ARTICLE

COOPERATION WITH UNITED NATIONS ATROCITY INQUIRIES

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ABSTRACT

This article evaluates the legal basis for a state duty to cooperate with atrocity inquiries within the United Nations ("UN"). The conventional understanding is that such duty only exists pursuant to a Security Council decision. Through examination of General Assembly practice in monitoring state cooperation with atrocity inquiries, this article considers whether there is a basis for cooperation to be constructed as a primary obligation under the UN Charter. It considers the extent to which the text of the UN Charter and other sources of international law support a reasonable interpretive claim that a duty to cooperate with UN atrocity inquiries exists. While practice is inconsistent, the article shows there to be seeds from which the General Assembly could, in a "declaration," confirm an understanding that state cooperation with UN atrocity inquiries is obligatory.

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I. INTRODUCTION

The United Nations ("UN") has an extensive practice of creating fact-finding bodies to inquire into atrocity situations (those concerning alleged commission of war crimes, crimes against humanity, genocide, and other systematic human rights violations).[1] These "atrocity inquiries," as they are termed here, are tasked with establishing facts and determining the occurrence of international crimes (genocide, war crimes, and crimes against humanity) and serious violations of international human rights law.[2] Although inquiries have become an important feature of the UN's mandate to secure accountability for atrocities, they rely to a significant extent upon the cooperation of states to gather necessary information. "Cooperation" in this respect connotates various features.[3] The Darfur inquiry set out six criteria to determine the degree to which a state has successfully cooperated with an atrocity inquiry: (i) freedom of movement for members of the atrocity inquiry throughout the territory where the alleged violations have occurred; (ii) unfettered access to witnesses and

1. There is a growing scholarly literature on these developments. *See, e.g.,* Ginevra Le Moli, *From "Is" to "Ought": The Development of Normative Powers of UN Investigative Mechanisms*, CHIN. J. INT'L L. (2021); Michael Becker & Sarah Nouwen, *International Commissions of Inquiry: What Difference Do They Make? Taking an Empirical Approach*, 30(3) EUR. J. INT'L L. 819 (2019); Hala Khoury-Bisharat, *The Unintended Consequences of the Goldstone Commission of Inquiry on Human Rights Organizations in Israel*, 30(3) EUR. J. INT'L L. 877 (2019); Eliav Lieblich, *At Least Something: The UN Special Committee on the Problem of Hungary, 1957-1958*, 30(3) EUR. J. INT'L L. 843 (2019); Larissa Van den Herik, *An Inquiry into the Role of Commissions of Inquiry in International Law: Navigating the Tensions between Fact-Finding and Application of International Law*, 13 CHIN. J. INT'L L. 507 (2014).

2. Other descriptions of atrocity inquiries in the UN system include "commissions of inquiry", "fact-finding missions", "panel of experts", or "commission of experts". *See* U.N. OHCHR, Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice 7 (2015), https://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf [https://perma.cc/P66D-TGY2]. For brevity, "atrocity inquiry" is used here.

3. Scholars have defined cooperation more generally in international relations as "the voluntary coordinated action of two or more States which takes place under a legal regime and serves a specific objective": Rüdiger Wolfrum, *International Law of Cooperation*, *in* MAX PLANCK ENCYC. PUB. INT'L L. ¶ 2 (Apr. 2010). Space precludes a detailed exposition of this general use, the focus here being on its specific development within the framework of the UN system in the context of atrocity crime inquiries.

places/establishments; (iii) free access to all sources of information, including documentary material and physical evidence; (iv) appropriate security arrangements for the personnel and documents of the atrocity inquiry; (v) protection of victims and witnesses and all those who appear before the inquiry; and (vi) privileges, immunities and facilities necessary for the independent conduct of the inquiry.[4]

The conventional understanding of UN atrocity inquiries is that there is no obligation to cooperate in these ways unless required by a Security Council decision.[5] To this understanding, there exists no primary obligation under the UN Charter to cooperate with inquiries generally. This understanding has implications for inquiries that are not supported by a Security Council decision, particularly those established by the General Assembly or Human Rights Council which operate without the consent of the territorial state concerned.[6] A lack of cooperation has not stopped inquiries from producing final reports.[7] Still, cooperation will often be the single most important factor in ensuring that the mandate of an atrocity inquiry is fulfilled.[8] A

4. Rep. of the Comm'n Inquiry Darfur to U.N. Secretary-General., ¶ 28 (Jan. 25, 2005).

5. U.N. Charter, arts. 25 & 48; Anne-Marie Devereux, *Investigating Violations of International Human Rights Law and International Humanitarian Law through an International Commission of Inquiry: Libya and Beyond*, *in* INVESTIGATING OPERATIONAL INCIDENTS IN A MILITARY CONTEXT: LAW, JUSTICE, POLITICS 114 (2015) (David Lovell ed., 2015). The Security Council has also required cooperation with non-Chapter VII established atrocity inquiries: S.C. Res. 1636 ¶ 11 (Oct. 31, 2005). Security Council members have called on Burundi to cooperate with the Human Rights Council's Burundi Commission: Press Release, U.N. Security Council, Security Council Press Statement on Situation in Burundi', SC/12750 (Mar. 13, 2017), http://www.un.org/press/en/2017/sc12750.doc.htm [https://perma.cc/LE9E-R2D3].

6. By contrast, inquiries established by the Secretary-General have been with the consent of the territorial State concerned and have enjoyed greater instances of cooperation: Steven Ratner, *After Atrocity: Optimizing UN Action Toward Accountability for Human Rights Abuses*, 36(3) MICH. J. INT'L L. 541, 551 (2015).

7. *See, e.g.,* the inquiry reports relied on in: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v Myanmar), Order 2020, I.C.J. 178 (Jan. 23 2020), https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-02-00-EN.pdf [https://perma.cc/CE67-UHLC]; *see also* OHCHR, Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice 65 ("[L]ack of cooperation from the authorities has not prevented investigations and fact-finding from taking place nor commissions/missions from reaching conclusions").

8. *See, e.g.,* Human Rts. Comm., Rep. of the Comm. of Inquiry on Human Rights, Eritrea, U.N. Doc. A/HRC/29/42, at ¶ 82 (2015) (the lack of access is a "great concern" and impediment to an effective inquiry). Non-cooperation is a longstanding problem: Frances

failure of cooperation may constrain the workings of an inquiry, in that the quality and reliability of inquiry reports will often turn upon the extent to which the territorial State provides access to the inquiry.[9] Even if an inquiry can conduct interviews with witnesses remotely or outside of the territory concerned, the lack of the cooperation of persons implicated can affect the extent to which exculpatory evidence, on the one hand, and proof of their intention, on the other, is acquired.[10] Drawing conclusions based upon an incomplete evidentiary record can also compromise the independence of an inquiry in the eyes of some international publics, who may perceive the inquiry to have crossed the line into advocacy over fair adjudication.[11] At the very least, it opens up inquiries to criticism that their conclusions do not reflect the realities on the ground.

Despite the importance of cooperation to the fulfilment of inquiry mandates, scholars have not paid attention to the basis for fashioning a cooperation duty within the UN system; the need for this to be voluntarily obtained, outside of a Security Council decision, has been assumed. Instead, scholars have tended to focus on procedural fairness issues and the effects of inquiry reports both on international institutions and in the country under investigation. Some of these studies have shown atrocity inquiry reports to have exerted influence on international and domestic

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Trix, *Peace-Mongering in 1913: The Carnegie Commission of Inquiry and Its Report on the Balkan Wars*, 5(2) FIRST WORLD WAR STUD. 147, 151-52 (2014).

9. Human Rts. Comm., Rep. of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, U.N. Doc. A/HRC/40/CRP .2, at ¶¶ 30-31 (Mar. 18, 2019); U.N. G.A., Rep. of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, U.N. Doc. A/72/764, at ¶ 1 (Feb. 28, 2018) ("If relevant information holders choose not to cooperate with the Mechanism, that might affect its ability to collect evidence and develop case files about associated crimes."); U.N. GAOR, 2nd Emergency Special Session, 571st plen. mtg., U.N. Doc. A/PV.571, at ¶ 150 (Nov. 9, 1956).

10. *See, e.g.,* Syria Report, *supra* note 9, at ¶ 15; Human Rts. Comm., Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/ 48 (Sep. 25, 2009) ¶¶ 137-45; Human Rts. Comm., Report of the detailed findings of the comm'n of inquiry on human rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/CRP .1 (Feb. 7, 2014), at ¶¶ 21, 62, 932, 1086; Eritrea Report, *supra* note 8, at ¶ 12.

11. *See, e.g.,* Michael Ramsden, *Accountability for Crimes Against the Rohingya: Strategic Litigation in the International Court of Justice*, 26 HARVARD NEG. L. REV 153, 170 (2021) (citing a criticism noted by counsel for Myanmar in challenging the veracity of inquiry reports in support of ICJ provisional measures).

decision-makers.[12] The scholarly literature has also upheld the basis for the establishment of these inquiries even without the consent of the states concerned. Given the growing body of literature on these aspects of atrocity inquiries, it is imperative to consider the legal nature of the cooperation in this area. This is not only because scholarly analysis might reveal there to be less uniformity on this position in state and institutional practice than has been assumed,[13] but also because the development of a cooperation duty might fit within the broader trend toward the normalization and "juridification"[14] of atrocity inquiries within the UN system despite sovereigntist objections.[15] The notion that atrocity inquiries can be established without the consent of the state concerned was itself once a controversial proposition but has become a generally accepted UN practice. Yet, it is also apparent that the UN system is organic; it has room to grow, not only where concerned with the allocation and distribution of institutional powers, but also in defining the obligations that come with UN membership.[16] In this respect, it is now well established that obligations under the UN Charter do not derive solely from Security Council decisions or those, where relevant, of the International Court of Justice ("ICJ"). Rather, the UN Charter contains a set of primary obligations that exist independent of the

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

13. Further analysis outlined *infra* has found this to be true.

14. "Juridification" denotes a shift towards commissions performing judicial-like functions, including the identification and determination (within the scope of their mandate, at least) of those responsible for violations of international law. This trend is comprehensively analyzed in CATHERINE HARWOOD, THE ROLES AND FUNCTIONS OF ATROCITY-RELATED UNITED NATIONS COMMISSIONS OF INQUIRY IN THE INTERNATIONAL LEGAL ORDER (2020).

15. Despite these objections, the text of the UN Charter justifies the legality of atrocity inquiries within the UN system (to facilitate the General Assembly's recommendations) and as a form of subsequent/established practice in the interpretation of the Charter. These legal foundations are explored in detail in Michael Ramsden, INTERNATIONAL JUSTICE IN THE UNITED NATIONS GENERAL ASSEMBLY 183-85 (2021).

