, 'Trade Sanctions and Human Rights - Past, Present, and Future' (2003) 6 *Journal of International Economic Law* 797.
- 258 *Nicaragua* (n 51) 108; and for discussion see: Alexandra Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?' (2017) 16 *Chinese Journal of International Law* 175, 181; Maziar Jamnejad and Michael Wood, 'The Principle of Non-intervention' (2009) 22 *Leiden Journal of International Law* 345, 347; Joyner (n 252); Vaughan Lowe and Antonios Tzanakopoulos, 'Economic Warfare' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) <<https://opil-ouplaw-com.ezproxy.library.uq.edu.au/view/10.1093/law:epil/9780199231690/law-9780199231690-e292>>.
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- 260 See: Council of the European Union, 'EU Adopts a Global Human Rights Sanctions Regime' (Press Release, 7 December 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/12/07/eu-adopts-a-global-human-rights-sanctions-regime/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EU+adopts+a+global+human+rights+sanctions+regime#>; UK Foreign and Commonwealth Office, 'UK Announces First Sanctions Under New Global Human Rights Regime' (Press Release, 6 July 2020) <<https://www.gov.uk/government/news/uk-announces-first-sanctions-under-new-global-human-rights-regime>>; Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) SC 2017 c 21 (Canada); Global Magnitsky Human Rights Accountability Act (Public Law 114-328) (2017) (US).
- 261 On the need to respect due process requirements see UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (2018) UN Doc A/HRC/39/54. On economic, social and cultural rights see: UN Committee on Economic, Social and Cultural Rights (n 251); UNGA, 'Thematic Study of the Office of the United Nations High Commissioner for Human Rights on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (2012) UN Doc A/HRC/19/33; UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (2017) UN Doc A/HRC/36/44.
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- 263 See Tzanakopoulos, 'Sanctions Imposed Unilaterally' (n 253); Margo Kaplan, 'Using Collective Interests to Ensure Human Rights: An Analysis of the Articles on State Responsibility' (2014) 79(5) *New York University Law Review* 1902.
- 264 ILC, 'Report on the Fifty-Third Session' (n 232) 75.
- 265 Ibid 76, 137 (art 54).
- 266 Ibid 139. For discussion see: Nigel White, 'Sanctions and Restrictive Measures in International Law' (2018) 27(1) *Italian Yearbook of International Law* 8; Kaplan (n 263); David Bederman, 'Counterintuiting Countermeasures' (2002) 96(4) *American Journal of International Law* 827; Linos-Alexandre Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community', in James Crawford et al (eds), *The Law of International Responsibility* (Oxford University Press 2010) 1146-47; Martin Dawidowicz, *Third Party Countermeasures in International Law* (Cambridge University Press 2017); Alexandra Hofer, 'The "Curiouser and the Curiouser" Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia' (2018) 23(1) *Journal of Conflict and Security Law* 75, 96-8.
- 267 See discussion in Barber, 'Survey of the General Assembly's Competence' (n 18) 37; Barber, 'Legal Effects of General Assembly Resolutions' (n 50).
- 268 For discussion of this argument see Barber, 'Legal Effects of General Assembly Resolutions' (n 50).
- 269 For a discussion of the benefits of recognising a right of collective countermeasures, as opposed to implicitly encouraging – through a lack of regulation – states to impose their own measures see Kaplan (n 263); Sicilianos (n 266).
- 270 See, eg, UNGA Res 2107 (XX) (1965) on the Portuguese Territories; UNGA Res 2383 (XXIII) (1968) on Southern Rhodesia; UNGA Res 41/35A-B (1986) on apartheid; UNGA Res ES-8/2 (1981) on Namibia.
- 271 UNGA Res 500 (V) (1951).

- 272 UNGA Res 1474 (ES-IV) (1960).
- 273 UNGA Res 36/27 (1981).
- 274 See, eg, UNGA Res 42/209B (1987).
- 275 For the UNGA's practice in this regard see Barber, 'General Assembly's Troubled Relationship with Unilateral Sanctions' (n 253).
- 276 Gary Hufbauer, Jeffrey J Schott and Kimberly Ann Elliot, *Economic Sanctions Reconsidered* (Peterson Institute for International Economics 2007) 158-160. Among other things, that study found that sanctions are: of limited utility in achieving foreign policy goals that depend on 'compelling the target country to take actions it stoutly resists'; more likely to be effective where they target small countries with 'relatively modest policy goals'; and liable to fail where sender countries have 'cross-cutting interests and conflicting goals in their overall relations with the target country'.
