THE LEGALIZING AND LEGITIMIZING FUNCTION OF UN GENERAL ASSEMBLY RESOLUTIONS

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In his essay[1] on the "Uniting for Peace" resolution, Larry Johnson suggests that the General Assembly can recommend non-use of force collective measures when the Security Council is blocked because of a permanent member casting a veto. He rightly points out that today there is no longer any need to use Uniting for Peace for such recommendations. The General Assembly can and has recommended so-called "voluntary sanctions" in cases where it found a threat to international peace and security to exist. For example, in resolution 2107 (XX)[2] of December 21, 1965 concerning the Question of Territories under Portuguese Administration, the Assembly, making no reference to Uniting for Peace, urged "Member States to take the following measures, separately or collectively:

> (a) To break off diplomatic and consular relations with the Government of Portugal or refrain from establishing such relations;
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> (b) To close their ports to all vessels flying the Portuguese flag or in the service of Portugal;
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> (c) To prohibit their ships from entering any ports in Portugal and its colonial territories;
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> (d) To refuse landing and transit facilities to all aircraft belonging to or in the service of the Government of Portugal and to companies registered under the laws of Portugal;
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> (e) To boycott all trade with Portugal."

It is generally accepted that Member States are not required to take the non-use of force collective measures recommended in such voluntary sanctions resolutions. The crucial question, however, is whether such resolutions have any permissive effect and, in particular, whether they can legally justify measures by Member States that would otherwise be contrary to international law. While States are free to break off diplomatic and consular relations at any time or to prohibit their ships from entering foreign ports, landing and transit rights of aircraft, port access for ships, and trade relations may be governed by treaties. For example, can a recommendation by the General Assembly to refuse landing and transit facilities to all aircraft belonging to a certain State justify the violation of a bilateral or multilateral air services agreement with that State providing for landing and transit rights? Or, are Member States allowed to disregard a trade agreement with a State if the General Assembly calls for a boycott of all trade relations with that State?

I. The Legalizing Effect of General Assembly Resolutions

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[1] Larry D. Johnson, *"Uniting for Peace": Does it Still Serve Any Useful Purpose?*, 108 AJIL Unbound 106 (2014).

[2] GA Res. 2107 (XX) (Dec. 21, 1965).

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Collective measures recommended by the General Assembly will be limited by the existing treaty and customary international law obligations of Member States unless the breach of the conflicting obligation can be legally justified. In the following, I explore several possible legal justifications.

General Assembly Resolutions and Article 103 of the UN Charter

Recommendations of the General Assembly do not create legal obligations under the Charter and there is thus no potential conflict of "obligations" as required by Article 103[3] of the UN Charter, which reads:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

In the event of a conflict between a non-binding recommendation and a pre-existing treaty obligation, the latter prevails in law. The position is the same for obligations existing under customary international law. Attempts to use Article 103 to legalize the breach of conflicting treaty obligations disregard the wording of the provision and do not offer any legal reasoning for why mere recommendations should justify the breach of treaty obligations.

General Assembly Resolutions as a Fundamental Change of Circumstances

F. Blaine Sloan suggested[4] that, based on the doctrine *rebus sic stantibus*, a recommendation of the General Assembly has sufficient force to effectively release a State from obligations incurred under a treaty. The doctrine, which is now codified in Article 62 of the Vienna Convention on the Law of Treaties[5] (VCLT), provides that a fundamental change of circumstances, which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties, may be invoked as a ground for terminating, withdrawing, or suspending the operation of a treaty. Additionally, the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty and the effect of the change must radically transform the extent of obligations still to be performed under the treaty. It seems doubtful that either the adoption of a recommendation by the General Assembly or the situation giving rise to such a recommendation meets the rather strict requirements of the *rebus sic stantibus* doctrine. In any case, a fundamental change of circumstances does not automatically release States from their treaty obligations. Rather, the fundamental change may only be "invoked" by States as a ground for terminating, withdrawing, or suspending the operation of the treaty. States Parties to the VCLT that want to invoke such a change must give written notice to the addressee of the measures recommended by the General Assembly. If that State objects to the termination, withdrawal, or suspension of the operation of the treaty, a special conciliation procedure must be followed.[6]

General Assembly Resolutions as a Circumstance Precluding Wrongfulness

[3] UN Charter, art. 103.

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

[5] Vienna Convention on the Law of Treaties, No. 18232, art. 62, May 23, 1969.

[6] *Id.* at art. 66(b).