16. Ruth Wedgwood, *Unilateral Action in the UN System*, 11(2) EUR. J INT'L L. 349 (2000); Philippe Sands & Pierre Klein, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 454 (2009); Pollux, *The Interpretation of the Charter*, 23 BRITISH YBK INT'L L. 54, 55 (1946); Daniel Moeckli & Nigel White, *Treaties as 'Living Instrument', in* CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES (Dino Kritsiotis & Michael Bowman eds., 2016); Jessica Liang, *Modifying the UN Charter through Subsequent Practice: Prospects for the Charter's Revitalization*, 81 NORDIC J. INT'L L. 1, 1 (2012).

decisions of competent organs.[17] With this framework in mind, the following Article considers the extent to which the UN Charter, and institutional practice, supports the claim that there is a general duty to cooperate with an atrocity inquiry even without a binding decision of the Security Council.

In framing this issue, it is important to be clear about why finding a legal obligation in the UN Charter is useful. There are many instances where States have cooperated with atrocity inquiries that are not explicated upon any sense of observance with a legal obligation; cooperation, rather, has aligned with a state's self-interest. Within the UN, the Secretary-General's creation of inquiries has followed this model; cooperation has been secured precisely because the state consented to the inquiry.[18] Rather, being able to frame cooperation as a legal duty is most useful for those inquiries established by the General Assembly or Human Rights Council against the wishes of the relevant state. There is also a large body of practice of these bodies in exhorting Members to cooperate with an inquiry; political or moral pressure of this kind has been noted as a useful tool in promoting compliance or at least mobilizing shame against recalcitrant States.[19] However, the imperative for cooperation would be strengthened if it could be framed as a legal obligation. Writers have noted, for instance, that the Security Council's adoption of a binding resolution demanding cooperation with atrocity inquiries has led to Member State compliance.[20] Finding a legal obligation to

17. *See, e.g.*, Advisory Opinion on Human Rights Obligations Under the UN Charter: Namibia (Advisory Opinion), [1971] I.C.J. Rep 16, 57; ROSALYN HIGGINS ET AL. (eds.), OPPENHEIM'S INTERNATIONAL LAW: UNITED NATIONS 816 (2017); Louis Sohn, *The Human Rights Clauses of the Charter*, 12 TEXAS INT'L L. J. 129, 133 (1977).

18. *See, e.g.,* Steven Ratner, *After Atrocity: Optimizing UN Action Toward Accountability for Human Rights Abuses*, 36(3) MICH. J. INT'L L. 541, 551 (2015).

19. G.A., 62nd Sess., 76th plen. mtg. at 35, U.N. Doc A/62/PV.76 (Dec. 18, 2007); G.A., 52nd Session, 71st plen. mtg. at 18, A/52/PV.71 (Dec. 15, 1997). Scholars have also observed the political pressure deriving from General Assembly recommendations: BLAINE SLOAN, UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD 42 (1992); CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 198 (2014).

20. For instance, when the Security Council established the Darfur Commission and indicated the possibility of sanctions in the event of non-cooperation, the Sudanese Representative indicated its willingness to continue to cooperate: U.N. SCOR, 49th year, 5040th mtg. at 14, U.N. Doc. S/PV.5040 (Sept. 18, 2004); Patrick Butchard & Christian Henderson, *A Functional Typology of Commissions of Inquiry*, in COMMISSIONS OF INQUIRY: PROBLEMS AND PROSPECTS (Christian Henderson ed., 2017), at 31; Micaela Frulli, *Fact-*

cooperate, and a corresponding violation of this obligation, also augments collective responses: it might justify the General Assembly or Human Rights Council to publicly denounce the recalcitrant states under the shadow of law, including to recommend (as it has on several occasions) voluntary sanctions.[21] Establishing such a legal duty would also reinforce the legitimacy of contentious evidentiary findings, such as where an inquiry report effectively created a reverse onus on the relevant state concerned.[22]

Given the increasingly important role that inquiries perform in UN responses to atrocities, it is instructive to consider the basis for framing a legal obligation to cooperate with them in the future.[23] The future is the focus here because, as is readily acknowledged, there is no general acceptance of a cooperative duty yet. Nor, for that matter, is such an obligation explicit in the UN Charter. However, as will be argued, a textual basis exists for Member States, acting collectively, to assert that such a duty arises within this legal framework. The UN Charter, as an organic system, provides procedural latitude for interpretive evolution, as a manifestation of subsequent "agreement" or "practice," premised upon the memberships' general acceptance.[24] That said, Member States do have varying conceptions of the weight to be placed on different sources of interpretation, be that the object and purpose of the Charter (Articles 1 and 2), the text of a particular provision, or, where appropriate, the implied or inherent powers under the

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Finding or Paving the Road to Criminal Justice: Some Reflections on United Nations Commissions of Inquiry, 10 J. INT'L CRIM. JUST. 1323, 1333 (2012).

21. See e.g. G.A. Res. 69/188 ¶ 8 (Dec. 18, 2014).

22. Michael Nesbitt, *Due Process in UN Commissions of Inquiry: A Legal Analysis of the Procedures of Goldstone's Gaza Inquiry*, 18(1) GERMAN L. J. 127, 179 (2019).

23. As to inquiries that require cooperation outside of the UN system, see: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977, art. 90, June 8, 1977, 1125 U.N.T.S. 3, 43-45; Hague Convention for the Pacific Settlement of International Disputes 1899, art. 12, July 29, 1899; Hague Convention for the Pacific Settlement of International Disputes 1907, art. 23, Oct. 18, 1907.

24. *See* Harwood *supra*, note 14. *See also* Christopher Peters, *Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?*, 3(2) GOETTINGEN J. INT'L L. 617 (2011); Rebecca Barber, *Revisiting the Legal Effect 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?*, 26 J. CONFLICT & SEC. L. 9 (2021).

Charter.[25] Where a practice is yet to be established these various interpretive approaches place some constraints on the scope of institutional evolution. This Article therefore will test the extent to which an *interpretive claim* can be advanced that there is a duty to cooperate with atrocity inquiries under the UN Charter. In evaluating practice and the textual foundation for a cooperation duty, the following Article is divided into two parts.

Part II tracks UN diplomatic exchanges to survey Member State attitudes toward a cooperation duty. Given that the General Assembly is the most representative organ, a particular emphasis will be placed here on its debates and resolutions to discern a common legal position on a putative cooperation duty. The assumption underlying the following analysis is that Assembly resolutions provide evidence as to the content of international law. Some dispute the prescriptive significance of Assembly resolutions, although this view is increasingly anachronistic given the influence that its declarations have had in the identification and development of international law.[26] In this regard, the Assembly has produced a body of resolutions that have addressed the need for states to cooperate with atrocity inquiries, including on "unfettered access," relevant documentation and appearance of witnesses.[27] This Article will assess the significance of this practice in the interpretation of the UN Charter.

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25. Mahnoush Arsanjani, *Are There Limits to The Dynamic Interpretation Of The Constitution And Statutes Of Ios By The Internal Organs Of Such Organizations?* 235 (Institut de Droit International, 2019). *See also* the UN Charter based justifications for Uniting for Peace, a resolution which arguably expands the powers of the General Assembly beyond those contemplated in the Charter: U.N., *Yearbook of the United Nations*, 1950, at 183-90; Michael Ramsden, *"Uniting for Peace" in the Age of International Justice*, 42 YALE J. INT'L L 1 (2016).

26. *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, U.N. Doc. A/73/10 (2018), *reprinted in* [2018] 2 Y.B. Int'l L. Comm'n 199 U.N. Doc. A/73/10; G.A. Res. 73/202, annex, conclusion 12(2) Identification of Customary International Law, (Dec. 20, 2018); Rosalyn Higgins, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 5 (1963); Richard Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60(4) AM. J. INT'L L. 782, 782 (1966).

27. G.A. Res. 72/191 ¶ 33 (Dec. 19, 2017); G.A. Res. 67/262, preamble, ¶ 7 (May 15, 2013); G.A. Res. 38/79 (D), ¶ 16 (Dec. 15, 1983) (here, the Assembly did not request that Israel allow witnesses to appear before the UN mechanism, but did "condemn" their refusal to permit persons from the occupied territories to so appear). *See also* G.A. Res. 54/184 ¶ 37 (1999) (transfer to the *ad hoc* tribunals indicted persons).

Part III will consider the textual legal basis for a general duty to cooperate with UN atrocity inquiries. An analysis of the provisions of the UN Charter and their drafting history will ascertain the extent to which they can support a reasonable interpretive claim that a cooperation duty exists. Article 2(5) of the UN Charter demands particular attention, as its requirement that Member States lend "every assistance" to the UN whenever action is taken seems to support a cooperation duty by implication. Another entry point for such a duty includes the requirement that treaty parties act in good faith, which might extend to cooperating with atrocity inquiries and the political organs that established these subsidiary bodies. Finally, this Article considers the basis for a cooperation duty outside of the UN Charter, including under human rights treaties and customary international law, which might be used by UN organs including the General Assembly in framing the need to cooperate in the future.

II. THE COOPERATION IMPERATIVE IN UN PRACTICE

The focus of this section is to evaluate the cooperation imperative in the practice of UN atrocity inquiries that have been established (i) without the consent of the state concerned and (ii) outside of a binding decision of the Security Council. Given their extensive practice in establishing such inquiries, the General Assembly and Human Rights Council will be the focus of analysis here. Where relevant, use of cooperation norms in other fields aside from atrocity response will also be considered, particularly given the General Assembly's extensive involvement in creating inquiries into matters such as racial discrimination (as in apartheid South Africa), self-determination, and peace maintenance.

In the UN's opening years there were few atrocity inquiries established without the consent of the relevant State. The General Assembly's atrocity crime cooperation exhortations were instead focused horizontally at inter-State cooperation, as with its 1946 recommendation that all states arrest persons responsible for war crimes during World War II and send them for prosecution in those states where the crimes occurred.[28] Although the concept of a UN atrocity inquiry had yet to be born, the Assembly appeared to regard a Member's reporting that which is of international concern

28. G.A. Res. 3 (I) (Feb. 13, 1946).

to be important, and thus made a "request" to India and South Africa to report to a future session on the treatment of persons of Indian origin in South Africa.[29] Outside of the atrocity inquiry context, in 1947 the Assembly saw the value in establishing subsidiary fact-finding organs in a different sphere: colonial independence. The Assembly vested the Special Committee for Palestine with the "widest powers to ascertain and record facts" and the power to conduct investigations "in Palestine . . . wherever it may deem useful."[30] The cooperation of the British mandatory authority was therefore expected or assumed. Similarly, in 1947 the Assembly also created a subsidiary organ to report on international peace and security, and expressly recognized that an investigation "shall not be conducted without the consent of the State or States in whose territory it is to take place," implying cooperation to be voluntary.[31] The Peace Observation Commission (POC), established under the Uniting for Peace resolution, likewise could only operate in a territory with the permission of the Member State concerned; states were only "recommend[ed]" to cooperate with the Commission.[32] In 1952 this was put in practice as the Assembly authorized the POC to dispatch observers to the Balkans "but only to the territory of States consenting thereto."[33]

Another significant event in 1952 was the General Assembly's creation of the Commission on the Racial Situation in the Union of South Africa.[34] Resolution 616 (A) (1952) referenced cooperation twice, noting it to be a UN purpose; it "invit[ed]" South Africa to "extend its full cooperation" with the new Commission.[35] That said, the imperative for cooperation was overshadowed in Assembly debates over the meaning of interference in Article 2(7) and whether the Assembly could establish an inquiry against the will of

29. G.A. Res. 44 (I) ¶ 3 (Feb. 13, 1946); *see also* G.A. Res. 385 (V) ¶ 5 (Nov. 3, 1950) ("invites" UN members to submit to the Secretary-General all evidence which they now hold or which may become available in relation to this question).