- 277 Thomas Biersteker, Marcos Tourinho and Sue Eckert, *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2016) 236.
- 278 Hufbauer, Schott and Elliot (n 276) 44, 157, citing Ioana Petrescu, 'Rethinking Economic Sanction Success: Sanctions as Deterrents' (2007) <<https://www.semanticscholar.org/paper/Rethinking-Economic-Sanction-Success%3A-Sanctions-as-Petrescu/8e6aad96dc3ae5cb77c3ff1670e68fe92d3ad281>>. Petrescu's study of economic sanctions episodes involving 'militarized conflicts' found that sanctions reduced the likelihood of the targeted actor, or another actor in the same geographic vicinity or with similar military capabilities, participating in a different military conflict within the next five years by between 9 and 12 percent.
- 279 UN Committee on Economic, Social and Cultural Rights (n 251) 415.
- 280 Biersteker, Tourinho and Eckert (n 277) 27-28.
- 281 See Alexandra Hofer, 'The Proportionality of Unilateral "Targeted" Sanctions: Whose Interests Should Count?' (2020) 89(3-4) *Nordic Journal of International Law* 404; Erica Moret, 'Humanitarian Impacts of Economic Sanctions on Iran and Syria' (2014) 24(1) *European Security* 120.
- 282 See Sarah Cleveland, 'Norm Internalization and U.S. Economic Sanctions' (2001) 26 *Yale Journal of International Law* 1, 6; Alexandra Hofer, 'The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law' (2019) 113 *AJIL Unbound* 163, 166; Kaplan (n 263) 1914.
- 283 Biersteker, Tourinho and Eckert (n 277) 23.
- 284 Hufbauer, Schott and Elliot (n 276) 158.
- 285 US Department of State, 'Department of State Position Paper' (30 October 1951) <<https://history.state.gov/historicaldocuments/frus1951v07p2/d326>>.
- 286 See Carl Anderson, 'Portuguese Africa: A Brief History of UN Involvement' (1974) 4(1) *Denver Journal of Law and Policy* 133, 149-150.
- 287 Ibrahim Gassama, 'Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid' (1996) 19 *Fordham International Law Journal* 1464, 1489.
- 288 Ibid 1510; see also Alex Vines, 'Can UN Arms Embargoes be Effective?' (2007) 83(6) *International Affairs* 1107, 149-50.
- 289 See, eg, UNGA Res ES-9/1 (1982)
- 290 See Palestinian BDS National Committee, 'BDS' <<https://bdsmovement.net>>.
- 291 See: 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States', UNGA Res 2131 (XX) (1965); 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States', UNGA Res 26/25 (1970); 'Charter on the Economic Rights and Duties of States', UNGA Res 3281 (XXIX) (1974).
- 292 UNGA Res 46/210 (1991) and subsequent annual resolutions with the same title.
- 293 UNGA Res 51/103 (1996) and subsequent annual resolutions with the same title.
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- 295 See UNGA, 'Thematic Study' (n 261); and successive UNGA Reports of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights: UN Doc A/HRC/30/45 (2015); UN Doc A/HRC/36/44 (2017); UN Doc A/HRC/39/54 (2018). For discussion see Barber, 'General Assembly's Troubled Relationship with Unilateral Sanctions' (n 253).
- 296 See: UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (2017) UN Doc A/HRC/36/44; UNGA, 'Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights' (2018) UN Doc A/HRC/39/54; UNGA, 'Elements for a Draft General Assembly Declaration on Unilateral Coercive Measures and the Rule of Law (Updated)' (2019) UN Doc A/HRC/42/46/Add.1.

- 297 *Certain Expenses* (n 10) 163. See also Kelsen, 'Acheson Plan' (n 25) 516; Goodrich, 'Expanding Role of the General Assembly' (n 25) 249.
- 298 See references cited at n 26-27, above.
- 299 UNGA Res 377(V)(A) (1950).
- 300 See, eg, UNGA Res ES-8/2 (1981); UNGA Res 41/35(A) (1986).
- 301 UNGA Res 33/38A (1978).
- 302 UNGA Res 49/10 (1994).
- 303 UNGA Res 498 (V) (1951); and for discussion see L Johnson (n 27).