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A recommendation of the General Assembly does not qualify as a circumstance precluding wrongfulness under the Articles on Responsibility of States for Internationally Wrongful Acts[7] (ARSIWA) adopted by the International Law Commission in 2001. The list of circumstances precluding wrongfulness in Articles 20 to 25 ARSIWA (consent, self-defense, countermeasures, force majeure, distress, and necessity) is exhaustive. In particular, it cannot be argued that States, by becoming members of the United Nations, indirectly consented in advance to the General Assembly, by way of recommendation, "legalizing" the breach of existing treaty obligations among Member States. However, this does not necessarily preclude such recommendations from having a legalizing effect. As Article 59 of ARSIWA makes clear, the articles are without prejudice to the Charter of the United Nations. In its commentary on the articles,[8] the Commission pointed out that it is vital to distinguish between individual measures, taken either by one State or by a group of States each acting in its individual capacity (which are covered by the articles), and institutional reactions in the framework of international organizations such as the United Nations (which are not). There is thus room for a General Assembly resolution precluding the wrongfulness of voluntary sanctions "outside the ARSIWA."

General Assembly Resolutions as Independent Legal Justification

Academic literature is divided on the question of whether recommendations of the General Assembly can justify the violation of conflicting treaty and customary international law obligations. Proponents of this view usually do not offer any legal reasoning, but simply refer to the statement of Judge Hersch Lauterpacht in his separate opinion in the South West Africa Voting Procedures case[9] that non-binding recommendations of the General Assembly may "on proper occasions . . . provide a legal authorization for Members determined to act upon them individually or collectively." Lauterpacht, however, was primarily concerned with the non-binding effect of General Assembly resolutions and not with their authorizing effect. It is also not clear what he meant by "proper occasions" and when such occasions might arise. In any case, Lauterpacht did not offer any legal reasoning for his proposition. The UN Charter provides no legal basis for such an authorizing or justifying effect and resolutions of the Assembly cannot amend the Charter. As the organ of a subject of international law, the General Assembly is, as a rule, bound by the Charter and international law in general.

A legal basis for the justifying effect of General Assembly recommendations might be found in customary international law. However, it seems difficult to establish the required State practice and *opinio juris* to that effect. The General Assembly has not recommended any voluntary sanctions since the early 1980s and, even before, the recommended sanctions in most cases did not conflict with existing international obligations. There seems to be no case where a State has expressly relied on a General Assembly recommendation to justify its violation of otherwise existing international legal obligations. There is also no clear evidence of *opinio juris*. In its Uniting for Peace resolution, the General Assembly established a Collective Measures Committee, which in its 1951 Report[10] stated:

> In the event of a decision or *recommendation* of the United Nations to undertake collective measures, the following guiding principles should be given full consideration by the Security Council or the *General Assembly* and by States:

[7] Int'l Law Comm'n, Responsibility of States for Internationally Wrongful Acts, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, UN Doc. A/56/10; GAOR, 56th Sess. (2001).

[8] Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, UN Doc. A/56/10; GAOR, 56th Sess. (2001).

[9] Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Separate Opinion of Judge H. Lauterpacht in Advisory Opinion of 7 VI 55, 1995 ICJ REP. 90, 115 (1995).

[10] UN Charter art. 103, para. 14.

> (i) Guiding principles of general application:
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> (d) It is of importance that *States should not be subjected to legal liabilities* under treaties or other international agreements as a consequence of carrying out United Nations collective measures. (Emphasis added)

Rather than stating that collective measures taken as a consequence of a recommendation by the General Assembly do not give rise to any legal liabilities, the Committee tasked the General Assembly to make sure that States are not subjected to legal liabilities under treaties or other international agreements. The Committee thus indirectly confirmed that measures taken as a result of General Assembly recommendations could violate existing treaties and give rise to legal liabilities. Calls by the General Assembly for collective measures are of a general nature and are addressed to all Member States. It cannot be assumed that it is the intention of the General Assembly to call upon Member States to act in breach of conflicting obligations. Instead, Member States that want to exercise the collective measures called for by the General Assembly should first terminate conflicting treaty obligations in accordance with the procedures provided for in the treaty concerned.

Some support for the justifying effect of General Assembly recommendations may be derived from Article 2(1) of the Commission's initial Draft Code of Offences against the Peace and Security of Mankind,[11] as adopted by the Commission in 1951, which provided that "the employment by the authorities of a State of armed force against another State in pursuance of a . . .recommendation by a competent organ of the United Nations" does not constitute an offense against the peace and security of mankind. The Commission, however, did not specify who was a "competent organ of the United Nations" in this respect, and no mention was made in the Commission's commentary of either the General Assembly or the Uniting for Peace resolution. The provision was not included in the Commission's final Draft Code of Crimes Against the Peace and Security of Mankind,[12] adopted in 1996. This may have been due to the divergence of views as to whether General Assembly recommendations could provide a justification for the use of force.

Indeed, the discussions in the 1960s leading up to UN General Assembly Resolution 2625 (XX), the so-called "Friendly Relations Declaration,"[13] suggest that States held divergent views with regard to the justifying effect of General Assembly resolutions. While the Soviet Union and other Eastern Bloc countries insisted that only decisions of the Security Council according to Article 42[14] of the UN Charter could justify a violation of the prohibition of the use of force in Article 2(4),[15] some Western countries took the view that such a justification could also be provided by a resolution of the General Assembly. This difference of opinion is reflected in Principle I, paragraph 13, of the Friendly Relations Declaration, which provides that nothing in the Declaration "shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful." These conflicting views speak against an

[11] Rep. of the Int'l Law Comm'n, Draft Code of Offences against the Peace and Security of Mankind, 9 UN GAOR Supp. No. 9, art. 2, para. 1, UN Doc. A/CN.4/88 (1954), *repinted in* [1954] 2 Y.B. INT'L L. COMM'N 112, 116, UN Doc. A/CN.4/SER.A/1954/Add.1.