30. G.A. Res. 106 (S-l) ¶¶ 2, 4 (May 15, 1947).

31. G.A. Res. 111 (II) ¶ 2 (Nov. 13, 1947); G.A., 111th plen. mtg., A/PV.111, at 811 (Nov. 13, 1947).

32. G.A. Res. 377 (V) ¶¶ 3, 5 (Nov. 3, 1950).

33. G.A. Res. 508 (VI) B (Dec. 7, 1951).

34. G.A. Res. 616 (VIII) (A), ¶ 1 (Dec. 5, 1952).

35. *Id.* at preamble, ¶ 2.

the state concerned.[36] Still these objections did not carry much momentum—although South Africa, which claimed the Commission to be *ultra vires*, declined to allow it to enter its territory.[37] The consequence of South Africa's failure to cooperate attracted some attention in Assembly meetings. Brazil considered South African non-cooperation to be fatal to the Commission's continuance, noting it to be "unrealistic to insist on imposing on the Government of the Union a sort of technical assistance which it refuses to accept."[38] India took a contrary view, alleging South Africa's non-cooperation to "be inconsistent with the spirit and letter of the Charter."[39] Still, the language in Assembly resolutions remained timid. In contrast to "deploring" apartheid, the absence of cooperation was met with "regret" and spurred the "invitation" of South Africa to reconsider its position.[40]

The next major event worth more detailed analysis occurred in 1956 with Russia's intervention in Hungary, leading the General Assembly to create an inquiry and adopt a series of resolutions dealing with cooperation. In the first such resolution, which was both American drafted and sponsored, the Assembly "call[ed] upon" the Soviet Union to "permit observers" designated by the Secretary-General to "enter the territory" to carry out unfettered investigations.[41] It also "called upon" members to cooperate with the Secretary-General.[42] The Secretary-General, in communicating with the incumbent Hungarian government, referred to the cooperation "demand of the General Assembly" and the "firm expectation" that this request "will be accepted."[43] The Assembly responded to Soviet refusals to cooperate by "urging" them to

36. G.A., 7th Sess., 401st plen. mtg., U.N. Doc. A/PV.401 (Dec. 5, 1952); G.A., 7th Sess., 381st plen. mtg., at 53-59, U.N. Doc. A/PV.381 (Oct. 17, 1952) (extensive objection by South Africa to the placing of apartheid on the General Assembly's agenda).

37. *See e.g.*, G.A., Rep. of the United Nations Commission on the Racial Situation in the Union of South Africa, U.N. Doc. A/2505 & U.N. Doc. A/2505/Add1 (1953).

38. G.A., 9th Sess., 511th plen. mtg. at 488, U.N. Doc. A/PV.511 (Dec. 14, 1954).

39. *Id.* at 490.

40. G.A. Res. 721 (VIII), preamble, ¶ 5 (Nov. 27, 1953); *see also* G.A. Res. 820 (IX), ¶ 2, 4 (Dec. 14, 1954); G.A. Res. 917 (X), ¶ 2 (Dec. 6, 1955); G.A. Res. 1016 (XI), ¶¶ 1, 4 (Jan. 30, 1957).

41. G.A. Res. 1004 (ES-II), ¶ 5 (Nov. 4, 1956).

42. *Id.* ¶ 6.

43. U.N. Secretary-General, Aide-memoire dated Nov. 8, 1956 from the Secretary-General addressed to the Minister for Foreign affairs of Hungary, U.N. Doc. A/3315 (Nov. 8, 1956).

"cooperate fully."[44] In a hardening of language in response to Soviet recalcitrance, the Assembly then made a specific "request" in Resolution 1130 (XI) (1956) that the Soviet Union "communicate to the Secretary-General, not later than 7 December 1956, their consent to receive United Nations observers."[45] The tone of this resolution, in setting a deadline and carrying an expectation of compliance, departed from Assembly practice up to that point, prompting Members to request a vote specifically on this paragraph.[46] The deadline paragraph also caught the attention of the international media; the *New York Times* indicated that more drastic measures would be taken if not met.[47]

What these drastic measures might be, and the basis for imposing them, was left vague in the General Assembly. In the explanations of vote on Resolution 1130 (XI) (1956), the major powers avoided any specific threats.[48] The more interesting observations on the legal foundation of a cooperation duty, even if rather elliptical, were made from the smaller powers. Uruguay considered it "undeniable that this world parliament possesses full authority to cross the borders of any Member State for the purpose of finding out whether or not crimes have been committed against international law and order."[49] A permutation of this argument was that granting entrance to an Assembly-mandated inquiry was obligatory. India, too, suggested there to be some duty to accept the presence of an inquiry, but stated this as "not a legal, but a moral duty."[50] The Dominican Republic asserted that the Soviet Union was both "legally and morally" bound to cooperate.[51] China regarded the Secretary-General's entrance into Hungary to conduct an inquiry as "a part of the minimum obligations of the

44. G.A. Res. 1006 (ES-II), ¶ 3 (Nov. 9, 1956) ("Urges" the Soviet Union to "cooperate fully"); *see also* 571st plen. mtg., *supra* note 9, at ¶ 150 ("It is only after the observers have gone in, if they do go there-and that must be at the express wish of the Government of the country.").

45. G.A. Res. 1130 (XI), ¶ 2 (Dec. 4, 1956).

46. U.N. GAOR, 11th Sess., 608th plen. mtg. at 526, A/PV.608 (Dec. 4, 1956). This vote passed with 44 votes to 13, with 13 abstentions. *Id.*

47. *Id.* ¶ 43.

48. Nonetheless, the Soviet Union said that it would not be intimidated into cooperation with "blackmail and threats." *Id.* ¶ 43.

49. *Id.* ¶ 75.

50. *Id.* ¶ 107.

51. *Id.* ¶ 229.

United Nations towards the Hungarian people."[52] In focusing on the consequence of non-cooperation, Nepal also observed that the Soviet Union's failure to "comply" with Assembly resolutions "shows their lack of faith and trust in the Purposes and Principles of the Charter."[53] India, similarly, felt Soviet recalcitrance was a "lack of courtesy" and a "violation of the spirit of the Charter."[54] This alludes to, as the next section demonstrates, a requirement to cooperate as tied to a duty to act in good faith under the UN Charter. It was not a point taken, however, by other Members nor incorporated into the text of any of the resolutions.

The Soviet Union indicated that it would not be intimidated by the "blackmail and threats" contained in Resolution 1130 (XI) (1956); not buckling to pressure, the deadline to cooperate expired.[55] None of the suggested coercive action threatened by the General Assembly was taken. Soviet non-cooperation was only noted in a subsequent resolution to evoke a "grave concern," whereas the denial of the exercise of fundamental rights of Hungarians, on the other hand, was condemned as a "violation of the Charter."[56] The Secretary-General, lamenting the Soviet's lack of cooperation, in turn recommended the Assembly establish an inquiry to facilitate "the consideration of matters relating to Hungary that went beyond what could be achieved through an investigation of the kind with which the Secretary-General has been charged."[57] That said, the Assembly's subsequent establishment in Resolution 1132 (XI) (1957) of an inquiry to investigate the "situation created" by Soviet intervention was also accompanied by the weaker "call" for the Soviets to cooperate.[58] In the explanation of the vote, there was little consideration on the imperatives of cooperation, perhaps surprising given the failed attempts to secure the Secretary-General's access into Hungary previously. That said, Indonesia indicated its preference that the resolution use the word "requests" rather than "calls upon," the implication being that "requests" carries with it a greater

52. *Id.* ¶ 28.
53. *Id.* ¶ 92.
54. *Id.* ¶ 108.
55. *Id.* ¶ 43.
56. G.A. Res. 1131 (XI), pmbl., ¶ 2 (Dec. 4, 1956).
57. U.N. Secretary-General, *Report of the Secretary-General*, ¶ 9 U.N. Doc. A/3485 (Jan. 5, 1957).
58. G.A. Res. 1132 (XI), ¶ 2 (Jan, 10, 1957).

expectation of cooperation.[59] However, this suggestion was not heeded. Finally, by way of a conclusion on the Hungary situation, the inquiry's publication of the report was later endorsed by the Assembly; Resolution 1133 (XI) (1957), which "regretted" that the Soviet Union and Hungary "have failed to co-operate in any way with the Committee," once again did not spell out the legal consequences arising from non-cooperation.[60] This early example neatly illustrated a general timidity of the Assembly both in framing cooperation in strong terms and in confronting non-cooperation, features that would remain present in many later situations even less politically charged as one involving a superpower.

One area where the General Assembly has been more willing to confront non-cooperation in stronger terms is with inquiries established to investigate situations in colonial territories. These inquires have typically been concerned with reporting on the preparedness for independence of these territories and the actions of a colonial power against peoples under their mandate. Here there appears to be a stronger expectation of cooperation on the mandate holder, including to allow it access into the mandated territory. After the assassination of the Prime Minister of Burundi in 1961, the Assembly "request[ed]" an inquiry to visit the scene immediately, and the colonial Belgian authorities gave their cooperation.[61] In 1962, the Assembly "deplor[ed]" Portugal's failure to cooperate with a subcommittee it established to look into "recent disturbances and conflicts in Angola."[62] Resolution 1742 (XVI) (1962) went further in requesting Member States "to use their influence to secure the compliance of Portugal with the present resolution."[63] This alludes to the possibility of Members exerting pressure through the imposition of sanctions as a means

59. U.N. GAOR, 11th Sess., 636th plen. mtg., ¶ 107, U.N. Doc. A/PV.636 (Jan. 10, 1957).

60. G.A. Res. 1133 (XI), pmbl. (Sept. 11, 1957); *see also* U.N. GAOR, 11th Sess., 677th plen. mtg., ¶ 80, U.N. Doc., A/PV.677 (Sep. 13, 1957). In the following session, the GA also "deplored" the Soviet Union's refusal to cooperate. G.A. Res. 1312 (XIII), ¶ 3 (Dec. 12, 1958).

61. G.A. Res. 1627 (XVI), ¶ 2 (Oct. 23, 1961); *see also* U.N. Comm'n, Question of the future of Ruanda-Urundi: Rep. of the U.N. Comm'n for Ruanda-Urundi on the assassination of the Prime Minister of Burundi, ¶¶ 17-19, U.N. Doc. A/5086 (Jan. 26, 1961).