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- 310 Proponents of this view include: Talmon (n 255); Dominik Zaum, 'The Security Council, the General Assembly, and War: The Uniting for Peace Resolution' in Vaughen Lowe, Adam Roberts and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press 2010); L Johnson (n 27); International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001); Dinstein (n 62) 367; O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2012) 330-31.
- 311 See Reicher (n 62) 30-31 ('quasi-constitutional'); Andrassy (n 16) 581 ('step in the evolution...'). See also: Kelsen, 'Recent Trends' (n 61), describing the U4P Resolution as 'the beginning of the new law of the United Nations' (at 151); Richardson (n 69) 138 ('authoritative influence').
- 312 See: Kelsen, 'Recent Trends' (n 61) 150 ('decide ... which enforcement measures may be taken'); Reicher (n 62) 44 (on UNGA recommendations as an exception to article 2(4)); Andrassy (n 16). In support of this assertion, reference may be made to the factors referenced in section 1.C, above: the ICJ's acceptance of the competence of UN organs to interpret their own powers; the jurisprudence of the ICJ regarding the relevance of the 'practice of the organisation' as a guide to the interpretation of the UN Charter; and the ILC's recent affirmation that the practice of international organisations may serve as a guide to the interpretation of their constituent instruments: see discussion in Barber, 'Legal Effect of General Assembly Resolutions' (n 50) 26-27.
- 313 Patrick Butchard, 'Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter' (2018) 23(2) *Journal of Conflict and Security Law* 229, 249-50 (emphasis added).
- 314 Butchard, *Responsibility to Protect* (n 28) 203; Nigel White and Nicholas Tsagourias, *Collective Security: Theory, Law and Practice* (Cambridge University Press 2013) 292; Kenny (n 77) 25.
- 315 See Harold Koh, 'The War Powers and Humanitarian Intervention' (20th Frankel Lecture, University of Houston Law Centre, 6 November 2015) 1011; Paul Williams, Trevor Ulbrick and Jonathan Worboys, 'Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis' (2012) 45(1/2) *Case Western Reserve Journal of International Law* 473, 490-491; Richardson (n 69) 140.
- 316 Carswell (n 71) 464; see also Ramsden, "'Uniting for Peace and Humanitarian Intervention' (n 75) 304.
- 317 Carswell (n 71) 464-5; Ramsden, "'Uniting for Peace" and Humanitarian Intervention' (n 75) 304. In order for a delegation of power to be effective: Danesh Sarooshi, 'The Legal Framework Governing United Nations Subsidiary Organs' (1996) 67 *British Yearbook of International Law* 413, 426.
- 318 ICISS (n 310) 53; see also Williams, Ulbrick and Worboys (n 315).
- 319 See discussion in Talmon (n 255) 128; Chesterman, 'Legality Versus Legitimacy' (2002) *Security Dialogue* 33(3) 293; Michael Byers and Simon Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law, in JL Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press 2003) 177, 198-201.
- 320 See discussion in Nigel White, *United Nations and the Maintenance of International Peace* (n 85) 181, 208-209; Nigel White, 'UN Charter and Peacekeeping Forces: Constitutional Issues' (1995-1996) 3 *International Peacekeeping* 43.

- 321 *Certain Expenses* (n 10) 164.
- 322 Ibid 166.
- 323 Ibid 177
- 324 See discussion in White, 'UN Charter and Peacekeeping Forces' (n 320).
- 325 See discussion in Barber, 'Survey of the General Assembly's Competence' (n 18). An exception to this was the UN Temporary Executive Authority (UNTEA) in West New Guinea (1962), which was more an administrative authority than a peacekeeping operation.
- 326 UNGA Res 109 (II) (1947).
- 327 UNGA Res 1000 (ES-I) (1956).
- 328 UNSC Res 34 (1974) on Greece; UNSC Res 119 (1956) on Suez.
- 329 UNGA Res 1237 (ES-III) (1958), and see discussion in Hitoshi Nasu, *The International Law on Peacekeeping* (Martinus Nijhoff 2009) 83 and Gerald Curtis, 'The United Nations Observation Group in Lebanon' (2009) 18(4) *International Organisation* 738.
- 330 UNGA Res 1474 (ES-IV) (1960). See also discussion in White, *United Nations and the Maintenance of International Peace* (n 85) 199.
- 331 UNGA, 'Request for the Inclusion of a Supplementary Item in the Agenda of the Seventeenth Session: Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian)' (20 August 1962) UN Doc A/5170, Annex I.