[12] Rep. of the Int'l Law Comm'n, Draft Code of Crimes against the Peace and Security of Mankind, 51 UN GAOR Supp. No. 10, UN Doc. A/51/10 (1996), *reprinted in* [1996] 2 Y.B. INT'L L. COMM'N 42, UN Doc. A/CN.4/SER.a/1996/Add.1 (Part 2).

[13] GA Res. 2625 (XXV) (Oct. 24, 1970).

[14] UN Charter art. 42.

[15] UN Charter art. 2, para. 4.

established *opinio juris* with regard to the justifying effect of General Assembly recommendations—both with regard to the use of force and more generally.

General Assembly Resolutions as a Means to Coordinate Collective Countermeasures

While a recommendation by the General Assembly cannot serve as an independent legal justification of otherwise wrongful conduct, it may establish a presumption that the conduct recommended by the Assembly is lawful for other reasons. Voluntary sanctions could be seen as an example of collective "third party countermeasures." As a rule, only the injured State may take countermeasures. However, the saving clause in Article 54 ARSIWA[16] provides that any State may take "lawful measures" against a responsible State to ensure the cessation of the breach of an international obligation owed to the international community as a whole. Such "lawful measures" may also have the character of countermeasures: that is, an illegal act in response to a prior illegal act. The General Assembly has called upon Member States to impose voluntary sanctions only in situations which it determined constitute a "threat to international peace and security." It could be argued that the obligation not to threaten international peace and security is an obligation owed to the international community as a whole, which, in case of a breach, may give rise to collective sanctions by all States. In this situation, the recommendation by the General Assembly would simply fulfill a coordinating function. Practice of States acting upon a recommendation of the General Assembly and imposing voluntary sanctions in contravention of existing obligations is virtually non-existent. At present, it is therefore difficult to argue that collective sanctions taken at the recommendation of the General Assembly qualify as "lawful measures" in terms of Article 54 ARSIWA. There is, however, room for development in this direction.

To sum up: resolutions of the General Assembly do not have a legalizing function. Therefore, Member States acting on the basis of such resolutions—either under Uniting for Peace or otherwise—may only do so within the limits of their existing international law obligations. This requirement greatly reduces the possible impact of voluntary sanctions recommended by the General Assembly.

II. The Legitimizing Effect of General Assembly Resolutions

As recommendations of the General Assembly cannot legalize conduct that is otherwise illegal, the literature on General Assembly resolutions usually refers to "legitimacy," rather than "legality." Thus, it has been argued that action taken as a result of a General Assembly recommendation will certainly be regarded as "legitimate" or that a recommendation will "legitimize" a breach of treaties. It has also been said that such recommendations carry "considerable political weight" or "great moral force." While this may be true with regard to a particular resolution, no generalization should be made to that effect. Much will depend on the circumstances of the adoption of the resolution in question. The weight or force of a resolution will usually depend on the number of States voting for its adoption.

Recommendations with regard to the maintenance of international peace and security are regarded "important questions" in terms of Article 18(2)[17] of the UN Charter and thus require a "two-thirds majority of Members present and voting." This could mean that any recommendation of voluntary sanctions would have to be carried by at least 129 Member States, which would indicate a broad level of support for such sanctions. However, the phrase "Members present and voting" is defined in Rule 86 of the Rules of Procedure of the

[16] *See* Int'l Law Comm'n, Responsibility of States for Internationally Wrongful Acts art. 54, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, UN Doc. A/56/10; GAOR, 56th Sess. (2001).

[17] UN Charter art. 18, para. 2.

General Assembly[18] as "Members casting an affirmative or negative vote." Member States that abstain from voting, and those which are not present or not participating, are considered as "not voting" and not counted towards the two-thirds majority requirement. Considering that recommendations may be adopted with only a majority of the Members present, a resolution recommending voluntary sanctions could be adopted by less than half of the Member States of the United Nations. In such a case, the legitimizing effect of the recommendation would tend towards zero.

Rather than making constant reference to the Assembly using force under Uniting for Peace, Larry Johnson calls in his post for more thought to be given to "innovative and inventive non-use of force measures which the Assembly could employ in situations where the Council has been blocked." While such a call is laudable, the limits of the General Assembly's powers should not be overlooked—the Assembly cannot legalize otherwise illegal acts, even for the noblest of causes. And for the international lawyer any justification of a measure as being "illegal but legitimate" must be deeply troubling and totally unsatisfactory.

[18] Rules of Procedure of the General Assembly, UN Doc. A/520/Rev.17 (2008).