62. G.A. Res. 1603 (XV), pmbl. (Apr. 20, 1961); *see also* G.A. Res. 1742 (XVI), pmbl. (Jan. 30, 1962).

63. G.A. Res. 1742 (XVI), ¶ 7 (Jan. 30, 1962); *see also* G.A. Res. 1807 (XVII), ¶ 8 (Dec. 14, 1962).

to secure compliance and cooperation.[64] The Assembly in a later resolution also "reminded" Portugal that its non-compliance with UN resolutions is "inconsistent with its membership."[65] The implication here is that cooperation is intrinsic to UN membership, although the Assembly did not focus specifically on non-cooperation as being the offending conduct but a general non-compliance with UN resolutions on matters that included cooperation. Either way, the Assembly's campaign to exert pressure had traction; Portugal agreed to allow the sub-committee access into Angola.[66] By contrast, condemnation of failures to comply with "repeated resolutions" of the Assembly and Security Council, which included calls for cooperation, did not meet with the same success in South Africa.[67]

Some inquires were established with the consent of the State concerned. Where cooperation has been forthcoming from the outset of an inquiry, it has sometimes been welcomed and praised as a voluntary act of good faith. In 1963, upon reports surfacing of human rights abuses in South Vietnam, the government welcomed a delegation to enter the territory and conduct investigations. The government, however, was adamant that it be publicly known that the inquiry had not been "imposed" but rather was "invited," something which the inquiry chairman readily acknowledged.[68] As the Vietnamese Secretary of State for Foreign Affairs noted, Vietnam could not "have furnished better proof of its goodwill and good faith than by thus allowing [the inquiry] complete liberty to obtain information by all available means."[69] Treating cooperation

64. More generally, where the General Assembly has recommended sanctions for violations of international obligations these have not mentioned specifically a failure to cooperate with UN organs: G.A. Res. 41/35(B), ¶ 7 (Nov. 10, 1986); *see also* G.A. Res. 37/184, ¶ 5 (Dec. 17, 1982); G.A. Res. 34/93(A), ¶ 12 (Dec. 12, 1979); G.A. Res. 2107 (XX), ¶ 7 (Dec. 21, 1965); G.A. Res. 500 (V), ¶ 1 (May 18, 1951); G.A. Res. 39(1) (Dec. 12, 1946). That said, some resolutions link recommended sanctions to a failure to implement General Assembly resolutions, which impliedly includes a failure to cooperate. G.A. Res. 40/168 (A), ¶¶ 7, 13, 14 (Dec. 16, 1985).

65. G.A. Res. 1819 (XVII), ¶ 8 (Dec. 18, 1962).

66. U.N. GAOR, 17th Sess., 1196th plen. mtg. at 1167-68, U.N. Doc. A/PV.1196 (Dec. 18, 1962).

67. G.A. Res. 1881 (XVIII), ¶ 1 (Dec. 17, 1963); *see also* G.A. Res. 1761 (XVII), ¶ 6 (Nov. 6, 1962).

68. Rep. of the U.N. Fact-Finding Mission to South Vietnam of Its Eighteenth Session, U.N. Doc. A/5630, ¶ 30 (Dec. 7, 1963) [hereinafter *South Vietnam Report*].

69. Aide-memoire dated 28 October 1963 from the Secretary of State for Foreign Affairs to the Chairman of the Mission. *Id.* at 81. The government also then invited the UN

as a tool of diplomacy rather than law therefore could be seen as offering greater incentive to a country to participate on the basis that it would be instrumental to a public narrative of their voluntary openness and transparency.[70]

By the late 1960s, alongside the passage and commencement of international human rights treaties, there was a growing perception that the international community needed to support the development of an international system of human rights protection. However, this did not translate into the distillation of a clear principle that linked the promotion of human rights with an obligation to cooperate with UN inquiries. The 1968 International Conference of Human Rights, convened to consider ways to strengthen human rights, did not lead to any specific recognition of the need to cooperate with UN atrocity inquiries, except for a general acknowledgment that it was the "obligation of the international community to co-operate in eradicating" massive denials of human rights.[71] Assembly resolutions, including most notably a 1973 declaration on cooperation for atrocity crimes,[72] focused more specifically on the duty of states to cooperate with one another to prosecute suspects of international crimes rather acknowledging any vertical obligation to cooperate with UN organs in this regard.[73]

The 1970s and 1980s continued to show inconsistency in the General Assembly's framing of cooperation with inquiries. In 1973, following reports of a "massacre" in Mozambique, the Assembly established an atrocity inquiry "to carry out an investigation," and stressed that the Portuguese colonial authorities "must allow a

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to attend "in order that they may find out for themselves the true situation regarding the relations between the Government and the Viet-Namese Buddhist community": U.N. GAOR, 18th Sess., 1232nd plen. mtg. ¶ 93, U.N. Doc. A/PV.1232 (Oct. 7, 1963).

70. *See also* A/L.425 and add. 1, *reproduced in South Vietnam Report*, *supra* note 68, ¶ 93 (showing the draft resolution prepared by Chile and Costa Rica that took note of Vietnam's cooperation).

71. International Conference on Human Rights, *Final Act of the International Conference on Human Rights*, art. 10, U.N. Doc. A/CONF.32/41 (May 13, 1968).

72. Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. *Id.*

73. G.A. Res. 3074 (XXVIII) ¶ 3 (Nov. 30, 1973). *See also* G.A. Res. 2840 (XXVI) ¶ 4 (Dec. 18, 1971) ("[R]efusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principle of the Charter of the United Nations and to generally recognized norms of international law.").

thorough and impartial investigation of the reported atrocities" and "reques[ted]" them to cooperate with the inquiry.[74] However, Portugal's failure to cooperate went without consequence; the Assembly gave little attention to the alleged Mozambique atrocities in later sessions, instead simply giving "appreciation" to the inquiry report and commending all governments to take "appropriate action" in line with the recommendations.[75] In the non-colonial context, the language concerning cooperation was inconsistent in Assembly resolutions during this period. The Assembly "deplored" or "regretted" the persistent non-cooperation of Member States with inquiries into situations in Chile, Afghanistan, and Iran.[76] However, there was no suggestion that cooperation was a legal obligation, nor that the failure to observe it was inconsistent with the UN Charter. In relation to occupied territories, the Assembly repeatedly "demand[ed]" that Israel allow access to an inquiry, although, again, the legal significance of this phrasing was left ambiguous.[77] Still, in other situations, the Assembly merely exhorted the membership to cooperate ("calls upon").[78] Although prominent jurist Theo van Boven noted in 1987 that there appeared to be a "growing legal opinion" that states are obliged to "cooperate in procedures applicable to humanitarian issues and human rights law," the basis for an obligation in relation to UN inquiries could not be clearly seen in Assembly resolutions or accompanying explanations of vote.[79] Nor was such duty present in the Assembly's 1991 Fact-Finding Declaration, which affirmed the voluntariness of state cooperation; the sending of a UN mission "to the territory of any State requires the prior consent of that State, subject to the relevant provisions of the Charter."[80]

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74. G.A. Res. 3114 (XXVIII), at 97-98, pmbl., ¶ 3 (1973).

75. U.N. GAOR, 29th Sess., at 117, U.N. Doc. A/9631 (Sept. 17- Dec. 18, 1974); U.N. GAOR, 29th Sess., 2318th plen. mtg. at 1453, U.N. Doc. A/PV.2318 (Dec. 13, 1974).

76. G.A. Res. 31/124, ¶ 3 (Dec. 16, 1976); *see also* G.A. Res. 41/158, at 206 (Dec. 4, 1986); G.A. Res. 41/159, at 207 (Dec. 4, 1986).

77. *See, e.g.,* G.A. Res. 42/160 (D), ¶ 3 (Dec. 8, 1987) (Special Committee on Israel); *see also* G.A. Res. 33/113 (C), ¶ 2 (Dec. 18, 1978) ("Deplores the continued refusal by Israel to allow the Special Committee access to the occupied territories").

78. G.A. Res. 33/172, ¶ 2 (Dec. 20, 1978).

79. Theo van Boven, *Duty of States to Cooperate*, 5 *Mennesker og Rettigheter* 8, 9 (1987).

80. G.A. Res. 46/59, ¶ 6 (Dec. 9, 1991). *See also* G.A., 67th mtg., 46th Sess., U.N. Doc. A/46/PV.67, at 42 (Dec. 9, 1991) ("prior consent . . . implies that the State has the right to

Since the 1990s there has been a perceptible rise in the number of inquiries established to investigate atrocities, initially in the Security Council and at an increased pace by the Human Rights Council from 2007 onward. The Security Council has, acting under Chapter VII, sometimes made cooperation mandatory, formulating this imperative as a "demand."[81] This has led the General Assembly to mirror the Security Council's mandatory language on the same situation, as it did in Resolution 49/205 (1995), demanding that "immediate and unimpeded access be granted" to various UN investigators.[82] That said, the Assembly has used the same ostensibly mandatory language ("demand") to describe cooperation with various non-Chapter VII inquiries, or strongly condemned non-cooperation in a manner that implies there to be an expectation of compliance.[83] The Assembly has thus consistently "demanded" Syria to grant access to inquiries.[84] It has also used instances of reengaged cooperation to support its decisions, as it did in readmitting Libya to membership of the Human Rights Council.[85] In relation to the Israeli occupation, since

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determine in advance and explicitly the terms and conditions for entry into, stay in and withdrawal from its territory of fact-finding missions, subject to the relevant provisions of the Charter".)

81. *See, e.g.,* S.C. Res. 941, ¶ 5 (Sept. 23, 1994) ("Demands that the Bosnian Serb party accord immediate and unimpeded access for the Special Representative of the Secretary-General, UNPROFOR, UNHCR and ICRC to Banja Luka, Bijeljina and other areas of concern"); *see also* G.A. Res. 49/196, ¶ 5 (Mar. 10, 1995) ("Condemns" the continued refusal to permit an inquiry in the territory).

82. G.A. Res. 49/204, ¶ 4 (Mar. 13, 1995); *see also* G.A. Res. 50/200, ¶ 8 (Mar. 11, 1996); G.A. Res. 54/184, ¶ 6 (Feb. 29, 2000) (each evidence of a demand to cooperate with the *ad hoc* tribunals).

83. G.A. Res. 49/204, ¶ 4 (Mar. 13, 1995); *see also* G.A. Res. 49/198, ¶ 12 (Mar. 13, 1995); G.A. Res. 53/160, ¶ 14 (Feb. 9, 1999) (*'Regrets the lack of cooperation'* of the DRC); G.A. Res. 62/169, ¶ 3 (Mar. 20, 2008) ("insists" that the government "cooperate fully"); Human Rts. Comm., Res. 29/18, at 4 (July 2, 2015); Human Rts. Comm., Res. 26/24, ¶ 2 (July 14, 2014); Human Rts. Comm., Res. 19/17, at 2 (April 10, 2012).

84. G.A. Res. 74/169, ¶ 27 (Dec. 18, 2019); *see also* G.A. Res. 73/182, ¶ 23 (Dec. 17, 2018); G.A. Res. 72/191, ¶ 26 (Dec. 19, 2017); G.A. Res. 71/203, ¶ 22 (Dec. 19, 2016); G.A. Res. 70/234, ¶ 12 (Dec. 23, 2015); G.A. Res. 69/189, ¶ 10 (Dec. 18, 2014); G.A. Res. 68/182, ¶ 8 (Dec. 18, 2013); G.A. Res. 67/262, at 2, ¶ 7 (May 15, 2013); G.A. Res. 67/183, ¶ 7 (Dec. 20, 2012); G.A. Res. 66/253 B, ¶ 10 (Aug. 3, 2012); G.A. Res. 66/253, ¶ 3 (Feb. 16, 2012); G.A. Res. 66/176, ¶ 5 (Dec. 19, 2011).