- 332 UNGA Res 1752 (XVII) (1962).
- 333 UNGA Verbatim Record (21 September 1962) UN Doc A/PV.1127, 53.
- 334 UNGA Res 48/208 (1993).
- 335 UNGA Res 53/203A-B (1998); UNGA Res 54/189A-B (1999).
- 336 See *Competence of the General Assembly* (n 254) 7, discussed in Halberstam (n 254) 186-7; Erasmus (n 254) 46.
- 337 UNGA, 'Rules of Procedure of the General Assembly' (1984) UN Doc A/520/Rev 15, rule 27.
- 338 UNGA, 'Statement by the Legal Counsel Submitted to the President of the General Assembly at its Request' (1970) UN Doc A/8160.
- 339 Farrokh Jhabvala, 'The Credentials Approach to Representation Questions in the UN' (1977) 7 *California Western International Law Journal* 615, 631. Jhabvala argues that even through Res 396(V) refers expressly to scenarios in which two rival claimants seek recognition, 'the legal criteria must be, *a priori*, the same in all cases since it is the representative capacity of the authority in question'. Jhabvala argues that therefore, 'any principle of representativeness [embodied in Resolution 396(V)] ... should rule in all cases where representation is questioned': at 631. See also Raymond Suttner, 'Has South Africa been Illegally Excluded from the United Nations General Assembly?' (1984) 17 *Comparative and International Law Journal of South Africa* 279.
- 340 Note that, however, the UNGA's action in the case of South Africa is widely regarded as either contrary to the UN Charter, or at least as '*sui generis*, not as establishing a practice that substitutes the General Assembly for the Security Council as the UN organ empowered to suspend or expel members': see Halberstam (n 254) 191.
- 341 ILC, 'Report on the Fifty-Third Session' (n 232) 71-2 (art 22).
- 342 Ibid.
- 343 Frederic Dopagne, 'Sanctions and Countermeasures by International Organisations', in Richard Collins and Nigel White (eds), *International Organisations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge 2011) 185-6.
- 344 See *ibid*; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell 2009) 549.
- 345 Christine Chinkin et al, 'Opinion: In re: United Nations Credentials Committee: Challenge to the Credentials of the Delegation of the State Peace and Development Council to represent Myanmar/Burma' (2019) 6. See also White, *Law of International Organisations* (n 27) 124.
- 346 Chinkin et al (n 345) 15.
- 347 For discussion of these cases see Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 152-8; Erasmus (n 254); Jhabvala (n 339).
- 348 See Higgins (n 347) 158-9; Erasmus (n 254) 42-3.
- 349 See, eg, 'Letter dated 82/20/22 from the Representatives of [43 Member States] to the United Nations addressed to the President of the General Assembly' (1982) UN Doc A/37/563.

- 350 UNGA Res 3206 (XXIX) (1974) (approving the report of the Credentials Committee); UNGA, 'Credentials of Representatives to the Twenty-Ninth Session of the General Assembly: First Report of the Credentials Committee' (28 September 1974) UN Doc A/9779, 4 (recommending the rejection of South Africa's credentials).
- 351 UNGA Official Records, 29th sess, 2281st plen mtng (12 November 1974) UN Doc A/PV/2281, 854. See discussion in Erasmus (n 254); Jhabvala (n 339); Alison Duxbury, *The Participation of States in International Organisations* (Cambridge University Press 2011).
- 352 Matthew Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through its Accreditation Process, and Should It' (2000) 32 *New York University Journal of International Law and Policy* 725, 725.
- 353 See discussion in *ibid.*
- 354 Edith Lederer, 'Myanmar 1990 Election Winners Want Junta's Seat' (*USA Today*, 9 September 2008) <https://usatoday30.usatoday.com/news/world/2008-09-09-1775524742_x.htm>.
- 355 See discussion in Duxbury (n 351) 116-117.
- 356 UNGA, 'Credentials of Representatives to the Sixty-Third Session of the General Assembly' (29 December 2008) UN Doc A/63/633.
- 357 UNGA Res 63/245 (2008).
- 358 Chinkin et al (n 345) 5.
- 359 Griffin (n 352) 732.
- 360 *Ibid* 727.
- 361 Duxbury (n 351) 120.
- 362 UNGA Res 60/1 (2005).
- 363 Genocide Convention (n 15) art I.
- 364 *Bosnian Genocide Case* (n 211) 221.