85. In reaching that decision, the General Assembly emphasized:

> "[T]he commitments made by Libya to uphold its obligations under international human rights law, to promote and protect human rights, democracy and the rule of law, and to cooperate with relevant international human rights mechanisms, as well as the Office of the United Nations High Commissioner for Human Rights

2000 the Assembly has tied the demand to cooperate with an inquiry to an underlying legal obligation in the UN Charter: Israel's need to cooperate was "in accordance with its obligations as a State Member of the United Nations."[86] However, this is an isolated example; resolutions in other situations demanding cooperation have not explained the legal significance of such request. Nor, despite noting the gravest forms of violations of international law, including the possible occurrence of genocide, did the Assembly use these opportunities to explicate upon a duty to cooperate.[87] Furthermore, as with prior periods analyzed above, for all the resolutions that sought to frame cooperation in ostensibly mandatory terms there are many others that imply voluntariness, using terms such as "call upon," "encourage," "urge," or "strongly urge" Members to cooperate.[88]

Nor, in recent years, have states advanced so clearly an interpretive claim in UN forums that cooperation with inquiries is mandatory. Opponents, in fact, have resisted the strengthening of language in Assembly resolutions. Russia thus remarked in 2019 that "confrontation keeps building every year" in country specific resolutions, including Syrian resolutions.[89] Most of these objections have focused on a putative legitimacy deficit in country-specific resolutions, either on the basis that the General Assembly or Human Rights Council should avoid pronouncing on issues within the domestic affairs of a state, or otherwise should act with political impartiality in the selection of situations.[90] Challenges to the legitimacy of findings of particular commissions has also been

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and the International Commission of Inquiry established by the Human Rights Council in its resolution S-15/1 of 25 February 2011" G.A. Res. 66/11 (Nov. 18, 2011).

86. G.A. Res. 72/84, ¶ 2 (Dec. 7, 2017) (Special Committee on Israel).

87. G.A. Res. 74/246, ¶ 4 (Dec. 27, 2019); *see also* G.A. Res. 73/264, ¶¶ 1, 8 (Dec. 22, 2018).

88. G.A. Res. 74/177, ¶ 17 (Dec. 18, 2019); *see also* G.A. Res. 70/233, ¶ 18 (2015); G.A. Res. 71/205, ¶ 4 (2016); GA Res 71/202, ¶ 14 (2016). *See, e.g.,* Human Rts. Couns. Res. 42/26, ¶ 23 (2019); Human Rts. Couns. Res. 34/25, ¶ 14 (2017); Human Rts. Couns. Res. 31/20, ¶ 17 (2016); Human Rts. Couns. Res. 29/18, ¶ 12 (2015); Human Rts. Couns. Res. 25/1, ¶ 9 (2014).

89. G.A., 74th Sess., 50th plen. mtg., A/74/PV.50 at 27 (Dec. 18, 2019). *See also* G.A., 73rd Sess., 56th plen. mtg., A/73/PV.56 at 5 (Dec. 17, 2018) (rejecting this "exertion of pressure on other countries under the pretense of human rights").

90. *See, e.g.,* G.A., 71st Sess., 66th plen. mtg., A/71/PV.66 at 25 (Dec. 21, 2016); *see also* G.A. 37th Sess., 110th plen. mtg., A/37/PV.110 at 1800 (Dec. 17, 1982).

cited as a reason for withholding cooperation.[91] Eritrea thus refused entry to an inquiry on the basis that it was lacking a valid creation based upon the consent of the territorial state concerned.[92] The implication here is that cooperation is a voluntary endeavour which will be predicated on the inquiry enjoying political legitimacy. Other noteworthy state practice can be seen from the application for provisional measures in *The Gambia v Myanmar*.[93] The Gambia sought an interim order that would have required Myanmar to cooperate and grant access to all UN inquiries engaged in investigating alleged genocidal acts against the Rohingya.[94] Although the ICJ did not grant that particular order, The Gambia, and members of the Organization of Islamic Cooperation whom it represented in the case against Myanmar, seemed to accept that no duty to cooperate with UN inquiries exists, thereby necessitating the ICJ order.[95]

Finally, there is general lack of recognition of a cooperation duty in inquiry reports. It is common for them to include cooperation in their list of recommendations, the implication being that this is voluntary.[96] Reports have not generally addressed the legal implications of recalcitrance; at best they tend to express their "regret" or outline the exhaustive yet unsuccessful steps that

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91. Israel Ministry of Foreign Affairs, Israel will not cooperate with UNHRC investigative committee, Nov. 13, 2014, http://mfa.gov.il/MFA/PressRoom/2014/Pages/Israel-will-not-cooperate-with-UNHRC-investigative- committee-13-Nov-2014.aspx [https://perma.cc/ALW6-FX5V] ("*Given that* the Schabas committee is not a commission of inquiry but rather a committee of foregone conclusions pretending to conduct an investigation before publishing its conclusions and following consultations among the relevant people, the government has decided Israel will not cooperate…" (emphasis added)).

92. OHCHR, Human Rights Council holds interactive dialogue with the Special Rapporteur on the situation of human rights in Eritrea, June 24, 2015, https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16136&LangID=E [https://perma.cc/QP4H-5SM2].

93. Genocide (The Gambia v Myanmar) (Provisional Measures) (ICJ, Jan. 23, 2020).

94. Genocide Convention (The Gambia v Myanmar), Verbatim Record, Dec. 10, 2019, at 71 https://www.icj-cij.org/public/files/case-related/178/178-20191210-ORA-01-00-BI.pdf [https://perma.cc/U7SX-YN5L].

95. *Id.*

96. Eritrea Report, *supra* note 8, ¶ 95; *but see* Human Rts. Couns., Rep. of the United Nations Independent Investigation on Burundi (UNIIB), U.N. Doc. S-24/1, A/HRC/33/37, ¶ 146 (Sep. 20, 2016) ("The Government of Burundi *must cooperate* with the international human rights system, including treaty bodies such as the Committee against Torture. It *should also cooperate* with efforts to monitor the human rights situation on the ground.") (emphasis added); G.A., U.N. Doc. A/74/699, ¶ 48 (Feb. 13, 2020).

UN bodies have taken to secure states' cooperation.[97] One notable exception is the inquiry established for the situation in the Democratic People's Republic of Korea (DPRK). The 2014 final report considered that the DPRK's "open defiance of the United Nations" in refusing to cooperate with the inquiry "makes this a case where decisive, yet carefully targeted action should be taken by the Security Council in support of the ongoing efforts of the remainder of the United Nations system."[98] This view implies that the failure to cooperate with a UN inquiry threatens international peace and security, if the "action" referred to in the report is intended to mean Security Council enforcement action under Chapter VII. It also rested on a putative duty of States to cooperate "to bring to an end through lawful means any breach of peremptory international law."[99] Still, neither the General Assembly nor the Human Rights Council, which both endorsed the

97. Human Rts. Comm., Rep. of the independent international fact- finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, ¶ 7, U.N. Doc. A/HRC/22/63 (Feb. 7, 2013) ("The mission had expected to undertake field visits to Israel and the Occupied Palestinian Territory in order to observe directly the situation on the ground. It addressed five requests for cooperation to the Government of Israel through the Permanent Mission of Israel in Geneva. The Government did not respond to the mission's requests. The mission regrets the fact that the Government did not respond and that, consequently, it did not have access to Israel and the Occupied Palestinian Territory."); DPRK Rep., *supra* note 10, ¶ 21("In a letter dated 10 May 2013, the DPRK directly conveyed to the President of the Human Rights Council that it 'totally and categorically rejects the Commission of Inquiry'. Regrettably, this stance has remained unchanged, despite numerous efforts by the Commission to engage the DPRK."); Human Rts. Comm., Rep. of the OHCHR Investigation on Sri Lanka (OISL), ¶¶ 36-40, U.N. Doc. A/HRC/30/CRP.2 (Sept. 16, 2015) ("The greatest obstacle to OISL work was the absence of cooperation and undermining of the investigation by the former Government…[T]he new Government did not cooperate directly with OISL, its position on access to the country did not change, and it did not respond officially to a letter sent on 15 March reiterating a request for information."); Human Rts. Comm., Rep. of the independent international commission of inquiry on the Syrian Arab Republic, U.N.Doc. A/HRC/19/69, at 4 (Feb. 22, 2012) ("The commission regrets that the Government of the Syrian Arab Republic did not give the commission access to the country, nor did it respond positively to its requests to interview authorized Government spokespersons.").

98. DPRK Rep., *supra* note 10, ¶ 1208.

99. *Id.* ¶ 1672. *See also* Human Rts. Comm., Detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/42/CRP .5, ¶¶ 52-55 (Sept. 16, 2019).

report, sought to elucidate a legal requirement to cooperate with inquiries beyond a rebuke for its non-occurrence.[100]

III. CONSTRUCTING A LEGAL DUTY TO COOPERATE WITH UN INQUIRIES

Accordingly, there is a lack of practice in the General Assembly to support a legal duty under the UN Charter to cooperate with atrocity inquiries, absent a decision of the Security Council. Nonetheless, it remains useful to consider a potential basis in the UN Charter and general international law from which such an obligation could be constructed. Although some of the following analysis is *lex ferenda*, it nonetheless provides a reasonable basis for future Charter-based interpretive claims to be made by the UN membership. It examines the possibility of fashioning a duty to cooperate from the text of the UN Charter and considers the extent to which such a duty is supported by the principle of good faith. Beyond the UN Charter, atrocity inquiry reports, as already alluded to, have referenced a duty to cooperate in other instruments or customary international law.[101] There is potential for the Assembly to thus confirm such an understanding of international law to give more specificity to this cooperation duty.

A. Cooperation under the UN Charter

Cooperation is an organizing concept of the UN Charter. Article 1 explicates that two purposes of the UN are to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character," and to be a "centre for harmonizing the actions of nations in the attainment of these common ends."[102] Pursuant to Article 56, "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization" to achieve a myriad of human rights and socio-economic purposes set out in Article 55.[103] Pursuant to

100. G.A. Res. 69/188, pmbl., ¶ 2 (2014) ("very serious concern" at non-cooperation); Human Rts. Comm., Res. 25/25, at pmbl., 2 (2014) ("deeply regretting" the refusal to cooperate).

101. *See* discussion *supra* note 99.

102. U.N. Charter art. 1.

103. U.N. Charter art. 55-56.

Article 2(5), moreover, a requirement to lend "every assistance" also arises where "action" is taken.[104]

1. Duty to Lend "Every Assistance"

Of these provisions, Article 2(5) provides the clearest textual basis in which to frame a cooperation duty where an inquiry is established. It provides that "[a]ll Members shall give the United Nations every assistance in *any action* it takes in accordance with the present Charter."[105] This language of the provision is what represents a positive obligation, which is followed by a negative duty upon States to "refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action."[106] The interpretive claim here would be that "any action" denotes the creation of an atrocity inquiry by a competent UN organ, with "every assistance" entailing a requirement to cooperate with this inquiry in a manner that would entail granting it the necessary access and support for it to conduct an effective investigation. The ICJ in the *Reparation for Injuries* Advisory Opinion indicated that "every assistance" was a commitment to be "strictly observed" so as to ensure the "effective working of the Organization."[107] The ICJ made these comments in the context of explaining the UN's legal personality: "it must be noted that the effective working of the Organization—the accomplishment of its task, and the independence and effectiveness of the work of its agents—require that these undertakings should be strictly observed."[108]

However, there is nothing in the drafting history nor in established UN practice to support the proposition that Article 2(5) generates such a general duty to cooperate with UN atrocity inquiries. The drafting conferences provide scant guidance; the drafting history only references two unsuccessful amendment proposals, both concerning the implications of the duty to lend every assistance to UN military campaigns on the neutrality of

104. U.N. Charter art. 2(5).
105. *Id.*
106. *Id.*
107. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 183 (April 11, 1949).
108. *Id.*

states.[109] Furthermore, Article 2(5) had no predecessor in the Covenant of the League of Nations from which guidance could be drawn. Article 2(5) has also been neglected in UN practice, as it is seldom featured in principal organs' resolutions.[110] Security Council resolutions have not expressly invoked the provision, although it has sometimes used identical or similar phrases.[111] Some Security Council members have referenced Article 2(5) to underline the need for recalcitrant states to observe Council resolutions, although this has not been widespread.[112] The General Assembly has never grounded cooperation with an atrocity inquiry in the text of Article 2(5), although a draft resolution has generally alluded to the provision in a preambulatory clause, seemingly to merely underline the solidarity between the organization and its membership, in the different context of a proposal to reform the Security Council.[113] The final report of the High-level Panel on UN Peace Operations (the "Brahimi Report" as it is commonly referred) indicated that there is an expectation that Members give "every assistance" under Article 2(5) to inquiries established by the Secretary-General; the same can be said for Assembly or Human Rights Council inquiries.[114] The qualification here is that no other atrocity inquiry report has invoked Article 2(5) in this way.

The lack of practice might be used to weaken an interpretive claim that there is a general duty to cooperate with an atrocity inquiry under Article 2(5), but equally, the structure of this provision, and its place within the scheme of the UN Charter, could also support the plausibility of this interpretive claim. A narrow view is that Article 2(5) only denotes Security Council "enforcement action" under Chapter VII. However, Article 2(5) differentiates forms of action, whereas the positive obligation to render "every assistance" refers to "*any* action," the negative duty

109. U.N. Conference of International Organization, U.N. Doc. 423, I/1/20 (Vol. VI), 312; U.N. Conference of International Organization, U.N. Doc. 739, I/1/19(a) (Vol. VI), 722.

110. *See also supra* Part II.

111. *See, e.g.*, Helmut Philipp Aust, *Ch.I Purposes and Principles, Article 2 (5)*, THE CHARTER OF THE UNITED NATIONS, VOL. 1, 239 (Bruno Simma and others, eds., 2012); S.C. Res. 82, ¶ 3 (June 25, 1950) (Korean crisis in 1950 where it called upon Member States "to render every assistance to the United Nations in the execution of this resolution").

112. U.N. SCOR 27th Sess., 1632nd mtg., ¶ 28, U.N. Doc. S/PV.1632 (Feb. 1, 1972).

113. G.A. Draft Res., A/59/L.64 (July 6, 2005).

114. G.A., Comprehensive Review of the Whole Question of Peacekeeping Operations in all their Aspects, A/55/305-S/2000/809, ¶ 32 (Aug. 21, 2000).

is to refrain from undermining UN "preventative or enforcement action."[115] Article 2(5) is also contained in Chapter I of the UN Charter, concerning the "Principles and Purposes," and is not specifically directed toward Security Council enforcement action. It may be claimed that the different descriptions of action in Article 2(5) stem from a drafting aberration, and that enforcement action is what "any action" really means. But, as the ICJ has noted, albeit in a different context of delineating permissible budgetary matters, the drafters were aware of distinctions and knew how to employ more restrictive meanings when necessary.[116] The distinctions drawn between different forms of "action" in Article 2(5) support the imposition of duties on Member States to lend assistance to the UN whenever it takes "any" action.

This begs the question over what "action" entails. Based upon a literal meaning of the word, the Oxford English Dictionary defines "action" as "something that is done."[117] In a sense, this would cover a great variety of activities within the UN, but it is also clear that "action" must be appreciated as an act that produces a particular legal effect within the legal framework of the UN Charter for it to be considered as "done." This might lead to the conclusion that only the Security Council can act, whether that be through enforcement action or other types of action, given that only it (and the ICJ) has the express power to bind the membership in the UN Charter. On this reasoning, a General Assembly "recommendation" to cooperate with an inquiry produces no legal effects and therefore is not a form of action which triggers a duty under Article 2(5). Although Assembly recommendations do not generally bind the membership, this does not mean that they are incapable of producing effects in particular spheres of institutional activity. Indeed, the United States once held the view that the Assembly's termination of South Africa's Mandate of South West Africa constituted a form of "action" under Article 2(5):

115. U.N. Charter art. 2(5).

116. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151, 159 (July 20, 1962) ("In the first place, concerning the word 'budget' in paragraph I of Article 17, it is clear that the existence of the distinction between 'administrative budgets' and 'operational budgets' was not absent from the minds of the drafters of the Charter."). *See also* Sloan, CHANGING WORLD, *supra* note 19, at 23.

117. *Action,* OXFORD ENGLISH DICTIONARY (X ed., 2010).

> We have accepted this conclusion because we agree that it is a correct and authoritative statement of the existing obligations of UN members under international law as a result of the termination by the General Assembly of the South West Africa mandate and the assumption by the UN of responsibility and authority over Namibia. We did not consider that binding resolutions were necessary to produce these obligations, for we believed that they flowed directly from the Charter, particularly Article 2, paragraph 5 which requires all members to assist the United Nations in any action it takes in accordance with the Charter.[118]

This construction would support the notion that "action" includes the discharge of functions under the UN Charter that are connected to not only Security Council decisions but also primary obligations under the UN Charter. According to the United States (above), therefore, the General Assembly's termination of the mandate in turn produced an effect within the UN legal order that required South Africa's assistance to discharge it under Article 2(5). A similar mode of reasoning could be extended to the creation of atrocity inquiries by the General Assembly or Human Rights Council, particularly given the textual basis for their creation in Article 22, which allows the Assembly to establish "such subsidiary organs as it deems necessary for the performance of its functions."[119] The creation of a subsidiary entity, a form of *implementation* of its resolutions, can reasonably be construed as "action" within the framework of the UN Charter. Indeed, some support for this proposition is provided by the ICJ in *Certain Expenses*, an Advisory Opinion from 1962 which delineated action taken by the Assembly and Security Council.[120] Whereas only the Security Council could take "enforcement action," the Assembly could permissibly take "some kind of *action*" to maintain international peace and security provided that it was not

118. International Organizations – Legal Effect of Acts, 1975, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, § 4, at 89. *See also* Namibia Advisory Opinion, *supra* note 17, ¶ 110.

119. U.N. Charter art. 22.

120. Certain Expenses Advisory Opinion, *supra* note 107, at 163. The issue turned on whether the creation of the UNEF (a peacekeeping force), created by the Secretary-General pursuant to authority granted by the General Assembly, constituted a valid "expenditure" under the UN Charter. One of the issues, therefore, was whether the Assembly could take "action" to establish a peacekeeping force that could be deployed to maintain peace and security in different States.

"coercive."[121] This was inferred from Article 14 of the UN Charter, which permits the Assembly to "recommend measures for the peaceful adjustment of any situation."[122] Here the ICJ equated "measures" with "action."[123] As to what might constitute Assembly action, the ICJ noted further:

> [T]he *implementation* of its recommendations for setting up commissions or other bodies involves organizational activity – *action* - in connection with the maintenance of international peace and security. Such implementation is a normal feature of the functioning of the United Nations. Such committees, commissions or other bodies or individuals, constitute, in some cases, subsidiary organs established under the authority of Article 22 of the Charter. The functions of the General Assembly for which it may establish such subsidiary organs include, for example, investigation, observation and supervision, but the way in which such subsidiary organs are utilized depends on the consent of the State or States concerned.[124]

The ICJ's emphasis on the basis for General Assembly action as being derived from State consent would seem to preclude the triggering of the cooperation duty in Article 2(5), this being the antithesis of consent. However, this aspect of *Certain Expenses* is open to reappraisal in light of contemporary practice. It may have been that in 1962 the Assembly's subsidiary organs were predicated on consent; this no longer remains the case based upon a long line of practice. To be sure, the peacekeeping mission referenced in *Certain Expenses* entered the territory and the consent of the relevant territorial state would still be necessary for a non-Chapter VII peacekeeping force. However, atrocity inquiries have commonly been established without the consent of the state concerned. Furthermore, the ICJ did not consider the effect of Article 2(5), nor did it have to as the peacekeeping mechanisms established by the Assembly were all predicated on consent.[125] Still, it is not suggested here that the Assembly could exercise a coercive power like the Security Council, in the sense that it could

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 165 (emphasis added).
125. *Id.*

authorize its atrocity inquiry to enter territory against the will of the relevant state. The point, rather, is that the Assembly's creation of a subsidiary body in the implementation of a resolution is itself a form of action which subsequently triggers a duty to cooperate under Article 2(5). How this duty is enforced in the event of non-cooperation is another matter.

A plausible interpretive claim can therefore be advanced by Member States in the future where the General Assembly (and the Human Rights Council, exercising delegated powers) takes measures to implement resolutions through the creation of subsidiary bodies. Article 2(5) would require Member States to give "every assistance" to this body.[126] Although there might be some penumbra of doubt as to what "every assistance" might entail, in the context of cooperation with an atrocity inquiry the expectation would be that this includes unfettered access to witnesses and territory, elements that have repeatedly featured in UN practice over the last decade.[127] While "every assistance" therefore has a relatively clear meaning in relation to cooperation with atrocity inquiries, it is also conceivable that the form of cooperation will turn upon the text of a particular resolution; the language will define the scope of such obligation on Member States under Article 2(5). Where, for instance, the Assembly demands a Member State to cooperate with an atrocity inquiry through the production of specific information, this demand serves to define the form of assistance that would be necessary for there to be compliance with the "every assistance" duty in Article 2(5). In this regard, the resolution, commanding the support of the general membership, will be strong evidence as to the content of the Article 2(5) and the form in which it is discharged in a particular situation.

2. Good Faith

Even if Article 2(5) does not lend support to the interpretive claim for a general duty to cooperate with UN atrocity inquiries, there is arguably some existing duty for states to engage with General Assembly recommendations dealing with cooperation. It is trite that Assembly resolutions do not generally create a source of obligation, except in relation to defined internal operational

126. For a comparable argument see Sloan, CHANGING WORLD, *supra* note 19, at 36.
127. *See supra* Section III.A.2 for consideration on this point.

matters.[128] Where the Assembly makes a "demand" to cooperate, therefore, it must be read in light of this orthodoxy. However, it presents an overly simplistic picture to assert that the non-binding character of recommendations means that they can be ignored at will. Rather, it is submitted, Member States are required to give a good faith consideration to them and must account to the Assembly where they refuse to cooperate. This principle finds roots in domestic systems of administrative law, imposing requirements on public authorities to take into account all relevant considerations before making a decision and to furnish reasons.[129] This administrative law concept shares the same normative root with the "good faith" principle, being a general principle of treaty interpretation.[130] Article 2(2) of the UN Charter defines this duty to apply to the fulfilment of "obligations assumed by them in accordance with the present Charter."[131] It might be said that as recommendations are not "obligations" there is no duty to act in good faith in relation to them. But it is reasonable to consider the good faith principle as applying to all aspects of the Member States' relations with the UN, including in their consideration of Assembly recommendations.

There is some practice to support this good faith principle. As the Assembly noted in its Fact-Finding Declaration, States should give "timely consideration" to any request for cooperation and should "inform the organ of its decision without undue delay," "giving reasons for its decision" where it refuses to accede to the request.[132] Given that it was adopted by consensus and was described as a "declaration," these statements of principle reflect an important legal expectation incumbent upon States in

128. *See generally* Sloan, CHANGING WORLD, *supra* note 19; Blaine Sloan, *The Binding Force of a Recommendation of the General Assembly of the United Nations*, 25 BRITISH YBK INT'L L. 1 (1948).

129. Margaret Young & Sebastian Sullivan, *Evolution through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice*, 16 MELBOURNE J. INT'L L. 311, 338 (2015).

130. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 26 (entered into force Jan. 27, 1980); Mark Clodfelter, *Do States Have a Duty to Cooperate in the Interpretation of Investment Treaties*, 108 AM. SOCIETY INT'L L. PROC. 188 (2014) ("perhaps the most obvious source for a duty to cooperate on interpretation is found in Vienna Convention Article 26's prescription that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'").

131. U.N. Charter art. 2(2).

132. G.A. Res. 46/59, ¶ 19 (1991).

circumstances where the Assembly calls for their cooperation.[133] Judge Hersch Lauterpacht of the ICJ reinforced this point, albeit in the context of the administration of trust territories: "[a] Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic, and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision."[134] While a state was not bound to accept the recommendation, it was "bound to give it due consideration in good faith."[135] In turn, if a state decides to disregard the recommendation, then "it is bound to explain the reasons for its decision."[136] Similar reasoning is found in the ICJ's 2014 *Whaling* decision in the context of the International Whaling Convention.[137] Japan was under "an obligation to give due regard to . . . recommendations" adopted by the International Whaling Commission ("IWC").[138] The ICJ did not explicate upon the basis of such a duty, except to note that Japan accepted it and that it flowed from a "duty to co-operate."[139] *Ad hoc* Judge Hilary Charlesworth particularly noted that IWC resolutions "when adopted by consensus or a large majority vote . . . represent an articulation of the shared interests at stake," and parties are "thus required to consider these resolutions in good faith."[140] In the context of the UN Charter, the same can be said about Assembly recommendations.

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133. The use of the phrase "declaration" is intended to convey greater solemnity in the expression of a principle of "great and lasting importance." U.N. Office of Legal Affairs, Memorandum on Use of the Terms "Declaration and Recommendation", U.N. Doc. E/CN.4/L.610, ¶ 3 (Apr. 2, 1962).

134. South West Africa Voting Procedure, Advisory Opinion, 1955 I.C.J. Rep. 67, 119 (Judge Lauterpacht).

135. *Id.*

136. *Id.* at 120; Young & Sullivan, *supra* note 129, at 328. *See also* Interpretation of the Agreement between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, at 95, 97 (Dec. 20, 1980) (requirement to "consult together in good faith"); Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. Rep. 3, ¶ 75 (duty to consult and negotiate "flows from the very nature of the respective rights of the Parties" and this duty "corresponds to the Principles and provisions of the Charter of the United Nations on peaceful settlement of disputes").

137. Whaling in the Antarctic (Austrl. v. Japan), Judgement, 2014 I.C.J. Rep. 226 (Mar. 31, 2014).

138. *Id.* at 269-70.

139. *Id.* at 257. The relevant provision at issue, art VIII of the Convention, was also not so explicit.

140. *Id.*, (separate opinion by Judge Charlesworth, J.), at 457.

Still, it might be queried whether the duty to act in good faith is meaningful, particularly given that it imposes only what appears to be a minimal requirement to consider a recommendation and to give reasons where a state rejects it. Recalcitrant states, including Myanmar, have been quite consistent in their reasons as to why they reject Assembly recommendations to cooperate, alleging the scrutiny to be politically biased and tainted.[141] However, the membership as a whole, acting through the Assembly, is the ultimate judge as to whether the reasons given by a state evince a good faith consideration of the recommendations to cooperate.[142] This burden of explanation has featured in a line of Assembly resolutions, as well as a determination as to whether such burden was satisfactorily met.[143] An early example arose in 1949, in response to a concern that the Assembly had with respect to the suppression of human rights in Bulgaria and Hungary.[144] Similarly, with regard to disappearances in Chile and Guatemala, the Assembly "requested" these authorities to "clarify the fate" of those who disappeared or were unaccounted for.[145] It was more specific in calling upon Iraq, in response to reports of disappearances of Kuwaitis and other nationals, to provide "detailed information" on all persons deported from or arrested in Kuwait, records of those who were executed, as well as the location of their graves.[146] It "urged" Sudan to "explain without delay the circumstances of the repeated air attacks on civilian targets in southern Sudan."[147] The

141. *See e.g.*, U.N. GOAR, 74th Sess., 52nd plen. mtg., at 32, U.N. Doc. A/74/PV.52 (Dec. 19, 2019). Myanmar's resistance to UN involvement in the Rohingya crisis is explored in greater detail in Ramsden, *Accountability, supra* note 11, at 170.

142. The Assembly's quasi-judicial competence, in making determinations based upon a set of norms in a situation, is long recognized as established institutional practice even if not always effectively utilized. Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58(4) AM. J. INT'L L. 960 (1964); U.N. Conference of International Organization (XIII) (1945); Ramsden, INTERNATIONAL JUSTICE, *supra* note 15, Ch. 4; Michael Ramsden & Tom Hamilton, *"Uniting Against Impunity": The UN General Assembly as a Catalyst for Action at the ICC*, 66 INT'L & COMP. L.Q. 893, 902 (2017).

143. This burden of explanation has arisen in other areas. G.A. Res. 1536 (XV), ¶ 4 (1960) (on the administration of non-self-governing territories); G.A. Res. 1402 (XIV) (B), ¶ 4 (1959) (on outcome of nuclear disarmament negotiation).

144. G.A. Res. 385 (V), ¶ 4 (1950). These States provided no "satisfactory refutation" of accusations. *Id.*

145. G.A. Res. 38/100, ¶ 6 (1983); G.A. Res. 37/183, ¶ 5 (1982). *See also* G.A. Res. 40/140, ¶ 6 (1985); G.A. Res. 33/175, ¶ 2 (1978).

146. G.A. Res. 49/203, ¶ 5 (1995).

147. G.A. Res. 49/198, ¶ 6 (1994).

Assembly "requested" that Portugal submit a report to a designated future session "on the measures it has undertaken in the implementation of the present resolution."[148] It also "demanded" that Israel inform the Secretary-General of the "results of the investigations" with respect to political assassination attempts.[149]

This practice supports the proposition, as part of the good faith principle, that a state is under a burden to substantively explain its conduct and to indicate what measures have been taken to investigate matters that have caused alarm to the international community. This is premised not on a specific duty to cooperate. Rather, states, by virtue of membership in a multilateral treaty organization established to foster cooperation, have the onus to meaningfully participate to achieve the organization's objectives. Judging the instances in which a state, due to its failure to justify its conduct, has acted in bad faith, will depend on the articulated opinion of the membership. As explained above, Member States have been especially pointed in their condemnation of States who have displayed a persistent disregard of Assembly recommendations to cooperate with atrocity inquiries.[150] In this regard, such persistent disregard can be understood as an act of bad faith. Once again, dictum of the late Judge Lauterpacht is highly perceptive, which describes bad faith of this nature as an abuse of right: "[T]he cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter."[151] Accordingly, the recalcitrant state "may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right."[152]

148. G.A. Res. 1742 (XVI), ¶ 9 (Jan. 30, 1962).
149. G.A. Res. 38/79 (H), ¶ 2 (Dec. 15, 1983).
150. *See supra* notes 76-77.
151. Voting Procedure, *supra* note 134, at 120.
152. Voting Procedure, *supra* note 134, at 120.

B. Cooperation Duty under International Law

Outside of the UN Charter, a duty of cooperation might be fashioned from specific treaty regimes or as a matter of customary international law. The latter is currently lacking in a precisely formulated duty to cooperate. However, as scholars have noted, a duty to cooperate has been translated into more specific commitments in particular areas of international law, including international environmental law, the use of force, and international economic law.[153] In this regard, the sources of international criminal law and international human rights law might be used to provide a more particularized duty to cooperate with UN atrocity inquiries.

In the fields of international criminal law, there are a number of treaties that proscribe conduct and specify obligations to prevent and punish the commission of atrocity crimes.[154] Similarly, the General Assembly's Cooperation Principles declare 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."[155] However, the basis of these

153. Wolfrum, *supra* note 3, ¶ 2 (noting that cooperation has no inherent value but turns on the specified objective to be achieved in a legal regime) (citing, as an example, G.A. Res. 2625 (XXV) (Oct. 24, 1970)) (adopting the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States); Philippe Sands et al., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 215-16 (Cambridge Univ. Press, 2d ed., 2003) (illustrating how cooperation, including the principle of 'good neighborliness', has been translated into rules of international environmental law).

154. *See, e.g.,* International Convention on the Suppression and Punishment of the Crime of Apartheid, art. 5, (entered into force July 18, 1976) 1015 U.N.T.S. 243, art. 5 ("The States Parties to the present Convention undertake . . . (a) to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime"); International Convention against the Taking of Hostages (entered into force Jun. 3, 1983), 1316 UNTS 205, art. 4:

> States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of . . . offences . . . including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages.

G.A. Res. 39/46, art. 2, ¶ 1 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction").

155. G.A. Res. 3074 (XXVIII), ¶ 4 (Dec. 3, 1973).

duties is often formulated as inter-state cooperation in the prosecution or extradition of suspects; it does not clearly extend to an explicit obligation to cooperate with international organizations, let alone a particular form such as a UN atrocity inquiry.[156] Where cooperation with international organizations is envisaged, this arises more as a power than a duty. For example, Article VIII of the Genocide Convention provides that any contracting party "may call" upon UN organs to take action.[157] That said, the UN exists as a means to give effect to common objectives, which has increasingly come to include the coordination of investigations into atrocity crimes. This coordination function is particularly apparent with the General Assembly's mechanism for Syria, whose function is to prepare individual case files to support future prosecutorial efforts, including at a national level.[158] In this respect it might be argued that states have entrusted upon the UN the function of investigating international crimes on their behalf, thereby supporting the claim that an inter-state cooperation duty also extends to the relationship between states and the UN.

While there is no clear and explicit obligation in these instruments to cooperate with UN atrocity inquiries, there is some movement in this direction under the International Covenant on Civil and Political Rights ("ICCPR"), as seen in Human Rights Committee General Comment No. 36, adopted in September 2019.[159] The Committee observed that "States should support and cooperate in good faith with international mechanisms of investigation and prosecutions addressing possible violations of article 6."[160] Article 6 of the ICCPR enshrines the right to life, which

156. *See id. See also* Rebecca Barber, *Accountability for Crimes against the Rohingya: Possibilities for the General Assembly where the Security Council Fails*, 17(3) J. INT'L CRIM. JUST. 557, 584 (2019) (surveying sources to discern a duty under customary international law for states to cooperate with each other in the prosecution of war crimes; but not a specific requirement, as such, to cooperate with atrocity inquiries).

157. Convention on the Prevention and Punishment of the Crime of Genocide, (entered into force Jan. 12, 1951) 78 U.N.T.S. 277.

158. U.N. Secretary-General, *Implementation of the Resolution Establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, ¶¶ 30-31, U.N. Doc. A/71/755 (Jan. 19, 2017).

159. Human Rts. Comm., General Comment No. 36, ¶ 28, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

160. General comment No. 36, ¶ 28, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

includes a positive obligation to investigate possible violations of this right which, according to the Human Rights Committee, might extend to cooperation with international mechanisms.[161] Although "international mechanisms" is quite general, UN atrocity inquiries are engaged in investigations; they could align their mandate so that it covers alleged violations of Article 6 to engage directly with the ICCPR. Indeed, many atrocity inquiries reports have applied standards under the ICCPR.[162] Although General Comments are not legally binding, they are highly persuasive.[163] General Comment No. 36 therefore offers support for the future development of a general cooperation duty with UN atrocity inquiries, at least where the right to life is engaged under the ICCPR.

A duty to cooperate with a UN atrocity inquiry might therefore derive from a particular treaty regime external to the UN. Still, it is possible for the UN, specifically the General Assembly, to influence the development of obligations in these distinct regimes. The Assembly has regularly articulated and applied obligations from a myriad of treaties, including, for example, the Geneva Conventions and the Genocide Convention.[164] To be sure, Assembly resolutions remain formally non-binding, but they offer a rich source of evidence as to the scope and content of international obligations, whether they arise under the UN Charter, other multilateral treaty regimes, or customary international law.[165] Indeed, a recent report of the International Law Commission ("ILC") noted the capacity for Assembly resolutions to constitute a "subsequent agreement" by the treaty parties in the interpretation of a treaty.[166] The ILC

161. *Id.*; Art. 6, International Covenant on Civil and Political Rights (entered into force Mar. 23, 1976) 999 U.N.T.S. 171.

162. *See, e.g.,* the extensive application of the ICCPR in DPRK Report, *supra* note 10.

163. Eckart Klein & David Kretzmer, *The UN Human Rights Committee: The General Comments - The Evolution of an Autonomous Monitoring Instrument*, 58 GERMAN Y.B. INT'L L. 189 (2015).

164. *See e.*g., G.A. Res. 55/116, ¶ 2(ii) (Mar. 12, 2021); G.A. Res. 53/164, ¶ 8 (Feb. 25, 1999); G.A. Res. 50/193, pmbl. (Mar. 11, 1996); G.A. Res. 49/198, ¶ 6 (Mar. 13, 1995); G.A. Res. 40/161(D), pmbl., ¶ 5 (Dec. 16, 1985). Although see earlier objection to the Assembly performing this interpretive role: U.N. GAOR, 37th Sess., 108th plen. mtg., ¶ 121, U.N. Doc. A/37/PV.108 (Dec. 16, 1982).

165. Higgins, DEVELOPMENT, *supra* note 26, at 5; Draft conclusions on subsequent agreements, *supra* note 26, Conclusion 12(2).

166. Draft conclusions on subsequent agreements, *supra* note 26, at 111. *See also* Whaling in the Antarctic, *supra* note 137, at 257; HENRY SCHERMERS & NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 854 (2011) (General Assembly interpretations on the constituent instruments of the Oil Pollution Compensation Fund);

provided the examples of Assembly resolutions that endorsed General Comments in the treaty regimes of the ICCPR and International Covenant on Economic, Social and Cultural Rights as evidence of subsequent agreements.[167] There might therefore be some room for Assembly resolutions to articulate a general duty to cooperate with UN atrocity inquiries in the future. It could start by endorsing General Comment No. 36 as a statement of obligations under Article 6 of the ICCPR.

A further basis in which to fashion a cooperation duty is by locating this within the obligations to prevent atrocities, a view alluded to in the DPRK inquiry final report.[168] There are multiple treaties that emphasize a duty of prevention.[169] The ILC presented the view that States might be under a duty to "cooperate to bring to an end through lawful means any serious breach" of international law.[170] The ILC further acknowledged that cooperation "could be organized in the framework of a competent international organization, in particular the United Nations."[171] In the finalized Draft Articles on Crimes Against Humanity, the ILC incorporated a requirement on states to cooperate, to prevent crimes against humanity, with "relevant intergovernmental organizations."[172] The ILC chose the word "relevant" to indicate that "cooperation with any particular intergovernmental organization will depend, among other things, on the organization's functions and mandate, on the legal relationship of the State to that organization, and on the context in which the need

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NIGEL WHITE, THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE 38 (2002) (Assembly resolutions adopted by consensus may be regarded as subsequent agreements).

167. G.A. Res. 65/221, ¶ 5, n. 8 (Apr. 5, 2011) (referring to Human Rights Comm. General Comment No. 29). *See also* G.A. Res. 70/169, pmbl. (Feb. 22, 2016) (recalling Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water).

168. *See* DPRK Report, *supra* note 10, ¶ 1204 and associated text.

169. *See supra* note 154.

170. ILC, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 41, U.N. Doc. A/56/10 (2001). *See also* G.A. Res. 3074, ¶ 3 (1974) ("States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose").

171. Draft Articles on the Responsibility of States, *supra* note 170, ¶ 2.

172. Draft Articles on Prevention and Punishment of Crimes against Humanity, with Commentaries, art. 4, U.N. Doc. A/74/10 (2019).

for cooperation arises."[173] The premise here is that accountability is a means to prevent future atrocities; given that international investigations have been noted to serve a deterrent function this connection can certainly be made.[174] States could advance the claim that this entails a duty to cooperate with a UN atrocity inquiry as part of the prevention response. Indeed, most atrocity inquiries have been established to address ongoing events and have recommended measures to prevent the future occurrence of atrocities.[175]

IV. CONCLUSION

Through an analysis of UN practice this Article has evaluated the plausibility of the interpretive claim that there exists a legal duty to cooperate with atrocity crime inquiries. It noted that obtaining Member States' cooperation, particularly from the Member whose situation is under investigation, is perceived as important for an atrocity inquiry to fulfil its mandate. Yet, while there has been a trend toward the political organs establishing inquiries against the wishes of relevant Member States, this has not been accompanied with a general cognizance that cooperation with such inquiries is mandatory within the UN system, outside of a binding decision of the Security Council.

This is particularly evident in the practice of the General Assembly in their monitoring of cooperation with atrocity inquiries. It is trite that an Assembly recommendation is non-binding, although this does not preclude the membership from confirming their understanding, in a "declaration", as to the content of legal obligations under the UN Charter. Such interpretation, where it commands general acceptance of the membership, is evidence of a subsequent agreement or practice in the interpretation of the UN Charter. However, it is apparent that no such interpretive agreement on cooperation as a Charter

173. *Id.* at 61, ¶ 14.

174. Human Rts. Comm., Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, ¶ 141, U.N. Doc. A/HRC/28/69 (Feb. 5, 2015); U.N. GAOR, 77th Sess., 80th plen. mtg., at 7, U.N. Doc. A/67/PV.80 (May 15, 2013); U.N. GAOR, 65th Sess., 76th plen. mtg., at 7, 5, U.N. Doc. A/65/PV.76 (Mar. 1, 2011).

175. DPRK Report, *supra* note 10, ¶ 1225 ("The United Nations should immediately apply this strategy to help prevent the recurrence or continuation of crimes against humanity in the Democratic People's Republic of Korea.").

obligation is present in Assembly resolutions practice. There is some practice which might be used as a seed for a future interpretive claim that a cooperation duty exists, particularly the consistent iterations of "demands" in the Syria situation, and the view that Israeli cooperation would be "in accordance with its obligations as a State Member of the United Nations." That is said, however, with the caveat that there are many instances in which cooperation is framed in voluntary terms, thereby undermining the interpretive claim for a duty under the UN Charter as being gleaned from current practice.

Still, there are potential bases in the UN Charter in which a reasonable interpretive claim might be advanced by Member States on the existence of a cooperation duty. Article 2(5), although underutilized in UN resolutions practice, provides the closest textual basis of a duty in its requirement that Members lend "every assistance" where "action" is taken. Many read "action" here as Chapter VII enforcement action, although the text also supports a broader reading as including the creation of subsidiary organs by the General Assembly (or Human Rights Council) to implement their resolutions. A modest duty to cooperate with atrocity inquiries might also be fashioned from the good faith principle under the UN Charter, which requires Member States to openly engage with the UN, including providing reasons where it rejects a request for cooperation. While the good faith principle imposes a rather minimal cooperation burden, it nonetheless provides an additional hook in which to monitor Member States in their relations with the UN on atrocity situations. Outside of the UN Charter, there is some recognition of a requirement to cooperate with relevant international processes, as the Human Rights Committee recently noted. A cooperation duty might also be conceived as concomitant of the duty to prevent atrocities and State obligations to investigate and prosecute international crimes. In the form of a "declaration," it is open to the General Assembly to confirm an understanding of the content and nature of these obligations.

In the absence of Security Council action, it might be queried whether these initiatives towards the recognition of a Charter-based cooperation duty are meaningful. A Security Council decision requiring Member States to cooperate with an inquiry report has behind it the threat of coercive action under Chapter VII.

On this view, by contrast, the creation of inquiries by the General Assembly or Human Rights Council advances a more limited purpose of providing information to support these organs in adopting non-binding recommendations. Nonetheless, the UN Charter, as a treaty, imposes primary obligations on Member States which might reasonably extend to a duty to cooperate with atrocity inquiries, as concomitant of its growing mandate in advancing accountability for international crimes and serious human rights violations. The framing of this duty as a primary obligation in turn provides an additional basis, in the General Assembly and other forums, in which to condemn the recalcitrance of Member States, thereby giving wider legal expression to the view that cooperation accords "with its obligations as a State Member of the United Nations."